The Jurisdiction of Courts (Part 1)

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THE JURISDICTION OF COURTS

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I

In dealing with judicial jurisdiction some confusion arises out of the fact that a large portion of the specifically applied law of jurisdiction is stated in terms of the substantive law and procedural law. A question of jurisdiction may be raised while an action is pending, or it may be raised after the action has been disposed of and a judgment has been rendered. Thus the law of jurisdiction may be found in the law of "direct attack," and in the law of "collateral attack," in the law of res judicata, of estoppel of record and in the law of domestic and foreign judgments generally.

The reason for this is (in the field of so-called collateral attack) that after a judgment has been rendered its validity as a judgment depends upon whether or not it was rendered by a court acting as a court at the time of its rendition. To start with res judicata deals with the substantive aspect of a judgment; it accepts the rights and duties and facts as stated in the judgment as the final assertion on the subject. It is based upon the obvious policy of putting an end to controversies or possible controversies between parties. However, it has been based also upon the assumption that policy required that the controversy be ended by a court. Thus the pretended judgment of a pretended court, in other words, a judgment rendered without jurisdiction, was ineffective. The dogma was that the question of "jurisdiction" was always an open one.\(^1\) What to do with that dogma is the most interesting question in the field of jurisdiction of courts. But be-

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\(^1\) The Restatement of Conflict of Laws originally so stated the rule. See, Sec. 490 Tentative Draft No. 2 Cf., Sec. 450-f as finally published.
fore attempting an answer it is desirable to investigate the existing law and its background.

II

Jurisdiction of courts is sometimes classified as adjective or procedural law. But it would seem desirable to classify it as a thing apart from either substance or procedure. In truth it is an obvious distinct concept having little in common with either the substantive or adjective law. Substantive law deals with the rights, powers, privileges and immunities which persons may legally enjoy and their so-called “correlatives.” Adjective laws deals with the rules governing the conduct of a judicial proceeding brought for the purpose of securing judicial recognition of some part of the substantive law as between adverse or possibly adverse parties. The law of the jurisdiction of courts deals with the power or capacity of a court to deal judicially with the proceeding which has been or may be brought before it. Its foundation and its function are quite separate and distinct from either the law of substance or the law of procedure.

Adjective law has to do with the functioning of a court only after it has been determined that the court is functioning as a court, except in the case where it is used to question jurisdiction. There it operates on the theory that the law of jurisdiction has already been successfully applied. But even in the case where it is used to question jurisdiction the law of pleading is something quite separate and distinct from the law of jurisdiction, it merely prescribes how the question may be presented and it has nothing to do with how it is decided. That latter problem lies exclusively in the field of the law of jurisdiction. It is thus well to separate it from both substantive law and adjective law and classify it as a distinct concept—the law of jurisdiction of courts. It is, of course, an abstraction and we can well distinguish between its general “existence” and its specific exercise.

2 The jurisdictional concept includes the jurisdiction of the legislature and the executive. Much of the law of constitutional law, and most (if not all) of the law of the conflict of laws is a part of the law of jurisdiction.
There are other classifications or sub-classifications which it is well to notice. The first is that which divides judicial jurisdiction into 1, jurisdiction of the person, 2, jurisdiction of the subject-matter.

In the abstract jurisdiction of the person means obviously that the court in question has been granted the power to deal with a class of persons. "In its exercise the person in question falls within the general class and has been brought within its authority to act in relation to his rights and duties (in their broadest senses).

Under the earliest common law apparently the concept was that the physical presence of the parties was necessary before a court could specifically exercise its jurisdiction in respect to them. We still follow that rule in our criminal law today. Gradually the theory lost its foothold in the civil law and jurisdiction of the person became purely conceptualistic.

