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JURISDICTION OF THE SUBJECT MATTER AND RES JUDICATA

BERNARD C. GAVIT †

One of our oldest dogmas is that if a court has no jurisdiction of the subject matter of an action its pretended judgment or decree is a nullity. Thus a question of jurisdiction of the subject matter can be raised at any time during the proceedings and even for the first time on appeal. It can be raised in collateral proceedings, which means, in other words, that the judgment or decree, being a nullity, is not *res judicata* as to a subsequent legal action.

It must be observed that the law of jurisdiction of the courts is neither procedural law nor substantive law. It has nothing to do with either the creation or recognition of substantive rights; it is simply a limitation on the power of a court to act *as a court*. Jurisdiction in general is of the same character, and thus much of constitutional law and practically all of the conflict of laws are not substantive. They impose limitations on the power of a state to act legally either in a legislative, executive or judicial manner.

But the doctrine of *res judicata* is a doctrine of substantive law. It is that once the legal rights of parties have been judicially or impartially recognized, such recognition is subsequently conclusive as to those rights. The conclusiveness of a judgment, decree or award rests on the same basis as the conclusiveness of a written contract, will or deed. The rights so expressed are the only rights on that subject between the parties.

So, stating that a judgment is not *res judicata* because the court had no jurisdiction of the subject matter of the action is simply another way of stating that it is no judgment, and of finally saying that a judgment to be a valid adjudication must be rendered by a court having power to deal with the subject matter. In other words, the law of jurisdiction is stated in terms of the substantive law, which is merely describing the jurisdictional concept in other language.

It will be seen, therefore, that jurisdiction of the subject matter and *res judicata* are two separate and distinct concepts; that they are not and need not be co-extensive in result. The policy behind the jurisdictional concept is something quite different from that behind the concept of *res judicata*. It may well be that good policy dictates that the jurisdictional concept be preserved, and at the same time that the concept of *res judicata* be extended. The policy back of the preservation of the first is largely political. The

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courts derive their power to act as courts from constitutions and statutes, and there are theoretical and practical difficulties in the enlargement of their jurisdiction by judicial legislation. The difficulties are not insurmountable, of course; for by the simple expedient of "interpretation" the constitutions and statutes could be construed to mean almost anything they ought conveniently to mean.

But *res judicata* is substantive law; and it is common law. There is no theoretical nor practical difficulty in enlarging it to circumscribe any situation where it can be used to reach a desirable result. The policy back of it is simply that a determination of the legal rights of parties by a disinterested person, upon the supposed merits, and after notice and hearing, *ought* finally to settle the matter. It is not necessary that the person making the determination be a court; the essential elements are that he be disinterested and that the decision be on the supposed merits and after notice and hearing.

If there is a choice, then, between explaining the cases upholding as final a determination by a court having no jurisdiction of the subject matter under the jurisdictional concept, or the doctrine of *res judicata*, the latter seems preferable. If we take the first we must rewrite the law of jurisdiction; if we take the second there is little, if any, rewriting to be done.

It is an observable fact that the courts back away from the jurisdictional concept about as often as they meet it face to face. It is easy learning that jurisdiction of the subject matter cannot be waived or created by consent; that, in other words, the parties cannot legislate and give to a court a jurisdiction it does not legally possess. Also it is an elementary principle that a tribunal cannot create for itself a jurisdiction it does not legally possess. Thus if certain facts are jurisdictional the general rule, in keeping with the theory involved, is that a court's finding on those facts is not conclusive. That is to say, the tribunal cannot by the simple expedient of mis-stating the facts create a jurisdiction it does not legally possess.

There are, however, many cases where an incongruous result is reached. Some courts have held that the question of jurisdiction can be waived;¹ others, that a person may be "estopped" to assert the lack of jurisdiction;² and quite generally the rule is stated to be that if the court in question were one of general jurisdiction its mistaken determination of the facts is erroneous merely and not jurisdictional, or if there were not a specific determination of those facts that the court is conclusively presumed to have found them to have existed.³

¹ See, e. g., *Grasselli Chemical Co. v. Simon*, 84 Ind. App. 327, 150 N. E. 617 (1926). Cf. *In re Moore*, 79 Ind. App. 470, 138 N. E. 783 (1923). See also cases cited in the article *infra* note 4.

