Marquette Law Review

Volume 48
Issue 1 *Summer 1964*

Article 8

Recent Decisions: Full Faith and Credit and Collateral Attack on the Determination of Jurisdiction

James Wm. Dwyer

RECENT DECISIONS

Conflict of Laws: Full Faith and Credit and Collateral Attack on the Determination of Jurisdiction: The petitioners instituted a quiet title action concerning bottom land on the Missouri River where it forms the boundary between Missouri and Nebraska. "The Nebraska court had jurisdiction over the subject matter of the controversy only if the land in question was in Nebraska."[1] Both parties to the action appeared in the Nebraska court and fully litigated the issues. After a hearing, the Nebraska court ruled in favor of the petitioners and quieted title in them. On appeal, the Supreme Court of Nebraska affirmed the judgment after a trial de novo on the record made in the lower court. In the hearing, the Nebraska Supreme Court specifically found that the land in question was located in Nebraska and, therefore, that the Nebraska courts had jurisdiction over the subject matter of the case.[2]

Rather than petitioning the United States Supreme Court for a writ of certiorari, the respondent, the losing party in the Nebraska courts, commenced the identical quiet title action in Missouri. The case was removed to the federal district court in Missouri on the basis of diversity of citizenship. The district court ruled that the judgment of the Nebraska Supreme Court was res judicata and, therefore, the subject matter was not open to further litigation.[3] The case was then taken to the United States Court of Appeals for the Eighth Circuit, which reversed the district court.[4] Granting certiorari, the United States Supreme Court in *Durfee v. Duke*[5] reversed the decision of the court of appeals, thereby supporting the decisio of the Nebraska Supreme Court. The United States Supreme Court held that

> . . . the Federal Court in Missouri had the power, and upon proper averments the duty, to inquire into the jurisdiction of the Nebraska courts to render the decree quieting title to the land in the petitioners. We further hold that when that inquiry disclosed, as it did, that the jurisdictional issues had been fully and fairly litigated by the parties and finally determined in the Nebraska courts, the Federal Court in Missouri was correct in ruling that further inquiry was precluded.[6]

Stated simply, the Supreme Court will not sanction legal procedures which permit collateral attack on the jurisdiction of a court, if the issue of jurisdiction had been fully litigated before that court according to

---

[1] Durfee v. Duke, 84 S. Ct. 242, 243 (1963).
[2] Durfee v. Keiffer, 168 Neb. 272, 95 N.W. 2d 618 (1959).
[3] Duke v. Durfee, 215 F. Supp. 901 (W.D. Mo. 1961).
[4] Duke v. Durfee, 308 F. 2d 209 (8th Cir. 1962). The decision of this court has been criticized. 63 COLUM. L. REV. 353 (1963); 51 GEO. L. J. 851 (1963); 111 U. PA. L. REV. 1218 (1963); 37 TUL. L. REV. 335 (1963); 49 VA. L. REV. 180 (1963).
[5] 84 S. Ct. 242 (1963).
[6] *Id.* at 248.

the requirements of due process.[7] Although the Supreme Court has previously allowed one state to relitigate the jurisdictional finding of another state where there appears to have been no actual contest,[8] the practical need to end litigation concerning the jurisdiction has led the Supreme Court to apply the principles of res judicata to a determination of jurisdiction by a state court.[9]

The rule against collateral attack on the jurisdiction of a court is a mandate of the United States Constitution.[10] This constitutional provision and the federal statute implementing it prevent a disappointed party from proceeding to another jurisdiction for a more favorable adjudication of his claim. The command of the full faith and credit clause is simply "that the same faith and credit be elsewhere given to a judgment of the courts of any State as would be received by it in the courts of that State."[11] Thus, in *Durfee,* once the federal district court in Missouri decided that the Nebraska court had fully litigated the jurisdictional question, it correctly held that the decision of the Nebraska court was binding upon it. The basic principle is that "the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principle on which the judgment is based."[12]

The question arises as to precisely what the court of a sister state may do upon receiving a case after the same cause has already been decided in another jurisdiction. In an early Supreme Court decision, the Court held that "the jurisdiction of the court by which the judgment is rendered in any state may be questioned in a collateral proceeding in

---

[7] *Accord,* Sherrer v. Sherrer, 334 U.S. 343 (1948); Trienies v. Sunshine Mining Co., 308 U.S. 66 (1939); Stoll v. Gottlieb, 305 U.S. 165 (1938) (subject matter jurisdiction); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931) (personal jurisdiction).

[8] Thompson v. Whitman, 85 U.S. 457 (1873).

[9] Riley v. New York Trust Co., 315 U.S. 343, 349 (1942).