In the abstract jurisdiction of the subject-matter is the pre-conceived power to deal with a class or classes of judicial proceedings. In its specific exercise the question is usually simply whether the proceeding in question falls within the general classification, although it is possible to provide that certain action or facts are conditions precedent to the exercise of jurisdiction of the subject-matter. There are varying definitions and decisions as to what constitutes "the subject-matter of an action." Most of them arise out of attempts to interpret and administer certain provisions of the Code of Procedure where the phrase "subject-matter of an action" is used on several occasions. On the whole the results reached and the language used are not particularly helpful for the very simple reason that the courts have never sufficiently dissected the judicial processes and functions, nor thought the problem through. On careful analysis it does seem possible, however, to present a rather clear concept as to what constitutes the subject-matter of an action.

Our legal system is operated upon the theory that the legal rights and duties of all persons have a pre-conceived existence.

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4 Due usually, of course, to a constitutional acceptance of the rule.
A person's rights in relation to his real estate or person he carries around with him. If we call that person P, and the person who interferes, or threatens to interfere with those rights, D, we find that the courts were brought into existence for the purpose of giving judicial recognition to them in favor of P and against D. Theoretically P's judgment against D is the right which he previously had, but which is now conclusively and finally evidenced by a court record. When P seeks the aid of a court he is asking a specific judicial recognition of an asserted "existing" right against D.

At some time in the past inevitably P and D have in fact come together or into some relationship with each other (else we have a moot case) There is necessarily in every judicial proceeding a background of past events or facts. Necessarily P's asserted right against D has that background, and although P may have many pre-conceived general legal rights, he necessarily is presenting a specific right arising out of a specific situation when he comes into court. Under some systems of pleading, of course, the situation is expressly asserted, and the right only impliedly asserted, but the truth is that in any given case he asserts both. The function of the court is to determine the truth of those assertions. It inquires then into two things (or a complex thing), the asserted legal rights of the parties under the asserted facts. The court deals with that. That constitutes the subject-matter of an action.

Mr. Justice Cardozo has given expression to the proposition in this form: "None the less, as in other cases of contested right, the judgment does not create the title which it registers." In re Melrose Ave., 234 N. Y. 48, 54, 136 N. E. 235, 237 (1922). Mr. Justice Holmes has said this: "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." Prentis v. Atlantic Coast Line, 211 U. S. 210, 239 (1908). In the recent gold clause cases Chief Justice Hughes states the theory thus: "The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through courts, the contractual obligation still exists, and, despite infirmities of procedure, remains binding upon the conscience of the sovereign." Perry v. United States, 55 S. Ct. 432, 436 (1935).

Jurisdiction is also divided into jurisdiction of actions in rem and jurisdiction of actions in personam. The classification is a significant one, for the character of the process or notice necessary in a given case depends upon it. The distinction between the two is usually stated in terms of the results, that is, what is the theoretical character of the judgment the court will render? If the judgment is self-executing it is said to be an action in rem, if it is not it is an action in personam.

It is submitted that the explanation is inaccurate and that its proponents must finally give to the phrase “self-executing” a legal content at variance with its factual content. To start with it is never helpful to define a legal concept in terms of its results. In fact that really denies the concept. It is of no value whatever in the determination of a specific problem in the future. Is there not, therefore, some test which can be applied at the beginning, rather than at the end? It is believed that there is, and that the only basic distinction between actions in rem and actions in personam is that in the former the court is dealing primarily with a right in rem, and in the latter it is dealing with a right in personam. (“Primarily” is inserted because there are cases in which both are involved.)

If we look at the distinction based upon the “self-executing” character of the judgment we find many judgments in rem which may not be self-executing in any factual sense, as for example, partition, ejectment, replevin, mortgage foreclosure (in a “lien theory” state), attachment and even admiralty judgments. In each of those cases, as a matter of fact, the plaintiff needs some additional action before he actually realizes upon his judgment.

