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Judgments--Res Judicata Held Inoperative in Interstate Land Controversy (Duke v. Durfee, 308 F.2d 209 (8th Cir. 1962))

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to the original plaintiff's defendant and thus can only affect those claims joined by the original plaintiff. The right of removal is a purely statutory right and in light of the avowed congressional purpose to limit removal, the statute must be strictly construed.[40]

The Court in the principal case is the first federal district court in New York to consider the interpretation of the phrase "joined by" in section 1441. This holding is indeed significant in that it is the only New York district court to expressly deny the right of removal by a third-party defendant based on a strict construction of section 1441(c). Such a treatment of "ancillary" third-party claims is consistent with the present federal trend.[41]

It is interesting to note that the liability of the third-party defendant was contingent upon the original defendant's liability to the plaintiff. Both causes of action arose from the identical transaction, and, under the rule of the *Finn* case, such circumstances do not result in "separate and independent" actions. Since the Court in the principal case could have conveniently denied removal on this basis, it could be said that the Court desired to determine the applicability of section 1441 to third-party practice. Such a broad holding now makes a determination of what constitutes "separate and independent" unnecessary since removal is precluded *ab initio*.

JUDGMENTS — RES JUDICATA HELD INOPERATIVE IN INTERSTATE LAND CONTROVERSY. — A change in the flow of the Missouri River — the borderline between Missouri and Nebraska — caused the jurisdictional location of certain river bottom land to become

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[40] *Ibid.*

[41] Approximately one month after the principal case was decided, a New Jersey district court in White v. Baltic Conveyor Co., 209 F. Supp. 716 (D.N.J. 1962) rendered a decision denying the third-party defendant's right to remove. The basic reasoning employed by the court in *Baltic* is substantially that used in the principal case, but the court in *Baltic* offers additional arguments by suggesting that if the ancillary suit were removed and the transactions were interrelated, one court might have to await the outcome of the other's trial and this would defeat "the prompt, economical, and sound administration of justice." *Id.* at 721. A second argument offered is that if *one* court controls a main claim and a third-party claim, it will be considerably easier to promote settlement possibilities. *Ibid.*

The court here expressly refused to follow the decision in Industrial Lithographic Co. v. Mendelsohn, 119 F. Supp. 284 (D.N.J. 1954), which was rendered by a federal court of the same jurisdiction and whose holding was *contra*.

doubtful. Plaintiff, a Missouri citizen, claimed title to the land, as did defendants, Nebraska citizens. Defendants instituted an action to quiet title to the land against the present plaintiff in a Nebraska state court. In that action, the present plaintiff contested the Nebraska court's jurisdiction alleging that the land was located in Missouri. Ultimately, the Supreme Court of Nebraska held that the land was located in Nebraska and consequently the lower court had jurisdiction.[1] Plaintiff then instituted the present action to quiet title in a Missouri state court. Upon removal to the federal district court, the defendants set forth the Nebraska judgment as an affirmative defense. The district court rendered judgment for the defendant holding the prior judgment to be res judicata both as to the jurisdictional issue and the ownership of the land, despite its own finding that the land was situated in Missouri. The court of appeals reversed and remanded *holding,* that in a land controversy such as this, the policy against permitting a court to act beyond its jurisdiction outweighs any conflicting res judicata principle. Hence, res judicata could not preclude the district court from inquiring collaterally into the subject-matter jurisdiction of the Nebraska court. *Duke v. Durfee,* 308 F.2d 209 (8th Cir. 1962), *petition for cert. filed,* 31 U.S.L. WEEK 3172 (U.S. Nov. 14, 1962) (No. 593).

The full faith and credit clause of the Constitution requires that the courts of each state accord to a judgment of another state the force and effect which it has in the state where rendered, provided that the original forum had jurisdiction over both the parties and the subject matter.[2] Federal courts are bound equally with the state courts to observe the mandate of the full faith and credit clause.[3] However, it has long been a fundamental principle in conflict of laws, that the constitutional command of full faith and credit, while foreclosing inquiry into non-jurisdictional matters, does not preclude a second forum's collateral inquiry into questions of the first court's personal or subject-matter jurisdiction.[4]

On the other hand, the doctrine of res judicata as applied to jurisdictional issues presents a problem decidedly more complex

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[1] Durfee v. Keiffer, 168 Neb. 272, 95 N.W.2d 618 (1959). The present plaintiff claims title under a Missouri swamp land patent; the defendants under a Nebraska sheriff's deed.

