Montana Law Review

Volume 16
Issue 1 *Spring 1955*

Article 5

January 1955

The Effect of Lack of Jurisdiction

Alvin F. Slaight Jr.
University of Montana School of Law

THE EFFECT OF LACK OF JURISDICTION[1]

The following statement taken from a Montana case represents the doctrine, as it is generally applied by most courts, which allows the validity of a prior judgment to be impeached in a collateral proceeding:

> "If a court has no jurisdiction of the subject of an action, a judgment rendered therein does not adjudicate anything. It does not bind the parties, nor can it thereafter be made the foundation of any right. It is a mere nullity without life or vigor. The infirmity appearing upon its face, its validity can be assailed on appeal or by motion to set it aside in the court which rendered it, or by objection to it when an effort is made to use it as evidence in any other proceeding to establish a right."[2]

I.

Introduction to the Rule.

One of the earliest American decisions recognizing and applying this doctrine, that a collateral attack is always permissible when there is a lack of jurisdiction over the subject matter, is *Elliott v. Peirsol.*[3] The *Elliott* case involved an ejectment action brought by the heirs at law of one Sarah Elliott against Peirsol, who claimed title to the land in question by virtue of a deed executed by James Elliott and his wife, Sarah Elliott; Peirsol set up this deed as a defense to the action. The deed as originally executed was defective, due to the failure of the county clerk to recite the fact that Sarah Peirsol had consented, in a privy examination, to the conveyance; however, the defect had supposedly been corrected by a court order directing the county clerk to amend the certificate.[4] After examining the Kentucky statutes which prescribed the procedure to be followed in conveyances by a *feme covert,* the Supreme Court held that the County Court did not have the power to amend the original deed, and since the court did not have the power to so act, it did not have jurisdiction over the subject matter. Therefore, the court concluded:

> ". . . if it [any court] act without authority, its judgments and orders are regarded as nullities. They are not

[1]The scope of this note is confined exclusively to lack of jurisdiction over the subject matter and does not include the many problems posed by cases involving a lack of jurisdiction over the person.
[2]See Evans v. Oregon Short R. R. Co. (1915), 51 Mont. 107, 112; 149 P. 715, 717.
[3]Elliott et al v. The Lessee of Peirsol et al (1828), 1 Pet. 328, 7 L. Ed. 164.
[4]To read: ". . . and the said Sarah being first examined, privily and apart from her husband, did declare that she freely and willingly sealed the said writing. . . ."

> voidable but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered in law as trespassers.
>
> "This distinction runs through all the cases on the subject; and it proves that the jurisdiction of any court exercising authority over a subject may be inquired into in every court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."

The importance of this decision lies in the language used by the court in reference to the effect of judgments where there is a want of jurisdiction, and as an illustration of the early and complete acceptance of the rule. To be sure, there has been some modification of the rule as stated in the *Elliott* case since it was handed down in 1828,[5] but the same basic doctrine, supported by the same verbage, can be found over and over again in nearly all the decisions involving a collateral attack on a prior judgment. Actually, it is no longer a rule, it is regarded more as a truism, something sacrosanct. Describing the fatal effect of judgments rendered in the absence of jurisdiction, the courts become lyrical, they are: "*coram non judice,*" "without force or effect," "of no avail," "absolutely void," "nullities." Granted the doctrine of *Elliott v. Peirsol* is accepted, the question is, is there any justification for it? Is it consonant with modern legal theory? Or is it time for a re-examination of its validity in the light of its present application?

Today, at least where domestic judgments are involved,[6] the strict rule as enunciated in the *Elliott* case has been modified by the requirement that the lack of jurisdiction must affirmatively appear from the record. That is, "The judgment or decree may not be attacked collaterally, unless the judgment-roll in the cause

[5]The principal modification of the general rule is stated thusly in 49 C. J. S. *Judgments*, § 421: "In order to be collateraly attacked the want of jurisdiction must *affirmatively appear on the face of the record*, and the facts showing the want of jurisdiction must be alleged." (Emphasis supplied)

[6]Traditionally a more liberal rule has been practiced when dealing with judgments rendered by a "foreign" jurisdiction. However, even the more elastic rule, as laid down by the court in Thompson v. Whitman (1873), 18 Wall 457, 21 L. Ed. 897, has been considerably modified by a line of recent Supreme Court decisions, *infra*, note 39.

shall show the judgment or decree to be void.'"[7] The defect may not be shown by facts aliunde the record.[8]

II.