Probably originally the theory was based upon the metaphysical notion that in an action in rem the proceedings were against a tangible thing, over which the court had, or had acquired, a physical control, and with which in its judgment

it directly dealt. Under such a theory a court dealt with "things" and not legal interests in relation to them. When the possibility of attaching a debt or other chose in action was admitted that theory lost its validity. Under modern jurisprudence the theory has been repudiated. It is apparent that even in an action to quiet title to real estate, for example, the court is really dealing only with the plaintiff's and defendant's asserted rights in relation to the real estate, it is in no sense dealing with the real estate in fact. It is for this reason after all that parties are as necessary to an action in rem as they are to an action in personam. The subject-matter of an action in rem is in this respect remarkably like the subject-matter of an action in personam; it is the asserted rights of the parties under the asserted facts, and in both cases the rights are equally intangible for the simple reason that both are but mental concepts. Nor does it make a distinction to say that in an action in rem the rights are in relation to real estate, or other specific and tangible property, because the action of trespass (which is in personam) really involves rights in relation to real estate; while an action in garnishment may be in rem and be in relation to intangible property.

It will be noticed, however, that in most actions in rem the rights involved are usually primary rights, while in an action in personam the rights are usually secondary or remedial rights. Does that form a basis for distinction? A primary right is defined as a pre-conceived legal right whose ownership is not based upon wrongful conduct. Thus title to property generally and the right to the performance of a contract before breach are primary rights; while the right to damages for trespass or breach of contract are secondary.

7 Mr. Justice Holmes is authority for the statement that "all proceedings, like all rights, are really against persons." Tyler v. Judges of the Court of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 453 (1900). The preliminary sections of the American Law Institute Restatement of the Law of Property are based upon this philosophy.


9 The first is a right in rem; the second is a right in personam.
rights. But the chose in action may now be the subject-matter of an action in rem, so that the distinction is inconclusive.

If we look at the possible distinctions between the primary right to the performance of a contract and the primary rights (in the broad sense) which constitute the title to property we find the clue to a solution of the difficulty. The first has been classified as a chose in action, while the latter was classified as property. The first was originally property in only a very limited sense, the latter always was "property" and nothing but "property." In other words the chose in action was both theoretically and actually a limited right against a person. There was no power of sale. The law did not recognize the other incidents of property arising from it, such as a right to protection against wrongful invasion. Title to property, however, was a complex thing, and was composed of a number of rights against all persons, together with the power of disposition and the other incidents of "title."

If it is now true that an action in rem must be against persons also, as a practical matter there is a personal aspect to all rights in rem, when court procedure and jurisdiction are concerned. The old theory maintains itself, however, and in such a case the plaintiff is asserting a right in rem against the defendants named.

The distinction then between a primary right in rem and a primary right in personam is whether or not the right in question in the aspect presented for determination is against the defendant because the right had its origin against him solely, or is against him as a result of a larger antecedent right with which he has come in contact. The primary right in personam is not asserted as a property right but as a personal right; while the primary right in rem is asserted as a property right, despite its personal character.

10 The author prefers "secondary" over "remedial" because of the confusion brought into the picture by the use of the latter. There is strictly speaking no right to a remedy; (unless it be as a matter of constitutional law) and a person can secure judicial recognition of a primary right as easily as he can secure judicial recognition of a secondary right (as for example in an action to quiet title). Both are substantive and are separate and apart from either the law of procedure or the law of jurisdiction.

11 See supra n. 8.
On the other hand the *chose in action* became assignable, the tort of interference with a contract relationship developed, it could be garnisheed. The result has been that around the *chose in action* there have developed all the insignia of "property". Those same insignia in relation to tangible property are inseparable from it, and really constitute the "title." It is clear that the power to assign, or sell a *chose in action*, as well as the rights protected by the law of torts in connection with it, now constitute a "property" or a "title." Purely for historical reasons do we regard the *chose in action* as a thing separate from its incidents, so that it remains essentially a right *in personam*, while a "property," despite its personal aspects, remains essentially a bundle of rights *in rem*. The two, after all, are remarkably similar in their final legal content; but there is enough of actual, mental and historical differences to maintain the legal distinctions between them. We may well see the time, of course, when the distinctions between actions *in rem* and actions *in personam* will be lost. The problems presented by the distinctions are after all as to where an action ought to be brought and what constitutes reasonable notice. History, as usual, ought not to be the exclusively determining factor.

