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1931

### Jurisdiction, Binding Effect of Rulings Sustaining Jurisdiction of the Person

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#### Recommended Citation

Edward W. Hinton, Note, "Jurisdiction, Binding Effect of Rulings Sustaining Jurisdiction of the Person", 26 Illinois Law Review 432 (1931).

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dignation and contempt of the medical profession. It should now stimulate the conscience of the bench and the bar to inspect their own creation and to acknowledge the intellectual shame of it. Looking over the record of these rulings, in Illinois and elsewhere, was there ever a sadder spectacle of fatuous futility? Since these court officials must be conscious that the main purpose of a trial is to arrive at truth, do they not even for a moment reflect on the inaptness of this rule for that purpose? Can they sit there and inscribe these irrational and ignoble logomachies and believe that the cause of justice is being helped? The rulings have now reached such a climax of nonsense that they are almost symptomatic of some general failing in the professional intellect that can tolerate them as a part of the daily pabulum. Must we not acknowledge that they are a disgrace to the profession—nay more, a disgrace to the human intellect? Will bench and bar never awaken to their duty of casting away utterly this type of futility?

There is at least a sign of awakening elsewhere, in another state. In Alabama, where the opinion rule had long ago reached the acme of irrationality, a bill, supported by a committee of judges and lawyers, was introduced in this year's legislature, reading as follows:

"Section 1. Subject to the provisions of Section 3 of this Act, a conclusion or opinion may always be stated by a lay or non-expert witness, provided the topic involved in such opinion or conclusion does not require special experience for drawing or reaching such opinion or conclusion, and provided the witness is first shown to have had adequate personal observation of any data from which such opinion or conclusion might be drawn or reached.

"Sec. 2. Such opinion or conclusion may be stated by the witness irrespective of whether the data are or are not capable of being so stated or described by the witness in words or by gestures that the court or jury, as the case may be, is equally capable of drawing or reaching the opinion or conclusion; or, irrespective of whether the data are or are not stated by the witness before stating his opinion or conclusion; or, irrespective of whether the opinion or conclusion involves the very subject of the issue or one of the issues in the case.

"Sec. 3. The trial judge may, in his discretion, disallow or exclude the opinion or conclusion of a lay witness, whenever in his judgment, such testimony is merely cumulative or superfluous.

"Sec. 4. The provisions of this Act shall apply to all courts in this state."

JOHN H. WIGMORE.

JURISDICTION—BINDING EFFECT OF RULINGS SUSTAINING JURISDICTION OF THE PERSON.—[United States] It has been quite commonly assumed, though the authorities on the point are few,<sup>1</sup> that where there has not been such service of process as to give the court jurisdiction of the person, the defendant might appear specially and object to the process or service, and in case of adverse

1. For a collection of the cases and a critical discussion of the problems involved, see *Medina* "Conclusiveness of Rulings on Jurisdiction" (1931) 31 Col. Law Rev. 238.

ruling followed by a default, the judgment would be open to the defense of lack of jurisdiction. Thus in one of the earlier cases,<sup>2</sup> Mr. Justice Brewer, in discussing a statute converting a special appearance into a submission, observed:

"It must be conceded that such statutes contravene the established rule elsewhere—a rule which also obtained in Texas at an earlier day, to wit, that an appearance which, as expressed, is solely to challenge the jurisdiction, is not a general appearance in the case and does not waive the illegality of the service or submit the party to the jurisdiction of the court . . . The difference between the present rule in Texas and elsewhere is simply this: Elsewhere the defendant may obtain the judgment of the court upon the sufficiency of the service, without submitting himself to its jurisdiction. In Texas, by its statute, if he asks the court to determine any question, even that of service, he submits himself wholly to its jurisdiction. Elsewhere he gets an opinion of the court before deciding his own action. In Texas he takes all the risk."

The assumption that a ruling sustaining jurisdiction was not binding is illustrated by a late New York case.<sup>3</sup> A suit had been brought in Rhode Island against the Adams Express Company, and the process served upon an agent appointed in compliance with a local statute, but whose appointment had been revoked when the American Railway Express Co. took over the defendant's business under the war regulations. The defendant appeared specially to vacate the service, and, when its objection was overruled, suffered a judgment by default. The plaintiff then brought suit on this judgment in New York. A judgment in its favor was affirmed by the Appellate Division without opinion. The Court of Appeals apparently took it for granted that the defense of want of jurisdiction in the Rhode Island court was available, and accordingly held the first judgment void.

