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THE DECLINE OF JURISDICTION BY CONSENT*

DAN B. DOBBS†

The parties cannot give a court jurisdiction of the subject matter¹ by their consent or acquiescence.² So sanctified is this formula that a halo of constitutionality surrounds it.³ In the name of this saintly precept a plaintiff may choose his forum, lose his suit and try again in another forum on the ground that the first court had no jurisdiction.⁴

Two broad qualifications to this rule (hereafter called the no consent rule) must be stated. The first is that the rule is often wider and more inclusive than it might sound because any number of procedural requirements may be treated as jurisdictional and non-

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¹ The term "jurisdiction of the subject matter" is variously used to mean: (1) jurisdiction of a kind or class of actions, *e.g.*, jurisdiction over actions based on contract. BROWN, JURISDICTION OF COURTS § 3 (2d ed. 1901); RESTATEMENT, JUDGMENTS § 7, comment *b* (1942); (2) jurisdiction of a specific *res* or thing in controversy, tangible or intangible, *e.g.*, jurisdiction of the marital status of parties. See Harper, *The Myth of the Void Divorce*, 2 LAW & CONTEMP. PROB. 335, 336 (1955); (3) jurisdiction to act in general or to furnish a particular remedy, *e.g.*, the power to act where some procedural requirement has not been met. See Harper, *Collateral Attack Upon Foreign Judgment: The Doctrine of Pemberton v. Hughes*, 29 MICH. L. REV. 661, 672 (1931). In the last situation, courts may characterize a procedural requirement as involving jurisdiction of the subject matter, or merely as "jurisdictional," or as a "condition precedent" to jurisdiction of the subject matter. See Gavit, *Jurisdiction of Courts* (pts. 1-3), 11 IND. L.J. 324, 439, 524, 529 (1936). It is not clear why some procedural requirements are "jurisdictional."

² See generally 1 FREEMAN, JUDGMENTS §§ 337-38 (5th ed. 1925); BROWN, *op. cit.* *supra* note 1, at §§ 3, 10.

³ See Gavit, *Jurisdiction of the Subject Matter and Res Judicata*, 80 U. PA. L. REV. 386 (1932); see also The Marshalsea, 10 Co. Rep. 68b, 74a, 77 Eng. Rep. 1027, 1035 (K.B. 1612).

⁴ Mansfield, C. & L. M. Ry. v. Swan, 111 U.S. 379 (1884), holding that a party removing to federal court may object to the removal on jurisdictional grounds at any time; *Briscoe v. Stephens*, 2 Bing. 213, 130 Eng. Rep. 288 (K.B. 1824).

waivable.⁵ The second is that the rule is often narrower because in many situations jurisdiction of the subject matter can in fact be conferred by consent. Not only may jurisdiction be created by *res judicata*, as in "bootstrap" cases,⁶ but acts of the parties which fall short of *res judicata* may be sufficient to confer jurisdiction.⁷

Increasing attention is being paid to cases that rest jurisdiction in effect on estoppel and in so doing effectively confer jurisdiction by consent or acquiescence of the parties. A fairly typical, though undistinguished, case of this sort is *Unruh v. Industrial Comm'n.*⁸ There, *W* had obtained a mail order Mexican divorce from her first husband, *H*. She then married *T*. *H* died in an industrial accident. *W*, pursuing the no consent rule and the compensation, made her claim for the death benefits. She argued that since the mail order divorce was void, she was still the legal wife of *H*. If so, she was entitled to the death benefits. The Mexican court, of course, lacked jurisdiction of the subject matter. The wife's divorce was clearly void, and just as clearly orthodoxy compels the conclusion that neither her nor *H*'s consent gave the Mexican court jurisdiction. The Arizona court, hearing the claim for death benefits, agreed that the Mexican divorce was void and held that *W* was indeed still the legal wife of *H*. But, it said, she was barred from attacking the Mexican decree by something called quasi-estoppel. The theory seems to be that the original decree is void—the law clearly says so—but that no one will be permitted to mention the fact. The result, of course, is that the "void" decree is to all intents and purposes validated.

All of this raises several inquiries about the traditional no

⁵ See, e.g., *State v. Hanes*, 187 Kan. 382, 357 P.2d 819 (1960), where it was held that failure to allege service of notice of appeal, even when actually served, was a jurisdictional defect that may not be waived. Even venue limitations are sometimes treated as jurisdictional. *Ahrens v. Clark*, 335 U.S. 188 (1948) (court will raise issue on its own motion). Jurisdictional amount, see *Bent's Ex'r v. Graves*, 3 McCord 280 (S.C. 1825), and, apart from statute, term time are jurisdictional. *Gregg v. Cooke*, 7 Tenn. 82 (1823).

⁶ See *Triennies v. Sunshine Mining Co.*, 308 U.S. 66 (1939).

⁷ *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940), discussed in *Boskey & Braucher, Jurisdiction and Collateral Attack: October Term, 1939*, 40 COLUM. L. REV. 1006 (1940). *Coe v. Coe*, 334 U.S. 378 (1948); *Di Frischia v. New York Central R.R.*, 279 F.2d 141 (3d Cir. 1960), noted in 15 U. MIAMI L. REV. 315 (1961).

⁸ 81 Ariz. 118, 301 P.2d 1029 (1956). For cases not involving the divorce setting, see *Burgess v. Nail*, 103 F.2d 37 (10th Cir. 1939) (alternative holding); *Bluejacket State Bank v. First Nat'l Bank*, 155 Okla. 300, 9 P.2d 2 (1932).

consent rule. Since there are operational exceptions, if not doctrinal ones, does the rule express any truth about the law on the subject? Is it, in other words, a satisfactory guide for prediction? If not, what guides in policy, history or logic would assist in formulating a jurisdictional rule that is responsive to the functional needs of our own judicial system?

At the outset a certain amount of ingrown nonsense should be excised. We have come to think of the no consent rule as the inevitable product of either logic or the rational demands of policy. It is not. The rule has not always existed, even in England.⁹ Furthermore, the rule today rests precariously on this logic: (1) only the law can confer jurisdiction; (2) the parties are not the law; (3) therefore, the parties cannot confer jurisdiction.¹⁰ This has often seemed acceptable partly because it is patly logical and partly because it evokes images of the parties as vigilantes taking the law into their own hands.

But this syllogism is a weak cornerstone indeed. First, it does not account for the appendage "subject matter" to the rule against consent. The law also confers jurisdiction over the parties and usually requires that process be served. If the parties cannot con-

⁹ Y.B. Mich. 30-31 Edw. 1, f. 486, 492, pl. 1 (1303): "Within these twenty years people have been accustomed to take bonds, binding debtors to submit to the decision of the Holy Church in Mercantile matters, and by those obligations they used to draw to the Church pleas of debt . . . and it was seen that that was against law. . ." MAITLAND, *A Conveyancer in the Thirteenth Century*, in 2 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND (Fisher ed. 1911) (setting forth an obligation to submit to "all" jurisdiction). Professor Adams cites a case where the parties were allowed to proceed in court christian when it was shown "that the plaintiff had signed a previous agreement to submit to the jurisdiction of the bishop." Adams, *The Writ of Prohibition to Court Christian*, 20 MINN. L. REV. 272 (1935),

England tends to be less concerned with jurisdiction than we are though the English cases are hopelessly in conflict. Generally, compare 9 HALSBURY, LAWS OF ENGLAND, *Courts* §§ 824-25 (3d ed. 1954), with 11 *id.* at *Crown Proceedings* §§ 219-22. See also *South Africa: Magistrates' Court Act*, § 45, 3 Union Stat. 1013 (So. Afr. 1950); *Truck & Car Co. (Pty.) v. Ewart*, [1949] 4 So. Afr. L.R. 295 (jurisdiction by consent permitted as to subject matter); Colson, *Jurisdiction by Consent in Magistrates' Court*, 2 SO. AFR. L.T. 82 (1933), criticizing an earlier statute; *Roman Law, Dutch-Roman Law*: 1 VOET, COMMENTARY ON THE PANDECTS 202, particularly 215, 218 (Gane transl. 1955); cf. *Malcomes & Co. v. Allkin & Co.*, [1914] C.P.D. 519 (So. Afr.), apparently following Dutch-Roman law; *Canon Law*: see BURKE, COMPETENCE IN ECCLESIASTICAL TRIBUNALS 4-5, 15-16, 25-28 (1922). See also 1 HISTORICAL LAW TRACTS 313, 369 (Edinburgh, 1758): parties may not consent to jurisdiction of "time or place," but may consent to jurisdiction of "subject matter."

¹⁰ 1 FREEMAN, *op. cit. supra* note 2, at 674-77. The second premise is usually unstated.

sent to jurisdiction of the "subject matter," is there any logical reason why the rule should not apply to jurisdiction of the person as well?

Consider, however, the larger implications of this logic. Its structure and import are virtually identical with and probably stem from the property notion that one can convey only what he has. It is not difficult, however, to find policies overriding this persuasive logic in the property field, so that it is often possible for Possessor to convey to Innocent the property of Gullible even though Possessor has no title which he himself can assert.

More important, the logic of the no consent rule does not stand on its own two feet. An alternative conclusion is logically possible and it would be wholly consistent with the method and rules of the common law. We might say, for example, that when the parties fail to raise a jurisdictional issue in a timely manner, the *law* confers jurisdiction, not the parties.¹¹ Such a conclusion is consistent even with the premises above.

Furthermore, a choice of different premises,¹² a choice that can conform to common law rules, would force a recognition of jurisdiction by consent. Consider this well accepted idea of contract law and the results that follow: (1) contracts of the parties, express or implied, will be enforced by the law (unless such contracts are against public policy); (2) consent to jurisdiction of a court is a contract, express or implied; (3) therefore, the law will enforce jurisdiction conferred by consent of the parties (unless this is against public policy).¹³

¹¹ Acts of parties are often attributed to the "law." Compare, for example, the effect of a voluntary conveyance and the renunciation of a devise under a will. The "voluntary conveyance" may be subject to attack as in fraud of creditors, or the vendor may have a tax liability. But if he merely "renounces" under a will, his act may not be treated as a conveyance for either purpose. See *Bradford v. Calhoun*, 120 Tenn. 53, 109 S.W. 502 (1908) ("The renunciation is not a voluntary conveyance. . ."); *People v. Flanagan*, 331 Ill. 203, 162 N.E. 848 (1928); ATKINSON, *WILLS* 774-76 (2d ed. 1953). See also Dabin, *General Theory of Law*, in *THE LEGAL PHILOSOPHIES OF LASK, REDBRUCH, AND DABIN* 250 (20th Cent. Leg. Phil. Ser., Wilk transl. 1950), discussing the "transformation" of contractual rules into the "law of the state."

¹² Oliphant & Hewitt, *Introduction to RUEFF, FROM THE PHYSICAL TO THE SOCIAL SCIENCES* at ix-xxxii (1929), discussing the significance of the choice of premises.

¹³ Interestingly enough one theory of contracts turns the proposition around by arguing that a contract confers sovereignty on the parties, *i.e.*, the legal ability to use the state's power to enforce a contract. See Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 585 (1933).