So it is true that when we are dealing with a *chose in action* as a *chose in action* it remains a right *in personam*. But when we come to the property side of the *chose in action* we may have an action *in rem*, because we are now dealing with a right *in rem*. Theoretically there should be no more difficulty in having an action to quiet title to a *chose in action* than there is to quiet title to real estate. For the same reason we have receivership, bankruptcy, probate or garnishment proceedings where the court deals with the property aspects of *chooses in action*. The truth is that if we start back at the beginning of those actions we find that the law under some circumstances gives a creditor a present power of disposition (or in older language, a right) over his debtor's property (including his *chooses in action*) \(^{12}\) When a creditor starts one of those proceedings he is seeking judicial recognition of

\(^{12}\) In the probate proceedings it is held *in trust* for him by the executor or administrator.
that power of sale. It is a right *in rem*, and, therefore, we have an action *in rem*.

The ultimate means of enforcement is immaterial. In a partition suit or a probate proceeding, for example, the sale is effected by the court itself;¹³ but in an attachment suit, a garnishment proceeding, a mortgage foreclosure (in a "lien theory" state) the sale is effected by the sheriff.¹⁴ In either event the judgment is a judicial recognition of the power of sale, the action is *in rem*, although it is clear that the judgment is in no factual sense self-executing.¹⁵

On such a basis it is unnecessary to say, for example, that the judgment in ejectment is "self-executing," because the writ of execution or restitution under which the sheriff acts is "in aid of the judgment" rather than in the enforcement of it.¹⁶ The right asserted by the plaintiff in such an action and judicially recognized by the judgment was a right *in rem* (the right to the possession of the property) and consequently there is an action *in rem*, despite the now personal feature of both the right and the action.

It is undoubtedly true that originally the law of equity could not be brought into the common law concept of legal rights or actions for the simple reason that the court of equity did not operate under any pre-conception as to legal rights, nor did it deal with them. It dealt with the parties' consciences, and it was not until rather recent times that judges and writers began to speak of equitable rights (in the broadest sense, again) It is to be doubted if modern jurisprudence makes any distinction on this score between legal and equitable rights, and it would seem highly desirable that our theories here make no distinction. Thus we have equitable rights, equitable conveyances and equitable torts. When, for

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¹³ See, e. g., Heppe v. Heppe, 199 Ind. 566, 149 N. E. 890 (1925) holding that an order for a partition sale is a "final" judgment from which an appeal lies, and recognizing, therefore, that the sale is an enforcement of the judgment.

¹⁴ The sheriff ordinarily is not a court officer, but an executive officer. See, Knisely v. Ham, 39 Okla. 623, 136 Pac. 427 (1913) and n. 49 L. R. A. (N. S.) 770; and Conflict of Laws Restatement (1934 Am. L. Inst.) Sec. 56.

¹⁵ The word "self-executing" of course may be a valid legal one, but it is certainly misleading.

¹⁶ See, e. g., 9 R. C. L., pp. 930, 931.
example, P sues to restrain threatened trespass he asserts and recovers on a secondary equitable right arising out of the equitable law of torts. When P sues for specific performance of a contract the contract is broken in equity as it is in law, and the plaintiff recovers on a secondary equitable right to specific reparation for the breach of the contract. "Specific performance" is thus something of a misnomer. Professor Langdell was always careful to employ the phrase "specific reparation." 17

If under modern statutes the decree operates as a conveyance it is because the law now makes the original contract both a legal contract and an equitable conveyance of the title to the land. P therefore asserts and gets exactly what his contract gave him, but it is an action

in rem,

because he is really asserting a right

in rem.

-An action

in rem,

therefore, is one in which the plaintiff asserts and is seeking judicial recognition of a right (in its broadest sense)

in rem,

an action

in personam

is one in which the plaintiff asserts and is seeking judicial recognition of a right

in personam.

