CURRENT LEGAL PERIODICALS

Res Judicata Reexamined. Edward W. Cleary. 57 Yale Law Journal: 339–350.

Where an action has been carried to judgment and a second action is brought involving the same cause of action and between the same parties, the judgment in the former suit is conclusive, not only as to all questions actually decided but as to all questions that might properly have been litigated and determined in that action. This is a typical statement of the rule of *res judicata.* The author of this article suggests that when courts so often feel the need of apologizing to litigants for dismissing their actions by reason of this rule — "while administering the kiss of death" to their causes — it is time to reconsider its reasons.

The question to be determined is: How large is a "cause of action"? Exponents of one school of thought favour a small one, which would avoid the *res judicata* rule in many cases, while those of the opposing school prefer a big "cause of action", which "increases the scope and content of a suit" but also enlarges the effect of the rule. Attention has heretofore been centred rather on definition than on effect.

There is not much difficulty about the first part of the rule. It is when courts set out to discover what might have been litigated that they define and redefine causes of action and so "change pumpkins into coaches and one man's property into another's". The "splitting" of the facts and law giving rise to the suit may relate to the theory of recovery, or the relief given in it may be an "arithmetical splitting". Thus a first action may be for one kind of negligence, and the second, involving the same accident, for another kind; one may obtain a foreclosure in one action and bring another on the same mortgage for a money judgment; or one action may be for personal injuries and a second for property damage. The defence of *res judicata* is met in each case.

Four grounds are advanced to justify the rule. It is said that it avoids the danger of double recovery. It should, however, be possible to determine what items of damage were considered in the first action. A case is cited here, in which a plaintiff obtained a judgment against an automobile driver for personal injuries and then brought action against his physician for malpractice. The second ground is "the desirability of stable decisions". Proper weight should be given to prior decisions but there is no ques-

tioning of an earlier judgment where there is only a splitting of relief or where a second action is brought for elements of damage not considered in the first. Where a plaintiff merely attempts "under a different guise" to obtain what he has failed to get in a prior action he should be estopped.

The third ground is that the rule is necessary to avoid vexatious litigation. Joinder rules have been liberalized to encourage litigants to bring as many disputed matters as possible into one action, but surely it would be too great a penalty to deprive a plaintiff of all relief because he did not join in one action some "wholly unrelated matters". The assessment of costs would be a more effective and less harsh means of avoiding unnecessary litigation than the application of the rule of *res judicata.* The last ground, the need for "economy of court time", is not a valid one. It is more important that the courts "should deal honorably" with litigants than that "a few hours of court time should be saved".

Most cases involving *res judicata* are brought as the result of procedural errors. It is submitted that they should be decided with reference to "the basic objects of the rule" rather than on theories as to the definition of "a cause of action". If the subject matters of two actions are "inextricably involved" with each other the second action should be barred. If this is not the case but if all questions could more conveniently and economically have been tried in one action, a policy of allowing the plaintiff to carry on his second action, while penalizing him by assessing costs against him, would "let the punishment fit the crime".

Restraint on American Communist Activities. N. E. L. 96 University of Pennsylvania Law Review: 381–401.

The purpose of this note is to analyze the devices employed "to reduce the power, influence and extent of communist activity" in the United States, to consider proposals for more stringent measures and to "evaluate" them.

In 1917 the Espionage Act was passed to deal with those who attempted to interfere with the armed forces or to obstruct recruiting and, after the war, "syndicalist statutes" were passed in some of the states, designed to protect against "advocacy and teaching" of force and violence. Cases decided in 1937 indicated that to secure convictions under such statutes "effective promulgation of revolutionary doctrine and incitement" must be found. A sedition section was added by Congress to the Alien Registration Act in 1940 and finally, in 1947, a bill, H.R. 2122, was proposed

in Congress, which would make unlawful membership of the Communist party or of any organization whose aim is the "establishment, control, seizure or overthrow" of government by the use of force or violence.

During and after the first world war, alien communists were deported and naturalized members of the party had their certificates cancelled. Deportation was not considered to be a punishment, so that the usual criminal law safeguards were not applicable. Recently, however, the Supreme Court held in a deportation case that membership or affiliation with the party had not been proved and, in a case involving denaturalization, "attacked the principle of 'guilt' by mere association". Bill H.R. 2122 may have been introduced in an attempt to avoid the necessity of proof of "individual advocacy or incitement of revolution", but since it is a criminal measure it is doubtful if its purpose would be achieved. It would be quite impossible, too, to protect society from "fellow-travellers" by such legislation.