Collateral Attack of Contempt Orders

However, this is but a limitation to the rule. The only true exception, that is, the only exception generally recognized as such,[9] is that found in *United States v. United Mine Workers of America.*[10] This case involved an appeal of a contempt order issued by Judge Goldsborough, wherein John L. Lewis was fined $10,000.00, and the defendant Union was fined $3,500,000.00. The defendants contended, among other things, that inasmuch as the district court did not have jurisdiction to render the temporary restraining order, the subsequent contempt order was also null and void. In answer to this contention the court said:

> "In the case before us, the District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief. The defendants, in making their private determination of the law, acted at their peril. Their disobedience is punishable as criminal contempt."

And, in discussing the effect of criminal contempt, the court further stated:

> "The District Court on November 29, affirmatively decided that the Norris-LaGuardia Act was of no force in

[7] In re Fort Shaw Irrigation District (1927), 81 Mont. 170, 261 P. 962. This, of course, applies only to courts of general jurisdiction. *cf.* 31 AM. JUR., *Judgments*, § 603 *et seq.* ". . . However, there are cases in which it is held that a judgment void for lack of jurisdiction may be attacked in collateral proceedings, although its void character may not appear from the record."

[8] 1 FREEMAN, ON JUDGMENTS (5th ed. 1925) §§ 376, 377.

[9] There may be found some broad statements in 3 A. L. R. 535 and in 1 FREEMAN, ON JUDGMENTS (5th ed. 1925) § 320, to the effect that ". . . a party, at whose instance a judgment has been rendered is not entitled, in a collateral proceedings, to contend that the judgment is invalid." However, the cases cited as supporting this rule either do not involve a lack of jurisdiction over the subject of the action or the statements by the courts are *obiter.* (Iselin v. LaCoste (C.C.A. 5th, 1945) 147 F. (2d) 791; Laird v. State (1916) 79 Tex. Crim. Rep. 129, 184 SW 810; Matter of Morrisson (1889) 52 Hun. 102 (N.Y.); McDermott v. Isbell (1854) 4 Cal. 113). The generally accepted rule is that found in Grubb v. Public Utilities Commission (1929) 281 U.S. 470, 74 L. Ed. 972, 50 S. Ct. 581, wherein by dicta, the court said: "But the appellant does question that it had jurisdiction of the subject-matter—and this although at the outset he treated that jurisdiction as subsisting and invoked its exercise. Of course, he is entitled to raise this question notwithstanding his prior inconsistent attitude, for jurisdiction of the subject-matter must arise by law and not by mere consent."

[10] (1949) 330 U. S. 258, 91 L. Ed. 884, 67 S. Ct. 677.

> this case and that injunctive relief was therefore authorized. Orders outstanding or issued after that date were to be obeyed until they expired or were set aside by appropriate proceedings, appellate or otherwise. The convictions for criminal contempt intervening before that time may stand."

The court here was faced squarely with the problem of having to choose between giving effect to the doctrine that a collateral attack may *always* be maintained where there is a lack of jurisdiction, or the policy of maintaining the dignity of the court. Although the Court had considerable difficulty in reaching the decision,[11] it concluded, and rightly so, that the dominant interest to be served was that of maintaining the dignity of the court.

III.

