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Menashe v. Sutton[1] had been instituted in a federal district court, and Sutton's motion to dismiss for lack of jurisdiction had been overruled. This ruling was not appealed. During the proceedings petitioner had refused to testify, and consequently was committed for contempt. In *United States* ex rel. *Sutton v. Mulcahy,*[2] petitioner by habeas corpus sought to reopen the issue of jurisdiction which had been determined in *Menashe v. Sutton.* In its decision the Second Circuit Court of Appeals *held:* even assuming that the district court had not had jurisdiction,[3] in the absence of special circumstances, the lower court's determination that it did have jurisdiction was immune from collateral attack. No special circumstances were here found.

This decision extends the holding in *United States v. Jaeger.*[4] There the petitioner was denied habeas corpus because he had failed to appeal the very order for violation of which he was committed for contempt. Here the order which petitioner had violated was not even appealable.[5] His error was in not appealing from the court's decision that it had jurisdiction to hear the case, a decision prior to and only indirectly related to the order which he violated. The two cases are otherwise substantially similar. Neither has been reviewed by the Supreme Court. They raise the question whether res judicata should be applied where the attack on jurisdiction, though technically collateral, arises directly out of the original action.

It is now well established that res judicata applies to jurisdictional as well as to other judicial determinations where the attack is by a subsequent unrelated action.[6] *Stoll v. Gottlieb*[7] applied it where the issue

[1] 71 F. Supp. 103 (S. D. N. Y. 1947).

[2] 169 F. 2d 94 (C. C. A. 2d 1948).

[3] Jurisdiction depended on constitutionality of the amendment extending diversity of citizenship privileges to citizens of the territories and the District of Columbia, 36 STAT. 1091 (1911), as amended, 54 STAT. 143 (1940), 28 U. S. C. §41(1)(b) (1946). The amendment was held unconstitutional in National Mutual Ins. Co. v. Tidewater Transfer Co., 165 F. 2d 531 (C. C. A. 4th 1947), *cert. granted,* 68 Sup. Ct. 746 (1948).

[4] 117 F. 2d 483 (C. C. A. 2d 1941).

[5] Petitioner had applied for a stay of the order to testify pending appeal from it, but the application was denied by the circuit court of appeals on the ground that the order was interlocutory and hence not appealable. United States *ex rel.* Sutton v. Mulcahy, 169 F. 2d 94 (C. C. A. 2d 1948).

[6] Angel v. Bullington, 330 U. S. 183 (1947); Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381 (1940); Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371 (1940); Treinies v. Sunshine Mining Co., 308 U. S. 66 (1940); Stoll v. Gottlieb, 305 U. S. 165 (1938); *cf.* Baldwin v. Iowa State Travelling Men's Ass'n, 283 U. S. 522 (1930); Dowell v. Applegate, 152 U. S. 327 (1893); Des Moines Navigation Co. v. Iowa Homestead Co., 123 U. S. 255 (1887). *But cf.* Vallely v. Northern Fire & Marine Ins. Co., 254 U. S. 348 (1920) (bankruptcy court declared insurance company an involuntary bankrupt in spite of an express statutory exemption; held not res judicata, but null and void,

of jurisdiction had been actually contested in the prior action, and *Chicot County Drainage District v. Baxter State Bank*[8] applied it where the court had impliedly determined its jurisdiction by assuming to hear the case. In both of these cases a bankruptcy court had determined that it had jurisdiction to dispose of certain rights of bondholders under a reorganization plan. Plaintiffs, though they had been parties to the bankruptcy proceedings, had not appealed. Later when they tried to raise the question of the bankruptcy court's jurisdiction in an independent unrelated action on the bonds, the Supreme Court held in both cases that the prior determination of jurisdiction, though wrong, was res judicata. These cases differ from the instant case in that here the attack, although it arose in a petition for habeas corpus, and so, strictly viewed, was a collateral attack, was from a practical standpoint subsidiary to the action out of which it originated.[9] Thus the rule of the principal case extends res judicata a little further into the field of jurisdictional determinations than did previous decisions.

The court in the *Sutton* case emphasized that habeas corpus is still available under exceptional circumstances even when the issue of jurisdiction has been determined and no appeal taken.[10] This is in accord with expressed views of the Supreme Court.[11] It is not yet altogether clear just what will be considered exceptional circumstances, as the qualification has rarely been invoked in order to grant the writ.[12] More

though the company had cooperated with the trustee in bankruptcy throughout his administration).

[7] 305 U. S. 165 (1938) (bankruptcy court released guarantor from liability on corporate bonds, an act in excess of its jurisdiction).

[8] 308 U. S. 371 (1940) (jurisdiction of a corporate reorganization was based on a statute subsequently held unconstitutional).