[10] U.S. CONST. art. IV, § 1: "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." *Cf.* 28 U.S.C. § 1738 (1948).

[11] United States v. Robinson, 74 F. Supp. 427, 430 (W.D. Ark. 1947); Roche v. McDonald, 275 U.S. 449, 451 (1927).

[12] Milliken v. Meyer, 311 U.S. 457, 462 (1940); RESTATEMENT, CONFLICT OF LAWS § 451(2) (Supp. 1948); *accord,* RESTATEMENT, JUDGMENTS § 10 (1942): "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 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. Among the factors appropriate to be considered in determining that collateral attack should be permitted are that (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."

another state, notwithstanding the provision of the fourth article of the Constitution."[13] Subsequently, this general statement has been modified by the United States Supreme Court in *Durfee* and similar cases involving the jurisdiction of a lower court. In *Stoll v. Gottlieb,*[14] the Illinois Supreme Court refused to recognize a plea of res judicata arising from orders of a district court in bankruptcy. Accordingly, the United States Supreme Court could see

> . . . no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation.
>
> Courts to determine the rights of parties are an integral part of our system of government. It is just as important 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.[15]

In *Sherrer v. Sherrer,*[16] the Court stated that once a defendant in a divorce proceeding "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,"[17] defendant is barred from further attacking the question of jurisdiction, because full faith and credit must be given to courts having proper jurisdiction. In the *Durfee* decision, the Supreme Court summed up these prior holdings, stating that "since the question of subject matter jurisdiction had been fully litigated in the original forum, the issue could not be retried in a subsequent action between the parties."[18] In effect, the Supreme Court is making the local doctrine of res judicata a part of our national jurisprudence.[19]

Upon receiving an adverse ruling in Nebraska, the only procedural step would have been for the defendant (respondent in the United States Supreme Court) to petition the Supreme Court for a writ of certiorari,[20] rather than commencing the action de novo in Missouri. If there was error in the Nebraska proceedings, the right to review the error was in the Nebraska or the federal appellate courts. The method provided for all litigants seeking final determination of their claims is

---

[13] Thompson v. Whitman, *supra* note 8, at 469.
[14] 305 U.S. 165 (1938).
[15] *Id.* at 172.
[16] 334 U.S. 343 (1948).
[17] *Id.* at 351-52.
[18] Note 5 *supra,* at 246.
[19] Riley v. New York Trust Co., *supra* note 9, at 349.
[20] See 28 U.S.C. § 1257(3) (1958).

to appeal to higher appellate courts.[21] It is clear that neither party would have been satisfied if respondent's method of litigation resulted in two federal district courts handing down contrary decisions, one holding for the petitioner and the other favoring respondent. The practical rationale is that

> . . . public policy requires that there be an end to litigation; so where one voluntarily appears and without success contests jurisdiction, the Supreme Court has held that he is "concluded by the judgment of the tribunal to which he has submitted his case." He cannot attack collaterally. *However, he can appeal from the original judgment and, if necessary, to the Supreme Court of the United States.*[22] (Emphasis added.)

It appears that the losing party waives the issue of jurisdiction in the original suit if he does not appeal the adverse ruling through the customary appellate channels.[23]

Although the issue of jurisdiction, as decided by the Nebraska court, was held to be final and binding in the federal district court in Missouri, there is strong evidence that the land in question was actually in Missouri. Even though the district court adhered to the constitutional principle of full faith and credit, the court in dicta stated:

> [I]t is difficult for me to understand how, under all the evidence, that the land in controversy is, or was at the time the issue was determined by that court, in Nebraska. . . . [I]t is my belief that *the evidence clearly reveals that the land lies in Missouri. . . .*[24] (Emphasis added.)

The reason for this peculiar situation is explained by the "bootstrap doctrine."[25] The theory underlying this doctrine is "that a court which initially has no jurisdiction can lift itself into jurisdiction, when the issue is litigated, by its own incorrect but conclusive finding that it does have jurisdiction."[26] The application of this doctrine contravenes the principle "that no state can exercise direct jurisdiction and authority over persons or property without its territory."[27] The courts, however, are inclined to overlook the latter and apply the former. In *Stoll v. Gottlieb*[28] the 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. There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court. Where adversary

[21] Trienies v. Sunshine Mining Co., 308 U.S. 66, 77 (1939).
[22] STRUMBERG, CONFLICT OF LAWS 113 (3d ed. 1963).
[23] Stimson, *When Does a Court Have Jurisdiction,* 45 A.B.A.J. 569, 636 (1959).
[24] Note 3 *supra,* at 907, 909.
[25] Note, 53 HARV. L. REV. 652 (1940).
[26] LEFLAR, CONFLICT OF LAWS § 74, at 143 (1st ed. 1959).
[27] Pennoyer v. Neff, 95 U.S. 714 (1871).
[28] Note 14 *supra.*

> parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or *whether its geographical jurisdiction covers the place of the occurrence under consideration.* . . . An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then *the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter.* When an erroneous judgment, whether from a court of first instance or from the court of final resort, is pleaded in another court or other jurisdiction the question is whether the former judgment is *res judicata.*[29] (Emphasis added.)