[2] U.S. CONST. art. IV, § 1; see Riley v. New York Trust Co., 315 U.S. 343 (1942).

[3] Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932). The full faith and credit clause was implemented by Congress specifically to embrace federal courts. 28 U.S.C. § 1738 (1958).

[4] *E.g.,* Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961); Riley v. New York Trust Co., *supra* note 2; Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912); Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1874).

than the corresponding problem raised by the full faith and credit clause. Res judicata precludes parties who have once contested an issue before a competent tribunal from thereafter relitigating the identical issue by means of a collateral attack in another forum.[5] Some jurisdictions have applied the doctrine not only to issues which were actually litigated, but also to those questions which could have been litigated.[6]

The application of the doctrine of res judicata to questions of personal jurisdiction appears to be well established. Thus, as the Supreme Court expressly enunciated in *Baldwin v. Iowa State Traveling Men's Ass'n*,[7] where an individual voluntarily appears in an action and litigates the question of jurisdiction over his person, the issue becomes res judicata and cannot be collaterally attacked in any tribunal.[8]

The corresponding application of res judicata to questions of subject-matter jurisdiction, as distinguished from jurisdiction over the person, has been neither clear nor consistent. The early decisions of the Supreme Court, which were primarily concerned with the disposition of realty, held that the factor of subject-matter jurisdiction could be collaterally inquired into at any time and by any court.[9] These cases appear to make no distinction between situations in which the jurisdictional issue had been expressly contested, and those in which it had not. Later, however, *Forsyth v. Hammond*,[10] another case involving jurisdiction over realty, precluded such a collateral inquiry and represents a departure from earlier opinions. However, in cases not involving the *Forsyth* exception, the earlier rule persisted well into the

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[5] Southern Pac. R.R. v. United States, 168 U.S. 1, 48 (1897); see BLACK, JUDGMENTS § 504 (2d ed. 1902).

[6] *E.g.*, Lipscomb v. Lipscomb, 179 Misc. 1025, 40 N.Y.S.2d 720 (Sup. Ct. 1943); Boyich v. J. A. Utley Co., 306 Mich. 625, 11 N.W.2d 267 (1943).

[7] 283 U.S. 522 (1931).

[8] Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931); see RESTATEMENT, CONFLICT OF LAWS § 451(1) (Supp. 1948); RESTATEMENT, JUDGMENTS § 9 (1942). However, collateral inquiry may be made as to the first tribunal's jurisdiction of the person of the defendant where the judgment in the prior suit was obtained by default and without litigation of the issue of personal jurisdiction. Baldwin v. Iowa State Traveling Men's Ass'n, *supra*.

[9] *E.g.*, Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839); Elliott v. Peirsol, 26 U.S. (1 Pet.) 328 (1828). See the discussion in Voorhees v. Jackson, 35 U.S. (10 Pet.) 449, 477-78 (1836); Thompson v. Tolmie, 27 U.S. (2 Pet.) 157, 168-69 (1829).

[10] 166 U.S. 506 (1897). This case was concerned with an intra-state realty conflict and the construction of a state's constitution and statutes by the courts of that state.

twentieth century and collateral attack of subject-matter jurisdiction was permitted even in non-realty situations.[11]

In 1938 a contrary doctrine emerged. The Supreme Court in *Stoll v. Gottlieb*[12] (a bankruptcy controversy), applied the *Baldwin* rule to issues concerning jurisdiction over the subject matter. Thus:

> [A] former judgment in a state court is conclusive between the parties and their privies in a federal court when entered upon an actually contested issue as to the jurisdiction of the court over the subject matter of the litigation. . . .[13]

The court placed specific reliance on the *Forsyth* case and distinguished the seemingly contrary results of intervening cases.[14]

Two years later in *Chicot County Drainage Dist. v. Baxter State Bank*[15] (a readjustment of indebtedness proceeding involving the effect of an unconstitutional statute), the application of res judicata to jurisdiction over the subject matter was extended to also include those controversies in which the issue of subject-matter jurisdiction had neither been contested nor expressly determined by the original forum. The *Chicot* case made every judgment wherein the defendant received proper notice and failed to contest the jurisdiction, conclusive upon the question of the tribunal's jurisdiction of the subject matter. The burden was thus placed upon the parties to raise the jurisdictional issue in the original action or to be precluded from ever contesting the jurisdiction of the court.

