

**Conflict of Laws—Jurisdiction of the Subject-Matter—Collateral Attack—[Federal].**—The plaintiff sued in an Illinois court to collect on bonds which had been guaranteed by the defendant. In a previous bankruptcy proceeding a federal court confirmed a reorganization plan providing for a cancellation of the defendant's guarantee of the bonds. While the state action was pending, the plaintiff petitioned the federal court to modify its decree on the ground that it had no power to release the guarantor under the Bankruptcy Act. The petition was denied and no appeal was taken. Subsequently the defendant pleaded the decree of the federal court as a bar in the state action. The Supreme Court of Illinois affirmed judgment for the plaintiff. On *certiorari* to the Supreme Court, *held*, reversed. A court's adjudication of its jurisdiction over the *subject matter*, where the issue has been contested, is *res judicata* in a subsequent action. *Stoll v. Gottlieb*.<sup>1</sup>

Previous decisions have established that a court's judgment as to its jurisdiction over the person, where actually contested, may be *res judicata* and impregnable to collateral attack.<sup>2</sup> Whether or not the same results would be reached in the case of decisions on jurisdiction of the subject-matter, which present more acute theoretical difficulties, has been doubtful until the instant decision.<sup>3</sup> In extending the doctrine of *res judicata* to controversies over jurisdiction of the subject-matter, which have been contested,<sup>4</sup> the Supreme Court has taken another step in overruling the classical dogma that jurisdictional questions are always open to collateral inquiry.

The classical approach to jurisdictional questions<sup>5</sup> embodies the principle that a court without jurisdiction cannot acquire it by its own decision, that its judgment is "void" and therefore always open to attack.<sup>6</sup> Thus, the full faith and credit clause does not preclude an inquiry into the jurisdiction of the original court;<sup>7</sup> nor does the doctrine of *res judicata*, it is said, apply, since the judgment or decree is a nullity.<sup>8</sup>

<sup>1</sup> 59 S. Ct. 134 (1938).

<sup>2</sup> Rest., Conflict of Laws § 451 (1934); 46 Yale L.J. 159 (1936); *Baldwin v. Iowa State Travelling Men's Ass'n*, 283 U.S. 522 (1931); *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25 (1917); *Ellis v. Starr Piano Co.*, 226 Mo. App. 1209, 49 S.W. (2d) 1078 (1932).

<sup>3</sup> See note in 46 Yale L.J. 159 (1936); Rest., Conflict of Laws § 451 (Caveat) (1934); Medina, Conclusiveness of Rulings on Jurisdiction, 31 Col. L. Rev. 238 (1931). At least one old case, *Forsyth v. Hammond*, 166 U.S. 506 (1897), and several recent federal court cases support the instant case. *Catholic Society v. Madison County*, 74 F. (2d) 848 (C.C.A. 4th 1935); *Hamilton Gas Co. v. Watters*, 79 F. (2d) 438 (C.C.A. 4th 1935); *Nat'l Park Bank v. McKibben*, 43 F. (2d) 254 (D.C. Ga. 1930).

<sup>4</sup> The Supreme Court left undecided the special situation in which status or land was in controversy. *Stoll v. Gottlieb*, 59 S. Ct. 134, 139 (1938).

<sup>5</sup> The leading case for this doctrine is *Thompson v. Whitman*, 18 Wall. (U.S.) 457 (1873). Cf. *Matter of Gregory*, 219 U.S. 210 (1911).

<sup>6</sup> *Thompson v. Whitman*, 18 Wall. (U.S.) 457 (1873). See also *Andrews v. Andrews*, 188 U.S. 14 (1903); 1 Freeman, *Judgments* §§ 322, 333 (5th ed. 1925); Gavit, *Jurisdiction of the Subject-Matter and Res Judicata*, 80 U. of Pa. L. Rev. 386 (1932).

<sup>7</sup> See note in 12 N. Car. L. Rev. 250 (1934); *Nat'l Exchange Bank of Tiffin v. Wiley*, 195 U.S. 257 (1904).