Such a choice of premises would put the emphasis where it belongs and would force us to ask the right question—what *are* the public policies, if any, against consent to jurisdiction, and how do they balance against the need to end litigation? The search for these policies seems particularly appropriate in this area because the cases permitting jurisdiction by estoppel are not in accord as to when that “estoppel” occurs or as to its ultimate effect.¹⁴ It is also important because it has been implied on the one hand that we should “validate” *all* void judgments¹⁵ and on the other that we should “validate” only those decrees that terminate a marriage.¹⁶ A rational determination of these disputed issues demands more than the arbitrary choice of a logical premise.

As a first step in the search for policies supporting the no consent rule a general outline of the rule’s development is pertinent. The purpose here is to sketch such an outline.

In looking at this kind of material it is necessary to make two things clear. First, consent is functionally equivalent to estoppel or acquiescence; that is, estoppel and acquiescence are different from explicit consent only in degree and only in that they imply no collusion. Thus the term “consent,” as used here, is treated as synonymous with estoppel and its variants. Second, consent to jurisdiction does not mean that the parties can *force* a court to accept a case not within its jurisdiction.¹⁷ The frame of reference

¹⁴ Cases sometimes speak of estoppel because of “acquiescence.” *Hafey v. Hafey*, 57 N.D. 381, 222 N.W. 256 (1928); sometimes because of “acceptance of benefits.” See *American Nat’l Bank & Trust Co. v. Taussig*, 255 F.2d 765 (7th Cir. 1958); *Allendorf v. Daily*, 6 Ill. 2d 577, 129 N.E.2d 673 (1955); and sometimes for an assortment of reasons, including the court’s resentment. *Bledsoe v. Seaman*, 77 Kan. 679, 95 Pac. 576 (1908). The effect of the “estoppel” on third parties is not always clear. See *Krause v. Krause*, 282 N.Y. 355, 26 N.E.2d 290 (1940), intimating that jurisdiction by estoppel may bind some, but not all. Because of this kind of confusion, the use of estoppel theories may diminish in favor of *res judicata* theories to accomplish similar results. Cf. *Johnson v. Muelberger*, 340 U.S. 581 (1951).

¹⁵ See GAVIT, *supra* note 1, at 386, suggesting that “void” judgments be treated as arbitration awards, since the parties intended a “submission.” For a criticism, see Comment, *The Effect of Extra-Jurisdictional Decisions*, 34 ILL. L. REV. 567 (1940).

¹⁶ Clark, *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, 70 YALE L.J. 45, 68 (1960): estoppel jurisdiction “rests . . . upon the contemporary view that when a marriage has ended . . . little is to be gained by treating it as if it were still in force.”

¹⁷ Thus jurisdiction by consent seldom has reference to appellate jurisdiction as distinguished from appellate review of trial court jurisdiction. Defects in appellate jurisdiction are usually attacked in timely manner or are forgotten. For this reason and because of policies favoring appellate

here is the kind of case in which the court and the parties fail to observe a jurisdictional defect and which proceeds to a full adjudication on the merits without objection.

POLITICAL AND CONCEPTUAL BACKGROUND OF THE RULE

The spirit of the rule against consent to jurisdiction can perhaps be seen in Bracton's assertion¹⁸ that the king is the fountain of justice and that all jurisdiction derives from him. Yet in the thirteenth century and for a long time afterward there was nothing inevitable about the rule. If the spirit was there, it was by no means certain that the spirit would be made flesh.

If we put aside the Roman law maxims that embody the rule¹⁹ and look for policies that support or condition it, two or three points stand out almost from the beginning of our law. The first is that the English courts were not, with certain exceptions, *created*. They did not proceed from a written constitution. They merely grew like Topsy. The result was that the boundaries of their jurisdiction were indistinct and could only be developed in one way: by assertion—successful assertion—of jurisdiction, case by case.²⁰ The boundaries of their jurisdiction could be limited only by the obverse, that is, by the unsuccessful assertion of jurisdiction. In short, the jurisdictional concept was a fundamental constitutional tool for allocating power.²¹ It did not merely push the pegs into pre-cut holes; it built the very framework of the judicial system.

control of the docket, the policy of dealing only with cases and controversies, and similar policies, jurisdiction by consent as used here does not refer to appellate jurisdiction as such. For similar reasons, "subject matter" is not a workable test of appellate jurisdiction. See *M'Call v. Peachy*, 5 Va. (1 Call.) 55 (1798).

¹⁸ See 1 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 87 (7th ed. 1956) [hereinafter cited as HOLDSWORTH]; Maitland, *Select Pleas of the Crown* in, *MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS* 42-44 (Goebel ed. 1931); 1 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 528-29 (2d ed. 1898).

¹⁹ DIGEST 2.14.38: The law of the state cannot be varied by agreement of private persons. Similar maxims were used by Coke in the seventeenth century, but in a different context. *Beaumont's Case*, 9 Co. Rep. 138b, 141b, 77 Eng. Rep. 928, 934 (C.W. 1612): "[P]acta privata juri publico derogare non possunt"; *Butt's Case*, 7 Co. Rep. 23a, 23b, 77 Eng. Rep. 445, 446 (C.P. 1600).

²⁰ Cf. MAITLAND, *ROMAN CANON LAW IN THE CHURCH OF ENGLAND* 120-21 (1898): in the medieval church, questions of constitutional law could be settled only by "persistent and relentless usurpation. Claims to jurisdictional superiority were being urged which had behind them no principle except that which recognizes the accomplished fact. . . ."

²¹ See Goebel, *Constitutional History and Constitutional Law*, 38 COLUM.

The second salient fact of life here was that medieval England was pock-marked with a multitude of courts serving a multitude of purposes, and that they were usually in the process of some muddled metamorphosis.²²

Finally, there was a striking absence of conflict of laws rules for dealing with this kind of common law federalism.²³ And since each kind of court might administer different rules of law or even wholly different systems of law, the choice of jurisdiction was often a choice of a legal system or a legal rule.²⁴ Thus it was crucial to the survival of a given system of law that the court which enshrined it be preserved from "encroachment" by other courts and other systems.²⁵

This is the formula for conflict and competition. And the diversity of national, feudal, local and clerical interests gives body and substance to it. At its broadest and highest level, the conflict between the inferior courts and the king's courts can be seen in terms of the need for a "common" law and national policy.²⁶ Certainly national courts did serve national policy; certainly they did in fact make a law common for the nation. But few kings were state planners. They were, in medieval England, concerned more deeply with the realities of power—particularly the power of the church.

L. REV. 555, 564 especially n.26 (1938). Compare MAITLAND, *ROMAN CANON LAW IN THE CHURCH OF ENGLAND* (1898).

²² See generally 1 HOLDSWORTH 680-84 *passim*, listing over 400 different courts.

²³ Sack, *Conflicts of Laws in the History of the English Law*, in *LAW—A CENTURY OF PROGRESS 1835-1935*, at 342 (1937).

²⁴ See generally *id.* at 356-57, and especially 420 n.154. Thus Coke says that when "one rule of law" is not sufficient, a new *court* is created, not merely a new law. 4 COKE, *INSTITUTES* 63 (1817) [hereinafter cited as COKE].

²⁵ This, of course, was particularly important as new systems of law were gaining in power, popularity and usefulness. England came dangerously close to a "reception" of civil law. MAITLAND, *English Law and the Renaissance* (Rede Lecture, Cambridge, 1901), in MAITLAND READER 221 (Delany ed. 1957), and *SELECTED HISTORICAL ESSAYS OF F. W. MAITLAND* 135 (Cambridge ed. 1957); *cf.* MAITLAND, *Outlines of English Legal History, 1560-1600*, in 2 *THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND* 417, 442 (Fisher ed. 1911). The growth of admiralty and the liberation of the ecclesiastical courts which put them on the same plane as common law courts, see *Caudry's Case*, 5 Cro. Rep. 1a, 77 Eng. Rep. 1 (K.B. 1591), made the common lawyers particularly aware of the dangers of "encroachment" on the common law by these alien systems.

²⁶ See 10 HOLDSWORTH 343 (6th ed. 1938). Common law decisions were important as an arm of the state because they were not merely deciding private disputes but were in fact creating, in large measure, the constitution.

As Maitland puts it succinctly, the church was a state.²⁷ It was operating courts, taxing the realm²⁸ and asserting power to affect English land titles.²⁹ Through the pope it issued royal decrees and decided international disputes.³⁰ It claimed to be the supreme secular as well as the supreme spiritual authority.³¹ It was a genuine threat to national sovereignty.

Jealousy of the church courts as well as of the church itself is therefore to be expected. A Parliament whose function was not yet fixed could not do everything, and medieval kings could not always cow its Lords Spiritual in any event. The courts, which had the advantage of regular meetings, assumed the job of eroding as much competition as they could in private litigation.

Secular courts were also a problem to national "policy makers." They tended to crop up without authority, and though attempts were made to put down such courts,³² kings continued to issue charters creating more.³³ And aside from charter, some courts could grow up by prescription, assuming jurisdiction simply because they had exercised it from "time out of mind."³⁴ Local courts

²⁷ MAITLAND, *ROMAN CANON LAW IN THE CHURCH OF ENGLAND* 100 (1898).

²⁸ Statute of Carlisle, 1307, 35 Edw. 1 (repealed). See the "tearful complaint" of both the "magnates" and clergy (1247) in 3 WILKINSON, *CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND 1216-1399*, at 253 (1958).

²⁹ This was accomplished through decisions on bastardy. See INTRODUCTION TO THE CURIA REGIS ROLLS, 1199-1230, at 104 (62 Seld. Soc., Flower ed. 1944), reporting a case where the justices disregarded an appeal to the Pope because "no appeal of bastardy should be made without the realm." See also Statutes of Merton, 1235, 20 Hen. 3, c. 9 (repealed).

³⁰ See Goebel, *Introduction—Matrix of Empire* to SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* at xlvii (1950) (arbitration between kings).

³¹ Pope Boniface VIII, *Bull Unam Sanctum* (1302), in SELECT HISTORICAL DOCUMENTS 435 (Henderson ed. 1892). In 1299 Boniface "claimed Scotland as a fief of Rome." 1 WILKINSON, *op. cit. supra* note 28, at 54, 62.

³² See 1 HOLDSWORTH 88 (quo warranto inquiries of Edward I).

³³ See WEINBAUM, *BRITISH BOROUGH CHARTERS: 1307-1660* (1943).

³⁴ Prescriptive jurisdiction might be more desirable as less restrictive than an outright charter. For example, a piepowder court was properly an adjunct to a fair or at least a market. 1 HOLDSWORTH 535-40. But "it is very clear, and not to be denied, that by prescription a man may well have and hold a court of pipowders, without a fair or market. . . ." *Goodson v. Duffill*, 2 Bulst. 21, 23, 80 Eng. Rep. 926, 928 (K.B. 1612), reported *sub nom* *Goodson v. Duffield*, Cro. Jac. 313, 79 Eng. Rep. 268 (K.B. 1612). There were, however, limits to what could be claimed by prescription. See *Howel v. Johns*, Cro. Eliz. 774, 78 Eng. Rep. 1004 (K.B. 1600). See also the discussion of local customs affecting jurisdiction in *London v. Cox*, L.R. 2 H.L. 239 (1867).

were sometimes preferred to the central courts because they were cheaper and quicker,³⁵ and in some cases satisfied a desire for local government and "community judging."³⁶ Since not only case decisions but a good deal of administrative work went on in these courts,³⁷ they were a threat to strong central control.

