Volume 9 | Issue 3 Article 10

1964

Conflict of Laws - Res Judicata - State's Determination of Subject Matter Jurisdiction Must Be Given Full Faith and Credit

William B. Freilich

CONFLICT OF LAWS—RES JUDICATA—STATE'S DETERMINATION OF SUBJECT MATTER JURISDICTION MUST BE GIVEN FULL FAITH AND CREDIT.

Durfee v. Duke (U.S. 1963)

A brought an action in a Nebraska state court to quiet title to land situated in the Missouri River bottom, the status of which had been affected by a shift in the Missouri-Nebraska boundary line which is formed by the mid-stream of the Missouri River. The Nebraska Court had jurisdiction over the subject matter of the controversy only if the land in question were in Nebraska. To determine that issue, the factual question of whether a shift in the river's course had been caused by avulsion or accretion had to be answered. *B* appeared in the Nebraska court and fully litigated the issues, explicitly contesting the court's jurisdiction over the subject matter. The court found it had jurisdiction and quieted title in *A*. *B* appealed and the Supreme Court of Nebraska[1] affirmed the judgment after a trial de novo on the record made in the lower court. *B* did not petition the Supreme Court of the United States, but instead brought an action two months later in the Missouri court to quiet title to the same land. The suit was removed to a federal district court by reason of diversity of citizenship. The district

---

this must be balanced against the possibility of the network holding back the desirable stations and using them as leverage to force acceptance of this undesirable package.

(3) If ABC is not using a must buy practice and in fact still uses a minimum dollar requirement, whether this practice would be in violation of the antitrust laws. Again, the reasonableness of such a requirement must be investigated. If it is found to be a reasonable system more issues must be decided:
   (a) What considerations should be taken into account in establishing the minimum. It is clear that the cost of production of the program in question would not alone be enough. There are various other factors that must be taken into account. The complication that arises is that some low budget programs are the most desirable and the networks depend on the high price that they bring to overcome the deficit caused by producing less desirable high budget programs, its public service responsibilities, and other non-production costs. In deciding this, the court must face the problem that in forcing the network to destroy its package and to divide the stations, the desirability of their product might be destroyed. Some advertisers might be interested in exposure of their product and not specific stations so that destruction of this broad exposure might preclude the network from this certain market.
   (b) Whether the court should oversee the stations offered by the network in this line-up.

(4) Whether the burden should be upon the network to come forth and show that its minimum dollar requirement is reasonable or upon the advertiser to show it to be unreasonable.

It can be seen that it would be necessary that all of these factors be taken into consideration and more evidence produced before a court can rightfully decide whether this agreement was in violation of the Sherman Act. The decision rendered on this motion cannot be considered as binding upon the court despite the unfortunate implications arising from the language of the opinion. This opinion is limited to what was actually decided: merely that these issues should be tried.

---

1. Durfee v. Keiffer, 168 Neb. 272, 95 N.W.2d 618 (1959).

court rendered judgment against *B*.[2] The Eighth Circuit reversed,[3] but on certiorari the Supreme Court reversed the circuit court *holding* that the issue had been adjudicated and that the judgment of the Nebraska court was res judicata and binding upon the district court. *Durfee v. Duke*, ... U.S. ....., 84 S.Ct. 242 (1963).

To implement the constitutional command of the full faith and credit clause[4] Congress has required that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."[5] The purpose of full faith and credit is to establish a useful means for ending litigation between adverse parties. Once the pleadings show that the issues of a case have been previously determined, the adjudication is ended. Without full faith and credit, "adversaries could wage again their legal battles whenever they met in other jurisdictions."[6] Every state is therefore required to give a judgment at least the res judicata effect which the judgment would be accorded in the state which rendered it, so that ". . . the local doctrines of res judicata, speaking generally, become a part of national jurisprudence. . . ."[7] Since in the instant case the Nebraska courts would give res judicata effect to the Nebraska judgment, so must the federal court in Missouri.[8]

It was argued, however, that a judgment of a court in J-1 is conclusive upon the merits in a court in J-2 only if the court in J-1 had the power to pass on the merits, that is, had jurisdiction to render the judgment.[9] The Court pointed out that, while it is established that a court in J-2 may

---

2. Duke v. Durfee, 215 F. Supp. 901 (W.D. Mo. 1961).

3. Duke v. Durfee, 308 F.2d 209 (8th Cir. 1962).

4. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof. U.S. CONST. art. IV, § 1.