<sup>8</sup> Gavit, *op. cit. supra* note 6. This statement is Dean Gavit's expression of the classical dogma, not his opinion as to what the law is, or should be.

Moreover, it is frequently urged that the due process clause requires an inquiry into the jurisdiction of the original court. Otherwise, the decree affecting the rights of the parties is not rendered by a court, acting as a court, and is, therefore, taking property without due process of law.<sup>9</sup>

Despite the logical symmetry of this reasoning there has been a trend toward the application of the principles underlying the doctrine of *res judicata* to decisions concerning jurisdiction.<sup>10</sup> These principles may be stated to be the litigant's interest in a conclusive determination, the public's interest in a peaceable and prompt settlement of the controversy,<sup>11</sup> and procedural simplicity.<sup>12</sup> Formerly, special grounds were used to achieve the result of the *res judicata* doctrine. Thus, a presumption was created in favor of the validity of a judgment of a court of general jurisdiction.<sup>13</sup> This ground was carried to an extreme by a diversity of citizenship case in which the defect appeared on the face of the record.<sup>14</sup> Findings of fact necessary to a determination of jurisdiction were designated quasi-jurisdictional facts, which were not subject to collateral attack, while jurisdictional questions of law were called strictly jurisdictional facts, which were always open to attack.<sup>15</sup> Doctrines of estoppel have been invoked.<sup>16</sup> In addition, the courts have been reluctant to allow collateral inquiry into a decision concerning jurisdiction, which was based upon statutory construction.<sup>17</sup> In recent

<sup>9</sup> Farrier, Full Faith and Credit of Adjudication of Jurisdictional Facts, 2 Univ. Chi. L. Rev. 552, 553 (1935); *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Old Wayne Life Ass'n v. McDonough*, 204 U.S. 8 (1907).

<sup>10</sup> Gavit, *op. cit. supra* note 6, at 389.

<sup>11</sup> 2 Freeman, Judgments § 626 (5th ed. 1925). It is said "whenever the law refuses to give effect to judgment or decree of a court because it was rendered without jurisdiction of the subject-matter, it is as a practical matter denying the sole interest it does have, namely, that of a peaceable settlement of a controversy between parties over their legal rights." Gavit, *op. cit. supra* note 6, at 388.

<sup>12</sup> The doctrine of *res judicata* as applied to jurisdictional questions has an important bearing upon the simplicity of appellate procedure under our dual system of government in which both federal and state courts have concurrent territorial jurisdiction. Thus, if the jurisdictional question is always open to attack, the case may be contested through both the federal and state courts with infinite opportunities for delay by either party. This situation is well illustrated by the discussion and diagram of *Baldwin v. American Surety Co.*, 287 U.S. 156 (1932), in Arnold and James, Cases on Trials, Judgments and Appeals 131, 134 (1936 ed.).

<sup>13</sup> *Evers v. Watson*, 156 U.S. 527 (1895); *Dowell v. Applegate*, 152 U.S. 327 (1894); *Chandler v. Peketz*, 297 U.S. 609 (1936).

<sup>14</sup> *Des Moines Navigation Co. v. Iowa Homestead Co.*, 123 U.S. 552 (1887).

<sup>15</sup> *Noble v. Union River Logging Co.*, 147 U.S. 165 (1893); *Chamblin v. Chamblin*, 362 Ill. 588, 1 N.E. (2d) 73 (1936). It was precisely on this basis that the Illinois Supreme Court was able to distinguish the instant case when it was there for decision. *Gottlieb v. Crowe (Stoll)*, 368 Ill. 88, 12 N.E. (2d) 881 (1937). The distinction, however, between questions of fact and law, made by the Illinois court, seems tenuous. 51 Harv. L. Rev. 1449 (1938).

<sup>16</sup> 1 Freeman, Judgments § 320 (5th ed. 1925); 3 *id.* § 1438; *Grasselli Chemical Co. v. Simon*, 84 Ind. App. 327, 150 N.E. 617 (1925). Yet the term estoppel is not the proper term to designate the conclusiveness of a judgment under *res judicata*. 2 Freeman, Judgments § 624 (5th ed. 1925).

