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Res Judicata And Jurisdiction Over The Subject Matter

be indirectly violated.[45] It would seem that a fair and equitable result can only be reached by the court's applying the doctrine of estoppel to save the trustee harmless. Furthermore, it appears that the statute would have no effect on the beneficiary's revocation of authority to assign future income.[46]

There is another problem under this statute, *i.e.*, can the trustee be compelled to carry out the assignment under the statute? Absent such a statute, a trustee cannot be compelled to commit a breach of trust by the beneficiary or by any other person.[47] Since this Delaware amendatory statute makes legal what was otherwise a breach of trust, it is submitted that the statute would require the trustee to carry out the assignment or be subjected to liability if he fails to do so.

In conclusion, it appears even in the face of a surprising lack of authority, that the validity of these assignments of either income or corpus under a spendthrift trust depends upon how far the courts are willing to go in carrying out the settlor's obvious intentions as manifested in the trust instrument.[48] It would also appear that the trustee's liability is dependent upon the jurisdiction in which the surcharge is sought, its statutory trust scheme, the interest assigned and the type of trust device employed.

MICHAEL K. SMELTZER

RES JUDICATA AND JURISDICTION OVER THE SUBJECT MATTER

One of the very old dogmas of the law was that a judgment or decree was void if rendered by a court which had no jurisdiction over the subject matter.[1] Such a judgment could be attacked either directly or

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[45]To hold the trustee liable in making an assignment would be to hold him liable for an act which the statute expressly allows.

[46]An assignment of income is valid as a contract to assign the property when received. Hence, the contract is complete when the income accrues, and thereafter the beneficiary cannot make an effective revocation of his authority. However, since the contract is not completed in regard to future income, the income not having accrued, it would follow that a revocation of authority to assign the income would be entirely effective, and the trustee would be subject to liability if he fails to comply with the revocation.

[47]1 A Bogert, Trusts and Trustees § 227 (1948), and cases cited therein.

[48]3 Scott, Trusts § 342.1 (2d ed. 1956).

[1]Freeman, Judgements § 337 (5th ed. 1925).

collaterally.[2] A shift of emphasis to res judicata, a rationale for giving finality to a judicial determination, has given rise to a concept which has considerably diminished the effect of the old dogma. It is now quite well recognized that a court without jurisdiction over the subject matter may have jurisdiction to decide whether it has jurisdiction, and bind the parties thereby.[3]

While res judicata has been applied rather freely to jurisdictional issues against a party who actually litigated either the jurisdictional question or the substantive merits, an interesting question arises as to whether the doctrine applies against a defaulting defendant after a joint defendant has actually litigated the case.[4] The question was recently presented to the Michigan courts in the case of *Haenlein v. Saginaw Bldg. Trades Council*.[5] The case arose out of an alleged unlawful labor practice. Two unions and one Dalton, a local representative of one of the unions, were joined as defendants and all made general appearances. Two of the defendants, the Teamsters and Dalton, joined in an answer asserting among other grounds that exclusive jurisdiction over the plaintiff's cause was vested in the National Labor Relations Board.[6] This answer was stricken, and upon the failure of these defendants to file an amended answer, a default decree was entered against them. The default decree was not attacked within the prescribed time after entry, not did these defendants appear when the case was subsequently tried against the other defendant. The defendants, Teamsters and Dalton, then applied to have the default decree set aside—reasserting that the Michigan court had not jurisdiction over the subject matter. The application was denied by the chancellor.

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[2]The rule still holds that "a judgment which is void is subject to collateral attack both in the State in which it is rendered and in other States." Restatement, Judgments § 11 (1942).

[3]Restatement, Judgments § 10 (1942). For a concise analysis of the development of res judicata as to jurisdictional issues in cases decided by the United States Supreme Court, see Note, 53 Harv. L. Rev. 652 (1940). A similar problem arises in the conflict of laws when the court of one state assumes to determine the law prescribing the jurisdiction of a court in another state. A typical example of this problem is brought out when plaintiff sues in state X on a judgment rendered in state Y and the defendant defends the latter action by challenging the jurisdiction of the court in state Y. See Comment, 18 Wash. & Lee L. Rev. 62 (1961).