The same assumption is tacitly made in the *Mix* case.<sup>4</sup> There suit had been brought in a state court of Missouri against a foreign railroad corporation which was not doing business in the state, and process served on a soliciting freight agent. The defendant appeared specially and moved to vacate the service. After adverse ruling on its motion, the defendant applied to the state Supreme Court for a writ of prohibition to prevent further proceedings in the case. The writ was refused without opinion. On certiorari the Supreme Court of the United States reversed the judgment denying prohibition, thus implying that the trial court was without jurisdiction. Where the question of allowing the defense of lack of jurisdiction in this class of cases has been discussed, the courts following this view have reasoned thus: A special appearance to object to the jurisdiction of a court is not a submission, and if the service of process was legally insufficient to confer jurisdic-

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2. *York v. Texas* (1890) 137 U. S. 15.

3. *Guerin Mills v. Adams Express Co.* (1930) 254 N. Y. 380.

4. *Michigan Central R. R. Co. v. Mix* (1929) 278 U. S. 492.

tion, an erroneous ruling on the question could not give the court any additional power.<sup>5</sup>

On the other hand jurisdiction has been sustained and the defense disallowed on the theory of *res judicata*,<sup>6</sup> that a special appearance to object to jurisdiction is at least such a submission as gives the court power to decide *that* question, and hence the decision would be binding until reversed by appellate proceedings. In the latest case<sup>7</sup> on the subject the Supreme Court of the United States has adopted the *res judicata* theory. In that case a suit had been brought in a state court in Missouri against a foreign corporation which removed it to the United States District Court. The defendant then appeared specially and moved to vacate the service on the ground that the person served was not its agent. The motion was overruled and a judgment by default entered. Suit was brought on this judgment in the United States District Court of Iowa which allowed the defense of want of jurisdiction, and rendered judgment for the defendant. This was affirmed by the Circuit Court of Appeals. When the case reached the Supreme Court, the judgment below was reversed on the following reasoning:

"The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of an appearance, the court had proceeded to judgment, and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. . . . It also had the right to appeal from the decision of the Missouri District Court, as shown by *Harkness v. Hyde*, supra, and the other authorities cited. It elected to follow neither of those courses, but after having been defeated upon full hearing in its contentions as to jurisdiction, it took no further steps, and the judgment in question resulted. Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the results of the contest; and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause . . ."

It seems impossible to reconcile this theory with the result in the *Mix* case. According to the reasoning in the *Baldwin* case the defendant's voluntary appearance in the state court to object to its jurisdiction would give the court power to determine that question, and its adjudication, after full hearing, would be binding, though erroneous. And if binding, the writ of prohibition was properly denied by the State Supreme Court, because prohibition

5. *Marshall v. R. M. Owen & Co.* (1912) 171 Mich. 232.

6. *Hall v. Wilson Mfg. Co.* (1927) 316 Mo. 812.

7. *Baldwin v. Iowa State Traveling Men's Ass'n* (1931) 51 Sup. Ct. 517.

is not a remedy for mere error, and lies only where there is a lack of jurisdiction.<sup>8</sup>

It must be noted, however, that the question of *res judicata* was not suggested in the *Mix* case, and the court and counsel seem to have proceeded on the assumption that the only question was whether the service of process gave the trial court jurisdiction. Under the federal rule, that an exception properly taken to an adverse ruling on an objection to jurisdiction is not waived<sup>9</sup> by a subsequent plea in bar and trial on the merits, the policy of applying the doctrine of *res judicata* to an adverse ruling on an objection to jurisdiction appears to be well justified, because the defendant has ample protection. He need not incur the risk of a failure to appear, nor the risk of a default after adverse ruling on his objection to the jurisdiction, since he may defend on the merits without waiving his exception. But in many of the states, a defense on the merits operates as a waiver of the exception to the adverse ruling on the objection to jurisdiction.<sup>10</sup>