Error in Exercise of Jurisdiction as Distinguished from Lack of Jurisdiction

In addition to the self-imposed restriction placed upon the doctrine, as represented by the rule that the lack of jurisdiction must affirmatively appear on the record, and the exception to the doctrine as found in the *United Mine Workers* case, there is yet another, which is by far the most important, restriction upon the doctrine. This restriction, or exception, is generally referred to as the distinction between lack of jurisdiction and error in exercise of jurisdiction.[12] This distinction is ably characterized by one of the leading texts in the field,[13] as follows:

> "In general, therefore, where the right of the court to assume jurisdiction of a cause and proceed to judgment depends upon the ascertainment of facts in *pais* and the court retains jurisdiction, it thereby impliedly adjudges that the requisite jurisdictional facts exist, and having found such facts in favor of jurisdiction, its decision in this respect, whether erroneous or not, cannot be questioned in a collateral proceeding, for a presumption arises in such cases, when the validity of the judgment is attacked, that the necessary jurisdictional facts were proven."

[11]Mr. Justice Jackson joined in the "majority" opinion, written by Mr. Chief Justice Vinson; Justice Frankfurther wrote a separate concurring opinion; Justices Black and Douglas concurred in part and dissented in part with the majority opinion; Justices Murphy and Rutledge each wrote a separate dissenting opinion. (Mr. Justice Reed and Mr. Justice Burton took no part in the decision.)

[12]The writer prefers to consider "error in exercise of jurisdiction" as an exception to the rule, although it is not technically such and is never referred to by the courts as an "exception."

[13]1 FREEMAN, ON JUDGMENTS (5th ed. 1925) § 350.

Although this recognition that there is such a thing as "error within jurisdiction" is not new to the law,[14] it has received a good deal of "development" within the past twenty odd years. As an example of this "development" one may compare two Montana cases, *Barnes v. Montana Lumber and Hardware Company,*[15] with *Haugan, et al. v. Yale Oil Corporation.*[16]

The *Barnes* case involved a collateral attack on a prior judgment foreclosing a lien on a threshing machine. In the prior proceeding there was no question but that the court had jurisdiction over the parties and over the general class of cases as the one presented. The controversy revolved around the interpretation of the word "structure," as found in Sections 8339, *et seq.*, Revised Codes of 1921, that is, whether or not a threshing machine came within the meaning of the word "structure," as used therein. The Court in the original action held that a lien did in fact exist and it foreclosed the same. Unfortunately for the defendant, who had purchased this threshing outfit from the lienor, the Supreme Court held that the word "structure," as used in Section 8339, did not include threshing machines and, as a consequence, The Court in the original suit did not have jurisdiction over the subject matter of the action.

The defendant contended that notwithstanding the fact a threshing machine is not a "structure" within the meaning of the statute, nevertheless the court in the original action had determined there was a valid lien on the property and that that determination was not subject to collateral attack. The Court was not impressed by the defendant's reasoning, however, and, in refusing to recognize the District Court's determination in the original action (that there was a valid lien on the property) as an error within jurisdiction, stated:

> "Certainly, where it affirmatively appears from the complaint that a claimant has no lien, a judgment declaring that he has such is invalid under the doctrine announced in the last quoted case. [*Crawford v. Pierce,* 56 Mont. 371, 185 Pac. 351][17] It may therefore be attacked collaterally."

A seemingly opposite result was reached in the *Haugan* case,

[14]The Lessee of Grignon et al. v. Astor et al. (1844), 2 How. 319, 11 L. Ed. 283.
[15](1923) 67 Mont. 481, 216 P. 335.
[16](1950) 124 Mont. 1, 217 P. (2d) 1084.
[17]The Crawford case is a classic example of the courts' willingness to apply the doctrine where a collateral attack is not even involved. The case was up on appeal and the issue was whether or not the complaint stated a cause of action.

which was an appeal from a decree quieting title to certain real property. Briefly stated, the facts are as follows: In 1939 John J. Sontag died testate leaving four heirs, two of whom were minors. During the probate of the Sontag Estate the real property was sold pursuant to a court order, plaintiff here being the ultimate purchaser. The two minor heirs, in this quiet title action, contend that they each have a one-fourth undivided interest in the property inasmuch as the probate court did not have jurisdiction to confirm the original sale. The basis of this contention is Section 91-3013, Revised Codes of 1947, which provides that notice of sale must be "published in a newspaper . . . for two weeks successively next before the day on which the sale is made . . . ." It was apparent from an examination of the record that notice, as provided for in the statute, had not been made.