The *Chicot* rule was approved in subsequent decisions,[16] but exceptions to this rule have appeared. Hence, where a countervailing public policy outweighs the policy considerations underlying the doctrine of res judicata, the Supreme Court has held that the latter doctrine will not preclude a collateral inquiry into the

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[11] Grubb v. Public Util. Comm'n, 281 U.S. 470 (1930); Vallely v. Northern Fire & Marine Ins. Co., 254 U.S. 348 (1920).

[12] 305 U.S. 165 (1938). In Davis v. Davis, 305 U.S. 32 (1938) (divorce action), which preceded the *Stoll* case, the Court applied res judicata to preclude a collateral attack of subject-matter jurisdiction where the issue had previously been litigated, but its holding appeared to be limited to divorce actions. In 1939 Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939) (involving personalty) reaffirmed the *Stoll* doctrine: "One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties." *Id.* at 78.

[13] Stoll v. Gottlieb, 305 U.S. 165, 173 (1938).

[14] *Id.* at 173-76.

[15] 308 U.S. 371 (1940).

[16] Heiser v. Woodruff, 327 U.S. 726 (1946); Jackson v. Irving Trust Co., 311 U.S. 494 (1941); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) (dictum).

prior court's subject-matter jurisdiction.[17] The American Law Institute has expressed its view of the area in the following terms:

> Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction.[18]

This pronouncement of the Institute is based upon a comprehensive review of the pertinent Supreme Court decisions, some of which are specifically referred to in its *Restatement*.[19]

The view presented immediately above was accepted by the Court in the principal case as a "correct statement of the law as the Supreme Court has developed it."[20] This statement was made only after the Court had made its own examination of the relevant decisions relating to res judicata and subject-matter jurisdiction. The Court noted that realty was directly in issue in the present controversy and proceeded to examine the Supreme Court decisions with this fact in mind. The earlier realty decisions, excepting *Forsyth* which the Court distinguished and limited to its peculiar facts,[21] refused to apply res judicata to questions of subject-matter jurisdiction. Even though the later cases did so apply the doctrine, they were not concerned with real estate, and in a few instances these cases indicated that they were not intended to control realty situations.[22] In addition, the Court found many expressions in Supreme Court decisions

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[17] United States v. United States Fid. & Guar. Co., 309 U.S. 506 (1940); Kalb v. Feuerstein, 308 U.S. 433 (1940). The policy factor was also dominant in Vallely v. Northern Fire & Marine Ins. Co., 254 U.S. 348 (1920).

[18] RESTATEMENT, CONFLICT OF LAWS § 451(2) (Supp. 1948); RESTATEMENT, JUDGMENTS § 10 (1942). The respective *Restatement* sections present the following factors as appropriate in considering whether or not a collateral attack should be permitted:
(a) the lack of jurisdiction over the subject matter was clear;
(b) the determination as to jurisdiction depended upon a question of law rather than of fact;
(c) the court was one of limited and not of general jurisdiction;
(d) the question of jurisdiction was not actually litigated;
(e) the policy against the court's acting beyond its jurisdiction is strong.
Apparently the Institute had formerly found the area of res judicata and subject-matter jurisdiction too uncertain to make a definitive statement. See RESTATEMENT, CONFLICT OF LAWS § 451, caveat (1934).

[19] RESTATEMENT, CONFLICT OF LAWS § 451, comment *a* (Supp. 1948).

[20] Duke v. Durfee, 308 F.2d 209, 218 (8th Cir. 1962), *petition for cert. filed*, 31 U.S.L. WEEK, 3172 (U.S. Nov. 14, 1962) (No. 593).

[21] *Id.* at 220.