Thus, the local secular courts were, along with the church courts, objects of sovereign jealousy. They were also objects of the personal jealousy of the king's judges because medieval courts were profitable institutions; the king's judges earned their money less through salaries than through fees.³⁸ (In early times the king himself had sat to decide disputes for fees.)³⁹ The profit principle applied on the local level as well⁴⁰ and many a manor was built with the profits of the lord's court.⁴¹

The importance of this is clear, and it can be left to the materialists to belabor the obvious. Something more fundamental was also at work driving the inferior courts into disfavor. Their prac-

³⁵ See Adams, *supra* note 9 (better procedure in ecclesiastical courts); Anonymous, Winch. 8, 124 Eng. Rep. 7 (C.P. 1620) (Admiralty procedure permitting joinder of claims); as to expense and difficulty of travel to Westminster, see Statute of Westminster, 1285, 13 Edw. 1, c. 38 (repealed), reciting the evil that people were called to sit on juries for the purpose of extorting money from them for letting them go in peace "and the Rich men abide at home" by these bribes; 1 HOLDSWORTH 280; MAITLAND, DOMESDAY BOOK AND BEYOND 102 (1921). Attorneys in the central courts seem to have added to the expense. See the criticism in *Gwinne v. Poole*, 2 Lut. 935, 1560, 125 Eng. Rep. 522, 858 (C.P. 1692).

³⁶ Goebel, *Introduction—Matrix of Empire* to SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS at xl (1950).

³⁷ 1 HOLDSWORTH 135, 185 (Court Leet as chief instrument for local government); WEBB, MANOR AND BOROUGH 347, 356 (1924) (Leet); *id.* at 361 (Manor and Hundred); *id.* at 388-90 (Justice Court).

³⁸ Judges in the central courts did receive salaries, but payment was apt to be irregular and in any event they got a considerable portion of their income from fees. 1 HOLDSWORTH 252-55. For a candid discussion of competition on this basis among the central courts, see 1 NORTH, LIVES 203 (1826 ed.), describing how the King's Bench "outwitted the Common Pleas," and the Common Pleas' attempt to "exclude" the King's Bench by act of Parliament: "There the Common Pleas thought they had nicked them."

³⁹ See INTRODUCTION TO THE CURIA REGIS ROLLS, 1199-1230, at 1-11, 367-68 (62 Seld. Soc., Flower ed. 1944), where John showed "compassion" by accepting a case for only 40 shillings.

⁴⁰ Private courts were often regarded as property and the owner might take profits either by leasing it or by allowing others to operate the court and taking the profit or a part thereof for himself. 1 HOLDSWORTH 6; WEBB, *op. cit. supra* note 37, at 344. The attorneys in all courts, of course, had an interest in increasing jurisdiction and litigation in the courts where they worked.

⁴¹ MAITLAND, DOMESDAY BOOK AND BEYOND 169 (1921).

tices too often did not comport with the medieval idea of justice.⁴² There was the constant problem of pressures, bribery and extortion by "great men."⁴³ There was the eternal temptation to nick the outsider. The latter practice was particularly odious and particularly susceptible of resolution in terms of jurisdiction.

Conceptual development, tradition and practical importance of personal rights united to force a territorial conception of jurisdiction.⁴⁴ The inferior courts were limited to actions that arose within the bailiwick.⁴⁵ Apart from tradition, the theory of the early jury system—that the jury must know something of the facts—seemed to require an insistence on territorial competence.⁴⁶ Perhaps more important, the limitation of local courts to actions that arose in their precincts was some protection to the "outsider" in that it limited the number of "outside" places where he might be sued. This was important because the "outsider" was under heavy pressure that could seriously impair his rights. Not only would local procedure be different, but the defendant was subject to arrest before the trial for the purposes of guaranteeing his presence. Since travel was difficult and communications comparatively nonexistent the traveler caught Pudding Magna, even on a genuine complaint, and would have it hard indeed. It did not make matters easier on him that he was also subject to arrest after judgment went against him.

Thus if a court took jurisdiction of an inappropriate cause, especially if it arose outside the territorial limits of the court, it was an abuse of the legal system itself and of valued rights of the defendant. It was not the fact that the court exceeded its jurisdiction as such that was immediately important; it was the fact that in these circumstances an excess of jurisdiction was indeed an abuse.

⁴² See SAYLES, *THE COURT OF KING'S BENCH* (Seld. Soc. Lecture, 1959) (the idea of justice combined with profit motive).

⁴³ See, e.g., Statute of Westminster, 1285, 13 Edw. 1, c. 38 (repealed); Statute made at Northampton, 1328, 2 Edw. 3, c. 2 (repealed); cf. 4 COKE 63 (need for Star Chamber). Perhaps someone should devote a book to the law of the "hautes homes." See N.Y. Times, Feb. 7, 1961, § 1, p. 1, col. 4.

⁴⁴ Conceptually, territorial limitations fit early feudal or semifederal organization, and the jurisdiction of the lord's court would naturally be considered in territorial terms over a given tract or a specified group of persons related to a given tract. See MAITLAND, *DOMESDAY BOOK AND BEYOND* (1921). Probably much older, possibly Saxon, this conception was incorporated in a "customal" at least before 1200. See 1 BOROUGH CUSTOMS 127 (18 Seld. Soc., Bateson ed. 1904); 1 HOLDSWORTH 149.

⁴⁵ By statute in 1275. Statutes made at Marleborough, 1275, 3 Edw. 1, c. 35 (repealed).

⁴⁶ See Sack, *op. cit. supra* note 23, at 345.

Was it not enough then to require the defendant to plead to the jurisdiction? It was not. First, attorneys in inferior courts, the king's judges tell us, were sworn to present no pleas to the jurisdiction.⁴⁷ Second, if a jurisdictional plea was entered, it could be ignored and the record falsified to show a plea to the merits.⁴⁸ The assumption in either event was that by pleading to the merits, the defendant admitted the jurisdiction of the court. Such an assumption—apparently still prevalent in 1700⁴⁹—reflects the general acceptance of jurisdiction by estoppel or consent. Even when Parliament attempted to limit the acquisition of jurisdiction by forged records, it did not attempt to foreclose acquisition of jurisdiction by a genuine estoppel as a matter of general law.⁵⁰ Thus, the no consent rule was not an immediate result of the known abuses in inferior courts, but such abuses explain both the central courts' distrust of inferior tribunals and the importance in England of adopting the no consent rule.

The king's courts had other reasons for distrusting inferior courts. They suspected the quality of justice dispensed there quite apart from intentional abuses. Again they were less concerned about jurisdiction as such than they were for its practical effects. The idea that jurisdiction is important in the abstract is a parvenu. The first and dominant concern was to enforce a just rule of law. A striking illustration of the fact that the courts were not originally interested in following merely the logic of some jurisdictional conception is a thirteenth century case in which an objection was made to an abbot's holding court.⁵¹ The decision was to allow him jurisdiction "on condition that two knights of the adjacent county of Essex should be present to see that the knights of the Abbot's court did right." Such a decision cannot possibly be reconciled with any theory of jurisdiction we now hold. It is a desire to supervise, to guarantee justice.

But such a method of supervision could not last. It was too

⁴⁷ See, *e.g.*, *Gwinne v. Poole*, 2 Lut. 935, 1560, 125 Eng. Rep. 522, 858 (K.B. 1693); *The Marshalsea*, 10 Co. Rep. 68b, 77 Eng. Rep. 1027 (K.B. 1612).

⁴⁸ *Articuli Super Chartas*, 1300, 28 Edw. 1, c. 3 (repealed); *Statutes made at Westminster*, 1436, 15 Hen. 6, c. 1 (repealed); *The Marshalsea*, *supra* note 47.

⁴⁹ *Gwinne v. Poole*, 2 Lut. 935, 1560, 125 Eng. Rep. 522, 858 (K.B. 1693).

⁵⁰ See *Statutes made at Westminster*, 1436, 15 Hen. 6, c. 1 (repealed).

⁵¹ Described in INTRODUCTION TO THE CURIA REGIS ROLLS, 1199-1230, at 97 (62 Seld. Soc., Flower ed. 1944).

crude. It went out with the idea that one could be criminally punished for suing in the wrong court.⁵² What method then was available for supervision of inferior courts? Appellate review of secular court decisions was possible, but not easy;⁵³ and review probably was not facilitated by the state of legal learning among the advocates in local courts. Review of ecclesiastical court decisions was not even possible.⁵⁴

The extraordinary writs gave expansion to the review of secular courts and opened the possibility for effective review even of the ecclesiastical courts.⁵⁵ Prohibition, especially, was useful. The writ of prohibition lay, of course, to prohibit the lower courts from acting outside their jurisdiction. Consequently, any attempt to supervise the decision below through this writ had to be made in jurisdictional terms, that is, by asserting that the lower court was not merely in error, but lacked jurisdiction. This kind of supervision would be little supervision indeed unless jurisdiction in some way related to the merits. But if jurisdiction could in some cases and in some degree be equated with merits, real supervision would be possible even though it came in the form of a jurisdictional decision. Either from insight or muddleheadedness (it is not easy to tell which) English courts found this possible.

For example, in *Harrison v. Burwell*,⁵⁶ decided in 1670, the Common Bench obviously wished to avoid a harsh and unreasonable legal rule of the ecclesiastical courts. The rule in question held that Harrison's marriage to his great aunt by affinity was void as incestuous. It was obviously preposterous, but the church courts had jurisdiction of this "subject matter." Harrison sought a prohibition since no appeal lay to the central courts. The Common Bench was forced to recognize the church's jurisdiction; but in a long opinion which examined the merits of the rule, the Levitical basis and the unnaturalness of incest, the court concluded that the church had no

⁵² See *id.* at 105; Adams, *supra* note 9, at 274-75.

⁵³ See 1 HOLDSWORTH 212-31; PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW 387 (5th ed. 1956). The problem of review is complicated, especially in early days by lack of written records. Goebel, *Introduction—Matrix of Empire* to SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS at xxvii (1950).

⁵⁴ 1 HOLDSWORTH 604-05; see POLLOCK & MAITLAND, *op. cit. supra* note 18.

⁵⁵ Cf. 1 HOLDSWORTH 228, especially n.10; 2 *id.* at 396-400, especially 397.