[4]The scope of this comment does not permit a discussion of whether there might have been sufficient privity between the joint defendants so that a determination against one defendant could bind the others. See Restatement, Judgments §§ 83-92 (1942).

[5]361 Mich. 263, 105 N.W.2d 166 (1960).

[6]This assertion was apparently based on the defendants' belief that the plaintiff's business was in interstate commerce, in which case the NLRB is thought to have exclusive jurisdiction.

In a split decision, the Michigan Supreme Court affirmed the decree dismissing the application on the basis of its interpretation of the Michigan statute prescribing the time during which a default decree could be attacked.[7] Of the jurisdictional argument the court said, "This jurisdictional question was not open to consideration below, nor is it here, for want of fact proof. . . ."[8] Thus a failure to plead and offer factual proof at trial was held to be sufficient basis for denying the jurisdictional contention.

A dissenting opinion recommended that the case be remanded for a factual determination of the jurisdictional question, maintaining that the defendants' failure to support their asserted defense by factual proof did not relieve the court of the duty to determine its own jurisdiction.[9] The dissenting judge took the view that the decree against the defaulting defendants was subject to collateral attack and that "the policy underlying the rule limiting reconsideration [of default decrees] must be weighed against the possible confusion that would result from permitting such a decree to remain outstanding. . . ."[10] While the majority opinion gave little consideration to the alleged jurisdictional defect, the dissent seems to have regarded it as incurable.

The opposing views initially give the appearance of being irreconcilable. The majority opinion, by dismissing the jurisdictional contention, would deny a defense in this action which the dissent regarded as a potentially successful defense if asserted on collateral attack.[11] Perhaps this can be explained by the fact that the majority opinion was concerned with the application of Michigan law, while the dissent also took into account the doctrine of pre-emption, a federal question.

Since the defaulting defendants were afforded the due process requirements of notice and opportunity to be heard,[12] there would

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[7]6A Mich. Comp. Laws, App. 4: Rules 28 & 48, Rules of Court (1948).

[8]105 N.W.2d at 168.

[9]It would seem that striking the defendants' answer might be regarded as an actual determination of the court's jurisdiction over the subject matter, so that a question for review by the United States Supreme Court was presented. Cf., Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931).

[10]105 N.W.2d at 174.

[11]It is difficult to draw, in theory, the distinction between a "direct" and a "collateral" attack. One authority states that "where a judgment is attacked in other ways than by proceedings in the original action to have it vacated or reversed or modified or by a proceeding in equity to prevent its enforcement, the attack is a 'collateral attack'." Restatement, Judgments § 11, comment a (1942). For the purpose of invoking res judicata, an attack is collateral, it seems, unless the action is taken pursuant to the original proceeding in the time and manner prescribed by law. That is to say that unless there is an available prescribed procedure for direct attack, the attack is collateral. See Annot., 1918D L.R.A. 470.

[12]Hurwitz v. North, 271 U.S. 40 (1926).

seem to be no valid objection to the Michigan court's interpretation of its own state law limiting direct attack, and its decision rendered pursuant thereto. However, if the subject matter involved in the *Haenlein* case is one over which the state court's jurisdiction has been pre-empted by federal statute, there is a separate jurisdictional question. There is authority clearly indicating that the question of lack of jurisdiction by state courts, as a result of federal pre-emption, can be raised collaterally.[13] Still, if there is a rationale by which the potential jurisdictional defect can be rectified without a factual determination, the decree should be valid and binding. It is here submitted that such a rationale must rest on the limit to which a court feels it should extend the doctrine of res judicata as to jurisdictional questions.