Despite the personal aspects of rights

in rem,

and the property aspects of rights

in personam,

we still cling to the theory that one is a right against many and the other a right against one. Here, as is usual in the field of jurisdiction, the historical aspect of the problem is determinative of most (and perhaps too many) cases. It is something of a mental feat to mark the distinctions between a right

in rem

and a right

in personam

but until the feat is accomplished there can be no clear solution of the principal problem. 18

17 See, A Brief Survey of Equity Jurisdiction, 1 Harv. L. Rev. 355, 358 (1888).

18 It is sometimes said that "it is impossible to conceive" of certain legal distinctions. The proponents of such a view probably only mean that we ought not to indulge in the conception because it is literally true that nothing is impossible in the field of legal concepts. Here legal science is on a par with pure mathematics. Legal concepts are the product of the imagination, and to paraphrase the Red Queen, with a little practice anyone should be able to imagine at least six impossible things every morning before breakfast. Few lawyers have difficulty in conceiving of a legal interest in an unborn contingent remainderman; but to the untrained that is a rather difficult concept. So the concepts surrounding the principal topic are refined, but they are far from im-
It is possible to mark the distinction between jurisdiction and venue in a few words. As we have seen specific jurisdiction is the capacity or power to deal with the case presented by the parties. Venue is a restraint on that capacity or power for the benefit of the defendant. The theory is that the court has jurisdiction but as against this defendant it ought not to use its power. Courts normally, for example, have jurisdiction throughout the state, but a statute may prescribe that certain actions shall be brought in certain courts. It is often said that the law of venue is the law as to where actions "ought to be brought;" but that same statement applies equally to the law of jurisdiction. Actions in truth ought to be brought in conformity to both the law of jurisdiction and the law of venue.

It is difficult in a given case to determine whether a statute or rule designating the court in which a given action shall be brought is dealing with jurisdiction or venue. The question is usually one of statutory interpretation, and the question can best be put in this form does the statute limit the power of the court to act as a court, or does it merely place a restraint on its admitted power? Again the courts are prone to answer that question solely in the light of the historical aspect of the situation.

No small measure of confusion has been brought into the picture at this point by the common law classification of actions into local actions and transitory actions. This has been assumed to have been a classification identical with actions in rem and actions in personam, or at least it has been thought that the distinction was between jurisdiction and venue. In truth the classification had neither basis. Originally all common law actions were begun in London, but if a trial was finally had in a given case it usually was held in the county where the factual situation had developed. The reason for that was that originally the jury was selected because of its knowledge of the facts and it decided the issue of facts on
its own knowledge. To get a proper jury, therefore, it was convenient to go to the locality where the factual situation had developed. When it was finally determined that the jury could no longer decide the issue of fact on anything other than the evidence given in court the reason for that practice disappeared. Under the old rule it was necessary for the plaintiff to make allegations as to the venue, that is, where the factual situation in question had developed. It was a material allegation so that a proper jury might be obtained, but when the jury no longer could decide on its own knowledge the allegation became immaterial in some cases and the rule developed that if the factual situation could possibly (as a physical fact) have developed in any county the venue could be laid by the plaintiff in any county; but if it could have possibly developed in only one county the venue could only be laid in the county where it actually occurred. The first was a transitory action, the latter a local action. 19

Thus all actions concerning personal injuries, for breach of contract or covenant, or concerning movable property were transitory. Some of the latter are in rem, of course. Actions relating to land were local, and thus even an action for trespass to land was a local action although it was an action in personam. In the local actions the allegation as to venue remained material, and the reason why a plaintiff could not maintain an action for trespass to land in a foreign country was because he could not make or prove a proper allegation as to venue. The question, however, has been erroneously regarded as a substantive or a jurisdictional one. 20

Courts have been classified as either courts of general, or special (limited) jurisdiction. Whether or not a given court is one or the other, or both, is a question of statutory and constitutional interpretation. It is usual, here again, to state the distinction in terms of its results and the quality of the

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19 Stephen, Principles of Pleading, 280-292 (1824).
20 See, Jacobus v. Colgate, 217 N. Y. 235, 111 N. E. 837 (1916) and note 44 L. R. A. (N. S.), 267. See Mr. Justice Cardozo’s “explanation” of his opinion in the Jacobus case in the subsequent case of Matter of Berkovitz v. Arbib and Houlberg, 230 N. Y. 261, 130 N. E. 288 (1921). The truth is that in the first case the learned justice was bitten by the bug of “realism,” which “error” he has since repudiated.
judgment rendered is said to be the determining factor. So it is often said that the judgment of a court of general jurisdiction is immune against collateral attack upon jurisdictional grounds, whereas the judgment of a court of special or limited jurisdiction is entitled to no such immunity. In the latter case all of the facts necessary to give jurisdiction must appear affirmatively on the record, and even then the correctness of their determination is open to collateral inquiry.