The Court first determined that a sale of land in a probate proceeding is separate from the administration of the estate and, therefore, the jurisdiction over the sale does not arise merely by the court having jurisdiction over the administration of the estate, but must be independently obtained. However, since there had been a proper petition for the sale of the real estate and the order to show cause was issued and served in a regular manner jurisdiction had attached. "Therefore," the Court concluded,

> ". . . although it is conceded that the publication of notice of sale of the real estate did not comply with the provisions of the statute, nevertheless jurisdiction having attached, the irregularity could not be attacked in a collateral proceeding.
>
> "A recital in the order of sale that an order to show cause was issued and service made to the satisfaction of the court protects a purchaser against a collateral attack since he need not look beyond the order if made within jurisdiction."

The above two cases, although distinguishable in some respects, are indicative of a trend designed to uphold prior judgments by declaring the jurisdictional defect an "error within jurisdiction" rather than to call it a "lack of jurisdiction" and thereby be forced to render the judgment void.[18]

[18]For an excellent discussion of this general problem, distinguishing between error within jurisdiction and lack of jurisdiction, see State ex rel Yoke v. District Court of the Eighth Judicial District, in and for Natrona County (1925), 33 Wyo. 281, 238 P. 545, wherein the court attempts to collate the cases on the subject and set a pattern, or guide, for future decisions. Unfortunately, the court only succeeds in pointing up the fact that there is no sure guide, or criteria, one can follow in order to determine into which class a particular case will fit.

The decision in the *Haugan* case is by no means the last word on the subject, in fact, it is scarcely the first word. The decision was somewhat timorous, it did not face the problem squarely, and it did not go nearly as far as it could have, or should have, gone.[19] In contrast, it is refreshing to read statements such as those contained in the United States Supreme Court decision of *Stoll v. Gottlieb*,[20] wherein a unanimous court said:

> "A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators . . . . [However] After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

And, further:

> ". . . its [the court's] determination of it [whether the court had jurisdiction] was the exercise of jurisdiction. Even if that court erred in entertaining its jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court."

If we accept this distinction between error in exercise of jurisdiction and lack of jurisdiction, can it be said that there has been no violence done the doctrine, or rationale behind the doctrine, that a judgment rendered by a court not having jurisdiction over the subject matter is void and open to contradiction or impeachment in a collateral as well as a direct proceeding? If "jurisdiction of the subject matter must arise by law and not by mere consent";[21] and, if "the court does not have the power by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators";[22] and, if it must be made to appear that the law has given the tribunal the

[19]Mr. Chief Justice Adair dissents; Mr. Justice Bottomly: "I dissent. It is clear that in this state failure to publish a notice of sale of real estate (as in this case) under the mandate of the statute is jurisdictional error."

[20](1938) 305 U. S. 165, 83 L. Ed. 104, 59 S. Ct. 134. Plaintiff brought this action in State Court (Illinois) upon a guarantee bond. Guarantor had been previously released from any obligation on the bond by the Federal Court in a bankruptcy proceeding (principal was the bankrupt). Plaintif was a party to the Federal proceedings.

[21]See Grubb v. Public Utilities Commission, *supra*, note 10.

[22]*Supra*, note 20.

power to hear and determine the subject matter in controversy before a court can render a binding judgment,[23] then can it be said that a court may, under certain vague conditions, examine the preliminary facts upon which jurisdiction depends and then, although the requisites for jurisdiction may in fact be lacking, determine from these facts that it has the power to hear and determine the matter before it?

Before going any further into the reasons behind this anomalous situation, however, it is well to examine at this point two leading cases dealing with another type of judgment, which was, until recently, deemed to have been void and subject to collateral attack.

IV.