5. 28 U.S.C. § 1738 (1958). The progenitor of the present statute was enacted by the First Congress in 1790. REV. STAT. § 905 (1875). "The Act extended the rule of the Constitution to all Courts, Federal as well as State." Mills v. Duryee, 11 U.S. (7 Cranch) 481, 485 (1813). Davis v. Davis, 305 U.S. 32, 40, 59 S.Ct. 3 (1938). See Durfee v. Duke, 84 S.Ct. 242, 243 n.2 (1963).

6. Riley v. New York Trust Co., 315 U.S. 343, 349, 62 S.Ct. 608, 612 (1942).

7. *Ibid.*

8. Durfee v. Duke, 84 S.Ct. 242, 244 n.6. The Nebraska Supreme Court has clearly postulated the relevant law of the State:

> This court adheres to the rule that if a court is one competent to decide whether or not the facts in any given proceeding confer jurisdiction, decides that it has jurisdiction, then its judgments entered within the scope of the subject matter over which its authority extends in proceedings following the lawful allegation of circumstances requiring the exercise of its jurisdiction, are not subject to collateral attack but conclusive against all the world unless reversed on appeal or avoided for error or fraud in a direct proceeding. Brandeen v. Lau, 113 Neb. 34, 201 N.W. 665; Douglas County v. Feenan, 146 Neb. 156, 18 N.W. 2d 740, 159 A.L.R. 569. Gergen v. Western Union Life Ins. Co., 149 Neb. 203, 210, 30 N.W.2d 558, 562.

9. Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 469 (1874).

> On the whole, we think it clear that the jurisdiction of the Court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the Judgment itself.

inquire into the jurisdiction of a J-1 judgment, modern decisions of the Supreme Court[10] have delineated the permissible scope of such an inquiry. As a general rule "a judgment is entitled to full faith and credit — even as to questions of jurisdiction — when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."[11]

In *Baldwin v. Iowa State Traveling Men's Ass'n*,[12] this principle was established in respect to questions of jurisdiction over the person. Once J-2 has discovered that the issue of personal jurisdiction has been litigated in J-1, there is no need to proceed further and "public policy dictates that there be an end of litigation."[13] The Court reasoned that when one has voluntarily appeared, presented his case and been fully heard, he should not, in the absence of fraud, be able to challenge the judgment of the tribunal to which he originally submitted his cause.

The extension of this general rule to include subject matter jurisdiction is the precise issue of *Durfee*. The Court pointed out that this rule is indeed applicable to questions involving jurisdiction over the subject matter.[14] Basically the Court concluded that although there may be differences between personal jurisdiction and subject matter jurisdiction, the doctrine of "one trial of an issue"[15] applies. Upon the reasoning and the cases cited, the Court held that once the issue has been fully litigated and judicially determined, it cannot be retried in another state in a litigation between the same parties. Collateral attack appears to have ended whenever the same parties have previously argued the issue. But what if the issue has not been argued?

Chicot County Drainage Dist. v. Baxter State Bank[16] indicates that the same result would be reached. Though not involving jurisdiction, but collateral attack on the merits, the case establishes the proposition that if an objection could have been raised in a prior hearing and was not, it cannot be subsequently raised. In that case, bondholders of a state drainage district had been parties to a proceeding under the Municipal Readjustment

10. Sherrer v. Sherrer, 334 U.S. 343, 68 S.Ct. 1087 (1948); Treinies v. Sunshine Mining Co., 308 U.S. 66, 60 S.Ct. 44 (1939); Davis v. Davis, 305 U.S. 32, 59 S.Ct. 3 (1938); Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134 (1938); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 51 S.Ct. 517 (1931).

11. Durfee v. Duke, 84 S.Ct. 242, 245 (1963).

12. 283 U.S. 522, 51 S.Ct. 517 (1931).