It will be asserted hereafter that the reason why the judgment of the court of general jurisdiction enjoys the exalted status it does is because that character of court has in addition to its other jurisdiction the superimposed jurisdiction to judicially determine finally its own and other courts' jurisdiction. On the other hand the court of special jurisdiction usually has no such power. Ordinarily there is no indication in the language of the statute or constitution creating the court in question that the court has or has not been given this additional power. It probably is true that this addition to the power of the so-called court of general jurisdiction is judicial legislation, which is made imperative by the necessities of the situation and the constitutional doctrine of the separation of powers.

The necessities of the situation are these: the duty to perform a judgment, rather than the original legal obligation upon which it is based, arises out of the law of judgments, which is substantive law. The law of self-help having been largely abolished, a person's rights in relation to his property usually prohibit another person as an individual or as an executive officer from proceeding against his property in satisfaction of an original legal obligation until a court, acting as a court, has judicially recognized it and recorded it in the form of a judgment. If it is only one in form there is no duty to perform it on the part of the supposed judgment defendant, and his property rights are protected against its proposed enforcement by the sheriff or others. Thus logically every judgment of any court is open to the subsequent inquiry did the court rendering it really have actual power to render it; is it a judgment only in form or is it also a judgment in substance?
Those questions are to be answered only by a court, because they lie within the field of the judicial power as distinguished from the executive or legislative fields. We have never put in the latter the power finally to determine the legal validity of a judgment of a court. Accepted doctrine here has conceded to the so-called court of general jurisdiction the power to deal with it finally (to make a mistake concerning it), while that has denied it to the so-called court of special or limited jurisdiction. As pointed out above that concession is a desirable one. But the denial is not necessarily so desirable.

Suppose for example that P has sued D in State X for divorce. P's actual domicil in State X is a jurisdictional fact, because only the state of domicil has jurisdiction of the marital status. Suppose the court in State X erroneously has decided that P was domiciled there and has rendered a decree of divorce. In a subsequent action involving the property rights of the parties theoretically the decree is void, because in fact and in law the court had no jurisdiction to render it. The second court therefore disregards it and holds that the parties are still married. In a third court the judgment of both previous courts is still inconclusive and unless we concede some additional power to the second court the validity of the first decree is still open to question. It is obvious that some court ought to have the power to determine the question finally; and there really is no reason why the first court cannot and ought not to be given the power as well as the second or third court. The decision of the first court can be reviewed on appeal, and there is always a constitutional question involved so that ultimately the question may be carried to the Supreme Court of the United States.\(^1\)

\(^1\) The due process clause of the Fourteenth Amendment is a general limitation on the powers of a state to act in any capacity. Whenever a state acts beyond its power or jurisdiction, therefore, a person is being deprived of property or liberty without due process of law. So judicial action beyond jurisdiction is always unconstitutional, and whenever the question of jurisdiction is raised the question of due process can also be raised. "Due process requires that the limits of jurisdiction shall not be transgressed" per Hughes, C. J., Burnett v. Brooks, 288 U. S. 378, 406 (1933). See also Old Wayne Mutual L. Assoc. v. McDonough, 204 U. S. 8, 23 (1907).
one case as well as in two or three, and there is every advantage, therefore, in giving to the first court the power to determine its own jurisdiction.

A recent case decided by the United States Supreme Court illustrates the proposition very forcibly. An Iowa insurance company was sued in Missouri, it appeared specially and by proper pleadings raised the question of the jurisdiction of the court, upon the theory that the company had never done business in the state, the court found against it; the defendant defaulted, and judgment was rendered against it. In an action on the Missouri judgment in Iowa the company sought to raise the question of jurisdiction again but it was held that the first judgment was res judicata. That can only be explained on the theory that the first court had the power finally to determine its own jurisdiction rightly or wrongly. The practical result is excellent, of course, for it was as easy for the defendant to have appealed from the first judgment as from the second.