[22] *Id.* at 219.

suggesting the existence of an immunity policy against the direct disposition of one state's realty by a sister state's judgment.[23] Factually perhaps, there was a significant enough basis for the Court to regard the earlier decisions as controlling in the present suit. Nevertheless, the Court elected to examine thoroughly the more recent developments in the area and as a result accepted the American Law Institute's view as its own.[24]

Perhaps the Court's express adoption of the Institute's view will bring some clarity into a relatively uncertain area. As can be readily seen this view affords a basis for the explanation of the seemingly contradictory opinions relating to res judicata and subject-matter jurisdiction. The determination pursuant to this view, that a collateral attack is warranted, appears to be a sound one—in an interstate land controversy such as was presented in the principal case "the policy against the court's acting beyond its jurisdiction is strong" [25] enough to outweigh any opposing res judicata policy. The principal decision, however, tends to support the factor of instability in the law. It presents one more instance in which the conclusiveness of a prior judgment is undermined in a second forum despite the observance of all the elements of due process in the prior adjudication.

The Court in the instant case failed to note any relationship between the doctrine of res judicata and full faith and credit, although this relation appears to have a significant bearing on the validity of the Court's decision. The precise relation between the two has not been fully established by the Supreme Court and consequently various interpretations have been presented.[26] It is submitted that the res judicata doctrine as developed in the rendering forum should be afforded the same treatment under the full faith and credit clause as any other law of that forum is afforded, provided the defendant appeared in the action. Such a treatment would preserve the essential nature of both doctrines.

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[23] *Id.* at 219-20. Among the cases cited in the principal case to uphold this proposition are: Williams v. North Carolina, 317 U.S. 287, 294 (1942); Fall v. Eastin, 215 U.S. 1 (1909); Carpenter v. Strange, 141 U.S. 87 (1891).

[24] The Court apparently gave much significance to policy factor (e) as expressed in the *Restatements.* See note 16 *supra.* Factor (e) is the only one of the five enumerated in the respective *Restatements* which the Court found to be applicable in the instant case.

[25] RESTATEMENT, CONFLICT OF LAWS § 451(2)(e) (Supp. 1948); RESTATEMENT, JUDGMENTS § 10(2)(e) (1942).

[26] See generally Boskey & Braucher, *Jurisdiction And Collateral Attack; October Term,* 1939, 40 COLUM. L. REV. 1006 (1940); Rashid, *The Full Faith And Credit Clause: Collateral Attack Of Jurisdictional Issues,* 36 GEO. L.J. 154 (1948); Note, *Developments In The Law—Res Judicata,* 65 HARV. L. REV. 818, 820-21, 850-55 (1952).

Whereas full faith and credit is not applicable to questions of jurisdiction, the doctrine of res judicata is. Hence, if a judgment is rendered in one state where the application of the res judicata principle precludes the parties from subsequently raising the question of jurisdiction collaterally within that forum, then a court in another state should be bound by full faith and credit to give the prior judgment the same conclusiveness it enjoys in the rendering state. Thus, the second forum will be bound to hold the matter of jurisdiction, whether it be over the person or the subject matter, as res judicata between parties to the previous suit. Of course the application of the res judicata doctrine will vary accordingly as that doctrine was evolved in the first forum, but in all cases the rule of the first forum, if it is to receive full faith and credit, must afford the contesting party due process.[27] It must also be noted that under extreme circumstances policy considerations of the second forum have been allowed to defeat the operation of full faith and credit.[28] Consequently, it appears that in an exceptional case a court in another state may permit a collateral attack though the courts of the rendering state would not.

With the above in mind, it will be noted that the Court in the principal case makes no mention of the status of the Nebraska law as to res judicata and collateral attack of subject-matter jurisdiction. Hence, the result arrived at in the instant case would appear to be justified provided that the Nebraska judgment was subject to collateral attack in that state; and unjustified if the law of Nebraska is otherwise, unless the present case is deemed one of those extremely rare cases in which the dictate of full faith and credit is inoperative. In addition, if there were no controlling decision in Nebraska, it seems that the Court in the principal case was by that fact justified in applying its own rule as to collateral attack of subject-matter jurisdiction.[29]

MALPRACTICE — STATUTE OF LIMITATIONS — PLAINTIFF'S CAUSE OF ACTION HELD NOT TO HAVE ACCRUED UNTIL END OF CONTINUOUS TREATMENT. — Plaintiff, an infant, brought a mal-

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[27] American Sur. Co. v. Baldwin, 287 U.S. 156 (1932).

[28] See State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154 (1945); Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, 306 U.S. 493 (1939).

[29] Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); Boskey & Braucher, *supra* note 26, at 1011-12.