Besides these direct attacks, methods have been developed to undermine the party leadership. Its candidates have had their nomination petitions denied on various grounds, such as fraud in procuring signatures, and certain states have statutes that deny the use of the ballot to the party or to any organization affiliated with it or having similar aims. In some states affidavits are required from officers or candidates of a party. The constitutionality of the California and Illinois statutes, however, has been questioned. A bill, H.R. 1884, proposed in Congress in 1947 would make it unlawful for a member of the communist party to file as a candidate for election to any state or federal elective office. This would seem to be "far too broad" and perhaps practically inexpedient.

A "new technique" has been evolved to provide against "danger to national security". Under War Service Regulations a finding of reasonable doubt as to loyalty to the Government would disqualify an applicant for certain appointments in government service. Now a president's order provides for a procedure by which a civil servant may be discharged if it is shown that reasonable grounds exist for belief that he is disloyal. The employee has considerable "procedural protection", but the names of informants need not be given. The Rees Bill, proposed in 1947, would set up a Loyalty Reveiw Board to decide loyalty cases after *ex parte* investigations. Such prosecutions are "a danger to civil rights", because it is very difficult to "distinguish between the shades of political thought".

The Committee on Un-American Activities — a Committee of Congress — has been accused of overstepping the legitimate function of Congress, the production of legislation, and using its power to name, as communist, groups that are really not communist. It is suggested that such an organization should be "presided over by non-political experts rather than by political figures".

Some labour unions have by their constitutions made communist party membership ground for expulsion of members and the 1947 Taft-Hartley Act reserves to unions "internal control of union affairs". On the other hand, the Act attempts to use this internal control "to effectuate an anti-communist policy by relative indirection". Unions must file "non-communist affidavits" in order to qualify as representatives in collective bargaining, or to request union shops or file unfair labour practice charges. The value of this provision is doubtful. A union may refuse to depose a communist leader and be deprived of its right to the use of collective bargaining machinery, but may create disruption by attempting to achieve its aims in some other way, or the leader may retire while continuing his influence in the general membership.

In his concluding paragraph the writer of this note suggests that there is danger in subjecting to these anti-communist sanctions, "people whose beliefs may be denominated liberal, or even radical, but whose actions bear not even a remote tendency of undermining faith in the evolutionary process of political development". Self-restraint is needed as a safeguard against frustration of the exercise of civil liberty and, in the absence of such self-restraint, a "judicial acuteness to perceive the purposes and possibilities latent in the newer devices" is needed.

Horse and Buggy Lien Law and Migratory Automobiles. Fairfax Leary Jr. 96 University of Pennsylvania Law Review: 455-483.

The problem of the "skip-state" operator, who makes a down payment on a car in one state and sells it in another, was dealt with in six cases, and gave rise to one statute, in the year 1947. The text-book rule is that in such cases a security interest, validly created, should be protected in a state to which an automobile has been removed without the consent of the conditional vendor or mortgagee. However, we find in many cases that the interest of a local purchaser has been preferred. In a Pennsylvania case reported in 1872 a Maryland doctor moved to Pennsylvania and sold there a horse he had mortgaged in

Maryland. In dismissing the action of the mortgagee the court asked if it would have been reasonable to require the purchaser to search the records of all the counties of Maryland. But the question is asked, "should horse and buggy precedent apply to automobiles?"

Seventeen states are called "non-title" states, liens being recorded only in the county clerks' offices. In the others, liens are entered on certificates of title, although in some of these states only liens existing at the time of issue of the certificates are shown on them. In some states liens are not shown but must be recorded at some central office. But when application is made for licence plates and registration of an "out-of-state" car almost all states seem to rely on the "quaint theory" that the applicant will tell the truth or produce a genuine bill of sale, disclosing liens. In such a case a purchaser buys a locally registered car and has no notice that there may be lien claimants in another state.