Whether or not there ever was de facto jurisdiction is not the issue once the case is appealed to the federal courts. The situation is the same when the case is taken to the United States Supreme Court upon certiorari, or when the possibility of appeal has been foreclosed by the passage of time or by denial of certiorari. When the litigation reaches this point, the issue before the court of last resort is to decide whether the original judgment is entitled to full faith and credit.

It is important to note that the Supreme Court in the *Durfee* case did not conclusively determine the boundary between Nebraska and Missouri. This is emphasized in the Supreme Court's concurring opinion:

> [W]e are not deciding the question whether the respondent would continue to be bound by the Nebraska judgment should it later be authoritatively decided, either in an original proceeding between the States in this Court or by a compact between the two states under Art. I, §10, that the disputed tract is in Missouri.[30]

Thus, since the finality achieved by the litigation only applies to the parties in the action and their privies,[31] future litigation originating in Missouri may create several practical problems if the land is then determined to be in Missouri.[32] There would be no bar to the state of Missouri bringing a property tax suit against the petitioners, the landowners as declared by the Nebraska court. Since the parties to this hypothetical tax dispute are original, the issue of jurisdiction as determined by the Nebraska court in *Durfee* may only have the authority of stare decisis. The fact that strong evidence exists that the Nebraska court did "lift" the tract of land in dispute into its jurisdiction renders it probable that the Missouri court would declare the land to be within the Missouri boundaries and subject to a Missouri property tax. At

[29] *Id.* at 171-72.
[30] Note 5 *supra*, at 248.
[31] Iselin v. C. W. Hunter Co., 173 F. 2d 388 (5th Cir. 1949); Martin v. Lopes, 28 Cal. 2d 618, 170 P. 2d 881, 883 (1946).
[32] Ordinarily, the law applied to property is determined by the situs of that property. RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 208, 211, 214, 215 (Tent. Draft No. 5, 1959).

the same time, petitioners' land might well be burdened with a Nebraska property tax, because the Nebraska court held the land to be part of its state. In conjunction with the property tax problem, a similar question will arise in determining which state may levy an inheritance tax if the land passes through intestacy or probate. Missouri may decide to impose an inheritance tax on the land and cause the issue of jurisdiction to be relitigated.

In addition, although the Nebraska court in *Durfee* awarded the land to petitioners, it could be questioned whether petitioners received a marketable title. When giving a sample definition of marketable title, a Wisconsin court stated that

> . . . although a title is good, if there is reasonable doubt as to its validity it is not marketable. A material defect is such as will cause a reasonable doubt and just apprehension in the mind of a reasonably prudent and intelligent person, acting upon competent legal advice, and prompt him to refuse to accept it. If such doubt exists as to make the title subject to probable attack by legal proceedings, or depends upon facts which can only be established by parol evidence if attack is made upon it in such proceeding, the title is not marketable.[33]

According to this definition of marketable title, it does not appear that the present landowner has the assurance of freedom from successful litigation. It is open to question whether an attorney would advise his client to purchase land which may be subject to the laws of a different state or to the laws of two states. It may also be true that other parties exist who have an interest in the disputed land and a right to begin suit in the Missouri courts. These "new parties" may seek better treatment under more favorable Missouri law. Hence, it would be advantageous for them to retry the issue of the jurisdiction of the Nebraska court over the land in dispute.

In *Durfee v. Duke*, the Supreme Court of the United States decided the Nebraska court's jurisdiction of land lying on the Nebraska-Missouri boundary according to the mandates of full faith and credit and according to prior Supreme Court decisions. However, the Court left open the substantive question as to whether the land was in Nebraska or Missouri. In subsequent litigation with parties not in privity to those in the original action, or with parties having different claims than those already litigated, the Missouri court may be called on to retry the issue of jurisdiction over the land. In essence, the Supreme Court did not finally decide that the land is located within the boundaries of Nebraska, and petitioners may have won only a Pyrrhic victory.

JAMES WM. DWYER

---

[33] Douglass v. Ransom, 205 Wis. 439, 446, 237 N.W. 260, 263 (1931).