⁵⁶ 2 Ventr. 9, 86 Eng. Rep. 278 (K.B. 1670).

jurisdiction to judge erroneously.⁵⁷ The writ of prohibition was granted, effectively overruling the judgment.⁵⁸ Similarly, the action of some administrative bodies was not reviewable in the central courts. Their errors could only be controlled by collateral attack; and when appeal was limited, the tendency was to permit such an attack, treating a mere error in fact-finding as jurisdictional.⁵⁹ Cases of this sort emphasize the overriding practical importance of the jurisdictional concept in creating a single and workable judicial system, and emphasize also the reasons for its use—the abuses and injustices of the non-common law systems.

The central courts at Westminster had, obviously, reason enough to limit inferior courts in every way they could. Undoubtedly they would have consistently followed the no consent rule from the thirteenth century on if they had only conceived it clearly. But they did not. Too many mental stumbling blocks lay in the path to such a refined conception—one that violated all the procedural emphasis on precise and timely pleading.

A part of the conceptual difficulty was that, initially, there was no recognition of the state as an entity with rights and interests.⁶⁰ Jurisdiction was not, therefore, thought of as a matter of public law; there was no such thing. There was the king, but not the crown. The king's jurisdictional commands were to be respected and a violation, as when a plaintiff sued in a court with no jurisdiction, was to be punished.⁶¹ Furthermore, up until the seventeenth century, courts were developed and their jurisdiction determined by

⁵⁷ The court attempted to justify the action on the basis of a statute, The Marriage Act, 1540, 32 Hen. 8, c. 38, but the act seems clearly inapplicable. The preamble reflects a different purpose and it specifically recognizes the jurisdiction of the church and authorizes dissolution of marriage for reasons sanctioned by "God's Law."

⁵⁸ For similar cases, see *Shatter v. Friend*, 1 Show. 158, 89 Eng. Rep. 510 (K.B. 1691) (Dolbin, J.: "it was an unconscionable and unreasonable thing to disallow the proof," prohibition granted after judgment), also reported *sub nom* *Shotter v. Friend*, 2 Salk. 547, 91 Eng. Rep. 462 (K.B. 1690); *Harris v. Hicks*, 2 Salk. 548, 91 Eng. Rep. 463 (K.B. 1694); *Gare v. Gapper*, 3 East. 472, 102 Eng. Rep. 678 (K.B. 1803); *Gould v. Gapper*, 5 East. 345, 102 Eng. Rep. 1102 (K.B. 1804).

⁵⁹ See *Terry v. Huntington*, Hardr. 480, 145 Eng. Rep. 577 (Ex. 1668); *Papillon v. Buckner*, Hardr. 478, 145 Eng. Rep. 556 (Ex. 1668): the Commissioners of Excise taxed certain low wines as "strong waters"; statutes, 12 Car. 2, c. 23, c. 24 (1660) (repealed), and 15 Car. 2, c. 11 (1663) (repealed), allowed only limited appeal. *Held*: erroneous finding of jurisdictional fact subject to attack collaterally.

⁶⁰ See 1 POLLOCK & MAITLAND, *op. cit. supra* note 18, at 511.

⁶¹ See note 52 *supra*.

prescription and fictions as well as by statute and royal charter.⁶² A system that sets its jurisdictional limitations by prescription, which is, after all, only "consent" over a period of time, cannot even think of a rule against jurisdiction by estoppel. It is perhaps no coincidence that the no consent rule was developed only after jurisdiction by prescription was invalidated.⁶³ Jurisdiction by fiction, and blatant fiction⁶⁴ at that, was on the same plane.

The other half of the no consent rule, the half that makes "subject matter" the prime test of judicial competence, was even more clearly out of the question. The concern of English courts was a concern to maintain limitations on territorial competence,⁶⁵ and this was true even through the nineteenth century.⁶⁶ Thus, in spite of persuasive reasons for the no consent rule, it did not fit well with the intellectual history of the English law. At the beginning of the seventeenth century there was little sign of its development.⁶⁷ On the other hand, the never-stagnant common law had been developing other ideas too, ideas that demanded the no consent rule, ideas that the great lawyers of the seventeenth century could absorb without conscious thought.

It has been suggested that one such idea centered on the original writ.⁶⁸ After all, it did mark the jurisdiction of the court and it shaped the cause of action⁶⁹ so that it made both jurisdiction and subject matter seem important. Surely it did play some part in forming ideas about jurisdiction and in emphasizing the importance of subject matter or "cause" as a significant test of jurisdiction. But the temptation to ascribe the whole jurisdictional conception to the original writ should be avoided. In the first place, the writ did

⁶² On prescription, see note 32 *supra*; on jurisdiction by fiction see PLUCKNETT, *op. cit. supra* note 53, at 60 (Quominus), 172 (Bill of Middlesex), 644-46 (assumpsit); for a fiction that did not succeed, see Sack, *supra* note 23, at 346: plaintiffs attempted to extend jurisdiction over actions accruing outside the territorial limits by alleging a deed made at Harfleur (in Normandy) was made at Harfluer "in the county of Kent."

⁶³ *Martin v. Marshal*, Hob. 63, 80 Eng. Rep. 211 (K.B. 1615); *The Earl of Derby's Case*, 12 Co. Rep. 114, 77 Eng. Rep. 1390 (K.B. 1614). *But cf.* 4 COKE 81.

⁶⁴ See, *e.g.*, the description of the Bill of Middlesex in 1 HOLDSWORTH 219-21. Coke makes it sound somewhat more reasonable. 4 COKE 71.

⁶⁵ See notes 44-46 *supra*.

⁶⁶ See *London v. Cox*, L.R. 2 H.L. 264 (1887).

⁶⁷ See ARTICULATION OF THE NO CONSENT RULE, *infra*.

⁶⁸ See Gavit, *Jurisdiction of Courts* (pts. 1-3), 11 IND. L.J. 324, 339, 439, 524 (1936).

⁶⁹ *Cf.* PLUCKNETT, *op. cit. supra* note 53, at 408; SUTTON, *PERSONAL ACTIONS AT COMMON LAW* 14-33 (1929).

not vest jurisdiction in the large sense. For example, it did not mark the boundaries between the King's Bench and Common Pleas.⁷⁰ It certainly had nothing whatever to do with the jurisdiction of the inferior courts or with the church courts.⁷¹ History and struggle marked those boundaries. The original writ assumed that the court involved had jurisdiction in the general sense. It merely authorized the hearing of a particular case thought to be within that jurisdiction.⁷² It would not give jurisdiction to the common pleas to hear a felony.⁷³ And the original writ was not the test of jurisdiction in every case. Courts might proceed without it.⁷⁴ In the seventeenth century when the no consent rule developed, the original writ was clearly of diminishing importance.⁷⁵

More to the point in developing the notion that one could not consent to jurisdiction was the very concept of jurisdiction itself—the concept of “law-speaking.”⁷⁶ The division, at least in earlier times, between law-speaking and the mere adjudication of disputes was demonstrated in Fleta's⁷⁷ description of common law jurisdiction. The courts had jurisdiction of certain actions, he said, but unless the original writ was issued, they had no *cognizance*. He then referred to jurisdiction and to “coercive power,” treating them

⁷⁰ Thus Fleta: “The . . . resident justices . . . have jurisdiction over all pleas and actions, real and personal and mixed, provided they have received warrant by the king's writ to take cognizance of them. . . .” FLETA, bk. 2, ch. 34 (72 Seld. Soc. 137, Richardson & Sayles 1955). Clearly, “jurisdiction” does not come from the writ.

⁷¹ See SAYLES, *op. cit. supra* note 42, at 14-16.

⁷² See HASTINGS, THE COURT OF COMMON PLEAS 157-68 (1947), and authorities cited in note 69 *supra*.

⁷³ In Coke's day and earlier, Common Pleas could not hear an appeal of felony. *Bowser v. Collins*, Y.B. Mich. 22 Edw. 4, f. 30, pl. 11 (1482); *The Marshalsea*, 10 Co. Rep. 68b, 77 Eng. Rep. 1027 (K.B. 1612). This was true whether or not the writ ran. Earlier the appeal of felony was a common plea. SAYLES, *op. cit. supra* note 42.

⁷⁴ See *The Marshalsea*, *supra* note 73. The writ of prohibition could be cast in the form of an original writ, but it could operate as a judicial writ as well. In an action of prohibition an original was not necessary because “the common law . . . is a prohibition of itself [and] stands instead of an original. . . .” Thus writs of prohibition could be issued by the courts. 4 COKE 99.

⁷⁵ “[I]n modern times the original writ was not in fact issued except in very few cases, though it was always supposed to have been issues.” SUTTON, *op. cit. supra* note 69, at 14.

⁷⁶ The word jurisdiction itself, of course, refers to the capacity to speak law. See Gobel, *Introduction—Matrix of Empire* to SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS at xxxvii-xxxix (1950). Cf. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869): “Jurisdiction is power to declare law,” *i.e.*, speak law rather than decide disputes.

⁷⁷ FLETA, *op. cit. supra* note 70.

as separate conceptions, although in the courts they tended to merge.

The courts were aware of their law-speaking function and effect, and this awareness must have increased many fold as previously decided cases came to have greater authority. This greater orientation toward precedent, Holdsworth thought, began with the development of written pleadings and the concomitant change in law reporting, a change that began to work a precedent-pointed approach "in the latter half of the sixteenth and at the beginning of the seventeenth centuries. . . ."⁷⁸

While it made very little difference who decided a given dispute so long as public interests were not clearly affected, it made a good deal of difference who "spoke law." Thus, arbitration based wholly on consent jurisdiction was as common as it was ancient.⁷⁹ Although a *contract* to arbitrate might not be enforced because it ousted the courts' jurisdiction,⁸⁰ an *award* would be enforced; and there was no stigma to arbitration for judges themselves acted as arbitrators.⁸¹ All this would be anomalous indeed unless it was recognized that arbitrators were merely deciding disputes;⁸² they were not furnishing precedent; they were not speaking law. Hence consent to their jurisdiction was an adequate basis for their power.

The consequence of this conception of jurisdiction, as distinguished from the mere power to hear and determine, was that a decision made without power to speak law is *not* law, even as to the parties. It made some sense to hold a judgment void even if the parties consented to it. To achieve the no consent rule it was only necessary that this concept of jurisdiction be clearly conceived.

⁷⁸ Holdsworth, *Case Law*, 50 L.Q. Rev. 180, 182 (1934).

⁷⁹ One authority dates arbitration in England to the fourteenth century. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 598 (1928). But it is mentioned at least as early as 1206. INTRODUCTION TO THE CURIA REGIS ROLLS, 1199-1230, at 461 (62 Seld. Soc., Flower ed. 1944). A delightful account of a fifteenth century arbitration may be found in *Introduction to YEAR BOOKS OF HENRY VI*, at xvi-lx (50 Sel. Soc., Williams ed. 1933).

⁸⁰ See Sayre, *supra* note 79, at 609-10 (1928), and the discussion in Judge Frank's opinion in *Kulkukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942); cf. *Vynior's Case*, 8 Co. Rep. 81b, 77 Eng. Rep. 597 (K.B. 1610).

⁸¹ See More, *Utopia* in THREE RENAISSANCE CLASSICS 106 (Milligan ed. 1953).

