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John Michael Webb

flict of interest.[39] It is probable that the use of the fictions attributing an agent's knowledge to a principal[40] in such a case would violate due process of law. The cases in which the agency is valid but the principal fails to receive notice would seem, like many other due process questions, to require a close examination of the facts of each case. Only after a close scrutiny of each particular set of facts could the courts decide whether the defendant had been accorded the protection that due process requires.

Robert G. McCain, III

Res Judicata — Actions in Rem — Durfee V. Duke

I. JURISDICTION

Jurisdiction is the power or ability of a court to entertain and to decide a particular legal controversy or question.[1] It consists basically of two distinct concepts—jurisdiction of the subject matter and jurisdiction of the person.[2] Jurisdiction of the subject matter is the power to hear and decide cases of the general class to which a particular proceeding belongs.[3] This jurisdiction must be granted by law;[4] it cannot be waived,[5] nor can it be granted to the court by consent of the parties.[6] Jurisdiction of the person is the power of the court to subject the parties in a particular case to decisions and rulings made in that case.[7] Unlike jurisdiction of the subject matter, juris-

[39] See note 25 *supra* and accompanying text.
[40] See text accompanying note 12 *supra.*

[1] Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U.S. 563 (1939); Davis v. Cleveland, C. C. & St. L. Ry., 217 U.S. 157 (1910); Brown v. Pyle, 310 F.2d 95, 96 (5th Cir. 1962); Korac v. Korac, 17 Ill. App. 2d 492, 150 N.E.2d 664 (1958); Fincher v. Fincher, 182 Kan. 724, 324 P.2d 159 (1958); Deich v. Deich, 136 Mont. 566, 323 P.2d 35 (1958).

[2] Finlen v. Skelly, 310 Ill. 170, 141 N.E. 388 (1923); State *ex rel.* Methodist Old People's Home v. Crawford, 159 Ore. 377, 80 P.2d 873, 878 (1938); State *ex rel.* Smith v. Bosworth, 117 S.E.2d 610 (W. Va. 1960).

[3] Noxon Chem. Prods. Co. v. Leckie, 39 F.2d 318 (3d Cir. 1930); State *ex rel.* Campbell v. Chapman, 145 Fla. 647, 1 So. 2d 278 (1941); Brown v. Jacobs, 367 Ill. 545, 12 N.E.2d 10 (1937); Lemasters v. Williams Coal Co., 206 Ind. 369, 189 N.E. 414 (1934); Welser v. Ealer, 317 Pa. 182, 176 Atl. 429 (1935).

[4] People *ex rel.* Kilduff v. Brewer, 328 Ill. 472, 160 N.E. 76 (1927).

[5] Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939); Robinson v. Attapulgus Clay Co., 55 Ga. App. 141, 189 S.E. 555, 557 (1937).

[6] *Ex parte* Schollenberger, 96 U.S. 369 (1877); Duvall v. Duvall, 224 Miss. 752, 80 So. 2d 752 (1955); State *ex rel.* Furstenfeld v. Nixon, 133 S.W. 340 (Mo. 1910); Hauger v. Hauger, 376 Pa. 216, 101 Atl. 2d 632 (1954).

[7] Collins v. Powell, 224 Iowa 1015, 277 N.W. 477 (1938); Hobbs v. German-Amer. Doctors, 14 Okla. 236, 78 Pac. 356 (1904).

diction of the person can be waived and can be granted to the court by the consent of the parties.[8]

Jurisdiction of the person must be exercised either in personam or in rem.[9] A judgment in personam imposes a personal liability or obligation on the person in favor of another; a judgment in rem is directed against a thing,[10] property,[11] or status of a person.[12] One important aspect of a judgment in rem is that it is binding on all the world.[13]

The United States Supreme Court's position on jurisdiction in rem is best reviewed and set forth in *Hanson v. Denckla:* "In rem jurisdiction. Founded on physical power . . . the in rem jurisdiction of a state court is limited by the extent of its power and by the coordinate authority of sister states. The basis of jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum state."[14] This concept of the limits of a court's in rem jurisdiction always has been especially strong in actions concerning real property. Perhaps the clearest statement is found in *Huntington v. Atrill:* "Proceedings in rem to determine the title to land must necessarily be brought in the state within whose borders the land is situated, and whose courts and officers alone can put the party in possession."[15]

In treating problems of jurisdiction the courts often use loose terminology. The opinions speak vaguely of "jurisdictional facts," and in some cases the court will even apply the wrong label altogether. Because the failure of the courts to use precise terminology

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[8] Federal Underwriter's Exch. v. Pugh, 141 Tex. 539, 174 S.W.2d 598 (1943).