The Effect of Judgments Founded Upon Unconstitutional Statutes

In 1885 the Supreme Court of the United States decided that Extein Norton was not entitled to collect from the County of Shelby, State of Tennessee, the sum of $29,000.00 plus interest, which represented the face "value" of twenty-nine bonds issued by direction of Barbour Lewis, President of the Board of County Commissioners of Shelby County.[24] The validity, or invalidity, of the bonds rested upon the authority of Mr. Lewis and his fellow county commissioners to issue them. The commissioners had been elected pursuant to a legislative act, which had purportedly created the "office" of county commissioner. Shortly after the bonds in question had been issued by the commissioners the act,[25] which created the office, was found to be unconstitutional.[26] The court held: "As the act attempting to create the office of commissioner never became a law, the office never came into existence." Therefore, since the office never came into existence, the commissioners could not have been *de facto* officers,

> ". . . for the existence of a *de facto* officer, there must be an office *de jure*. . . . Where no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached; and such, in our judgment, was the position of the commissioners of Shelby County, who undertook to act as the county court, which could be constitutionally held only by justices of the peace."

The basis or theory behind the decision was: "An unconstitutional act is not a law; it confers no right; it imposes no

[23]1 FREEMAN, ON JUDGMENTS (5th ed. 1925) § 333.
[24]Norton v. Shelby County (1885), 118 U. S. 425, 30 L. Ed. 178, 6 S. Ct. 1121.
[25]Statutes of 1867, Ch. 48, § 6 (Tenn.)
[26]Pope v. Phifer, 3 Heiskell, 691 (Tenn.)

duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

The language used by the court and the rationale for the decision is reminiscent of that employed by the courts when dealing with cases involving a want of jurisdiction. And the doctrine, though not as deeply rooted in our legal history, was as religiously followed and dogmatically stated as is the doctrine allowing a collateral attack where a lack of jurisdiction is apparent from the record. Today, however, the *Shelby County* case is important only for its historical significance; for in 1940 it was overruled by the case of *Chicot County Drainage District v. Baxter State Bank.*[27]

The *Chicot* case involved a suit by the respondent bank to recover on fourteen $1,000.00 bonds which had been issued by the petitioners in 1924. As a defense to this suit the petitioners pleaded an earlier decree, which determined that under the Act of Congress[28] holders of the type of bonds in question must present their bonds within one year or else be forever barred from participating in the plan of readjustment or in the funds paid into court. The decree in this original suit was entered in March, 1936. The Act which was relied on in the 1936 suit was subsequently held unconstitutional.[29] Both the petitioner and the respondents were parties to the original action. In overruling the *Shelby County* case and in giving effect to the judgment rendered pursuant to the unconstitutional statute, the court said:

> "As parties [to the suit], these bondholders had full opportunity to present any objections to the proceedings, not only as to its regularity, or the fairness of the proposed plan of readjustment, or for the propriety of the terms of the decree, but also as to the validity of the statute under which the proceeding was brought and the plan put into effect. Apparently no question of validity was raised and the cause proceeded to decree on the assumption by all parties and the court itself that the statute was valid. There was no attempt to review the decree. If the general principles governing the defense of *res judicata* are applicable, these bondholders, having the opportunity to raise the question of invalidity were not the less bound by the decree because they failed to raise it. [Citing bases]"

[27] (1939) 308 U. S. 271, 84 L. Ed. 239, 60 S. Ct. 231.
[28] 48 Stat. at L. 798, Ch. 345.
[29] Ashton v. Cameron County Water Improvement District, (1936), 298 U.S. 513, 80 L. Ed. 1309, 56 S. Ct. 84.

And in conclusion:

> "The remaining question is simply whether respondents, having failed to raise the question in the proceeding to which they were parties and to which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principles that *res judicata* may be pleaded as a bar, not only as respect matters actually presented to sustain or defeat the right asserted in the earlier proceeding, '*but also as respects any other available matter which might have been presented to that end.*' (Emphasis supplied) *Grubb v. Public Utilities Commission,* 281 U. S. 470, 74 L. Ed. 972, 50 Sup. Ct. 374, supra; *Cromwell v. Sac County,* 94 U. S. 351, 24 L. Ed. 195, supra."

