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relations."[57] It is interesting to speculate what brand of federalism strips an admittedly valid state procedural rule of its efficacy and finality and forces a busy state court to reconsider a case which under its own procedure—a procedure concededly designed to serve a legitimate state purpose—had been heard and fairly determined.

In *Fay v. Noia,* Mr. Justice Harlan predicted that "the effect of the approach adopted by the Court is, indeed, to do away with the adequate state ground rule entirely in every state case, involving a federal question, in which detention follows from a judgment."[58] It would seem that the Court in *Henry,* with its reliance on the collateral effect of *Fay,* substantiates the warning by Mr. Justice Harlan,[59] and that a concept—by many thought basic to a federal system—has in the course of two years been substantially diluted if not fatally undermined.

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Jurisdiction—Collateral Attack—Bootstrap Doctrine

In the recent case of *McKee v. Hassebroek,*[1] the United States Court of Appeals for the Tenth Circuit affirmed a federal district court decision allowing the heirs of a joint owner of United States savings bonds to attack collaterally an Oklahoma probate court's distribution of those bonds as a part of the estate of the other joint tenant. The joint tenants, husband and wife, had apparently agreed that the bonds would be included in the husband's estate. The wife, who was co-executrix of her husband's estate and devisee of a life estate in his personal property, considered the bonds a part of his estate and never asserted her own ownership, except as life tenant under the will. After her death intestate, the wife's heirs-at-law gained possession of the bonds, and the remaindermen under the husband's will brought an action in the federal district court to recover them. The Tenth Circuit Court of Appeals affirmed the district court's

[57] Henry v. Mississippi, 379 U.S. 443, 452 (1965).

[58] Fay v. Noia, 372 U.S. 391, 469-70 (1963).

[59] It should be noted in this respect that the Court in *Henry* adopts the same "waiver" concept as that set out by the Court in *Fay*—a deliberate by-passing of state procedural rules. The fact that the Court relies on *Fay* in applying this concept would seem to lend strong support to the conclusion that only the most flagrant procedural defaults will prevent a person detained pursuant to a state judgment from asserting his federal claims either on direct appeal or in a collateral habeas corpus proceeding.

[1] 337 F.2d 310 (10th Cir. 1964).

finding that the state probate court had had no jurisdiction over the savings bonds, since federal regulations, which provide that the surviving joint tenant shall receive absolute title to such bonds upon the death of his co-tenant, must prevail. Thus, the savings bonds were never a part of the husband's estate and the wife's heirs were found to be the proper claimants.

The court of appeals did not concern itself with the question of whether a collateral attack should be allowed under these circumstances, assuming that "since the bonds were never a part of the decedent-husband's estate, the probate court did not acquire jurisdiction over them and the purported exercise of jurisdiction was a nullity,"[2] and collateral attack therefore proper. The court thus adhered to the doctrine of *coram non judice:* if the court rendering a judgment had no jurisdiction, the judgment is void for all purposes.[3] The doctrine of *coram non judice* as applied to jurisdiction of the subject matter has been modified, however, by the United States Supreme Court's decisions that the doctrine of res judicata applies to a court's express[4] or implied[5] determination of its own jurisdiction of the subject matter when the court has jurisdiction of the parties, so that such a determination will prevail over collateral attack of its judgment for want of jurisdiction.

The doctrine of res judicata is grounded in the belief that economy in legal processes and certainty and finality of court judgments are desirable and perhaps necessary elements of a workable legal system.[6] Generally res judicata is thought of as applying to decisions on the merits of an action rather than to decisions on jurisdiction. But it is obvious that someone must decide whether or not a court has jurisdiction of a particular case, and that decision necessarily rests initially with the court in which the action is brought.[7] The Supreme Court has indicated that as long as there

[2] *Id.* at 312.

[3] *E.g., In re* Sawyer, 124 U.S. 200 (1888), where the Court quoted Elliot v. Peirsol, 26 U.S. (1 Pet.) 328, 340 (1828): "But if it [a court] act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void." 124 U.S. at 220. See 1 FREEMAN, JUDGMENTS § 322 (5th ed. 1925).

[4] Stoll v. Gottlieb, 305 U.S. 165 (1938).

[5] Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

[6] See 2 FREEMAN, *op. cit. supra* note 3, § 626; *Developments in the Law—Res Judicata,* 65 HARV. L. REV. 818 (1948).