13. *Id.* at 525–526, 51 S.Ct. at 518. "Public policy," said the Court:

> [D]ictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

14. Sherrer v. Sherrer, 334 U.S. 343, 68 S.Ct. 1087 (1948); Treinies v. Sunshine Mining Co., 308 U.S. 66, 60 S.Ct. 44 (1939); Davis v. Davis, 305 U.S. 32, 59 S.Ct. 3 (1938); Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134 (1938).

15. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525, 51 S.Ct. 517, 518 (1931).

16. 308 U.S. 371, 60 S.Ct. 317 (1940) (involving federal courts applying federal law). See Rashid, *The Full Faith and Credit Clause: Collateral Attack of Jurisdictional Issues*, 36 GEO. L. REV. 154, 165 (1948).

Act of 1934[17] for the readjustment of its indebtedness. In that first proceeding, the constitutionality of the statute was not questioned, but the bondholders did not comply with the provisions of the decree for retirement of their bonds within the limited time. Subsequent to the original proceeding, the Supreme Court, in *Ashton v. Cameron County Water Improvement Dist. No. 1*,[18] held the same statute unconstitutional as infringing on the control of the states over their financial affairs. In the subsequent action on their bonds, Chief Justice Hughes in his opinion indicated that the bondholders had had an opportunity to present their objections in the first proceeding, and to argue the validity of the statute under which the action was brought. Having failed to do this, the parties were not privileged to raise this question in a subsequent suit. The Court rested this decision on the well-settled principle that "res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end'."[19]

Combine *Durfee v. Duke* with the *Chicot County* case and it appears that the Supreme Court has accepted and reaffirmed the final step in the dismemberment of the principle of collateral attack. Had the *Durfee* opinion stopped at this point, possibly it would have stood for a strict, unbending rule on the finality of jurisdictional determinations. The Court, however, did not stop here, but specifically stated that there are exceptions to this general rule.[20] The Court pointed out that the doctrines of federal pre-emption or sovereign immunity may in some contexts be controlling.

In *Kalb v. Feuerstein*,[21] a judgment of foreclosure was entered in a state court upon foreclosure proceedings instituted by defendants as mortgagees. The mortgagors had meanwhile been granted a petition in the bankruptcy court pursuant to the Frasier-Lanke Act.[22] Subsequently the mortgagors commenced an action against the mortgagees for their foreclosure and eviction. The defendants attempted to set up the foreclosure judgment, which was not appealed, as res judicata to the mortgagors' action. The Supreme Court held that the judgment was subject to collateral attack on jurisdictional grounds by the defendant in that action when he later filed a petition in bankruptcy in a federal court. Thus, the first exception to the general rule was carved by the Court, interpreting Congress' manifest intention in its bankruptcy legislation, to oust the state court of jurisdiction in the foreclosure proceeding. In effect, the Court ruled that so strong a congressional policy existed as to obviate the need for a direct attack in the state court on its jurisdiction.

17. 48 Stat. 798 (1934), 11 U.S.C. § 303 (1940).

18. 298 U.S. 513, 56 S.Ct. 892 (1936) (5-4 decision).

19. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 378, 60 S.Ct. 317, 320 (1940).

20. Durfee v. Duke, 84 S.Ct. 242, 246 (1963).

21. 308 U.S. 433, 60 S.Ct. 343 (1940).

22. 11 U.S.C. § 203 (1940).

Another exception was pronounced in *United States v. United States Fid. & Guar. Co.*,[23] where the Supreme Court held a judgment against the United States on a cross-claim was subject to collateral attack on the jurisdictional grounds of sovereign immunity. If collateral attack had not been permitted, liability would have been imposed on certain Indian tribes that supposedly had sovereign immunity from suit. In neither this case nor *Kalb* had the jurisdictional issue been raised in J-1, although the vehement language used by the Court in both cases seems to insinuate that collateral attack would have been allowed[24] even if it had been raised.