[9] Overby v. Gordon, 177 U.S. 214 (1899); Dillon v. Heller, 39 Kan. 599, 18 Pac. 693 (1888); O'Hara v. Pittston, 186 Va. 325, 42 S.E.2d 269 (1947).

[10] The Chickie, 141 F.2d 80 (3d Cir. 1944); *In re* Hart's Estate, 287 Ill. App. 176, 4 N.E.2d 759 (1936); Gorham Co. v. United Eng'r & Contracting Co., 202 N.Y. 342, 95 N.E. 805 (1911).

[11] Tobin v. McClellan, 225 Ind. 335, 75 N.E.2d 149 (1947); Kean v. Rogers, 118 N.W. 515 (Iowa 1908); Hughes v. Hughes, 211 Ky. 799, 278 S.W. 121 (1925); Moss v. Standard Drug Co., 159 Ohio St. 464, 112 N.E.2d 542 (1953).

[12] Gassert v. Strong, 38 Mont. 18, 98 Pac. 497 (1908); Cross v. Armstrong, 44 Ohio St. 613, 10 N.E. 160 (1887). The most common example of this is a divorce action in which the status is the marriage itself.

[13] Hanson v. Denckla, 357 U.S. 235 (1958); Dupasseur v. Rochereau, 88 U.S. (21 Wall.) 130 (1901); Killebrew v. Killebrew, 398 Ill. 432, 75 N.E.2d 855 (1947); Booth v. Copley, 283 Ky. 23, 140 S.W.2d 662 (1940); International Typographical Union v. Macomb County, 306 Mich. 562, 11 N.W.2d 242 (1943).

[14] 357 U.S. 235, 246 (1958) (Footnote omitted.); *accord,* Riley v. New York Trust Co., 315 U.S. 343, 349 (1942); Baker v. Baker & Co., 242 U.S. 394, 400 (1916); Pennoyer v. Neff, 95 U.S. 714 (1877).

[15] 146 U.S. 657, 669 (1892). A strongly worded statement in Rose v. Himely, 2 U.S. (4 Cranch) 241, 277 (1808), also supports this concept: "It is repugnant of every idea of a proceeding *in rem* to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely *ex parte.*"

has added a semantic problem to an already difficulty area of the law, it is vital to a consideration of problems in this area to remember the distinct types of jurisdiction.

II. JURISDICTION AS RES JUDICATA

The development by the Supreme Court of the general rule that a court's decision that it has jurisdiction is res judicata appears to conflict with the established principles of an action in rem. A brief history of the development of the rule that a court's decision on jurisdiction is res judicata will be necessary to understand this conflict. In the early decision of *Thompson v. Whitman*,[16] the Supreme Court held that the full faith and credit clause[17] did not preclude an inquiry by another forum into the question of the first court's jurisdiction.[18] While this remains true to a degree,[19] the rule has been changed greatly.[20]

The first change came in the area of jurisdiction in personam. *Baldwin v. Iowa State Traveling Men's Ass'n.*[21] initiated the doctrine that if the defendant appears and litigates the issue of the court's jurisdiction over his person, a decision by the court that it has jurisdiction will make that issue res judicata and prevent collateral attack on that basis. This principle appears to be well entrenched and is set out in the Restatement of the Law of Judgments.[22] A series of de-

[16] 85 U.S. (18 Wall.) 457 (1874).

[17] "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." U.S. Const. art. IV, § 1. "[S]ame full faith and credit in every court . . . as they have by law or usage in the courts . . . from which they are taken." 28 U.S.C. § 1738 (1958).

[18] *Cf.*, Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839); Elliot v. Peirsol's Lessees, 26 U.S. (1 Pet.) 328 (1828).

[19] See Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961).

[20] Stoll v. Gottlieb best sets out the rationale behind this modification:

> It is just as important that there should be a place to end as that there should be a place to begin litigation. 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. 305 U.S. 165, 172 (1938).

[21] 283 U.S. 522 (1931):

> 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 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. *Id.* at 525.

Actually this principle appears in the earlier case of Chicago Life Ins. Co. v. Cherry, 244 U.S. 25 (1917), but it is not enunciated very clearly.