[7] Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or

is no blatant lack of jurisdiction,[8] it is more desirable to give this decision finality beyond appeal than to allow collateral attacks which would frequently result in mere second-guessing. If the rendering court has jurisdiction of the parties so that all have notice and there is no question of lack of due process, it is not unreasonable to require a timely appeal by any party who wishes challenge the court's jurisdiction of the subject matter. "After a party has had his day in court, with opportunity to present his evidence and his view of the law," the Court has said, "a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."[9]

There is no doubt that the state probate court in *McKee* was wrong in its distribution of the savings bonds, for the Supreme Court, in *Free v. Bland*,[10] held that the federal regulations controlling distribution of jointly owned savings bonds must prevail over local laws under the supremacy clause of the Constitution. A wrong decision, however, is not necessarily jurisdictional.[11] And, even if the probate court's error was jurisdictional, perhaps the court should have considered whether the "bootstrap doctrine"[12] should be applied.

It is arguable that the mistake of the Oklahoma probate court in distributing the bonds was mere error which could be corrected only on appeal,[13] since otherwise the doctrine of res judicata would apply to the decision on the merits. A probate court has juris-

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whether its geographical jurisdiction covers the place of the occurrence under consideration. Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter.

Stoll v. Gottlieb, 305 U.S. 165, 171-72 (1938).

[8] In Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940), the Court stressed the apparent regularity of the proceeding of the trial court whose judgment was being collaterally attacked. *Cf.* United States v. UMW, 330 U.S. 258 (1947), where the Court, in sustaining a contempt conviction being attacked on grounds that the rendering court had no jurisdiction, stated: "a different result would follow were the question of jurisdiction frivolous and not substantial. . . ." *Id.* at 293.

[9] Stoll v. Gottlieb, 305 U.S. 165, 172 (1938).

[10] 369 U.S. 663 (1962).

[11] Burnet v. Desmornes Y Alvares, 226 U.S. 145 (1912).

[12] Application of res judicata to jurisdictional decisions is commonly called the "bootstrap doctrine." Note, *Res Judicata and Jurisdiction: The Bootstrap Doctrine*, 53 HARV. L. REV. 652 (1940).

[13] See generally CHAFEE, *Lack of Power and Mistaken Use of Power—1*, in SOME PROBLEMS OF EQUITY 296 (1950).

diction over the "estate" of a decedent,[14] and necessarily that court must determine initially what the estate is.[15] Can it be said that a mistake as to the total content of the "estate" is jurisdictional?[16] The Supreme Court considered a somewhat analogous situation in *Jackson v. Irving Trust Co.*[17] In that case, the United States attempted to attack collaterally a judgment rendered in a statutory cause of action on grounds that the statute did not authorize recovery by "enemies" of the United States and that the successful claimant was in fact an "enemy." The Court rejected the argument that the rendering court's mistake was jurisdictional and held that appeal was the only proper remedy. Also relevant to the question of whether a particular mistake is erroneous or jurisdictional are cases in which a court of equity has granted equitable relief when there was, in fact, an adequate remedy at law. Some courts have called such a mistake jurisdictional.[18] Chafee, in *Some Problems of Equity,* has made a strong argument that such mistakes are not jurisdictional at all, but mere error, since there is no justifiable reason to single out a particular fact and "put it into a separate category as 'jurisdictional'."[19] To interpret jurisdiction of the subject matter to mean jurisdiction of a particular object rather than jurisdiction over a general area of the law could conceivably open our courts to a virtual flood of relitigation, for the logical conclusion of such an interpretation is that any wrong decision is jurisdictional. Such a view would forsake the rule that "the test of jurisdiction is not right decision, but the right to enter upon

[14] See 3 PAGE, WILLS § 26.3 (Bowe-Parker rev. 1961).

[15] See *In re* Griffin's Estate, 199 Okla. 676, 189 P.2d 933 (1947).

[16] Some courts have held that probate courts have jurisdiction to try title contested under joint tenancy and community property laws. In Robison v. Sidebotham, 243 F.2d 16 (9th Cir. 1957), the court refused to allow a collateral attack by a wife on a probate's distribution of certain property as part of her ex-husband's estate, even though she claimed that the property was not and never had been part of the estate. The wife had submitted a petition claiming the land in probate court, and the present court found that she was therefore not a "stranger to the estate" and was bound by the probate decision. The court mentioned the fact that in California, community property is not subjected to inheritance tax, which would seem to indicate that the state does not consider it a part of an "estate." See *In re* Griffin's Estate, *supra* note 15.

[17] 311 U.S. 494 (1941).

[18] *E.g.,* Denison v. Keck, 13 F.2d 384 (8th Cir. 1926).