The Supreme Court seems to be formulating limitations to the total abandonment of collateral attack. In so doing, the Court appears to be balancing the highly-valued policy of ending litigation against the policy of allowing a court to act beyond its jurisdiction. In effect the Court seems to have adopted the *Restatement*[25] approach to jurisdiction over the subject matter. According to the *Restatement*, the rule is that, where a court determines it has jurisdiction over the subject matter, it cannot be collaterally attacked on the grounds of lack of subject matter jurisdiction "unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction."[26] The factors included as appropriate to the balancing of these two principles are noted below.[27] Although the Court and the *Restatement* appear to agree on the general rule,[28] the factors to be considered have not been explicitly accepted by the Court. To what extent have these factors been implicitly accepted? If this question could be directly and immediately answered there would be no need to note this case. However, since it cannot, *Durfee* must be used as a stepping stone in determining the limitations on the now general rule that judgments cannot be collaterally attacked. Has the Court re-enforced the sweeping rule laid down in the *Chicot County* case, thus completing the dismemberment of collateral attack? Or has the Court

23. 309 U.S. 506, 60 S.Ct. 653 (1940).

24. *Id.* at 513, 60 S.Ct. at 657. ". . . this immunity cannot be waived by officials. If the contrary were true, it would subject the government to suit in any court in the discretion of the responsible officers."

Kalb v. Feuerstein, 308 U.S. 433, 444, 60 S.Ct. 343, 348 (1940). "Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer-debtor."

25. RESTATEMENT, CONFLICT OF LAWS, § 451(2) (Supp. 1948). See RESTATEMENT, JUDGMENTS, § 10 (1942).

26. RESTATEMENT, CONFLICT OF LAWS, § 451(2) (Supp. 1948).

27. The factors are as follows:
(a) the lack of jurisdiction over the subject matter was clear;
(b) the determination as to jurisdiction depended upon a question of law rather than of fact;
(c) the court was one of limited and not of general jurisdiction;
(d) the question of jurisdiction was not actually litigated;
(e) the policy against the court's acting beyond its jurisdiction is strong. *Ibid.*

28. In fact the *Restatement* accepted this rule after *Davis, Stoll* and *Treinies*. RESTATEMENT, CONFLICT OF LAWS, § 451, comment *a* (Supp. 1948). The American Law Institute stated that no opinion was expressed on whether or how far a party appearing and participating in the proceedings in one court could collaterally challenge the jurisdiction of the subject matter of that court. RESTATEMENT, CONFLICT OF LAWS, § 451, *caveat* (1942).

used the factual situation in the instant case to open the door once more to collateral attack? Since the Court did not allow collateral attack, it has not directly opened the door; but the fact that the Court specifically stated that there are exceptions to the rule of finality of jurisdictional determinations in a case where the parties directly argued the subject matter jurisdiction, leads one to believe that there may be situations where the underlying reasons for collateral attack may outweigh the reasons supporting res judicata, even where the parties have raised the issue in J-1.

In the instant case, the first four *Restatement* factors used to determine the balance between collateral attack and finality of decisions on subject matter jurisdiction are against an exception to res judicata. The lack of jurisdiction of the Nebraska court is not particularly clear; the dispute is almost entirely one of fact rather than of law;[29] the Nebraska courts were courts of general jurisdiction; the jurisdictional question was fully litigated.[30] This leaves among the stated factors only the fifth one resting on policy. It is certainly the most significant, since it is not susceptible to precise limitations and leaves to the courts an extensive range for interpretation.

It was argued that, with respect to cases involving real property, the rule of jurisdictional finality is overcome by the doctrine that courts of one state are completely without jurisdiction to directly affect title to land in other states.[31] Therefore, when the courts of one state are directly and adversely affected by another forum's determination of the situs of land as between the two states, the J-2 court may inquire into the jurisdictional grounds of the J-1 proceeding. However, since the Nebraska litigation is not res judicata to an action brought by Missouri in the Supreme Court,[32] there is no strong policy against upholding the rule against collateral attack. This is especially true since the location of land, like the domicile of a party to a divorce action, is a matter "to be resolved by judicial determination."[33] Thus, the Supreme Court reversed the circuit court and determined that there is no overriding policy to allow collateral attack in *Durfee*, so that the instant case conforms directly with the *Restatement*.

---

29. "The parties are not in disagreement as to the law concerning the effect of accretion and avulsion upon mid-channel state boundaries." Duke v. Durfee, 308 F.2d 209, 218 n.6 (8th Cir. 1962).