² I FREEMAN, JUDGMENTS (5th ed. 1925) § 320.

³ Probably the best illustration of this situation is the group of cases holding that while diversity of citizenship in the federal courts is a jurisdictional prerequisite, a judgment rendered cannot be attacked for the lack of it; the court is "presumed" to have found the fact to exist. See *Evers v. Watson*, 156 U. S. 527, 15 Sup. Ct. 430 (1895) and cases there cited.

Professor Fowler V. Harper has recently given point to the actualities of the situation in an article on *The Validity of Void Divorces*.⁴ In that interesting field the fact is proved to be that, except as against the state, the dogma of jurisdiction to divorce has given way to the point where it can truthfully be said that we have, as a practical matter, such a thing as divorce by consent of the parties!

There are obvious distinctions between the subject matter of divorce and the usual controversy over civil matters. The state is in theory a legally interested party in a divorce proceeding; it has a legal interest against the consensual dissolution of the marriage status. In the ordinary civil litigation, however, the state's interest is that of a bystander, and its chief concern is that the controversy be settled by peaceable means, which gives it a purely collateral interest. It is true that it sets up the machinery used by the parties in the settlement of their disputes; but the state's interests in the machinery are purely procedural and jurisdictional ones. It has no substantive interest involved.

It seems apparent, therefore, that if the state's principal interest in the settlement of controversies between litigants is that of a bystander there is little point to its insisting on other interest. In fact, whenever the law refuses to give effect to a judgment or decree of a court because it was rendered without jurisdiction of the subject matter, it is as a practical matter denying the sole interest it does have, namely, that of a *peaceable* settlement of a controversy between parties over their legal rights.

The latter forms the most substantial basis of the doctrine of *res judicata*. Originally the theory was explained upon the doctrine of merger, the doctrine of estoppel of record, or some similar basis. Today *res judicata* is much broader than any of its original concepts. Today the basis for the doctrine can be stated to be that, once the parties have litigated their legal rights before a disinterested tribunal, good policy requires that the result reached be final, regardless of its actual lack of merit in some cases.⁵ It is unnecessary today to explain *res judicata* in any case as resting on merger or estoppel of record.

The general disregard of the dogma concerning judicial jurisdiction of the subject matter of an action is thus understandable. The truth is that

⁴ (1930) 79 U. OF PA. L. REV. 158.

⁵ The doctrine has been extended to bar a subsequent action on a separate cause of action which "might have been adjudicated" under the procedural provisions for the joinder of actions, the "fusion" of action, and the assertion of a counter-claim. See Gavit, *The Code Cause of Action; Joinder and Counter-Claims* (1930) 30 COL. L. REV. 802. So far as the author is aware every recent case where the point was involved takes this view. In addition to the cases cited in the article *supra* see the more recent cases of *Sklarsky v. Great A. & P. Tea Co.*, 47 F. (2d) 662 (S. D. N. Y. 1931); *United States v. Pan-American Petroleum Co.*, 45 F. (2d) 821 (S. D. Cal. 1930); *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U. S. 522, 51 Sup. Ct. 517 (1931); *Largura v. Deutsch*, 176 N. E. 39 (Ind. App. 1931). See also *United States v. California & Oregon Land Co.*, 192 U. S. 355, 24 Sup. Ct. 266 (1904).

there has been a determination of the legal rights of the parties by a disinterested tribunal and the sole objection is that it was subsequently decided that the determination was extra-judicial. The parties thought that a court was rendering the decision, and it develops that it was only a man without official capacity to act as a court. The objection is thus a jurisdictional one as distinguished from a substantive one. And unless there is some good policy in preserving the purity of the jurisdictional concept and in giving an absolute monopoly of the determination of controversies between parties to the courts, as *courts*, there is little reason why the objection should finally determine the matter.

Undoubtedly there was originally thought to be some objection to allowing parties to submit their controversies over legal rights to anyone other than a court. The fact that the remuneration of the judges was based upon the amount of business done may have influenced the decision. The inability of the parties to have a binding accord without satisfaction, to substitute a contract cause of action for a tort cause of action, throws light on the older attitude toward the problem. The severity of the concept of jurisdiction of the subject matter is thus explicable however much the policies upon which it was based may not appeal to modern minds.