It will be noted that in that case the question of jurisdiction was specifically presented and passed upon. What happens if it is not so presented and passed upon, and what happens in a default case, are discussed hereafter. The principal point seems obvious. Judicial jurisdiction is finally a judicial question. Power to make a mistake concerning it is normally ascribed to a court of general jurisdiction, but not to a court of special jurisdiction. Defining those courts in terms of that power or the lack of it is merely stating a result. It can only be said that as to whether or not a court is one or the other properly is a question of a construction of the legislation or constitution creating it. But it is to be noted again that in the usual case the power really seems to arise out of a judicial doctrine rather than any actual and specific grant of power in the first instance. For that reason there is little which stands in the way of a judicial reclassification of most courts into the category of courts of general jurisdiction.

In the field of jurisdiction of courts the historical analogies are usually inapplicable, although much confusion has resulted

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22 Baldwin v. Iowa State Traveling Men's Ass'n, 283 U. S. 522 (1931).
because they have nevertheless been applied. The only court of general jurisdiction in England until the nineteenth century was the Court of Equity. The Common Law Courts were all courts of extremely special jurisdiction. Owing to the law of the original writ the court in truth had jurisdiction only as to the cause of action and parties referred to it by the writ. If the writ authorized the court to try an action of trespass *q.c.f* between P and D the only jurisdiction the court had was to try that action. Much of the narrowness of the substantive portion of the common law is the direct result of this law of jurisdiction. The theory was that the administration of justice was a royal prerogative and it was not until the reorganization of the court system in England in 1875 that it can fairly be said that theoretically the judicial function took its place in government as a thing separate and apart from the King.

Until that time except as to the Court of Equity no court was established with what we would today call general jurisdiction. The King dealt out jurisdiction piecemeal by a specific delegation of power in each case through the medium of the original writ. It is true that the actual issuance of the writ was early dispensed with but the theory of a jurisdiction based upon it continued.

Most of the Common Law analogies here, therefore, are false. The law of the original writ never obtained in this country after the revolution, and courts were and are an integral part of government rather than an agency of a sovereign power in the old sense. The ordinary trial courts in this country have always been given a very general grant of power. Thus in this particular field it is patent that Common Law decisions on the subject of *res judicata* and jurisdiction of courts may not be applicable.

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23 Sutton, Personal Actions at Common Law, 32 (1929).
24 Although apparently the old theory prevailed for some time. Thus it was held that the King could not appear as a witness in the King's Court. See, Walker-Smith, Lord Reading and His Cases (1934), 266. Although this general proposition seems to have been definitely repudiated to the extent that a proper judgment might be rendered against The Crown. *Ibid*. 350.
26 Clark, Principles of Equity, Secs. 7 § (1919), Cook, Cases on Equity 1-2 (1926).
28 Sutton, Personal Actions at Common Law, 43 (1929).
Common Law courts were classified as courts of record and courts not of record. The distinction is today apparently without any practical significance (other than a procedural one), but it is perhaps worthwhile to point out what the distinction was and why it no longer has importance. All of the King's Courts were courts of record, and the reason was not primarily that they kept a record of their proceedings, but because when they spoke they spoke as agents of the King; it was (in theory) the King who was speaking. What was said could not be successfully disputed, because the King's word was Truth. The result was that a decree or judgment by a court of record could not be questioned in subsequent proceedings, it remained the Truth as to the controversy between the parties and their rights and duties. In modern language we would describe the result under the doctrine of res judicata, although it is obviously a different concept. The basis of the doctrine of res judicata is a well founded public policy against the relitigation of a controversy between the parties which has once been decided by an impartial tribunal on the merits. The judgment becomes the right between the parties. The basis of the finality of a judgment of a court of record, as such, was the policy against allowing anyone to dispute the King's word, which is quite a different proposition. It arose not out of the law of judgments but out of the law of contempt.