30. This factor is not necessarily determinative using the reasoning in the instant case mentioned *supra*. See RESTATEMENT, JUDGMENTS, § 10, comment *c* (1942).

31. See, *e.g.*, Williams v. North Carolina, 317 U.S. 287, 294 n.5, 63 S.Ct. 207, 211 (1942); Olmstead v. Olmstead, 216 U.S. 386, 30 S.Ct. 292 (1910); Fall v. Eastin, 215 U.S. 1, 30 S.Ct. 3 (1909); Carpenter v. Strange, 141 U.S. 87, 105-106, 11 S.Ct. 960, 966 (1891). However, these cases are concerned with the full faith and credit that must be given to extra-territorial in rem judgments of state courts.

32. See U.S. CONST. art. III, § 2. But such an action might prove lengthy and costly. See Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 695 (1959). Also, a state's sovereignity, the validity of its land titles, and its power to tax, can be affected, although indirectly, by proceedings of the kind which have taken place in *Durfee*. Yet, an action by the state to determine the boundary would limit the multiple suits that may arise since such a litigation will determine the boundary of all the property along the river; and it will be binding in all future private party suits.

33. Sherrer v. Sherrer, 334 U.S. 343, 349, 68 S.Ct. 1087, 1090 (1948).

With the *Restatement*'s reasoning as a basis, the courts will undoubtedly evolve numerous situations where the theory of res judicata over the subject matter will be made inapplicable. It has been hypothesized that the following situations will probably not be immune from collateral attack: (1) labor disputes, (2) naturalizations, (3) suits against the military, (4) habeas corpus, and (5) cases of exclusive federal jurisdiction.[34] An application and analysis of the *Restatement* factors to a hypothetical situation provides a good means to explore the factors the court considers to strike the balance between the policy of res judicata and the policy against excessive judicial action.

Controversies touching on probate jurisdiction offer perhaps the most interesting analysis since they commonly begin and often end with domicile. At several points in the administration of an estate the decedent's domicile gains crucial importance: "upon it may depend whether the will can be probated under local statutes or even whether the will is valid, whether personalty shall be distributed according to one law or another, whether a particular state shall impose a death levy."[35] This last point has gained in importance since the advent of double domicile — now the terror of the rich man.[36] Where the exertion of state power is dependent upon domicile within its boundaries, neither the Fourteenth Amendment nor the full faith and credit clause require uniformity in the decisions.[37]

Under Virginia law[38] a will previously probated in another state is admitted to probate, but is subject to attack on appeal. An authenticated copy of a will probated in another state is no evidence in the Virginia proceeding as to the validity of the execution of a will devising realty in Virginia.[39]

To what extent does the doctrine of full faith and credit apply as between the same litigants to the issue of domicile? If the non-resident does not appear, he is not bound in another state.[40] However, it is a different case entirely if the non-resident appears and litigates the issue of domicile. The strong policy against collateral attack would seem to require full faith and credit. Similarly, it would appear from reading *Durfee* that if a party had objected to the probation of a will in J-1, he would then be prohibited from attacking the probate of the will in J-2. However, it seems unlikely that the probate court would be required to

34. Boskey & Brauchen, *Jurisdiction and Collateral Attack: October Term, 1939,* 40 COLUM. L. REV. 1006, 1013–30 (1940).

35. *Id.* at 1011.

36. See Tweed & Sargent, *Death and Taxes Are Certain — But What of Domicile,* 53 HARV. L. REV. 68 (1939).

37. Worcester County Trust Co. v. Riley, 302 U.S. 292, 299, 58 S.Ct. 185, 188 (1937).

38. VA. CODE tit. 64, § 88 (1950).

39. Horn v. Horn, 195 Va. 912, 81 S.E.2d 593 (1954). Other states have similar rules, however the refusal of the use of the J-1 probated will as any evidence in J-2 proceeding seems to be carried beyond its useful limits. See Note, 41 VA. L. REV. 279 (1955).

40. Burbank v. Ernst, 232 U.S. 162, 34 S.Ct. 299 (1914); Thormann v. Frame, 176 U.S. 350, 20 S.Ct. 446 (1900).