In two of the 1947 cases, Georgia cars subject to encumbrances were driven to other states and sold, then registered and resold. In one of these cases the holding of the trial court in favour of the Georgia finance company was upset and the case sent back, since it appeared that the car had probably been driven out of the state before the lien was recorded. In the other, there was no question as to the date of recording but the court ruled against the enforcement of a lien not filed in Florida, against a purchaser without notice. In a Pennsylvania case, even the dealer buying a car with New York licence plates was protected against a claim on a New York chattel mortgage. A purchaser in Wyoming of a car registered there but mortgaged in Colorado was protected against the mortgage, the car having been driven out of Colorado before the recording of the mortgage. The other two 1947 cases were decided in favour of out-of-state finance companies. The 1947 statute was passed in New Mexico and provides that no out-of-state security interest will be recognized unless the other state issues certificates of title and uses them as a "positive recording device".

In view of the practice of many used car dealers of inquiring as to liens on cars from other states, and of the opportunities for making such inquiry, it is submitted that loss should fall on the first purchaser, generally a dealer, rather than on the finance company. As between the finance company and the second purchaser, the former should bear the loss, although "the concept that one cannot convey what he does not have, dies but slowly".

The solution of the problem proposed here is that the authorities to whom application is made for registration of an out-of-state car should be required by statute to make inquiry for liens in the other state from the applicant and from the proper state officer or, in one of the "non-title" states, from the appropriate county clerk's office. This would not cover the case of the car owner who borrows in one county, then changes his residence and obtains a new registration in the second county, but this is an argument against county recording. Where there are "slip-ups", in obtaining information, losses should be paid by the state from an insurance fund.

Unless some such method as this is adopted, "courts will continue to struggle with difficult decisions" allocating losses "due to skip-state frauds". Purchasers, knowing that a car is registered in another state, should be bound by liens recorded there, while those with no such notice should be protected. Even universal adoption of the recording type of title certificate would not protect against the "duplicate title racket", where an owner, claiming that his certificate has been destroyed, obtains a duplicate, raises a loan on the strength of the duplicate and sells with his original clear certificate. The only way to give adequate protection against these frauds is to require that information as to liens be obtained "from the appropriate officials of the state in which the automobile was formerly registered".

The Wiener Case. William Q. De Funiak. 23 Notre Dame Lawyer: 28–46.

About one third of the American people are now governed by the law of community property. The principle underlying this law is that husband and wife form a marital partnership and, accordingly, everything acquired by either during the marriage belongs equally to both. Attention has been directed to the system in recent years because husbands and wives in a community-property state, being equal owners of earnings by both, have enjoyed the advantage of lower taxation rates than those in states where the earnings of one belong solely to him.

In 1930 it was decided by the United States Supreme Court in several cases that, in community-property states, a wife's interest in earnings of her husband was as complete as his and that they might file separate returns. Also, it had long been held that a wife's interest in a community did not pass to her through the death of her husband and that it was, therefore, not subject to state estate taxes. However, in 1942 Congress added a para-

graph to the federal Internal Revenue Code, which provided for inclusion in a decedent's gross estate of all property held in community by decedent and spouse, except such part as could be shown to have been separate property or earnings of the surviving spouse. In any case at least half of the community property was to be considered as belonging to the decedent for estate tax purposes. In the community-property states it was at once contended that this paragraph was unconstitutional since it provided for the measuring of a tax on one person's property by the property of another.

In Louisiana one, Sam Wiener Jr., died, having bequeathed his half of a community property to his three sons. The inheritance tax act of the state set the tax payable to the state at 80 per cent of the amount payable under the federal law and the state collector fixed the amount of the state tax on the basis that the whole of the property was liable under the federal act. The case reached the United States Supreme Court, which in 1945 "gave vent to an opinion that is a perpetual source of amazement" to judges and lawyers in community-property states. The court held that the tax, so far as the wife's half was concerned, was not one on the transfer of property but on "the surrender of old incidents of property" and "the acquisition of new incidents", *i.e.*, the possession, control and enjoyment of the property.

Professor de Funiak points out that there is nothing in the Act to indicate that there is to be a tax on "alleged incidents of property". Moreover, the court overlooks the fact that a wife does not receive possession of her half of the community property on her husband's death but has possession equally with him during the marriage. The husband manages it for both and every profit accrues equally to both. It is submitted that the court was "desperately determined" to find some property right or incident on the transfer of which the tax could be "tagged". The justices seem to have "considered it unfair that community property law gave an advantage in tax matters to inhabitants of the community property states" and, to give effect to this view, departed from "the formerly established fact that the estate tax is a tax upon the transfer of property of the decedent".