⁸² Compare Carlston, *Theory of the Arbitration Process*, 17 LAW & CONTEMP. PROB. 631 (1952): "Arbitration is the judicial organ of systems of law not of universal application. . . . [T]he proper function of arbitration is to adjudicate and not to create rights. . . ."

Perhaps the growing conceptual refinement as much as anything else brought the no consent rule to light. As previously noted, the rule is almost identical with the property rule that one cannot transfer more than he has. For several reasons it was an easy jump from property rule to jurisdictional rule. First, courts had their beginnings as private property. They were owned, they made profits and they might be appurtenant to other, more tangible property.⁸³ As late as 1728 they were leased by their owners to others.⁸⁴ The leap from a rule about property to a rule about courts is therefore conceptually easy.⁸⁵ Second, private law notions had always been the source of public law development.⁸⁶ The common law courts drew more or less consistently on property ideas.⁸⁷ For example, the body politic was analogized to the common law corporation. This kind of thinking was infectious.⁸⁸ Finally, in the seventeenth century, when the development of the no consent rule really began in earnest, the idea that no one could transfer more than he had seems to have become an all-purpose axiom easily applied to any subject.⁸⁹ Locke used it as a foundation for political theory to limit legislative jurisdiction. No legislature can exercise arbitrary power, he said, because power is derived from individuals in society and "nobody can transfer to another more power than he has in himself; and nobody has an absolute arbitrary power over himself. . . ."⁹⁰

A premise so pervasive and ubiquitous belongs to the culture.⁹¹

⁸³ See 1 HOLDSWORTH 6; MAITLAND, *DOMESDAY BOOK AND BEYOND* 169, 344 (1921); WEBB, *op. cit. supra* note 37, at 339.

⁸⁴ WEBB, *op. cit. supra* note 37, at 344.

⁸⁵ Thus in a discussion of a court's jurisdiction, we can readily recognize what counsel means in referring to the court's "seisin" of jurisdiction. See *Parisienne Basket Shoes Pty. Ltd. v. Whyte*, 59 Commw. L.R. 369, 371 (Austl. 1938).

⁸⁶ See Goebel, *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 559 n.11 (1938).

⁸⁷ Goebel, *Introduction—Matrix of Empire* to SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* at xlvii (1950).

⁸⁸ Goebel, *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 559 (1938).

⁸⁹ The rule as applied to property is very old indeed and is covered by a Roman maxim. See DIGEST 41.1.20, 50.17 54; FLETA, bk. 3, ch. 15, § 8 (Selden ed. 1647). Thus there is no intention of saying that the *property* form is new in the seventeenth century.

⁹⁰ LOCKE, *SECOND TREATISE* § 135 (Gough ed. 1946).

⁹¹ The idea of "voidness" is similar. Developed in property and canon law, it is carried over to jurisdictional rules. In this instance, at least, we can find cases where the connection is made explicit by judges. See *Terry v. Huntington*, Hard. 480, 145 Eng. Rep. 557 (Ex. 1668), based in part on

Masters of the insouciant transmutation of ideas, like Coke, could use its implications without conscious thought for the premise itself. The seventeenth century was ready to develop the no consent rule.

ARTICULATION OF THE NO CONSENT RULE

Coke's Contributions

It seems fairly clear that when Edward Coke rose to the bench in 1606 the no consent rule was not a hardened legal notion. Of course, there had almost always been court action that would be disregarded as wholly inappropriate. And in 1482 Judge Piggot had used those magic words, *coram non iudice* ("not before a judge"), to describe such a situation.⁹² But the implications of this phrase were not always clear in the sixteenth century, and to describe a judgment as void was not necessarily to say that it was incurably void, or void "ab initio," so that consent or estoppel would not cure it.⁹³

In 1600 inferior courts were still at their old stand, still forcing defendants to admit their jurisdiction, still assuming that admission would confer jurisdiction.⁹⁴ Recent cases had treated jurisdictional questions as settled when a final judgment had been entered without objection by the defendant.⁹⁵

On the other hand the clergy asserted⁹⁶ in 1605 that the common law courts were issuing prohibitions to the ecclesiastical courts even after the defendant "admitted" jurisdiction and judgment was entered. The issuance of such prohibitions seems to imply at least a tacit recognition of the no consent rule. The clergy objected strenuously to prohibitions after judgment. In the years after 1606

the rule that an acceptance of a second benefice made the first absolutely void. *Rex v. George*, Cro. Car. 354, 79 Eng. Rep. 910 (K.B. 1628).

⁹² *Bowser v. Collins*, Y.B. Mich. 22 Edw. 4, f. 30, pl. 11 (1483); GOEBEL & NAUGHTEN, *LAW ENFORCEMENT IN COLONIAL NEW YORK* 286 n.3 (1944).

⁹³ The word "void" was used, for example, where the jurisdiction had been timely attacked and the only issue was whether there was or was not jurisdiction so that "void" added nothing to the description. *Smith v. Chomeley*, 2 Dy. 135a, 73 Eng. Rep. 295 (K.B. 1556).

⁹⁴ *The Marshalsea*, 10 Co. Rep. 68b, 77 Eng. Rep. 1027 (K.B. 1612).

⁹⁵ *Hollmasts Case*, Noy. 70, 74 Eng. Rep. 1037 (K.B. 1596); *Susans v. Turner*, Noy. 67, 74 Eng. Rep. 1035 (K.B. 1594). In a rather different situation, otherwise. *Colvil v. Huddleston*, 1 Dy. 79a, 79b, 73 Eng. Rep. 169, 170 (K.B. 1552).

⁹⁶ *Articuli Cleri 1605*, art. 3, in 2 COKE 601, and in part in TANNER, *CONSTITUTIONAL DOCUMENTS OF JAMES I*, at 177 (1930) [hereinafter cited as *Articuli Cleri*].

Coke was required to defend this practice on several occasions, including one before James I.⁹⁷ Yet even in his carefully composed answers to the clerical charges, Coke never explicitly stated the no consent rule as a common law doctrine.

Although the conflict with the clergy produced no definitive statement of the no consent rule it dramatized the idea that courts could be limited if the common law refused to recognize their judgments. It did something more, it forced Coke to articulate statements that could only be justified if there *was* a no consent rule—for example, the assertion that writs of prohibition would issue at any time.⁹⁸

In 1610 the famous case of *The Marshalsea*,⁹⁹ a case that was cited as direct authority for two-hundred years,¹⁰⁰ provided the occasion for more explicit discussion. The Marshalsea court, or the Court of the Steward and Marshall,¹⁰¹ had tried a case in *assumpsit* and rendered judgment against the defendant in that suit. The defendant's surety, Hall, was, in the absence of the defendant, imprisoned by court order until the judgment was paid. Hall brought suit in the Common Pleas for false imprisonment, arguing that the original judgment, the basis for his imprisonment, was void. Therefore, he said, the officers had no authority to hold him. Of course, the liability of the officer could have been made to turn, not on actual jurisdiction, but on the officer's good faith.¹⁰² But Coke accepted the assumption that actual jurisdiction was determinative. Coke held simply that the Marshalsea court had the jurisdiction "only of trespass simpliciter," and not "trespass *secundum quid* . . . upon the case." This failure of jurisdiction made the judgment absolutely void, he said, because it was jurisdiction of the *cause* that was significant. (It may be helpful here to say that "cause" later developed into "subject matter.") Coke proposed the "cause" test

⁹⁷ Prohibitions Del Roy, 12 Co. Rep. 63, 77 Eng. Rep. 1342 (K.B. 1608); 5 HOLDSWORTH 430.

⁹⁸ "Prohibitions by law are to be granted at any time. . . . And it is folly of such as will proceed in the ecclesiastical court . . . whereof the kings temporall courts should have the jurisdiction. . . . And the kings courts . . . may lawfully prohibit the same, as well after judgment and execution, as before." *Articuli Cleri*, art. 3; see also *id.* at art. 10.

⁹⁹ 10 Co. Rep. 68b, 77 Eng. Rep. 1027 (K.B. 1612).

¹⁰⁰ As late as 1814. *Grumon v. Raymond*, 1 Conn. 39 (1814).

¹⁰¹ For discussion of this court, see 1 HOLDSWORTH 208.

¹⁰² Previous cases had dealt more in terms of good faith than in terms of jurisdiction. See *Windham v. Clere*, Cro. Eliz. 130, 78 Eng. Rep. 387 (K.B. 1589); cf. *Skewys v. Chamond*, 1 Dy. 59b, 73 Eng. Rep. 131 (K.B. 1545).

of competency, not on the basis of any common law doctrine, but on the basis of inductive reasoning. He took a series of cases that had held or indicated that a judgment was "void." In each instance he thought he was able to discern that there was a defect of jurisdiction relating to cause. He looked, for example, at a case involving an action taken after the end of the term. The proceeding had been held void. This was so, said Coke, because after the term there was no jurisdiction of the *cause*. He then reviewed apparently contrary authority. In some cases Coke could see that judgments had been held valid even though jurisdictional defects had clearly existed. He explained this seeming anomaly by saying that jurisdictional defects invalidated the judgment only if they deprived the court of jurisdiction of the *cause*. If the court had jurisdiction of the *cause*, any other jurisdictional defects were treated as mere error. A similar analysis had been made in a fifteenth century case, but without the English word "cause" as the basis for distinction.^{102a} It is probably fair to say that Coke's test—"jurisdiction of the cause"—is the beginning of our use of "subject matter" as the special test of judicial competence.

As to consent jurisdiction, Coke was not so clear. There are several dicta in *The Marshalsea* that imply a limitation on jurisdiction by estoppel. There was a statute¹⁰³ involved that expressly forbade jurisdiction by estoppel as to the *surety*, so that the surety would not be bound by the party's failure to object to jurisdiction. Coke also seems to say that the party himself will not be bound, but the reason may be that the Marshalsea court had the habit of falsifying jurisdictional facts. At any rate, Coke does not lay it down as an unequivocal common law doctrine that the party may not consent to jurisdiction.

In his lifetime, Coke lectured nearly everyone, including the king, on jurisdiction, but he never formulated any consistent theory on the consent problem.¹⁰⁴ In certain local courts, he thought¹⁰⁵ jurisdiction was settled if the defendant failed to seek prohibition before a final judgment was entered although such a defendant had an action in

^{102a} *Bowser v. Collins*, Y.B. Mich. 22 Edw. 4, f. 30, pl. 11 (1483).

¹⁰³ Statutes made at Westminster, 1436, 15 Hen. 6, c. 1 (repealed).

¹⁰⁴ For example, Coke stated the general rule that "where the court hath no authority to hold a plea of the cause . . . it is *coram non iudice*," and false testimony is not perjury. 3 COKE 163. Elsewhere, however, Coke thought "it was justice in the parliament to punish perjury" in a court of requests "although the court were holden by usurpation. . . ." 4 *id.* at 98.