It is said that jurisdiction over the subject matter cannot be conferred by the consent of the parties on a court without such jurisdiction, and that the defense of lack of jurisdiction is one of the strongest known to the law. It cannot be waived by the parties,[14] and unlike most defenses it need not be raised at any particular stage of the proceeding.[15] Until about two decades ago the authorities were of the opinion that jurisdiction over the subject matter was a prerequisite to any valid judgment or decree, and that in the absence of such jurisdiction a judgment or decree was void and subject to attack at any time either directly or collaterally.[16] The basis for this concept originated in the idea that a court is the instrument of the sovereign and subject to such limitations as have been politically imposed.[17]

Much of the effect of this dogma has been superseded by expanding the doctrine of res judicata to jurisdictional matters under the so-called "Bootstrap Doctrine."[18] The application of res judicata in this context is well expressed by the Restatement of Judgments:

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[13]Kalb v. Feuerstein, 308 U.S. 433 (1940). Here the collateral attack was instituted in the same state court which rendered the foreclosure decree in the original suit. The attack was sustained by the United States Supreme Court, under a federal statute which had withdrawn jurisdiction from the state courts to foreclose mortgages on farm land.

[14]Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874).

[15]Matson Nav. Co. v. United States, 284 U.S. 352 (1932).

[16]1 Freeman, Judgments § 337 (5th ed. 1925).

[17]See Gavit, Jurisdiction of the Subject Matter and Res Judicata, 80 U. Pa. L. Rev. 386 (1932).

[18]Angel v. Bullington, 330 U.S. 183 (1947); Sunshine Anthracite Coal Co. v. Atkins, 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 (1939); Stoll v. Gottlieb, 305 U.S. 165 (1938); Peri v. Groves, 183 Misc. 579, 50 N.Y.S.2d 300 (Sup. Ct. 1944).

> "Although the court does not have jurisdiction over the subject matter, it may have jurisdiction to determine the question whether it has jurisdiction over the subject matter and to bind the parties by its determination, with the result that thereafter they are precluded from successfully contending that the court had no jurisdiction over the subject matter."[19]

This result is explained by the growing emphasis by the courts "that it is just as important that there should be a place to end [litigation] as that there should be a place to begin."[20]

Like res judicata, the concept of jurisdiction over the subject matter is based upon public policy;[21] one dictates the finality of judgments and the other requires litigation to be in the proper forum. It would seem that in a case where both concepts are applicable a result should be reached by balancing the relative importance of the pertinent policy considerations.[22] Therefore, if by assumption there was no jurisdiction over the subject matter in the *Haenlein* case, the holding of the Michigan court may be justified if there were an acceptable and overriding basis for res judicata.

Before res judicata applies, all parties are entitled to their day in court.[23] Consequently, when either substantive or jurisdictional issues have been actually litigated the doctrine is more easily found to apply. A generally acceptable rationale can be worked out whereby a default judgment will preclude relitigation of substantive issues.[24] While there is some authority to the contrary, it would seem that res judi-

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[19]Restatement, Judgments § 10, comment a (1942).

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

[21]"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 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....

"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." 80 U. Pa. L. Rev. 386-87 (1932).

[22]Restatement, Judgments § 10 (1942).

"(2) Among the factors appropriate to be considered in determining that collateral attack should be permitted are that (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."

[23]This notion is perhaps no more than a figure of speech today. It is apparently embodied in the due process requirements of notice and opportunity to be heard, which furnish a sufficient basis for a default judgment. See note 12 supra.

[24]Morris v. Jones, 329 U.S. 545 (1947).

cata provides a similar rationale for precluding relitigation of jurisdictional issues after entry of a default judgment or decree.

The case of *Chicot County Drainage Dist. v. Baxter State Bank*[25] illustrates that there does not need to be actual litigation of the jurisdictional question. There a Federal District Court confirmed a readjustment plan in a proceeding to which the plaintiff was a party, under the authority of a statute later held unconstitutional, but which was not attacked in the original proceeding. In precluding the plaintiff from attacking the judgment collaterally, the United States Supreme Court said, "If the general principles governing the defense of res judicata are applicable, these bondholders, having the opportunity to raise the question of invalidity, were not the less bound by the decree because they failed to raise it."[26] This statement is consistent with the general rule governing substantive law, in that res judicata will apply to all jurisdictional matters as well as substantive matters which might have been raised in the original proceeding.[27]

Concededly the plaintiff in the *Chicot* case never actually litigated the jurisdiction question but only had a reasonable opportunity to do so. Thus it seems, that where a party has notice and a reasonable opportunity to litigate a case, he has in effect had his day in court. It should follow that notice and opportunity to be heard, even in case of a default decree, may establish a basis for res judicata as to jurisdictional matters if there are policy reasons for upholding the decree.