<sup>17</sup> *Denver First Nat'l Bank v. Klug*, 186 U.S. 202 (1902); *Hamilton Gas Co. v. Watters*, 79 F. (2d) 438 (C.C.A. 4th 1935); *Nat'l Park Bank v. McKibben*, 43 F. (2d) 254 (D.C. Ga.,

years, however, the courts have applied the doctrine of *res judicata* when the defendant appeared either generally or specially to contest jurisdiction.<sup>18</sup>

It is only natural that the doctrine of *res judicata* should have been applied first in cases concerning jurisdiction of the person, since the courts were aided by theories of waiver and consent.<sup>19</sup> The application, however, to questions of jurisdiction of the subject-matter was more difficult, since the court had to face squarely the line of cases which held that jurisdiction of the subject-matter could not be waived or conferred by consent and could be attacked at any time.<sup>20</sup> Thus, the court in the instant case was forced to decide that the policy reasons of the *res judicata* rule were more compelling than those, primarily political,<sup>21</sup> which support the classical dogma. More broadly, it is simply another illustration of the trend away from the "little nations" theory of statehood and toward the ideal of a unified nation.

The Supreme Court, in the instant case, leaves open several interesting questions. It refused to consider the merits of the case, saying "we express no opinion as to whether the Bankruptcy Court did or did not have jurisdiction of the subject-matter."<sup>22</sup> In the light of recent lower court decisions<sup>23</sup> and Section 16 of the Bankruptcy Act,<sup>24</sup> which states that "the liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt," it is probable that the Supreme Court will, in a proper case, hold that such a release is outside the power of the court, at least as to dissenters.<sup>25</sup> Insofar as this prophecy is a valid one, it shows to what extent the Supreme Court will go in giving a conclusive effect to a decree outside the jurisdiction of the court. Where the jurisdictional question has been contested, a court is allowed to create jurisdiction of the subject-matter by its own decision.<sup>26</sup>

The Supreme Court further failed to decide whether or not status and land cases presented such special circumstances that the holding of the present case would be inapplicable.<sup>27</sup> Concerning the former the same attitude evidenced by the instant case

1930); *Texas and Pacific Ry. Co. v. Gulf, Colo. & S.F. Ry. Co.*, 270 U.S. 266, 274 (1935); 86 U. of Pa. L. Rev. 676 (1938). It might be argued that the instant case falls within this special ground. Taken in connection, however, with the broad language of the opinion, it is believed to stand for a much broader proposition.

<sup>18</sup> 46 Yale L. J. 159, 161 (1936) and cases there cited. See note 3 *supra*.

<sup>19</sup> This situation has been rationalized on the theory that a special appearance to contest jurisdiction is a submission to the "limited jurisdiction" of the court to determine its "ultimate jurisdiction" over the parties. 41 Harv. L. Rev. 1055 (1928).

<sup>20</sup> *Southern Pacific Ry. Co. v. Denton*, 146 U.S. 202 (1892). See collection of cases in 32 L.R.A. (N.S.) 905, 909 (1911).

<sup>21</sup> Gavit, *op. cit. supra* note 6, at 386.

<sup>22</sup> *Stoll v. Gottlieb*, 59 S. Ct. 134, 137 (marginal note 8).

<sup>23</sup> *In re Diversey Building Corp.*, 86 F. (2d) 456 (C.C.A. 7th 1936); *In re Nine North Church Street, Inc.*, 82 F. (2d) 186 (C.C.A. 2d. 1936); *Union Trust Co. v. Willsea*, 275 N.Y. 164, 9 N.E. (2d) 820 (1937); *Durfee Trust Co. v. Steiger*, 4 N.E. (2d) 1014 (Mass. 1936); 23 Va. L. Rev. 601 (1937).

<sup>24</sup> 30 Stat. 550 (1898), 11 U.S.C.A. § 34 (1927).

<sup>25</sup> *Levi, Corporate Reorganization and a Ministry of Justice*, 23 Minn. L. Rev. 3, 27 (1938).

<sup>26</sup> *Cf. Forsyth v. Hammond*, 166 U.S. 506 (1897), where there was "color of jurisdiction."