If the *res judicata* rule is applied in such states, a defendant is, or may be, placed in a very embarrassing position. For example, where suit has been brought against a foreign corporation in some state where it is doubtful whether it was doing business to such an extent as to subject it to the local jurisdiction, and the claim is not large enough to enable it to remove the case to the federal court. If it fails to appear at all it may, of course, make the defense of lack of jurisdiction in any subsequent action on the judgment. But in that event it must risk all on the one more or less doubtful defense. If it appears specially and objects to the jurisdiction, then in case of an adverse ruling, it cannot stop there because its objection is now *res judicata*, but it must elect between two evils. In order to obtain appellate review of the ruling on jurisdiction it must forego any defense on the merits, because of the doctrine of waiver. If it elects to defend on the merits in the objectionable forum, the price is the surrender of all objections to the jurisdiction. Either of the alternatives seems to give the plaintiff an undue advantage. If the defendant should stand on the question of jurisdiction, the plaintiff has got rid of any defense on the merits; and if the defendant defends on the merits, the plaintiff has got rid of the jurisdictional objection. If the plaintiff is defeated on the question of jurisdiction he is free to begin a new action in the proper forum. If the defendant is defeated ultimately on the objection to jurisdiction, it has no further chance. The rule applied in the lower court is helpful to the defendant to this extent that it risked nothing by special appearance and ob-

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8. In *re C. R. I. & P. Ry. Co.* (1920) 255 U. S. 273; *Ex parte Transportes Maritimes* (1924) 264 U. S. 105.

9. *Harkness v. Hyde* (1878) 98 U. S. 476; *James-Dickinson Mortgage Co. v. Harry* (1927) 273 U. S. 119.

10. *Franklin Life Ins. Co. v. Hickson* (1902) 197 Ill. 117; *Newcomb v. Ry.* (1904) 182 Mo. 687. For a discussion of this problem, see *Sunderland* "Preserving a Special Appearance" (1911) 9 Mich. Law Rev. 396.

jection to the jurisdiction, and that it need not determine its own course until after ruling on the point.

However, in this group of states objections to jurisdiction of the person are evidently disfavored, and hence it may be expected that they will follow the *Baldwin* case, while adhering to their own view that a defendant must elect between an exception to the ruling on jurisdiction and any defense on the merits.

E. W. HINTON.

LICENSES—REVOCABILITY—CONTRACTS FOR EASEMENTS.—[Illinois] *Baird v. Westberg*<sup>1</sup> recalls the discussion that appeared in the earlier pages of this law review<sup>2</sup> where the two outstanding cases<sup>3</sup> on the subject in Illinois were considered at length, and the

1. (1931) 341 Ill. 616.

2. Note in (1914) 9 ILLINOIS LAW REVIEW 281: "It would seem from these authorities that, once it was clear that a license and nothing more was given, then the mere fact that the licensee was gullible enough to expend money or labor in reliance upon the belief that such license would not be revoked, would not be effectual to ripen such license into an easement. But it does seem that a right or interest in real estate, which is not revocable at the will of the owner of the land upon which it is to be enjoyed, may be had under certain circumstances, even without a deed or instrument in form to pass real estate. The question is, what are those circumstances? The answer of the cases, it seems, would be: Where there is a contract for an easement."

Note in (1918) 13 ILLINOIS LAW REVIEW 355: "It was suggested in an earlier comment on this question, . . . that the real test upon the question is the same as that applied to determine whether an oral contract for the sale or transfer of real property is enforceable. In the case now under review [*Girard v. Lehigh Stone Co.* (1917) 280 Ill. 479] the court would seem to have sustained this position, unless it was the intention of the court to hold that equity will sustain a parol agreement for an easement only when it can do so negatively, i. e., by denying to one who sought to interfere with its enjoyment, the aid of equity in sustaining such interference. It is not believed that the court intended to confine its decision to such narrow compass; at least not if the citation of *Kamphouse v. Gaffner* [(1874) 73 Ill. 453] was more than inadvertent, for the language there appearing as above quoted contemplates an affirmative action by a court of equity in enforcing such an agreement, and not merely a passive action of keeping hands off.

"If that is true, then the case of *Morse v. Lorenz* 262 Ill. 116, . . . is overruled by the present case, for in that case the claimant of the rights under oral agreement brought a bill for injunction, and the court denied the relief on the ground that a license was revocable despite the expenditure of money or the making of improvements in reliance thereon. In fact there is no difference between the two cases in their essential legal aspect, except that in the present case [*Girard v. Lehigh Stone Co.*] the relief was sought by the servient owners to enjoin the enjoyment of the agreement by the dominant owner, whereas in the case of *Morse v. Lorenz* the dominant owner sought to enjoin the interference with such enjoyment. If the court still adheres to *Morse v. Lorenz*, then in the present case equity, by keeping hands off, in effect relegated the parties to a proceeding at law where the servient owner was bound to prevail. Surely such a result was not contemplated."

3. *Morse v. Lorenz* (1914) 262 Ill. 115, and *Girard v. Lehigh Stone Co.* (1917) 280 Ill. 479.