¹⁰⁵ 2 *id.* at 229.

the nature of a tort action against a plaintiff who had taken him into a court of no jurisdiction. On the other hand, he asserted¹⁰⁶ that ecclesiastical courts could be prohibited at any time, even after the defendant had "admitted" jurisdiction. Still again, he expressed¹⁰⁷ dislike for those who sought prohibitions only after they saw their case going badly and he threatened to turn a deaf ear to their jurisdictional pleas. But in the same case, he slipped in an unsupported dictum that consent would not give jurisdiction.¹⁰⁸

Although he could not be consistent, Coke demonstrated forcefully the practical uses of the jurisdictional concept. He tied it firmly to the idea of voidness—that is, he specified clearly the effect of no jurisdiction. And he dramatized the constitutional importance of jurisdiction in an era that was erupting constitution makers.¹⁰⁹

Jurisdiction by Consent After Coke

For the rest of the century, that is, until about 1700, Coke's "cause" as a test of competence was either ignored or rejected.¹¹⁰ The territorial limit on jurisdiction was still more important.

As for the idea of consenting to jurisdiction, the seventeenth century inherited Coke's confusion on the subject. No integrated

¹⁰⁶ See note 98 *supra*.

¹⁰⁷ The Admiralty Case, 12 Co. Rep. 77, 77 Eng. Rep. 1355 (K.B. 1610).

¹⁰⁸ "[A]lthough the admittance of the party cannot give a jurisdiction to the Court where it of right hath none, for that will be an encroachment upon the common law; yet when the Court shall be advised that it is merely for vexation, and shall be intended for delay . . . unless that he can shew good matter . . . it shall not be granted." *Id.* at 78, 77 Eng. Rep. at 1356. See also WALLACE, THE REPORTERS 167 (1882). This may reflect "additions" of later years, not what was said or decided. *Cf.* 5 HOLDSWORTH 464. Compare Clark's Case, 5 Co. Rep. 64a, 77 Eng. Rep. 152 (K.B. 1596). *P.*, a burgess, assented to a town tax; he then failed to pay and was imprisoned; he sued for false imprisonment. *Held:* the taxing ordinance was void as against chapter 29 of the Magna Charta, and the "plaintiff's assent cannot alter the law in such a case."

¹⁰⁹ In The Marshalsea, 10 Co. Rep. 68b, 77 Eng. Rep. 1027 (K.B. 1612), Coke specifically evoked the Magna Charta on the jurisdictional question. The famous twenty-ninth chapter, he said, prohibits "every oppression *contra legum terrae*. . . . Then, if any against the law usurp any jurisdiction [and] by colour of an usurped authority oppress any man . . . he may be punished by that statute." *Id.* at 74a, 77 Eng. Rep. at 1035. Compare Clark's Case, 5 Co. Rep. 64, 77 Eng. Rep. 152 (K.B. 1596) (taxing ordinance void as against Magna Charta; no consent will validate).

¹¹⁰ *Squib v. Holt*, 1 Fr. 193, 89 Eng. Rep. 137 (K.B. 1675), reported *sub nom* *Squib v. Hole*, 2 Mod. 29, 86 Eng. Rep. 922 (K.B. 1675): Counsel's argument based on The Marshalsea, *supra* note 109, was rejected in favor of emphasis on the territorial limits on jurisdiction.

concept of jurisdiction and no universally applicable rule against consent to jurisdiction appeared. The confusion on the subject can be illustrated by a single line of cases. Coke had asserted both the power and the duty to issue writs of prohibition even after the lower court had entered judgment. Suppose, however, that the courts refused to issue prohibition after a final judgment below, as they sometimes did.¹¹¹ Should such cases be taken as approving jurisdiction by estoppel or "admittance?" In refusing a writ of prohibition in such cases, the courts might be saying: "After judgment, prohibition is not procedurally proper; but you may collaterally attack the judgment even though writ of prohibition is denied." Or the courts might be saying: "If you fail to raise the jurisdictional question until after judgment, the affair of jurisdiction is settled and the judgment is valid."

Coke, in dicta, had specifically said¹¹² that in certain circumstances, the refusal to grant prohibition did *not* end the jurisdictional question. Other judges, however, assumed that the defendant had to raise the jurisdictional issue before judgment was entered against him and that if he did not do so, he had consented to jurisdiction. For example, a prohibition after a judgment in Admiralty was refused in 1620 on the ground that the "poor marriners" should not be delayed in their wages and that Admiralty was better equipped procedurally to hear their claim.¹¹³ Such a decision clearly did not contemplate any further litigation on the jurisdictional issue; it contemplated that the defendant ship-master would pay his "poor marriners." Thus, jurisdiction was given by consent. This particular practice apparently became common in spite of a statute that

¹¹¹ *Endike v. Steed*, 1 Fr. 294, 89 Eng. Rep. 213, reported *sub nom* *Mendyke v. Sting*, 2 Mod. 271, 86 Eng. Rep. 1067 (K.B. 1677); *Smith v. Poyndreill's Ex'r*, Cro. Car. 97, 79 Eng. Rep. 686 (K.B. 1627); *Anonymous*, Winch. 8, 124 Eng. Rep. 7 (C.P. 1620); *Hollmasts Case*, Noy. 70, 74 Eng. Rep. 1037 (K.B. 1596); *Susans v. Turner*, Noy. 67, 74 Eng. Rep. 1035 (K.B. 1594); cf. *Anonymous*, 1 Vern. 301, 23 Eng. Rep. 482 (Ch. 1684): failure to plead to the jurisdiction is good reason to deny writ of prohibition, but "I will grant a prohibition for the king in such a case. . ."; *Anonymous* (Case 1), Sty. 45, 82 Eng. Rep. 517 (K.B. 1647); *Anonymous* (Case 2), Sty. 45, 82 Eng. Rep. 517 (K.B. 1647). See also 7 BACON, ABRIDGEMENT 232, 529 (Phila. ed. 1860).

¹¹² *Prohibition*, 12 Co. Rep. 76, 77 Eng. Rep. 1354 (H.L. 1610), holding that after excommunication, no prohibition would lie, but certain forms of collateral attack might be available. Excommunication was used as a punishment for ecclesiastical contempt, and after it remained in force forty days the victim could be imprisoned under a Chancery writ. See 2 PHILLIMORE, ECCLESIASTICAL LAW 1089-90 (2d ed. 1895).

¹¹³ *Anonymous*, Winch. 8, 124 Eng. Rep. 7 (C.P. 1620).

forbade this kind of suit in Admiralty. Chief Justice Holt spoke of it in 1700,¹¹⁴ saying that it would be permitted in spite of the statute because "common error makes law" even jurisdictional law.

Similarly, Justice Rolle,¹¹⁵ in the middle of the seventeenth century, twice "advised to the next term" without granting writs of prohibition where the defendant "had admitted the jurisdiction of the Court by pleading" to the merits. Although in another case¹¹⁶ he expressed the no consent rule in a dictum, he thought it was "mischievous to grant a prohibition in this case, for thereby many judgments will be stopped."

Only Chief Baron Hale seems to have considered explicitly whether denial of prohibition because of the party's admission of jurisdiction was merely denial of a particular remedy or was an affirmance of jurisdiction by consent. In 1668 he recited¹¹⁷ the maxim that the law aids the vigilant, not the sleepy, suggesting that a party could effectively consent to jurisdiction by failing to raise the issue in time. "It was a hard case," he said, but at least in the civil law courts, if prohibition was denied, collateral attack was also foreclosed. In the same case, however, he allowed a collateral attack on the decision of an administrative tribunal even though it was too late for a writ of prohibition.¹¹⁸

Thus, the prevailing assumption, liberally sprinkled with inconsistency, was that if the defendant failed to raise the jurisdictional issue, he was estopped to attack the jurisdiction later, either in prohibition or collateral attack. If this is so, then how did the cases ever develop the no consent rule? Two or three reasons suggest themselves. One is that the consent of the parties became disguised in a procedural rule: the jurisdictional defect must show on the face of the record, and if it does not, prohibition will be

¹¹⁴ *Clay v. Snelgrave*, 1 *Ld. Raym.* 576, 91 *Eng. Rep.* 1285 (K.B. 1700), per Holt, C.J.: "[I]t is an indulgence, that the Courts at Westminster permit mariners to sue for their wages in the Admiralty Court, because they may all join in suit, and it is grounded upon the principle *quod communis error facit jus*. . ." Chief Justice Holt also thought that prohibition was discretionary. On this point, the ease was overruled in *London v. Cox*, L.R. 2 H.L. 239 (1867).

¹¹⁵ *Anonymous* (2 Cases), *Sty.* 45, 82 *Eng. Rep.* 517 (K.B. 1647).

¹¹⁶ *Hill v. Bird*, *Sty.* 102, 82 *Eng. Rep.* 563 (K.B. 1648), citing an apparently unreported case.

¹¹⁷ *Terry v. Huntington*, *Hardr.* 480, 145 *Eng. Rep.* 557 (Ex. 1668); *Papillon v. Buckner*, *Hardr.* 478, 145 *Eng. Rep.* 556 (Ex. 1668) (companion case).

¹¹⁸ This was probably influenced by the fact that no appeal was allowed except to the justice courts. See text at note 59 *supra*.

denied even where judicial notice of geographical facts would indicate a failure of jurisdiction.¹¹⁹ As this disguise gained acceptance, it seemed more and more like a rule of procedure having nothing to do with jurisdiction by consent. The prohibition cases were safely locked in logic-tight compartments.¹²⁰ And while this process was going on, another procedural practice developed the no consent rule.

Procedural Development of the No Consent Rule

In 1605 the King's Bench assumed that estoppel would confer jurisdiction, but held that the plaintiff in the inferior court had to *allege* the jurisdictional facts.¹²¹ This was required even though such facts were put in issue by the defendant and a verdict rendered for the plaintiff. Now this was not a requirement that the plaintiff *prove* his jurisdictional facts;¹²² it was a requirement that he *allege*

¹¹⁹ See *Tourson v. Tourson*, 1 Rolle 80, 81 Eng. Rep. 342 (K.B. 1614) (per Coke); cf. *Gardner v. Booth*, 2 Salk. 549, 91 Eng. Rep. 464 (K.B. 1698). This face of the record rule, familiar today as a general rule of prohibition, originally was used *only* where the defendant had failed to object to the jurisdiction—that is, where he had a timely objection, he was not limited to the face of the record in presenting his case for the writ of prohibition. Cf. *Aubin v. Cox*, 1 Ventr. 180, 86 Eng. Rep. 122 (K.B. 1677).