[9] In view of the close relation of the two actions, would it not be proper as well as more consistent with the courts' express recognition of exceptions under special circumstances, to consider them within the framework of a single action and therefore apply law of the case principles instead of strict res judicata? The practical result would be substantially the same, but law of the case, being a practice of courts rather than a binding rule, allows the necessary flexibility without interfering with the usual absolute quality of res judicata. Messinger v. Anderson, 255 U. S. 436 (1911). The courts, however, have not discussed law of the case in decisions on such actions.

[10] United States *ex rel.* Sutton v. Mulcahy, 169 F. 2d 94, 96 (1948) ("Although the writ may still be availed of, despite neglect to appeal, in exceptional cases, we do not think the present is such a case.").

[11] *E.g.*, Bowen v. Johnston, 306 U. S. 19, 27 (1939) (". . . the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.").

[12] *E.g.*, United States *ex rel.* Stabler v. Watkins, 168 F. 2d 883 (C. C. A. 9th 1948) (default judgment cancelling a citizen's naturalization papers was based on jurisdiction gained by service of summons to a place ascertained to be his residence by hearsay affidavits only); Bowen v. Johnston, *supra* note 11 (jurisdiction depended on whether the federal government had exclusive jurisdiction over territory ceded by Georgia, and conflicting state statutes had to be construed to determine the answer).

often the courts have recognized the qualification only to point out that exceptional circumstances do not exist.[13]

One other limitation of the rule of the principal case might be implied from the fact that in the cases thus far decided where jurisdiction was held res judicata in the face of a collateral attack arising directly out of the original action, the issue of jurisdiction had been actually contested at the earlier stage.[14] The question is open whether a mere assumption of jurisdiction without actual contest would be res judicata when so attacked. The general rule is that res judicata applies as well where an issue might have been contested as where it was a real issue.[15] There is authority, however, indicating that whether or not jurisdiction was actually contested would be a factor in determining whether or not the circumstances were sufficiently exceptional to warrant allowing collateral attack.[16]

United States v. United Mine Workers[17] should next be considered, because it, like the *Sutton* case, deals with contempt committed in the course of proceedings to which defendant was a party where the defense was that the court had no jurisdiction. The court issued a temporary anti-strike injunction in order to preserve the status quo until it could exercise its power to determine whether or not it had jurisdiction to make the order permanent. The injunction was violated. The Supreme Court, in its opinion in the contempt prosecution, found that the lower court had actually been within its jurisdiction, but stated as an alternative holding that even if it had not actually possessed the requisite jurisdiction to make the order, the court was entitled to enforce obedience to the temporary injunction as the only means available to assure it the effective power to determine its own jurisdiction. Therefore the court held that disobedience of the temporary injunction was contempt without regard to whether or not the court had jurisdiction. The present case differs in that here there was no necessity

[13] Sunal v. Large, 332 U. S. 174, 179 (1947) (". . . the situations in which habeas corpus has done service for an appeal are the exceptions . . . habeas corpus is increasingly denied in case an appellate procedure was available for correction of the error." Here the petitioner had not appealed because of a prevailing view, founded on interpretation of a Supreme Court decision, that appeal was not available under the circumstances. After the time for appeal had expired, a later Supreme Court decision showed that the earlier interpretation had been wrong. Habeas corpus denied; not exceptional circumstances).

[14] In Bowen v. Johnston, 306 U. S. 19 (1939), the issue was assumed without actual contest, but since exceptional circumstances were found it is not clear what significance would be given to the fact taken alone.

[15] Angel v. Bullington, 330 U. S. 183 (1947), Note, 26 N. C. L. REV. 60 (1947); Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371 (1940).

[16] RESTATEMENT, JUDGMENTS, §10(2)(d) ("Among the factors appropriate to be considered in determining that collateral attack should be permitted are . . . the question of jurisdiction was not actually litigated."). *But see id.* §10(2)(d), comment (c).

[17] 330 U. S. 258 (1947).

of preserving the court's power to determine its own jurisdiction; that power had been exercised. Further, the nature of the case differs substantially from a labor injunction case, in which time is of the essence; here no urgent necessity compelled the court to enforce the order regardless of whether or not it was based on proper jurisdictional facts. Thus the *Mine Workers* case does not seem applicable to the circumstances of the principal case. It leaves open, so far as the Supreme Court is concerned, whether res judicata should be extended to a collateral attack on jurisdiction which arises directly out of the original action, where no such necessity exists.