[22] Restatement, Judgments § 9 (1942) and Restatement, Conflicts of Laws § 451 (1) (1942): "Res Judicata and Jurisdiction over the Person: Where a defendant appears in an action to object that the court has no jurisdiction over him and the court overrules the

cisions has established that the rule applied in *Baldwin* also is applicable to the decision of a court that it has jurisdiction of the subject matter.[23] *Treinies v. Sunshine Mining Co.* clearly establishes this adaptation with the statement: "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."[24] The later case of *Chicot County Drainage Dist. v. Baxter State Bank*[25] broadened the doctrine to include not only cases in which the issue of subject matter jurisdiction in fact was litigated, but also those cases in which it merely *could have been* litigated.

The rule that a finding of jurisdiction is res judicata has been applied to actions in rem prior to this time, although never in a suit involving land. Both *Sherrer v. Sherrer*,[26] a divorce, and *Davis v. Davis*,[27] a separation, were actions in rem or at least partook of some of the characteristics of actions in rem.[28] In *Sherrer*, in which the wife sued for divorce in Florida, the court found that it had juris-

objection and judgment is rendered against him, the parties are precluded from collaterally attacking the judgment on the ground that the court had no jurisdiction over the defendant."

[23] Sherrer v. Sherrer, 334 U.S. 343 (1948); Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); Stoll v. Gottlieb, 305 U.S. 165 (1938); Davis v. Davis, 305 U.S. 32 (1938). The additional criteria to be applied in determining whether a decision may be collaterally attacked for lack of jurisdiction over the subject matter are found in Restatement, Judgments § 10 (1942):

> Res Judicata and Jurisdiction over the Subject Matter.
>
> (1) 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.
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> (2) Among the factors appropriate to be considered in determining that the collateral attack should be permitted are that
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> (a) the lack of jurisdiction over the subject matter was clear;
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> (b) the determination as to the jurisdiction depended upon a question of law rather than fact;
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> (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.

Even though the rule of res judicata applies in the area of subject matter jurisdiction, exceptions are made. For example, an exception is made in the case of a federal preemption of jurisdiction, Kalb v. Feuerstein, 308 U.S. 433 (1940), and in an instance of sovereign immunity, United States v. United States Fid. & Guar. Co., 309 U.S. 506 (1940).

[24] 308 U.S. 66, 78 (1939).

[25] 308 U.S. 371 (1940).

[26] 334 U.S. 343 (1948).

[27] 305 U.S. 32 (1938).

[28] "Although it is now settled that a suit for divorce is not an ordinary adversary proceeding, it does not promote analysis, as was recently pointed out, to label divorce proceedings as actions *in rem*. . . . But insofar as a divorce decree partakes of some of the characteristics of a decree *in rem*, it is misleading to say that all the world is party to a proceeding *in rem*." Williams v. North Carolina, 325 U.S. 226, 232 (1945). For an interesting statement of the state's interest in the res in a divorce action see Coe v. Coe, 334 U.S. 378 (1948).

diction and the decree was granted. The former husband instituted a proceeding in Massachusetts collaterally attacking the Florida divorce decree on the theory that the Florida court had not acquired jurisdiction. The Massachusetts court found that the wife never was domiciled validly in Florida and, therefore, that the divorce decree was void because the Florida court never acquired jurisdiction of the res. The Supreme Court reversed, holding that the decree was valid because the Florida court's finding of jurisdiction was entitled to full faith and credit as res judicata.

Although both *Sherrer* and *Davis* apply the res judicata rule to sustain the original divorce decree, both courts seem to have dodged the in rem aspects of the case. The *Sherrer* opinion speaks vaguely in terms of "jurisdictional facts,"[29] while *Davis* uses the terminology "jurisdiction of the subject matter and person."[30] Apparently, neither court applies the res judicata rule explicitly to a finding of jurisdiction in an in rem action, but both courts reach that result in effect.