The *Chicot* case is truly a landmark decision. The court was faced squarely with the problem of having to decide whether to continue to give life and vigor to an outmoded and undesirable doctrine, which was based on neither reason nor sound public policy, but which had been irresponsibly followed for sixty-four years, or to frankly overrule it in the interest of preserving the integrity of the court and the sound principles of *res adjudicata.* In choosing the second alternative, The Court, no matter what its motives might have been,[30] went a long way toward eliminating the manly art of gamesmanship from the judicial process.

However, despite the analogy, in history, in rationale, and in effect of the two doctrines, if anyone in 1939 dared hope that the Supreme Court of the United States would take the next logical step and strike down *any* attempt to collaterally attack a judgment or decree of a "proceeding to which they were party and in which they could have raised it and had it finally determined" their hopes would have been short lived. For on the same day the *Chicot* case was decided, the court rendered justice to Mr. Ernest Newton Kalb.[31] In March, 1933, defendants began foreclosure proceedings on Mr. Kalb's farm; judgment of foreclosure was entered by the Walworth County Court in April of that same year. After the farm had been sold Kalb filed his petition in the bankruptcy court for composition and extension of time to pay his debts, as provided for by the Frazier-Lemke Act.[32] While this petition was pending in the Federal Court, the County Court granted the mortgagee's motion for confirmation

[30]Boskey & Braucher, JURISDICTION & COLLATERAL ATTACK, OCTOBER TERM, 1939, 40 COLO. L. REV. 1006, 1007 (1940).
[31]Kalb v. Feuerstein (1939), 308 U. S. 433, 84 L. Ed. 370, 60 S. Ct. 343.
[32]11 U. S. C. A. § 203 (5).

of the sheriff's sale. (No stay of the foreclosure action or of the subsequent action to enforce it was ever sought or granted in the state or bankruptcy court.) The Supreme Court determined that the policy behind The Act[33] was to make an "easily accessible statutory means for rehabilitating distressed farmers, who, as victims of a general economic depression, were without means to engage in formal court litigation." And that by The Act "... Congress has vested in the bankruptcy court exclusive jurisdiction over farmer-debtors and their property, and has by its Act withdrawn from all other courts all power under any circumstances to maintain and enforce foreclosure proceedings against them, its Act is the supreme law of the land which all courts—State and Federal—must observe." Therefore, "the action of the Walworth County Court [in foreclosing the mortgage] was not merely erroneous, but was beyond its power, void and subject to collateral attack."

Granted that to have held otherwise in the *Kalb* case would have to some extent circumvented the intent of Congress,[34] nevertheless it is submitted that the court would have done a great deal more for the cause of justice had it applied some of the maxims it laid down in the *Chicot* case.[35]

V.

Limitations Imposed by the Full Faith and Credit Clause

There is a line of Supreme Court decisions, represented by *Thompson v. Whitman, Chicago Life Ins. Co. v. Cherry, Baldwin v. Iowa State Traveling Mens Association, Coe v. Coe and Sherrer v. Sherrer,*[36] which, taken together, dramatically illustrate the changing approach of the Supreme Court of the United States to the doctrine of allowing a collateral attack on a judgment of a sister state. The cases are all the more significant in that they involve a conflict of laws problem and a construction of the full faith and credit clause of the Constitution; for it had long been

[33] *Id.*

[34] However, if the intent of Congress was to afford relief to farmers who "were without means to engage in formal court litigation," this decision, which allows and encourages a separate and collateral attack to be brought up through the United States Supreme Court, would not seem to further that policy or intent.

[35] Although one may criticise the result of the Kalb case, it must be admitted that the Supreme Court was justified in holding as it did, once it decided that the primary interest to be served was that which was represented by The Act. In this connection see *infra*, note 41.