¹²⁰ A similar line of cases and texts had it that an "imparlance" admitted the jurisdiction. Imparlance was a procedural stage, roughly analogous to an appearance or a request for time in which to plead. See STEPHEN, PLEADING 162 (1894). It was used in inferior as well as the central courts. See *Anonymous*, 1 Ventr. 333, 86 Eng. Rep. 216 (K.B. 1679). The general rule seems to have been that after imparlance, "the jurisdiction would be admitted." *Aubin v. Cox*, *supra* note 119; 7 BACON, *op. cit. supra* note 111, at 529-30; 1 COMYN, DIGEST 5, 71 (Dublin ed. 1785); GILBERT, HISTORY OF COMMON PLEAS (3d ed. 1779); VINER, ABRIDGEMENT OF LAW AND EQUITY 338-39 (2d ed. 1793). The cases and texts do not seem to make any distinction between admission of jurisdiction of the person and any other kind of jurisdictional admission. The only exception to the theory that imparlance admitted jurisdiction appears to be that a plea of "ancient demesne" could be made after imparlance. See 7 BACON, *op. cit. supra* note 111, at 529-30; cf. *Marshall's Case*, Cro. Cas. 9, 79 Eng. Rep. 613 (K.B. 1625), doubting that imparlance barred a plea of ancient demesne but taking the matter under advisement. The reasons for the ancient demesne exception are suggested in *Alden's Case*, 5 Co. Rep. 105a, 77 Eng. Rep. 217 (K.B. 1600): ancient demesne based on custom of manor; this is best determined by those who best know the custom, *i.e.*, the lord's court. Also, the plea may have been regarded as a plea in bar rather than in abatement. *David v. Lyster*, Sty. 90, 82 Eng. Rep. 553 (K.B. 1648).

¹²¹ *Quarles v. Searle*, Cro. Jac. 96, 79 Eng. Rep. 82 (K.B. 1605).

¹²² There is no distinction in these cases between jurisdictional *facts* and jurisdictional *rules*. As a result, where we treat litigation on jurisdictional facts as *res judicata*, the English may even today allow re-examination of such facts in collateral actions. See *Rex v. Fulham, Hammersmith & Kensington Rent Tribunal* [1951] 2 K.B. 1.

them. Without an allegation a verdict had nothing to support it.¹²³ In 1605 then jurisdiction by consent or estoppel was thought possible, but the first step that led to the contrary result was taken in requiring the plaintiff to *plead* that jurisdiction existed. From here it was a short step indeed to the notion that the plaintiff had also to *prove* jurisdiction, and a failure of *either* pleading or proof would defeat his claim to jurisdiction.¹²⁴

These premises were not readily accepted, and for a large part of the seventeenth century, cases were divided on the question whether estoppel jurisdiction was possible when the plaintiff failed to *allege* his jurisdictional facts. Some judges thought that "after verdict it shall be intended" that the inferior court had jurisdiction, thus permitting jurisdiction by estoppel.¹²⁵ In the end, it became accepted that the allegation of jurisdiction was necessary and without it jurisdiction did not exist.¹²⁶ The allegation itself, in other words, was jurisdictional.

Once such a premise was accepted, there was no convenient stopping place—if the scent went through a hollow log, the courts followed it there. It was soon clear that whoever relied on the first court's judgment in a second action, had to allege the first court's jurisdiction anew.¹²⁷ In other words the burden of alleging the court's jurisdiction never ceased; and whenever the judgment was in question, whoever sought to support it always had the burden of asserting its validity. Once again, such a pleading rule implied the additional requirement that the one who pleads must prove. Thus we reach the peculiar rule that the burden of proving jurisdiction is upon him who sustains, not upon him who attacks, the

¹²³ Cf. SHIPMAN, COMMON LAW PLEADING 531-33 (1923) (what pleading defects may be aided by verdict); STEPHEN, *op. cit. supra* note 120, at 225.

¹²⁴ *Golding v. Jackson*, 2 Rolle 498, 81 Eng. Rep. 941 (K.B. 1625). This was a case originating in the Marshalsea court and it was an action on the case, an action Coke had expressly said was outside the Marshall's jurisdiction. Yet the King's Bench did not mention any rule against consent to jurisdiction, but rather puts the decision on the procedural ground.

¹²⁵ *Truscott v. Carpenter*, 1 Ld. Raym. 229, 91 Eng. Rep. 1050 (K.B. 1697); *Gwinne v. Poole*, 2 Lut. 935, 1560, 125 Eng. Rep. 522, 858 (C.P. 1693); cf. *Lucking v. Denning*, 1 Salk. 201, 91 Eng. Rep. 180 (K.B. 1702); *Bernard v. Bernard*, 1 Lev. 289, 83 Eng. Rep. 411 (K.B. 1670) (no final decision; plaintiff dismissed after judges argued among themselves for several terms).

¹²⁶ See, *e.g.*, *Moravia v. Sloper*, Willes. 30, 125 Eng. Rep. 1039 (C.P. 1737). Cf. *Dye v. Olive*, March N.C. 117, 82 Eng. Rep. 437 (K.B. 1636).

¹²⁷ An officer is sued for false arrest; he justifies under the process of an inferior court. He must allege the jurisdiction of the inferior court. See, *e.g.*, cases cited in note 126 *supra*.

judgment.¹²⁸ And of course if jurisdiction had to be *proved* again in a collateral action, it could be *disproved*. The net result, of course, was that an inferior court judgment could be attacked at any time. Regardless of the defendant's lack of proof in the first action, if he could ever find proof to dispute the first court's jurisdiction, he could try his case a second time.¹²⁹

At this point the no consent rule exists de facto, dictated by the initial requirement that the plaintiff had to plead jurisdiction. Since proof followed pleading and even proof could never conclusively establish jurisdiction, it was clear that an admission could not supply what proof could not; that is, even an admission of jurisdiction would not bind the defendant.

The initial assumption that *something* would give jurisdiction by estoppel was dissipated by the procedural facts of life. Once the burden was cast upon the plaintiff it followed him forever, and no "admittance" could be effective. It must be said that contrary arguments were made even as late as the nineteenth century.¹³⁰ But they could not carry the day against the rigidities of procedure. And by 1677 the pleading rule was characterized as a "presumption" against the jurisdiction of inferior courts.¹³¹ Procedure had developed a substantial acceptance of the no consent rule, even if it was not articulated as such. Since the rule was developed so largely by the intricacies of procedures, there was seldom any discussion of the merits. The reasons for limiting inferior court jurisdiction

¹²⁸ See *Higginson v. Martin*, 1 Fr. 322, 89 Eng. Rep. 239, also reported 2 Mod. 195, 86 Eng. Rep. 1021 (K.B. 1677); *Squib v. Holt*, 1 Fr. 193, 89 Eng. Rep. 137, reported *sub nom* *Squib v. Hole*, 2 Mod. 29, 86 Eng. Rep. 922 (K.B. 1675). *But cf.* *Temple Kilingworth, Carth.* 189, 90 Eng. Rep. 715 (K.B. 1691); *Mendyke v. Stint*, 2 Mod. 271, 86 Eng. Rep. 1067 (K.B. 1677).

¹²⁹ For example, in *Squib v. Holt*, *supra* note 128, the plaintiff had alleged jurisdiction; defendant pleaded to the merits and thereby "had admitted the jurisdiction of the Court"; the officer then allowed the defendant to escape and the plaintiff sued the officer for permitting the escape. The officer put proof to the jury in Common Pleas that the inferior court had no jurisdiction. The Common Pleas jury agreed. See also *Terry v. Huntington*, *Hardr.* 480, 145 Eng. Rep. 557 (Ex. 1668); *cf.* *Mico v. Morris*, 3 Lev. 234, 83 Eng. Rep. 666 (K.B. 1685), apparently assuming that it made no difference whether or not proof in the inferior court was offered; former action is no bar to the second action where plaintiff can prove he brought first action in a court of no jurisdiction.

¹³⁰ See the argument of Sir Frederick Pollock in *Rex v. Justices of Cumberland*, 5 L.J. 11 (Mag. Cas. 1835).

¹³¹ *Peacock v. Bell*, 1 Saund. 69, 85 Eng. Rep. 81, 84, also reported 2 Keb. 226, 84 Eng. Rep. 142, reported *sub nom* *Hiccocks v. Bell*, 2 Keb. 183, 84 Eng. Rep. 114 (K.B. 1677).

provided a base for the no consent rule and its accidental development out of procedure. Thus no one ever had to consider whether the rule was a sound part of judicial procedure,¹³²

Development of "Subject Matter" as The Test of Competence

This is no place to explore aberrant conceptions of "subject matter." It is enough to say that, in general, almost any jurisdictional defect or procedural requirement not relating to jurisdiction of the person is treated as a defect of "subject matter" jurisdiction that cannot be waived.¹³³ More careful writers (and some who are not so careful) treat "subject matter" as relating to a *kind* or class of case.¹³⁴ Now although Coke had emphasized "cause" in much the same way that we emphasize "subject matter," the English courts generally tended to give greater prominence to territorial limitations on jurisdiction, limitations we should probably treat as venue requirements. How then did we reach the black-letter doctrine so often used that the parties cannot consent to jurisdiction of the *subject matter*?

Several lines of influence can be seen. First, the term "subject matter" began to be used long before it acquired any special significance. Judges of the late seventeenth century began using the term as a matter of judicial elegance. Jurisdiction, they would say learnedly,¹³⁵ is composed of jurisdiction of the place, the person and the subject matter. However, this analysis was superfluous because a defect in *any* of these phases of jurisdiction would render the judgment void. Thus "subject matter" did not have any special meaning. Cases of this sort put the idea in view that jurisdiction over the "subject matter" was in some way separable from jurisdiction over the person.¹³⁶

¹³² Goebel, *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 569 (1938).

¹³³ See note 5 *supra*.

¹³⁴ See RESTATEMENT, JUDGMENTS §7 (1942).

¹³⁵ *E.g.*, Terry v. Huntington, Hardr. 480, 145 Eng. Rep. 557 (Ex. 1668).

¹³⁶ The separation of "matter," or "subject matter" or "cause" is very old but it originally has no special meaning. See HORN, THE MIRROR OF JUSTICES, bk. III, ch. 1 (7 Seld. Soc., Whittaker ed. 1895), where "power to entertain the cause" is listed along with such objections as "false Latin." The term "matter" or "cause" became common as a loose and vague expression, not referring to any modern concept of "subject matter" but to any kind of jurisdiction, including, for example, territorial jurisdiction. See Prince's Case, 5 Co. Rep. 29b, 77 Eng. Rep. 96 (K.B. 1600). The phrase was also used in connection with "pendent" jurisdiction, *i.e.*, if ecclesiastical courts had "jurisdiction of the Original and principal matter," they had

A second factor that emphasized "subject matter," was the "face of the record" rule, that prohibition would not be granted after judgment unless the jurisdictional defect showed on the record.¹³⁷ This rule tended to diminish the English emphasis on territorial competence in some cases, because the English courts refused to take judicial notice that Hull-Bridge was within the jurisdiction of Hull,¹³⁸ or that River Lisbon was indeed a river.¹³⁹ Thus territorial or geographical facts did not, practically speaking, show on the face of the record. What *would* show? Most clearly and most often the record would show a lack of what we might call "subject matter" jurisdiction—for example, that a claim of tort was brought in a court created to hear only claims of debt and the like.¹⁴⁰

By the first of the eighteenth century, cases began to imply that "subject matter" had, perhaps, a special significance—that one could not consent to jurisdiction of the subject matter.¹⁴¹ Such implications were followed shortly by express dicta to the same effect.¹⁴² However, the same judges who proposed such an approach did not use it consistently¹⁴³ and believed that jurisdiction could be conferred by "common error."¹⁴⁴ "Subject matter," as a primary test

jurisdiction of the "dependent matter." Anonymous, 1 Rolle 12, 81 Eng. Rep. 291 (K.B. 1615). All these usages are merely descriptive of different kinds of jurisdictional requirements; they do not import any special consequences for "jurisdiction of the subject matter."