The defaulting defendants in the *Haenlein* case were afforded ample notice and opportunity to be heard. They were served, appeared, failed to file an amended answer and were later notified of the pending trial which was completely litigated against a joint defendant. Whereas the trial of the merits for the collaterally attacking party in the *Chicot* case furnished a reason for applying res judicata there, the trial of the merits against a joint defendant in the *Haenlein* case seems to furnish a similar reason. In the *Haenlein* case the plaintiff was obliged to proceed in the absence of any reason for a continuance, and neither he nor the court should be saddled with the burden of relitigating an issue which could have been decided there, unless there

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[25]308 U.S. 371 (1940).

[26]Id. at 375.

[27]"Some courts have held that only those facts actually litigated are foreclosed; other courts have held that all facts that might have been litigated under the pleadings are finally concluded; while still others have held that all facts that might in any way have been litigated are beyond question." 53 Harv. L. Rev. 652, 659 (1940). Perhaps some of the apparent inconsistencies are due to the court's failure to distinguish between res judicata and the more restricted concept of collateral estoppel. See Restatement, Judgments § 68, comment a (1942).

is some countervailing policy reason for denying the normal precluding effect of res judicata.[28]

Two considerations particularly have been stressed by the authorities as determinative of whether or not res judicata should apply so as to override the jurisdictional defect. The case of *Kalb v. Feuerstein*[29] presented one of the notable exceptions—that of withholding jurisdiction from state courts in order to protect a class of persons in the federal courts.[30] There a state court's decision that it had jurisdiction to foreclose a mortgage on farmland was held not to be res judicata on collateral attack. In pointing out the strong public policy against letting the state court exceed its authority, the United States Supreme Court said, "Congress set up in the Act an exclusive and easily accessible statutory means for rehabilitating distressed farmers. . . ."[31] Whether there is comparable public policy behind the withdrawal of state courts' jurisdiction over labor disputes affecting interstate commerce is rather speculative. If only national uniformity were intended, then the effect of res judicata should not be denied.[32]

A second consideration is that which arises when a court assumes jurisdiction upon a gross misconception of the law, *i.e.*, when there is a clear lack of jurisdiction over the subject matter. Coexistent with a clear lack of jurisdiction would be a stronger policy against res judicata—perhaps this much of the old dogma remains intact.[33] No inference of a clear lack of jurisdiction appeared in the *Haenlein* case. The court was one of general jurisdiction and was authorized to try cases of a similar nature. One might infer that, had there been a clear

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[28]In situations involving the concepts of res judicata and jurisdiction over the subject matter, the courts do not purport to deal with absolutes or principles of universal application. See Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944); Kloeb v. Armour & Co., 311 U.S. 199 (1940); United States v. United States Fid. & Guar. Co., 309 U.S. 506 (1940); and Kalb v. Feuerstein, 308 U.S. 433 (1940) wherein the court found some reason of public policy stronger than the policy behind res judicata.

[29]308 U.S. 433 (1940).

[30]State courts' jurisdiction to foreclose mortgages on farm land was pre-empted and exclusive jurisdiction over the proceeding was vested in the Federal Courts under the Frazier-Lemke Act, 11 U.S.C. § 203 (1958).

[31]308 U.S. at 443.

[32]For a discussion of legislative history and background of Federal pre-emptive legislation, see Note 12 Stan. L. Rev. 208 (1960).

[33]"Where the determination by the court that it has jurisdiction over the subject matter is obviously erroneous, and particularly where it is based upon an obvious misconception of the law, and especially where the court is one of limited jurisdiction, there is a policy against making the determination res judicata and precluding the unsuccessful party from collaterally attacking the judgment." Restatement, Judgments § 10, comment b (1942).