[19] CHAFEE, *op. cit. supra* note 13, at 329. See Woodrow v. Ewing, 263 P.2d 167 (Okla. 1953), where the court refused to allow a collateral attack on a proceeding to quiet title on grounds that the person in whom title was quieted was not in fact the owner. The court said this was error only.

the inquiry and make some decision."[20] It would seem that the probate court in *McKee* must necessarily have made some inquiry as to the status of the bonds and come to some decision about them, and, in Chafee's view, "if a court is bound to come to some conclusion, it has jurisdiction."[21]

Jurisdiction of the probate court in *McKee* is further substantiated by the existence in the law of wills of the doctrine of election,[22] application of which is within probate jurisdiction.[23] Under that doctrine, when a testator devises property actually belonging to another to a third party and also devises certain of his own property to the former, the true owner of the property thus devised to the third party must elect either to take his own property and renounce the gift under the will, or renounce his own property and take the gift.[24] Thus, if *T* devises property to *A* and at the same time devises *A*'s property to *B*, *A* must relinquish his own property to *B* in order to take the property devised to him. Acceptance of benefits under the will implies election to take under the will—no express and formal mode of election is required.[25] The *McKee* court refused to apply estoppel on the basis of the wife's conduct because it found she did not benefit from the inclusion of her bonds as part of the estate. This conclusion would seem to be incorrect under the doctrine of election, for the wife in *McKee* was devised and received a life estate in all her husband's personal property.

Hence, it is apparent that under the doctrine of election probate courts do have jurisdiction to distribute property belonging to persons other than the testator if such property owners elect to accept the terms of the will. It would therefore follow that distribution of such property in violation of the federal regulations is more properly considered erroneous than void.[26]

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[20] United States v. Ness, 230 Fed. 950, 953 (8th Cir. 1916).

[21] CHAFEE, *op. cit. supra* note 13, at 308.

[22] See generally 5 PAGE, *op. cit. supra* note 14, §§ 47.1-.46.

[23] See *In re* Williams' Estate, 272 P.2d 397 (Okla. 1954).

[24] *E.g.*, Brossenne v. Schmitt, 91 Ky. 465, 16 S.W. 135 (1891); Brown v. Brown, 42 Minn. 270, 44 N.W. 250 (1890); Bennett v. Bennett, 70 Ohio App. 187, 45 N.E.2d 614 (1942); Fox v. Fox, 117 Okla. 46, 245 Pac. 641 (1926) (dictum). See 5 PAGE, *op. cit. supra* note 14, § 47.13. The defendants in *McKee* would, of course, be bound by their intestate's election as privies.

[25] *E.g.*, Job Haines Home for Aged People v. Keene, 87 N.J. Eq. 509, 101 Atl. 512 (1917). See Matteson v. White, 98 Okla. 190, 224 Pac. 499 (1924).

[26] For cases holding that erroneous judgments are res judicata, see Reed v. Allen, 286 U.S. 191 (1932); Goldsmith v. M. Jackman & Sons,

Assuming lack of jurisdiction of the probate court, however, perhaps the federal court should have disallowed the collateral attack under the bootstrap doctrine. The doctrine has been applied by the Supreme Court in situations where there was a collateral attack on the judgment of a federal court in another federal court[27] or in a state court,[28] but it apparently has not been applied to a state court's determination of its own jurisdiction when that court's judgment has been attacked in a federal court proceeding. The Court has intimated that when there is no "countervailing" federal policy, bootstrap should be applied.[29] However, there is a strong indication that the Court considers the application of the doctrine to a state court judgment to depend upon whether the state itself would apply it.[30] This would appear to be the correct view under section 1738 of the Judicial Code,[31] which requires federal courts to give full faith and credit to state court proceedings. Oklahoma seems to have adopted the bootstrap doctrine.[32]

It can be argued that the bootstrap doctrine should not be applied in *McKee* in any event, since a probate court is an inferior court. The general rule is that an inferior court judgment carries no presumption of jurisdiction, so that it is subject to collateral attack unless jurisdiction clearly appears on the face of the proceedings.[33] However, probate courts usually receive the benefit of a

Inc., 327 F.2d 184 (10th Cir. 1964); Providential Dev. Co. v. United States Steel Co., 236 F.2d 277 (10th Cir. 1956).

[27] Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

[28] Stoll v. Gottlieb, 305 U.S. 165 (1938).

[29] Kalb v. Feuerstein, 308 U.S. 433 (1940).

[30] *Ex parte* George, 371 U.S. 72 (1962).

[31] 28 U.S.C. § 1738 (1958):

> The records and judicial proceedings of any court of any . . . State, Territory or Possession, or copies thereof . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

It can be argued that § 1738 does not require recognition of bootstrap jurisdiction at all, especially since it was enacted substantially in 1790 (ch. 11, 1 Stat. 122), before the bootstrap doctrine was developed.