III. DURFEE V. DUKE

The conflict that exists between the principles applicable to an action in rem and the res judicata rule of *Baldwin*[31] is illustrated well in the recent case of *Durfee v. Duke*.[32] In that case the Missouri River, forming the boundary between Nebraska and Missouri, moved either by avulsion or accretion, drawing into question the ownership of land that had previously been an island. Petitioner, a Nebraska citizen, brought suit in a Nebraska court to quiet his title to the land. Respondent, a Missouri citizen, appeared in the Nebraska court and litigated the issues, particularly contesting the court's jurisdiction over the "subject matter." (This is illustrative of the semantic problem previously mentioned—the issue in question was the court's jurisdiction over the res; both state courts had jurisdiction over the subject matter.[33]) The court found that the land was in Nebraska and quieted title in the petitioner. Respondent appealed to the Supreme Court of Nebraska which specifically found that the land was in Nebraska and, therefore, that the lower court had jurisdiction and had correctly decided the case.[34] Subsequently, the respondent brought

[29] 334 U.S. 343, 345 (1948).
[30] 305 U.S. 32, 35 (1938).
[31] Baldwin v. Iowa Traveling Men's Ass'n, 283 U.S. 522 (1931).
[32] 375 U.S. 106 (1963).
[33] Subject matter jurisdiction is the power to hear and decide cases of a certain class. Both state courts, Missouri and Nebraska, have the power to hear cases to determine title to land.
[34] Durfee v. Keiffer, 168 Neb. 272, 95 N.W.2d 618 (1959).

an action in a Missouri court to establish her title to the same land. Petitioner removed to a federal district court which expressed the opinion that the land was really in Missouri, but which dismissed the suit on the ground that the Nebraska decision made the matter res judicata.[35] The court of appeals reversed, saying that, because the controversy involved land, normal res judicata principles did not apply and that a Missouri court was free to retry the jurisdiction issue.[36] The court of appeals decision, in effect, would have established the rule that a finding by a court that certain land lies within its jurisdiction is not res judicata. The Supreme Court reversed the court of appeals holding that a Missouri court could inquire into the question of the Nebraska court's jurisdiction over the land, but that if the inquiry revealed that the issue of jurisdiction over the land had been fully and fairly litigated, the Missouri court must give the Nebraska decision full faith and credit as res judicata despite the fact that the situs of the land was in dispute.[37]

The decision in *Durfee v. Duke* again applies the res judicata rule of *Baldwin*[38] and *Treinies*[39] to an in rem action. As in *Sherrer*[40] and *Davis*[41] the court evades what appears to be the direct problem. The terms "action in rem" or "jurisdiction in rem" are never used; the Court sidesteps the issue by speaking solely of "jurisdiction of the subject matter." The Supreme Court, more than any other institution, should assume the duty to aid litigants and lawyers by making this legal terminology clear. To treat a court's decision that it has jurisdiction in rem with phrases such as "jurisdictional facts" and "jurisdiction of the subject matter" can only create confusion and obscure the problem. If the Court wishes to overrule previously established principles concerning jurisdiction in rem, an open treatment and recognition of the problem would seem the best course.

In *Durfee v. Duke*, jurisdiction of the res is dependent upon the answer to a factual question concerning the location of the land either within the boundaries of Nebraska or Missouri. The Nebraska court decided that the land was in Nebraska; the federal district court expressed the opinion that the land was in Missouri. Because the issue was in dispute, the Missouri court, under the old in rem principles, would have been permitted to entertain a collateral attack

[35] Duke v. Durfee, 215 F. Supp. 901 (W.D. Mo. 1961).
[36] Duke v. Durfee, 308 F.2d 209 (8th Cir. 1962).
[37] Durfee v. Duke, 375 U.S. 106 (1963).
[38] Baldwin v. Iowa Traveling Men's Ass'n, 283 U.S. 522 (1931).
[39] Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939).
[40] Sherrer v. Sherrer, 334 U.S. 343 (1948).
[41] Davis v. Davis, 305 U.S. 32 (1938).

on the question of the Nebraska court's jurisdiction of the res, even though the issue was fully and fairly litigated by the parties in the Nebraska proceeding.[42] Nevertheless, the Supreme Court held that the decision is res judicata despite the fact that land was involved and despite the possibility that the land was in Missouri. The Court said, "we discern no reason why the rule [of res judicata] should not be fully applicable."[43]

It must be noted that both the majority and concurring opinions are careful to point out that neither Nebraska nor Missouri is bound in any way by this decision. They would be free to settle their boundary by interstate compact or by an original suit in the Supreme Court.[44] The Court apparently accepted the principle that the res judicata rule does not apply to persons who are not parties to the suit or who are not in privity with them. The Court held that the res judicata rule applies at least to those who *appear* in the lower court and *fully litigate* the question of situs of the res, but the question whether such a decision will be res judicata to parties who appear but who do not fully litigate the issue is left open. The answer turns upon the interpretation of the language "fully and fairly litigated." The rule of *Chicot*,[45] that a finding is res judicata to persons who have had an opportunity to litigate the issue, is determinative. Thus, a collateral attack on jurisdiction should not be permitted.