The modern results are also explicable. There is a noticeable tendency, approaching destructive proportions, to disregard the dogma of jurisdiction of the subject matter,⁶ and the cause undoubtedly is that the older reasons have lost their appeal; there appears now to be no persuasive policy to sustain the old result. Here is a determination of a controversy by a disinterested person and it *ought* to be as final as if the parties had not been mistaken as to the capacity in which the arbitrator was acting. There no longer is any metaphysical sanctity of the courts to be upheld; whatever invasion there is of the judicial function is usually the result of an honest mistake of the parties; or if it was a dishonest invasion (as in some divorce cases where the parties fraudulently prove a domicile which does not exist) there is simply a repudiation by the parties of a disinterested determination of their rights. As a result the courts say that the parties are bound by it.

The reasonableness of the result is so patent that the only problem is as to the form in which it shall be stated. It is solely a problem of language; how shall the result be classified; what name shall we call it?

In the first place we can go back and re-write the law of jurisdiction of the subject matter to include this result. We can give effect to the determination as a judgment or a decree, and if we do we will have to say that jurisdiction of the subject matter of an action is determined by the conduct of litigants in certain classes of cases. It is a perfectly possible concept, as illustrated by the fact that it is the one which apparently the courts have

⁶ The citations in notes 1-4 *supra* give a fair example of the present situation.

adopted, for when they talk of the parties being bound by waiver or estoppel that is exactly what they mean; jurisdiction is determined by the conduct of the parties and not by the constitution and statutes of the state.

In the divorce cases the result can be explained on the basis which Professor Harper has suggested: that two separate things were involved, the status of the parties, and the property and other incidents of the status. Thus while the court may not have had jurisdiction to adjudicate the dissolution of the status, it did, by mere personal jurisdiction, have power to deal with its incidents. The only objection to that is that it is unreal, and it leaves the status as an empty shell. Marital status without its incidents is something of a ghost. The explanation disregards the fact that the decree does not purport to adjudicate the incidents but solely the status. If, for example, a wife later claims dower where she had previously consented to a divorce in favor of her husband by a court having no jurisdiction of the subject matter, and she is barred by reason of the divorce decree, the separation of the decree into an invalid judicial adjudication of the status and a valid judicial adjudication of her dower rights, is unreal. That is, of course, only a formal objection. The result is there; it is explicable in those terms; and the law has often employed a fiction as an explanation of a legal result.

Like most people the writer has a preference for his own explanation and classification of the result. He would explain it and classify it under the doctrine of *res judicata*, not because it is a judgment or decree of a court, but because it is either a technical arbitration and award by a disinterested person, or it presents a situation so closely analogous to it as to be brought easily and properly within it. It is a realistic explanation of the result in accepted legal language.

Res judicata is not limited to judicial judgments and decrees. It is ancient law that parties could submit their existing controversies over their legal rights to a disinterested person who was not a court and that his determination was conclusive.⁷ The determination was called an award and not a judgment or decree, but the difference is solely one of language; the results were practically identical. While the language usually employed is that "the award is conclusive", an award is also often spoken of as being *res judicata*.⁸ The policy for sustaining an award as conclusive is exactly the same policy which sustains a judgment or decree as conclusive.⁹ The modern tendency is to enlarge the scope of arbitration, to remove any formalities affecting its practical use, and to give point to the obvious policy in favor of a determination of legal controversies in any manner which protects the substantial rights of the parties. There is now no compelling reason why the courts should have a monopoly in that field.

⁷ 3 BL. COMM. 16; CALDWELL, ARBITRATION (2d Am. ed. 1853) 264 *et seq.*

⁸ See, for example, 2 R. C. L. 386 (1914) and cases there cited.