[32] Consolidated Motor Freight Terminal v. Vineyard, 193 Okla. 388, 143 P.2d 610 (1943); Fitzsimmons v. Oklahoma City, 192 Okla. 248, 135 P.2d 340 (1942).

[33] *E.g.*, Kempe's Lessee v. Kennedy, 9 U.S. (5 Cranch) 173 (1809) (Chief Justice Marshall's dictum). See 1 FREEMAN, *op. cit. supra* note 3, § 397. Although the court whose judgment was being attacked in the *Chicot County* case was an inferior federal court, such courts are not considered "inferior" courts for this purpose. In the case of McCormick v. Sullivant, 23 U.S. (10 Wheat.) 192 (1825), the Court said:

presumption of jurisdiction for this purpose,[34] and Oklahoma is clearly in accord.[35] Oklahoma's county courts have general probate jurisdiction,[36] and "their orders and judgments should be accorded like force, effect, and legal presumption as the judgments and decrees of other courts of general jurisdiction. . . ."[37] Further, the Oklahoma Supreme Court has held[38] that probate jurisdiction includes the power to decide whether title to land had vested in a wife at the death of her husband, under a state joint-ownership statute, or was the joint property of both husband and wife, the court considering this an "incidental question . . . within the probate jurisdiction of the county court."[39] The bootstrap doctrine then would seem to be applicable in *McKee* if the federal court gives the state court judgment the effect it would receive in the state itself.

The Supreme Court has created an exception to the bootstrap doctrine: when "the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction,"[40] collateral attack is allowed. The Court has applied the exception on two occasions, in the cases of *Kalb v. Feuerstein*[41] and *United States v. United States Fid. & Guar. Co.*[42] In *Kalb,* the Court decided that the Frazier-Lemke Act had pre-empted jurisdiction of a state court to dispossess the petitioners during pendency in a federal bankruptcy court of an action brought under the act. The Court found congressional intent to make such a pre-emption expressed in the act itself, which act provided that

> They [inferior federal courts] are all of limited jurisdiction; but they are not, on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities.

Id. at 199.

[34] See 3 PAGE, *op. cit. supra* note 14, § 26.142.

[35] Tiger v. Drumright, 95 Okla. 174, 217 Pac. 453 (1923).

[36] OKLA. CONST. art. VII, § 13.

[37] Tiger v. Drumright, 95 Okla. 174, 176, 217 Pac. 453, 455 (1923).

[38] *In re* Griffin's Estate, 199 Okla. 676, 189 P.2d 933 (1947).

[39] *Id.* at 680, 189 P.2d at 937. A Nebraska court allowed a probate court established under a constitutional provision (NEB. CONST. art. V, § 16) very similar to that of Oklahoma (OKLA. CONST. art. VII, §§ 12-13) to hear a declaratory judgment action to determine ownership of certain United States savings bonds as between decedent and her daughter, who were named as co-owners on the bonds. *In re* Hendricksen's Estate, 156 Neb. 463, 56 N.W.2d 711 (1953).

[40] RESTATEMENT, JUDGMENTS § 10 (1942).

[41] 308 U.S. 433 (1940).

[42] 309 U.S. 506 (1940).

"proceedings for foreclosure of a mortgage on land . . . or for recovery of possession of land" shall not be maintained or instituted in other courts except with permission of the bankruptcy judge.[43] Further, the act stated that "all such property shall be under the sole jurisdiction and control of the court in bankruptcy. . . ."[44] In *United States Fid. & Guar. Co.,* the Court held that the policy of governmental immunity outweighed the policy of res judicata when the government had not consented to the suit being attacked. Lower federal courts have made a few additions to the list of "countervailing policies."[45]

How strong is the policy of governmental control over distribution of joint-tenancy savings bonds? Unlike the statute involved in *Kalb,* the distribution regulation involved in *McKee* was not legislated by Congress, but was a regulation of the Secretary of the Treasury[46] made under Congress's general authorization.[47] This would seem to indicate that Congress considered it less important than the Frazier-Lemke Act, in which it expressly manifested its intent to create exclusive federal jurisdiction, and certainly it has less universal effect. The Frazier-Lemke Act was designed as a major force in combating the effects of economic depression, whereas the savings-bond regulation primarily effects only co-tenants of bonds and has no significant importance beyond the parties themselves. The policy of such a regulation would not seem to be strong enough to defeat application of the doctrine of res judicata, which has implications far beyond the parties to any particular litigation. Neither would the regulation seem comparable in importance to the doctrine of sovereign immunity, which has always been a basic tenet of our legal system. One state court has interpreted the policy of the regulation as merely "providing protection to the government if

[43] 47 Stat. 1473 (1933), 11 U.S.C. § 203(o)(2) (1958).