¹³⁷ Dean Gavit reaches the same conclusion by a slightly different route. See Gavit *Jurisdiction of Courts* (pts. 1-3), 11 IND. L.J. 324, 439, 524, 546 (1936).

¹³⁸ Bernard v. Bernard, 1 Lev. 289, 83 Eng. Rep. 411 (K.B. 1670).

¹³⁹ Tourson v. Tourson, 1 Rolle 80, 81 Eng. Rep. 342 (K.B. 1614): it might be an arm of the sea.

¹⁴⁰ Roberts v. Humby, 3 Mees. & W. 120, 150 Eng. Rep. 1081 (Ex. 1837): action of inferior court limited to debt. *Held*: this action was not in debt, this fact showed on the record, therefore, prohibition will issue after judgment. There was no discussion of "subject matter." Similarly, a suit in inferior court for an amount greater than the court's jurisdictional limit will show. Cf. Clarke v. Cork., Palm. 564, 81 Eng. Rep. 1222 (K.B. 1628), involving, however, some question of intent.

¹⁴¹ Gwinne v. Poole, 2 Lut. 935, 1560, 125 Eng. Rep. 522, 858 (C.P. 1693).

¹⁴² Lucking v. Denning, 1 Salk. 201, 91 Eng. Rep. 180, also reported Holt, 186, 90 Eng. Rep. 1001 (K.B. 1702). See also Parker v. Clerke, 3 Salk. 87, 91 Eng. Rep. 708, reported *sub nom* Parker v. Clerk, 6 Mod. 252, 87 Eng. Rep. 999 (K.B. 1704); Gardner v. Booth, 2 Salk. 548, 91 Eng. Rep. 464 (K.B. 1698).

¹⁴³ In Shotter v. Friend, 2 Salk. 547, 91 Eng. Rep. 462 (K.B. 1690), reported *sub nom* Shatter v. Friend, 1 Show. 158, 89 Eng. Rep. 510 (K.B. 1691), Holt, C.J., made the question of prohibition after judgment turn, not on "subject matter" defects, but on the fact that the judgment itself "in this case is the grievance."

¹⁴⁴ Clay v. Snelgrave, 1 Ld. Raym. 576, 91 Eng. Rep. 1285 (K.B. 1700).

of competence, never succeeded in England. Even in the nineteenth century, English judges occasionally implied that parties might consent to what we should call subject matter jurisdiction.¹⁴⁵

The first American cases after statehood are likewise remarkable for their lack of emphasis on "subject matter." The American courts under the written constitutions accepted the rule that "the parties cannot give jurisdiction where the law does not."¹⁴⁶ This much was a part of the legal folklore, and although a few courts failed to recognize the no consent rule in the early years of the nineteenth century, most of them accepted it readily. It made sense to courts which had to look for their powers, not in an amorphous tradition, but in written instruments.¹⁴⁷ It seemed particularly useful in the context of a federal system.¹⁴⁸ Yet the early American statement, in the context of a federal system.¹⁴⁸ Yet the early American statement that parties could *never* give jurisdiction, was far too broad.

¹⁴⁵ *Price v. Morgan*, 2 Mees. & W. 53, 55, 150 Eng. Rep. 665, 666 (K.B. 1836), per Parke, B.: "I should hesitate, when the writ has been obtained by the plaintiff himself, to grant a new trial on the ground of misdirection [of the writ to] the under-sheriff," *i.e.*, on the ground that the writ was directed for trial to a court of no jurisdiction except in debt.

In the eighteenth century it is comparatively easy to find cases that treat subject matter jurisdiction as waivable. See *Penn v. Baltimore*, 1 Ves. Sen. 444, 27 Eng. Rep. 1132 (Ch. 1750): after an objection to the jurisdiction that can only be considered an objection to the subject matter jurisdiction, the court said: "[A]nswering submits to the jurisdiction . . . : yet a court of equity, which can exercise a more liberal discretion than common law courts, if a plain defect of jurisdiction appears at the hearing will no more make a decree, than where a plain want of equity appears." *Id.* at 447, 27 Eng. Rep. at 1134. Some, not obviously misprints, will state the rule in reverse: "[I]f the Court has not a general jurisdiction of the subject-matter, he must plead to the jurisdiction and cannot take advantage of it upon the general issue." *Mostyn v. Fabrigas*, 1 Cowp. 161, 172, 98 Eng. Rep. 1021, 1027 (K.B. 1774); see, however, the discussion of this case in *Moore v. Houston*, 3 Serg. & R. 169 (Pa. 1817). Even where consent is not allowed to confer jurisdiction the term subject matter is not likely to be used. See, *e.g.*, *The Queen v. Judge of the County Court of Shropshire*, 20 Q.B.D. 242 (1887); *In re Aylmer*, 20 Q.B.D. 258 (1887); *Lawrence v. Wilcock*, 11 Ad. & El. 941, 113 Eng. Rep. 672 (K.B. 1840), all cited as expressing the "subject matter" test in 17 AM. & ENG. ENCY. LAW 1061 (2d ed. 1900).

¹⁴⁶ See, *e.g.*, *Bent's Ex'r v. Graves*, 3 McCord 280 (S.C. 1825); *Low v. Rice*, 8 Johns. 409 (N.Y. Sup. Ct. 1811).

¹⁴⁷ This had been so from the beginning in the American colonies. See HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS *passim*, but especially 140 (law of logic), 141, 143 (Scripture as a source of law) (1960). Jurisdiction in England derived from tradition, prescription, fiction; its boundaries did not seem final to Englishmen. Compare *M'Call v. Peachy*, 5 Va. (1 Call.) 48 (1798).

¹⁴⁸ A fair number of cases after the American Constitution arose in a multi-sovereign context. See, *e.g.*, *Vanderheyden v. Young*, 11 Johns. 150 (N.Y. 1814); *Moore v. Houston*, 3 Serg. & R. 169 (Pa. 1817).

It had to be limited. The specific problem, never explicitly articulated, but nevertheless real, was this: how shall we narrow the rule against jurisdiction by consent; how shall we phrase a rule that permits consent?

The term "subject matter" was handy. Coke had spoken of "cause," Holt of "subject matter," and American decisions had already used the term in a quite different sense, *i.e.*, to mean a specific *res*.¹⁴⁹ The term had the advantage of having no referent; it could mean anything. By the middle of the nineteenth century the American courts were no longer saying that parties can *never* consent to jurisdiction. The "subject matter" test was gaining general usage.¹⁵⁰

The textwriters' mania for generalization and for labels encouraged acceptance of the term. In the latter part of the nineteenth century Freeman's first book¹⁵¹ on judgments puts forth the subject matter test somewhat cautiously. But he provided a theory for the rule: only the law can confer jurisdiction of the "subject matter." He neatly bypassed the fact that the *law* also confers jurisdiction of the person.¹⁵² Thus Bracton's premise, that all jurisdiction flows from the sovereign, after five hundred years produced the conclusion that today permits the parties two bites at the cherry. In that half a millenium a single expression of policy in support of such a rule adorns our books: "The jurisdiction of the common law must not be encroached upon."¹⁵³

CONCLUSION

Policies for the no consent rule have, of course, been present in a curious farrago of constitution-making, jealousy and conceptual accident. But almost every reason that history suggests to support the rule against jurisdiction by consent has disappeared. Even the problems of our own federal system do not measure up to the heated conflict of the English courts. We need not look to the jurisdictional

¹⁴⁹ See *Rose v. Himely*, 8 U.S. (4 Cranch) 241 (1808).

¹⁵⁰ Kentucky used the subject matter test early in *Lindsey v. M'Clelland*, 4 Ky. (1 Bibb.) 262 (1808). The term had a general acceptance in the middle of the nineteenth century and after. *Hobart v. Frost*, 5 Duer. 672 (N.Y. 1856). The subject matter test was argued before the Virginia court, which rejected it. *M'Call v. Peachy*, 5 Va. (1 Call.) 48 (1797).

¹⁵¹ FREEMAN, JUDGMENTS 87 (1873).

¹⁵² *Id.* at 90.

¹⁵³ See, *e.g.*, *The Admiralty Case*, 12 Co. Rep. 77, 77 Eng. Rep. 1355 (K.B. 1610).

concept to gain adequate appellate review of cases otherwise barred from revision. A written constitution gives us a basis for insuring reasonable rules of law and procedure wholly independent of the jurisdictional concept. Neither is it required to build the larger framework of power, and we no longer need fear that a court which takes an unwarranted jurisdiction may, by so doing, acquire jurisdiction by prescription or by "common error." Except, perhaps, in the divorce cases, the curious notion that a court applied only one system of law—*its* law¹⁵⁴—is dispelled by a fairly developed system of conflict of laws.

Furthermore, it is apparent today that the problem of our judicial system is the problem of overburden rather than under-work, the problem of finality rather than the problem of injustice. When the no consent rule was developing, *res judicata* was not the significant legal tool that it is today, and the policies of *res judicata* were not weighed in the balance.

Possibly there are policies peculiar to our own judicial system that justify the use of the no consent rule, even if it forces two trials where one is enough. For example, the no consent rule is sometimes used to protect unrepresented third parties.¹⁵⁵ The same protection could be gained, if desirable, by limiting the *res judicata* effect of a judgment rather than by voiding it altogether. But present policies in favor of the no consent rule cannot be explored here.

The history of the rule, on the other hand, suggests one policy worth mentioning. Coke analogized¹⁵⁶ courts to members of the body. Each had a function. "If the eie [eye]," he said, usurps the work of the hand, this would "assuredly produce disorder and darkness, and bring the whole body out of order. . . ." This analogy

¹⁵⁴ See Hastie, J., dissenting in *Alton v. Alton*, 207 F.2d 667, 684-85 (3d Cir. 1953).

¹⁵⁵ See *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953), where both spouses in a divorce action appeared in a non-domiciliary territory. The judge raised the jurisdictional question and denied his jurisdiction. On appeal, *held*, no jurisdiction. The public interest of the domiciliary state must be protected by denial of jurisdiction. The real problem, as is sometimes recognized, is not so much a question of jurisdiction as it is a question of *res judicata*, or the range of force a judgment should have as against unrepresented third parties. Cf. *Sampsell v. Superior Court*, 32 Cal. 2d 763, 197 P.2d 739 (1948). The problem of the unrepresented third-party, whether the domiciliary state or an individual, arises only where the judgment purports to adjudicate in rem a status in which others may be interested.

¹⁵⁶ *Preface* to 4 COKE.

may suggest to a modern reader a test for consent to jurisdiction: is the court involved endowed with so much expertise that it, and only it, can reasonably try the case? If so, no consent of the parties should impair its province. But as between two courts of equity, do we need to be concerned if one mistakenly assumes jurisdiction, and the parties do not make timely objection? Or should we be concerned only if the "proper" court, like the "eie," is the only member that can do the proper job? History, at least, suggests little more.