The Present Legal Status of Germany. F. A. Mann, LL.D. (Lond.). 1 International Law Quarterly: 314–335.

Germany's present legal status may be a temporary one, but many problems are bound to arise that will make it necessary to determine just what is her "international and constitutional

position". Suppose, for example, that a British subject brings an action in an English court against a British official, who has confiscated his property in Germany. Has the official acted as agent of a German state, so as to give him the defence of "act of state"? What is the effect of naturalization brought about by British Military Government authorities in the British Zone? This article does not deal with the position of members of the armed forces of one of the allied nations, nor with that of Military Government officers in their relations with each other.

The "paramount laws" of Germany are contained in three documents, a Declaration and two Statements. By the "Declaration" the British, American, Soviet Union and French Governments assumed supreme authority, including all powers formerly possessed by the German Government, the High Command and subordinate German authorities. The allied governments stated their intention to determine the boundaries and the status of Germany or of any part of it, but their assumption of authority was not to "effect the annexation of Germany". The Control Council, formed by the four Commanders-in-Chief, and the four Zones of occupation, were established by the two "Statements".

The "supreme organ of Germany" is the Council with its "quadripartite organization", but it exercises authority only in Germany. The Allied Governments have authority in external matters, such for instance as the liquidation of German property in Switzerland. Each Commander-in-Chief is supreme in his zone except in matters affecting the country as a whole, which are reserved for the Council. Difficulties arise by reason of the ambiguity of the phrase, "matters affecting Germany as a whole".

Is Germany under belligerent occupation? If she is, then the Allies have in many ways gone beyond their rights under the Hague Regulations. The justification for the allied action is found in Germany's "peculiar situation" in 1945, the cessation of hostilities, the unconditional surrender and the disappearance of a central government. The Allies' aims "go far beyond military victory" in this new experiment in international law. Whether or not the allies are "belligerent occupants", the zones are not dominions of the occupying powers; each Military Governor of a zone is the delegate of the four Governments jointly, not of his own Government, even though supreme authority is exercised by the four Commanders-in-Chief, "on instructions from their Governments".

Does Germany now belong to the four occupying states? Professor Kelsen has contended that she is held under "joint

sovereignty". Dr. Mann disagrees with this theory on several grounds; there has been no announcement of an intention to acquire territorial sovereignty and this would be "so retrograde a development that very strong evidence would be required to support it". Then, is Germany a state? Having no government of her own free from control and no relations with the world at large, she is certainly not a "sovereign state", but it is submitted that Germany is a state "in the general sense of the term", if the Council can be regarded as her Government. While it is not "a German Government", it does constitute "the Government of Germany", since it has supreme authority in matters affecting Germany as a whole. Germany is said to be a "dependent State", with the Allied Governments exercising a "co-imperium", and is the same state as that which existed before the Declaration of Berlin, although its status has been impaired. Internally the Council performs the functions of a German government. In his zone each Commander-in-Chief represents, not his occupying state but the Government of Germany. German authorities are organs of the German State. In a recent English case the Secretary of State certified "that Germany was a State and that the Control Council was its Government".

Finally, does a state of war still exist? It has been argued that Germany, being no longer a state, cannot be at war. Dr. Mann says that "belligerency does not necessarily presuppose sovereignty". On the other hand, he asks how the United Kingdom could be at war with a state whose government included Field Marshall Montgomery. The state of war in the sense of international law, he says, "(probably) came to an end on June 5, 1945".

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REVERIE ON A LEGAL RELIC

Hamlet. There's another: why may not that be the scull of a lawyer? Where be his quiddits now, his quillits, his cases, his tenures, and his tricks? why does he suffer this rude knave now to knock him about the sconce with a dirty shovel, and will not tell him of his action of battery? H'm! This fellow might be in's time a great buyer of land, with his statutes, his recognizances, his fines, his double vouchers, his recoveries: is this the fine of his fines, and the recovery of his recoveries, to have his fine pate full of fine dirt? will his vouchers vouch him no more of his purchases, and double ones too, than the length and breadth of a pair of indentures? The very conveyance of his lands will hardly lie in this box; and must the inheritor himself have no more, ha? (Shakespeare: Hamlet, Prince of Denmark, Act V, Scene I)