[44] 49 Stat. 943 (1935), 11 U.S.C. § 203(p) (1958).

[45] In Hooper v. United States, 326 F.2d 982 (Ct. Cl.), *cert. denied,* 377 U.S. 977 (1964), the court allowed a collateral attack in federal court on a decision of the Court of Military Appeals because the latter court afforded no appeal. "We believe that an example of such an overriding consideration is present here, since a party should be given his day in a court from which review by the Supreme Court might ultimately be afforded." *Id.* at 985. *Accord, In re* Maier Brewing Co., 38 F. Supp. 806 (S.D. Cal. 1941) (corporate reorganization under the Chandler Act). *Cf.* Denver Bldg. & Constr. Trades Council v. NLRB, 186 F.2d 326 (D.C. Cir. 1950).

[46] 31 C.F.R. § 315.61 (1959).

[47] 40 Stat. 291 (1917), 31 U.S.C. 757(c) (1958).

its agents pay the named owner or co-owner."[48] In a situation where an estate of one co-owner successfully challenged the right of the other co-owner to take the bonds under the survivorship regulation, the court said: "It seems clear that the federal laws and regulations are not intended to interfere with the positive act of two co-owners of bonds by which one conveys her interest in them to the other."[49]

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Taxation—Deductibility of Campaign Expenses

Two recent decisions of United States district courts have questioned the soundness of the general rule that campaign expenses incurred by a candidate for public office are not deductible in the computation of federal income tax.[1] In *Maness v. United States*,[2]

[48] *In re* Hendricksen's Estate, 156 Neb. 463, 476, 56 N.W.2d 711, 719 (1953).

[49] *Id.* at 477, 56 N.W.2d at 719.

[1] This rule is stated in 4 MERTENS, THE LAW OF FEDERAL INCOME TAXATION § 25.135 (rev. ed. 1960) and in 1 RABKIN & JOHNSON, FEDERAL INCOME, GIFT AND ESTATE TAXATION § 3.03(10) (1964). The Treasury accepts the rule. See Treas. Reg. 103, § 19.23(a)-15 (1940), as amended, T.D. 5196, 1942-2 CUM. BULL. 96, 98; Treas. Reg. 103, § 19.23(o)-1 (1940); Treas. Reg. 111, §§ 29.23(a)-15(b), 29.23(o)-1, 29.23(q)-1 (1943); Treas. Reg. 118, §§ 39.23(a)-15(f), 39.23(o)-1(f), 39.23(q)-1(a) (1953); Treas. Reg. § 1.162-15(c)(1) (1958), as amended, T.D. 6435, 1960-1 CUM. BULL. 79; Treas. Reg. § 1.212-1(f) (1957); Proposed Treas. Reg. § 1.162-20(b)(1)(i), 29 Fed. Reg. 11190 (1964). See also Statement of Assistant Commissioner Sugarman Before the Special Committee of the House of Representatives to Investigate Campaign Expenditures, 82d Cong., 2d Sess. (1952), reprinted in 5 CCH 1953 STAND. FED. TAX REP. ¶ 6029. The Internal Revenue Code of 1954 and the accompanying legislative history have supported the rule. Section 271 disallows the deduction of bad debts owed by a political party to a taxpayer; a taxpayer may generally deduct bad debts under section 166. Section 162(e) clarifies deductibility of lobbying expenses dealt with in Treas. Reg. § 1.162-15(c)(1) (1958), as amended, T.D. 6435, 1960-1 CUM. BULL. 79. By partially changing the rules stated in the regulation it allows some types of lobbying expenses to be deducted. However, the rule stated in the regulation that campaign expenses are not deductible was not changed. Section 162(e)(2)(A) provides that the deduction allowed for certain types of lobbying expenses shall not be construed as allowing the deduction of any amount incurred in political campaigns. For case law supporting the rule see McDonald v. Commissioner, 323 U.S. 57 (1944); Mays v. Bowers, 201 F.2d 401 (4th Cir. 1953); Harry D. Moreland, 29 P-H Tax Ct. Mem. 1036 (1960); George W. Lindsay, 34 B.T.A. 840 (1936); David A. Reed, 13 B.T.A. 513 (1928), *rev'd on other grounds*, 34 F.2d 263 (3d Cir. 1929), *rev'd*, 281 U.S. 699 (1930).

[2] 15 Am. Fed. Tax R.2d 217 (M.D. Fla. 1965).