⁹ See STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930) 613 *et seq.*

The common law established some more or less formal requirements before an arbitration and award was legally effective. It also established some substantial requirements. But if we suppose the case to be, for example, that an employee sues his employer under a compensation act which makes an actual agreement as to the compensation payable a jurisdictional pre-requisite to the court's capacity to try the case, without alleging or proving the previous actual disagreement and that without objection the court does try the case and render a judgment in favor of the plaintiff, we find that the proceedings do comply with the technical and substantive requirements of the law of arbitration and award. There is a submission in writing (the pleadings in the case, signed by the duly authorized attorneys for the parties) of the controversy to a disinterested person. The submission is not in the technical language of a contract to arbitrate, and the defendant probably answered under a mistaken notion that he was legally compelled to answer. The fact is, however, that without fraud or duress he has actually submitted to the arbitration and impliedly (in fact) agreed to be bound by the award. Again the latter agreement may well have been induced by a mistake of law, which, however, does not really affect the substantial rights of the parties. There is an opportunity to present evidence and to be heard and a decision on the supposed merits by a disinterested person. The decision is in writing. The case fulfills every requirement of a valid common law arbitration and award, and there should be no difficulty in actually accepting it as such. It is not technically a judgment, but it is technically an award, and the doctrine of *res judicata* makes it final. There is no need to say that the parties waived the question of jurisdiction, or that they are "estopped" to assert the lack of jurisdiction. If it be conceded that the court did not act as a court, that its purported action is void because of a lack of jurisdiction, it is still true that the judge acted as an arbitrator and that the result is a valid and binding award.

Nor is there any need to say in the usual case that it is conclusively presumed that the court judicially determined its jurisdiction to exist. The result can more realistically be explained on the basis of a valid arbitration and award. Thus it would make no difference whether the court were a court of special or of general jurisdiction.

If it were the latter, and it did specifically, but erroneously, decide the question of its jurisdiction, the result could be upheld as a judgment or decree. The question of jurisdiction is a judicial one and there is no objection to a court being given the power to decide its own jurisdiction. The controversy must end somewhere; thus a specific decision by a court of general jurisdiction that it did have jurisdiction may well be *res judicata* on that point.¹⁰ There is, however, a distinction between a question of jurisdiction

¹⁰ See, for example, *Baldwin v. Iowa State Traveling Men's Ass'n*, *supra* note 5. See also, I FREEMAN, *op. cit. supra* note 2, at § 387.

specifically decided and one which is conclusively presumed to have been decided. The latter is simply another way of saying that the question is immaterial, and the sum total of the result is that the parties and court have created a jurisdiction which did not exist. If the result be sustained as an award, however, the difficulty is evaded.

Like the common law arbitration this one is revocable. The plaintiff may always voluntarily quit; and either party could revoke by raising the question of jurisdiction and the court presumably would dismiss the action. Likewise the court, if it discovered the jurisdictional defect, would presumably refuse to act and dismiss the action.

If the question were raised, however, and the court were to refuse erroneously to dismiss the action the result would vary depending on whether the court were a court of special or general jurisdiction. If it were the first, presumably the parties would not be bound, just as they would not be bound by an award which was rendered after a proper revocation. If it were a court of general jurisdiction, presumably they would be bound; not because it is an award, but because it is now a valid judgment. That is, again, if a court of general jurisdiction specifically passes on a question of jurisdiction that is within its power, the matter is *res judicata* as a judgment. To that extent jurisdiction is a practical concept, and necessarily so.

If we consider the divorce cases once more we find that the parties are bound, but the state is not.¹¹ That result is explicable on ordinary principles of *res judicata*; if the judge does not act as a court, but solely as an arbitrator, the state was not a party to, nor represented in, the proceedings. For that reason it is not bound; although the husband and wife are.

If the proceedings are by default, after the defendant has been actually notified, he is still sometimes bound by the judgment.¹² And he ought to be bound. If the proceedings were with his knowledge and actual consent there is just as much a submission to arbitration and award as there is in the case where he answers. The only distinction is that there is a formal submission in writing in the one case, while in the other case there is a submission not in writing. The distinction would be immaterial in any case not involving title to land, for it is only in that case that a written contract to be bound by an award was required.¹³

Although the cases are apparently quite uniform to the effect that an award involving title to land is not conclusive where it is based on a parol arbitration agreement,¹⁴ it is difficult to perceive why the doctrine of performance does not take it out of the Statute of Frauds. The agreement to be bound by an award was one agreement which was specifically executed by

¹¹ See Harper, *op. cit. supra* note 4.

¹² *Ibid.*

¹³ 2 R. C. L. (1914) 354.