There is no doubt that the *Sutton* case represents a logical development in the line of cases which in the past decade have extended res judicata into the previously exempt field of jurisdiction over the subject matter.[18] Jurisdiction as so used should be distinguished from the lack of jurisdiction to issue a particular order which may result from developments in the course of the trial. It is confined to decisions by a court on its initial jurisdiction to conduct the litigation. So construed the extension of res judicata to jurisdictional determinations seems a wise policy. It places no restraint on the use of collateral attack where there has been no hearing which meets the requirements of due process.[19] Nor does it preclude collateral attack by a person not a party to the original action, who had no right of appeal from the first determination.[20] It merely requires that a person who was a party to the original action proceed in the orderly course of law with his appellate remedies in the case of a jurisdictional determination just as he would be required to do in the case of any other judicial decision. Use of habeas corpus to attack a jurisdictional determination is eliminated unless there are exceptional circumstances outweighing the policy favoring cessation of litigation. This appears reasonable, as there is no generally applicable rule which requires special treatment for decisions on jurisdiction. The requirements of justice are met when a defendant has had a trial with all the protection afforded by the due process provision of the Constitution, before an impartial tribunal, and with full opportunity for appeal. In the absence of exceptional circumstances there appears no reason why, having acquiesced until the time for appeal had expired, a

[18] See note 6 *supra.*

[19] Townsend v. Burke, 68 Sup. Ct. 1252 (1948) (lack of counsel under circumstances which showed that defendant had been taken advantage of by the prosecution; habeas corpus granted); Wade v. Mayo, 68 Sup. Ct. 1270 (1948) (no counsel for eighteen-year-old defendant who was unable to adequately represent himself; habeas corpus granted).

[20] Fetzer v. Johnson, 15 F. 2d 145 (C. C. A. 8th 1926). Quaere whether a witness with a statutory right of appeal would be bound if he failed to exercise that right?

person should be heard to complain that he was tried by the wrong court.[21]

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Courts—Venue—Attempts to Limit Venue Provisions of the Federal Employers' Liability Act

Congress has provided a special venue statute for cases arising under the Federal Employers' Liability Act which permits the employee to sue (1) at the residence of the defendant, (2) where the cause of action arose, or (3) where the railroad is doing business.[1] Many employees have used the third provision as a means of "shopping" for an advantageous forum, or as a means of forcing railroads to compromise suits rather than defend in a forum which, although technically proper, is highly inconvenient to the railroad. The railroads have attempted to avoid the burdens of such suits by various means, the most recent of which has been a contract with the injured employee limiting the venue. There had been a conflict in the district courts[2] as to the validity of this type of contract, but recently the Sixth Circuit Court of Appeals decided that such an agreement is void under Section 5 of the FELA as an attempt by the railroad to exempt itself from liability under the Act.[3] The court looked to the history of the special venue provisions and concluded that they are an inherent part of the employer's liability. Thus, the latest device to narrow these troublesome provisions has failed.

It is important to note at the outset the purpose of the special venue statute of the FELA. Originally the venue of actions under that Act was governed by the general provisions applicable to federal courts. In

[21] There was a peculiarity in the Sutton case which has not been mentioned, *viz.*, the petition for habeas corpus was brought within the time allowed for appeal. It would be rare that counsel would make such an error, but where, as here, it occurs, it seems to penalize the petitioner unduly for his attorney's error in choice of remedies to refuse to consider the jurisdictional objection because of the guise in which it was introducd. See Circuit Judge Frank, dissenting in United States *ex rel.* Sutton v. Mulcahy, 169 F. 2d 94 (1948) ("I see no reason why irrational procedural formalism, judicial red-tape-ism, yielding injustice, should not be repudiated in the appellate process, when no statute stands in the way.").

[1] 36 STAT. 291 §6 (1910), 45 U. S. C. §56 (1946).

[2] Holding such contracts valid on the theory that venue is merely the place of enforcing liability are: Roland v. Atchison, T. & S. F. Ry., 65 F. Supp. 630 (N. D. Ill. 1946); Herrington v. Thompson, 61 F. Supp. 903 (W. D. Mo. 1945); Clark v. Lowden, 48 F. Supp. 261 (D. Minn. 1942); Detwiler v. Lowden, 198 Minn. 185, 269 N. W. 367 (1936). Holding such contracts invalid are: Krenger v. Pennsylvania R. R., 8 F. R. D. 65 (E. D. N. Y. 1947); Fleming v. Husted, 68 F. Supp. 900 (S. D. Iowa 1946); Sherman v. Pere Marquette Ry., 62 F. Supp. 590 (N. D. Ill. 1945) ("The beneficial effects of the statute should not be whittled away by the courts by distinguishing between adjective and substantive rights. . . ."); Peterson v. Ogden U. Ry., 110 Utah 573, 175 P. 2d 744 (1946). *Compare* Porter v. Fleming, 74 F. Supp. 378 (D. Minn. 1947).

[3] Akerly v. New York C. R. R., 68 F. 2d 812 (C. C. A. 6th 1948).