<sup>27</sup> See note 4 *supra*.

seems to prevail.<sup>28</sup> The result of the land cases is more doubtful,<sup>29</sup> but it is believed that even in this situation the same doctrines will be ultimately applied, since the defendant may always question the jurisdiction of the original court by appeal to the Supreme Court if necessary.

The court also leaves undecided the question of whether the doctrine of *res judicata* will be applied where the jurisdictional question was not actually contested. The decided cases present a maze of conflicting holdings. Some invoke the classical approach,<sup>30</sup> while others reach opposite results by the use of special grounds of estoppel of record,<sup>31</sup> and presumptions of conclusiveness of judgments by courts of general jurisdiction.<sup>32</sup> If the jurisdiction is not contested, additional theoretical difficulties are encountered, for a recognition of the original decree as valid would allow the parties to determine the jurisdiction of the court by their collusive conduct, contrary to statutory and constitutional enactments;<sup>33</sup> where contested, there is, in addition, a judicial determination of the jurisdictional question. Dean Gavit presents an ingenious solution by treating a judgment outside the jurisdiction of the court as a binding arbitration, thus leaving undisturbed the jurisdictional concept of a void judicial judgment.<sup>34</sup> In view of the trend toward simplified procedure<sup>35</sup> and a wider application of the doctrine that all available defenses must be presented at the first opportunity,<sup>36</sup> it would not be surprising to find the Supreme Court applying the doctrine of *res judicata* to all questions which might have been raised in the original action, including jurisdictional objections. Of course, in case of default any attempt to prevent collateral attack would violate the due process clause.<sup>37</sup>

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Constitutional Law—Elections—Registration Statutes—Negro Suffrage—[Federal].—The plaintiff, a Negro, sued to recover damages from the defendants, election officials and county judge, for having, because of his race and color, prevented his

<sup>28</sup> *Davis v. Davis*, 59 S. Ct. 3 (1938); noted in 6 Univ. Chi. L. Rev. 290 (1939); *Chamblin v. Chamblin*, 362 Ill. 588, 1 N.E. (2d) 73 (1936). Cf. *Andrews v. Andrews*, 188 U.S. 14 (1902). See also *Harper, The Validity of Void Divorces*, 79 U. of Pa. L. Rev. 158 (1930).

<sup>29</sup> *Forsyth v. Hammond*, 166 U.S. 506 (1896); *Carpenter v. Strange*, 141 U.S. 87 (1891); *Dowell v. Applegate*, 152 U.S. 327 (1894); *Fall v. Eastin*, 215 U.S. 1 (1909); *Norris v. Loyd*, 183 Iowa 1056, 168 N.W. 557 (1918); *Farmers Nat'l Bank v. Daggett*, 2 S.W. (2d) 834 (Comm'n of App. Tex. 1928).

<sup>30</sup> *Thompson v. Whitman*, 18 Wall. (U.S.) 457 (1873). See note 20 *supra*.

<sup>31</sup> *Smolinsky v. Federal Reserve Life Ins. Co.*, 126 Kan. 506, 268 Pac. 830 (1928); *Rice v. Metropolitan Life Ins. Co.*, 152 Ark. 498, 238 S.W. 772 (1922). Cf. *Thompson v. Whitman*, 18 Wall. (U.S.) 457 (1873). See also *Farrier, op. cit. supra* note 9, at 556.

<sup>32</sup> See note 13 *supra*.

<sup>33</sup> *Gavit, op. cit. supra* note 6, at 389.

<sup>34</sup> *Id.*, at 390.

<sup>35</sup> See note 12 *supra*.

<sup>36</sup> *Res judicata* has been extended to bar a subsequent action in a separate cause of action which "might have been adjudicated" under the procedural provisions for the joinder of actions, the "fusion" of the action and the assertion of a cross-claim. See *Gavit, The Code Cause of Action, Joinder and Counter-Claims*, 30 Col. L. Rev. 802 (1930).

<sup>37</sup> *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Old Wayne Life Ass'n v. McDonough*, 204 U.S. 8 (1907).