¹⁴ See Note (1909) 22 L. R. A. (N. S.) 716.

the common law; the promisor did not have the usual privilege of paying damages in lieu of performance. The rendition of the award executed the contract; nothing else remained to be done; legally nothing else could be done. An award operated as a legal conveyance which the courts of law recognized and gave effect to. It is true here that if and when the courts give effect to the award it is as a conveyance and not as a contract; it is no different, for example, from a valid decree of a court in an action to quiet title; there is in each case a conveyance by operation of law.

So the statutes on conveyancing could not apply, for they apply only where the conveyance is by the party or his agent; they do not apply to a conveyance by operation of law. The decisions noted above are based on the mistaken view that the recognition of the award would constitute the recognition of an oral contract to sell or convey. But that contract is executed; it is past history; the award is a conveyance by operation of law and its recognition as such does not offend the Statute of Frauds. In other words, if the original contract were in writing it would not help any, for when subsequent recognition is given the award it is not a recognition of the contract, nor an enforcement of it; the contract has already been enforced and executed by the rendition of the award; the award immediately becomes a conveyance by operation of law, and is recognized as such. It is the conveyance which is subsequently recognized and enforced. In the case of an ordinary award when a plaintiff recovers a judgment upon it he recovers not on the original contract to be bound by the award, but upon the award as *res judicata*, as the legal right between the parties. Its history includes a contract, but it is neither the contract nor the enforcement nor recognition of it.

In view of the authorities cited above there would be difficulty in sustaining a default judgment involving title to land as an award; but it is submitted that the cases are erroneously decided, and that properly the Statute of Frauds cannot be construed to forbid its recognition as a valid award. If that be true the usual default judgment which fails because of a lack of jurisdiction could properly be sustained as an award, even though title to land was involved.

The case may be that the purported judgment or divorce decree was by default and that although the defendant was legally notified by publication he had no actual notice of the proceedings. In such cases he is not bound, although the plaintiff may be bound if she remarries; likewise if the defendant afterwards learns of the judgment or decree and accepts it as valid and remarries he may also be bound.¹⁵

Those cases cannot be explained on the ground of arbitration and award. But they do not have to be explained on the doctrine of jurisdiction. In them there is an estoppel in the strict sense of that term. In the ordinary case

¹⁵ See Harper, *supra* note 4.

where the parties appear and the result is explained on the ground of estoppel there is no estoppel in the strict sense, for there is no misrepresentation, nor any reliance based solely on the wrongful conduct of the other party. The conduct of both is equal when measured by ordinary or legal standards. If, however, either party remarries there is an active misrepresentation and wrong, which the law of estoppel does not permit him to repudiate. The decision rests not on the validity of the decree as a decree; it is still invalid; but the subsequent conduct of the parties determines their rights.

Two apparent difficulties present themselves if we are to explain the usual situation on the basis of arbitration and award. The effect of such an explanation on the law of writs of execution and the full faith and credit clause of the Constitution will have to be examined.

The question would not often arise on execution. It is usually presented only where in a subsequent action on the purported judgment or decree, or in a defense based upon it, the validity of the original judgment or decree is called in question. If the court sustains it as *res judicata* it can well do so even although it is not a judgment or decree but solely a common law award.

If we suppose the case to be, however, that the plaintiff has secured a writ of execution to be issued, both the clerk and sheriff ordinarily would be protected even though the purported judgment were void as a judgment. The issuance of the writ and the service of it are ministerial and executive acts, and both the clerk and sheriff would be protected if the purported judgment were regular on its face.¹⁶

As a practical matter the only manner in which the defendant could raise the question would be by a collateral attack in a suit to enjoin the issuance or service of the writ. On the face of it the theory that the judgment was after all valid as a judgment because we have re-written the law of jurisdiction, and the theory that the judgment was invalid as a judgment but valid as an award would reach opposite results, and the first would be preferable.

That result, however, does not necessarily nor reasonably follow. The rule that the successful party could not enforce his award until he secured a judgment on it is simply an ancient rule of the common law, with nothing but its antiquity to commend it. By statute it has been largely modified and today quite generally an award if recorded is immediately enforceable by execution. The truth is that although the writ necessary for the commencement of an action was an executive and not a judicial writ, the writ of execution is a judicial writ and its issuance is finally a judicial matter.¹⁷ While the matter is today largely regulated by statute, and it might be difficult to construe the usual statute as authorizing the issuance of a writ of execution on a void judgment because it was nevertheless a valid award, there is no

¹⁶ 22 R. C. L. (1918) 481 *et seq.*

¹⁷ 10 R. C. L. (1915) 1218.

real difficulty in the courts providing for or allowing its issuance on that basis. A decision therefore allowing a writ of execution, although in terms of the law of jurisdiction, would not be a repudiation of the views here presented. With entire propriety the court could accept the judgment as a nullity, and sustain it as an award, and still allow the issuance of a writ of execution upon it. It would be justifiable common law legislation.