[36] (1874) 18 Wall. 457, 21 L. Ed. 897; (1916) 244 U. S. 25, 61 L. Ed. 966, 37 S. Ct. 492; (1922) 287 U. S. 156, 77 L. Ed. 231, 63 S. Ct. 35; (1948) 334 U. S. 378, 92 L. Ed. 1064, 68 S. Ct. 1094, 1 A.L.R. (2d) 1376; (1948) 334 U. S. 343, 92 L. Ed. 1429, 68 S. Ct. 1087, 1 A.L.R. (2d) 1355.

held that the full faith and credit clause did not prohibit a re-litigation of the jurisdictional facts found by the court in the first forum when the judgment was relied on by one of the parties in a subsequent action brought in the second forum.

Mr. Justice Bradley, who spoke for the court in the *Thompson* case, realized that he was "making law"[37] and indicated that the rule of the case might appear to conflict with a very basic doctrine: "Public policy and the dignity of the courts are supposed to require that no averrment shall be admitted to contradict the record. But as we have seen, that rule has no extra-territorial force." However, The Court did not feel compelled to do more than pay lip service to the "Public policy and the dignity of the courts," in sustaining collateral attacks on foreign judgments, until the *Baldwin* case was before it.

The *Baldwin* case involved a collateral attack on a prior Missouri judgment—the defendant had appeared in that action specially for the purpose of quashing the return, setting aside the service and dismissing the case for want of jurisdiction. This motion was overruled by the trial court and the defendant did not make any further appearance. The Supreme Court first determined that even if it could be shown that the person served with process in the Missouri action was in fact not an agent of the corporation, there was no denial of due process because ". . . there is involved in that doctrine [due process] no right to litigate the same question twice."

Upon disposing of the question of due process it then directed its attention to the principle issue, the conclusiveness of the first forum's record in respect to the matter of jurisdiction. In refusing to allow a re-litigation of the jurisdictional facts, the court said:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason 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."

The decision in the *Sherrer* case apparently removes this implied limitation contained in the *Baldwin* decision, that is, that the issue of jurisdiction must be *actually litigated* before it is *res*

[37] "But it must be admitted that no decision has ever been made on the precise point involved in the case before, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court."

adjudicata. The rule, as it is generally recognized today, is "that the requirement of full faith and credit *bar* a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister state when there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full *opportunity* to contest the jurisdictional issues, *and where the decree is not susceptible to such collateral attack in the courts of the state which rendered the decree. . . .*"[38] (Emphasis supplied)

Although, as previously indicated, the above cases represent doctrines applicable to the field of conflicts of laws which usually involve problems of jurisdiction over the person, as distinguished from jurisdiction over the subject matter, nevertheless they represent a trend that cannot be denied and one that has had considerable impact on this whole problem of collateral attack.[39]

VI.

Conclusion

The requirement that the one attacking a prior judgment may not go beyond the record (that is, that he may not show by facts *aliunde* the record that the original court was lacking in jurisdiction); the sustaining of a contempt order rendered by a court for a violation of its temporary restraining order, even when the court did not have jurisdiction to entertain the original suit; and the distinction between lack of jurisdiction and error within jurisdiction are all examples of whittling away at one doctrine and giving effect to another dominate doctrine. In spite of the somewhat apologetic language sometimes used when applying the above limitations and the facts that even when applying these limitations the courts stoutly maintain they are all the while adhering to the rule that "a judgment rendered by a court lacking jurisdiction is void," the mere fact that the limitations are applied is, in itself, a tacit admission that there is no sound basis for the rule. For if this lack of jurisdiction, or power, is what is behind the doctrine, then can it be said that even though there is in fact a lack of jurisdiction it is in some way cured because the defect does not appear on the record, or because the type of proceeding involved is of a unique nature, or because the court in the original action had already determined, although admittedly erroneously determined, that they did have

[38]Sherrer v. Sherrer (1948) 334 U. S. 343, 92 L. Ed. 1429, 68 S. Ct. 1087, 1 A.L.R. (2d) 1355.
[39]See In re Estrem's Estate (1940), 107 P. (2d) 36, 16 Cal. (2d) 563.

jurisdiction? Clearly the rule is not an absolute rule, something that has been and is to be applied rigidly in every instance; it is submitted that there are good reasons for abolishing it.