IV. Conclusion

In a feudal economy, ownership of land was the basic source and form of wealth. Money, the object of an action in personam, is now the primary form of wealth in this country. It is worth inquiring whether there are really such important policy considerations that things, just another and less important form of wealth, still should be confined narrowly within a special set of rules governing actions in rem. At one time, requirements of service to have jurisdiction of the person were strict.[46] With the advent of rapid and mass transportation, practical considerations have forced a change in the judicial attitude toward personal service. Such devices as nonresident motorist statutes and long arm statutes gradually have eroded these requirements until today mailing a notice to the last known address or merely serving a designated state official is held sufficient service

[42] See text accompanying notes 10-15 *supra*.
[43] 375 U.S. at 115.
[44] 375 U.S. at 116; U.S. Const. art. III, § 2; 28 U.S.C. § 1251(a) (1958).
[45] Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).
[46] Pennoyer v. Neff, 95 U.S. 714 (1877).

in some circumstances.[47] The historic doctrine that only the situs state has the power to adjudicate concerning a "thing" may be undermined in similar fashion.

One line of authority requires the courts of the situs state to enforce an equitable decree of a foreign court ordering a claimant to convey his interest in a res located in the situs state.[48] Since equitable decrees are in personam actions, the rule of *Baldwin*[49] applies and the decision is res judicata to the parties involved. However, this approach avoids the problem of giving res judicata effect to the decision of a foreign court in an in rem proceeding concerning land outside its jurisdiction.[50] The strict in rem concept was struck by circular attack in both *Sherrer*[51] and *Davis*.[52] But in the *Durfee* decision the court is bolder, invading the stronghold of in rem principles—land. In the principal case the situs of the land was in dispute, but perhaps the next step is to require enforcement of an extraterritorial decree concerning land which clearly is not within the jurisdiction of the court handing down the decision.[53]

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[47] *E.g.*, Tex. Rev. Civ. Stat. Ann. art. 2031b (1964).

[48] Redwood Inv. Co. v. Exley, 64 Cal. App. 455, 221 Pac. 973 (Dist. Ct. App. 1923); Matson v. Matson, 186 Iowa 607, 173 N.W. 127 (1919); McElreath v. McElreath, 162 Tex. 190, 345 S.W.2d 722 (1961) (the dissent presents one of the clearest arguments against recognizing such decrees); Mallette v. Scheerer, 164 Wis. 415, 160 N.W. 182 (1916). The problem generally is treated in Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. Chi. L. Rev. 620 (1954); Barbour, *The Extra-Territorial Effect of the Equitable Decree*, 17 Mich. L. Rev. 527 (1919).

[49] Baldwin v. Iowa Traveling Men's Ass'n, 283 U.S. 522 (1931).

[50] Fall v. Fall, 75 Neb. 104, 113 N.W. 175 (1907). "[T]he doctrine that jurisdiction respecting lands in a foreign state is not *in rem*, but one in personam, is bereft of all practical force, if the decree in personam is conclusive and must be enforced by the courts of the situs." *Id.* at 179.

[51] Sherrer v. Sherrer, 334 U.S. 343 (1948).

[52] Davis v. Davis, 305 U.S. 32 (1938).

[53] Mr. Justice Jackson, in Mullane v. Central Hanover Bank & Trust Co., states that the standards of actions *in rem* are "so elusive and confused generally" and seems to suggest that this "historic antithesis" is not as important as some other considerations. It is interesting to speculate on the reasonableness of disregarding this distinction altogether. 339 U.S. 306, 312-13 (1950).

In speaking of the phrases "in personam," "in rem," and "quasi in rem," Professor Hazard has the following to say; "I believe that much of the difficulty with decisions on jurisdiction in this sense, and with scholarly efforts to penetrate the problems of jurisdiction, is attributable to the obscurities of these terms themselves." Professor Hazard goes on to suggest the elimination of these phrases in favor of "more intelligible terms." Hazard, Research in Civil Procedure 66-67 (1963).