No case has been found involving the application of the full faith and credit clause to an award. The question would not usually arise because ordinary principles of the conflict of laws would compel a second state to recognize the award, for *res judicata* is substantive law. The rights of the parties are determined by the award and the second state will recognize them as so determined.

It is probably true, however, that so far a state is free in most instances to write its own conflict of laws without offending the due process clause.¹⁸ The question could be presented, therefore, as to whether or not the full faith and credit clause would compel the recognition of the award defined herein. In form it is official; in law it is not. The decision turns, of course, on the proper interpretation of the words "public acts and records" and "judicial proceedings" in the Constitution. Normally form has not been construed to satisfy the Constitution. Thus a judgment or act void for lack of jurisdiction is not entitled to full faith and credit in a second state; it can be attacked there for the same reasons that it could be attacked in the first state.

It probably is true that it would be difficult to construe the Constitution as compelling recognition of the judgment, if we said it was void as a judgment and valid as an award, in the absence of a statute in the first state providing for the official recording of awards. That result would not be of any great practical importance, as the situation where a second state would refuse to give effect to it would be unusual. The same policy which sanctions recognition of the award as *res judicata* in the first state would sanction its recognition in the second state. Were the second state to refuse to accept it for good reason no one ought to complain; if it refused to accept it arbitrarily the complaint is merely that the full faith and credit clause of the Constitution is not broad enough. The truth is, however, that in such a case the due process clause could be construed to reach the desired result.¹⁹

As pointed out at the beginning the problem is one of language. The results are rather plain, and whether we explain them under the language of jurisdiction, or the language of *res judicata* because there is a common law award, is merely a question of form. For the reasons advanced the latter

¹⁸ Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?* (1931) 15 MINN. L. REV. 161.

¹⁹ While it is normally true that the test of reasonableness under the due process clause has not been applied to judicial decisions on common law points there is a noticeable tendency to extend it to include it. See Ross, *op. cit. supra* note 18.

seems preferable. The concluding reason is that there is and ought to be a deep-seated reluctance to re-write all of the desirable results under the concept of jurisdiction. It is apparent that in the usual case where the parties appear and do not raise the question of jurisdiction the result ought to be binding upon them. Their later assertion that they are not bound lacks any substantial merit. It is a denial of the substantial policy upon which rests the doctrine of *res judicata*. If, for example, *P* and *D* in Indiana litigate the question of title to land in Illinois without objection, why should they not be bound by the result? Had the matter been submitted to a person not a court they would be bound. Why should the fact that the person happened also to be a judge affect the result adversely? If anything, that fact should help to sustain the result rather than to destroy its binding effect, for presumably the question was more properly settled than it would have been by a private individual.

If, again, as in Indiana, the issuance of a summons is jurisdictional,²⁰ and the question is raised in a collateral proceeding, what considerations compel the final conclusion that the parties are not bound by the award. There are none whatever, except the sanctity of the jurisdictional concept, based on political considerations.

If we accept the result as binding on the theory of *res judicata* because there is a valid award there is no difficulty in reaching a desirable result in any case. The sole objection that the parties might offer would be that the submission to arbitration was induced by a mistake of law. Usually the objection would be without actual merit; but were it meritorious there is no reason why a court of equity could not vacate the award for that reason, or in truth for any other reason which was meritorious.

The way is open under the doctrine of *res judicata* to include all of the situations where substantial justice requires that the supposed judgment or decree be considered conclusive. We can look forward to the time when courts will no longer swallow their consciences and regard all judgments rendered without jurisdiction of the subject matter as nullities. They can preserve the jurisdictional concept intact, and reach all results which are desirable under the concept of *res judicata*, by giving effect to the void judgment as a valid award.

²⁰ *Friebe v. Elder*, 181 Ind. 597, 105 N. E. 151 (1914).