After all, the problem is one of balancing the public interests involved. Weighing against the rule are the public interests in maintaining the dignity of the courts, bringing litigation to an end, and requiring that one present all his defenses in one action. Little can be said for the rule, it would seem, except that it is old and cherished.

In overruling the *Shelby County* case, Mr. Chief Justice Hughes, the author of the *Chicot* decision, said:

> "The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects . . . Questions of rights claimed to have become vested, of status, or prior determinations deemed to have finality, and acted upon accordingly, of public policy in the light of the nature both of the statute and its previous application, demand examination . . . and it is manifest from numerous decisions that an all-inclusive statement of a principle of the absolute retroactive invalidity cannot be justified."

This statement of the Supreme Court is equally applicable in dealing with the analogous cases of judgments which are supposedly void *ab initio* due to a want of jurisdiction. Are there not "rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute [judgment] and of its previous application" involved when dealing with prior judgments as well as when dealing with statutes? Are solemn judicial declarations, where both parties are either actually or constructively before the court,[40] entitled to less recognition, to be placed on a lower plane, than legislative declarations? One may not sit idly by and fail to challenge the validity of a statute under which his rights and duties are supposedly being determined, and then expect to be able to challenge it at a later date and thereby nullify all of those rights and duties which have become vested under the operation of the statute; why should not the same conclusive effect be given to judgments?

It is well settled that one may not collaterally attack a prior judgment by an allegation that the complaint or testimony on

[40]This note does not, of course, contemplate attacks by strangers to the action whose rights have been affected, but who were not actually parties or privies to the original suit.

which the judgment is based are false; or upon the grounds that the court erred in determining the law or facts of the original action. Why, then, should the courts allow a collateral attack on the ground that there was a lack of jurisdiction over the subject matter in the original action?[41] In both instances the attacking party has had his day in court and has presumably had ample opportunity to raise all of his defenses. Established principles designed to protect the rights of parties and govern the orderly judicial process indicate that the rule that a judgment rendered by a court without jurisdiction of the subject matter is wholly void and subject to collateral attack should be struck down once and for all.[42]

A. F. SLAIGHT

[41]Of course, if the court rendering the original judgment was barred by the Constitution or by the supreme law of the land from assuming jurisdiction of the action, then a collateral attack may be permissible and necessary, depending upon the circumstances, e. g., Pennoyer v. Neff (1877), 95 U. S. 714, 24 L. Ed. 565; *supra*, note 32.

[42]To bring about this desired result it would require, in addition to an overruling of the earlier decisions, legislative acton. In this connection, see R. C. M. 1947, §§ 93-1001-20, 93-1001-28 and 93-1001-29.

VENUE OF CONTRACTS ACTIONS IN MONTANA

In 1944 the *Hardenburgh*[1] case overturned settled law in Montana on the fundamental procedural question of the place of trial of actions on contracts. That the question is one which is still very much alive is evidenced by the recent decision of *Fraser v. Clark*,[2] wherein one of the dissenting justices said:

> "Nothing said in the majority opinion tends to reduce the confusion that exists on the subject. It merely disposes of the present controversy and in my judgment lends no help to the lawyer who may find himself confronted with questions of venue in the future."

Part I of this comment is a survey of the salient Montana cases on this subject of venue of contract actions, including the *Hardenburgh* and *Fraser* cases. Part II is an appraisal of the present state of Montana law on the matter. Part III is a critique of what would seem to be the present rule. Suggestions for change of the present rule are made in part IV.

[1]Hardenburgh v. Hardenburgh (1944) 115 Mont. 469, 146 P.(2d) 151.
[2](1954) .....Mont....., 273 P.(2d) 105.