The Anglo-Saxon courts of the people were therefore not courts of record, and until the doctrine of res judicata encompassed their judgments their action was in no sense final. Our inferior courts have been thought to be direct descendants of those courts and have usually been held not to be courts of record. But the doctrine of res judicata now makes their judgments conclusive.

Originally the principal distinction had practical consequences. The judgment of a court of record was conclusive and the proper remedy upon it was Debt. The judgment

27 3 Blackstone's Comm. 24.
28 Ibid. 25.
29 15 C. J. 720, 721.
of a court not of record was not conclusive, and the proper remedy originally was only Assumpsit, although Debt later would lie despite the uncertainty in the amount.\(^{31}\) Today those distinctions are immaterial. The doctrine of *res judicata* and the full faith and credit clause make the matter as final as the former, and Debt would be a proper remedy.\(^{32}\)

Except for some confusion which arises out of a failure to recognize the real distinctions involved the classification of courts as courts of record and those not of record is therefore today of no practical consequence. In this country since the Revolution we have had no King's courts, the justice of the peace and other lower courts derive their power from the same source as the superior courts, and there is actually no basis for any division into courts of record and courts not of record in the original sense of those terms. Even if we make the distinction and base it upon the historical analogies it is meaningless, for today the doctrine of *res judicata* is much broader than estoppel of record or merger, and the judgment of a court not of record is as conclusive as is that of a court of record.\(^{33}\) Usually, it is true, the court not of record is also a court of limited or special jurisdiction, so that its judgment is subject to attack on jurisdictional grounds;\(^{34}\) but that consequence is quite apart from the distinction between courts of record and those not of record.

It is quite obvious that estoppel of record, merger and *res judicata* are quite different and distinct concepts, based upon divergent theories although up to a point their results are the same. Just when *res judicata* became a defense although the situation presented was not encompassed by the doctrine of estoppel of record or merger it is impossible to tell. It is commonly said that *res judicata* owes its real birth to the Duchess of Kingston's Case\(^{35}\) decided in 1776. On the other

\(^{31}\) Ibid.

\(^{32}\) Andrews v. Montgomery, 19 Johns (N. Y.) 162 (1821), Cole v. Driskell, 1 Blackford (Ind.) 16 (1818). Being also a court of special jurisdiction the record must be made to show jurisdiction on its face, and the burden of proof on the subject is on the plaintiff.

\(^{33}\) Ibid.

\(^{34}\) See *supra* n. 32.

\(^{35}\) 20 Howell, St. T. 478, 3 Smith, Leading Cases, 1898.
hand it seems impossible to ascertain just when the rigor of
the rule of estoppel by record and merger abated to allow
collateral attack upon a judgment on jurisdictional grounds.
Undoubtedly the Common Law rule was that the record was
absolutely conclusive, and that it was only for defects appar-
ent upon the face of the record that a judgment could be
attacked collaterally.86

Today we rationalize that result (where the result still
follows) upon the theory that the first court had power to
determine finally its own jurisdiction. The law of estoppel of
record rationalized it upon the theory that the King’s word
was Truth or that the original obligation was merged in
the judgment. Now we sometimes allow the truth of a record
to be disputed, but when that development took place it is
impossible to tell. The essential point is that the development
has taken place but the old theory of estoppel of record is
often resurrected and used to bring confusion into the present
day results. We would do well to abandon the concept en-
tirely for *res judicata* can explain any result which it is de-
sirable to reach without the confusing historical, but inap-
plicable, doctrine of estoppel of record.

The same thing is true as to merger. It never did explain
the results where a plaintiff was defeated. It does not now
operate where there was a lack of jurisdiction. It was not
applied as to foreign judgments although in a proper case the
judgment was accepted as evidence of an obligation. Under
the Federal Constitution it becomes “conclusive” evidence,
so that today “merger” is largely a procedural problem, must
the plaintiff sue upon his judgment or his original cause of
action and prove the latter by his judgment?37

It will be seen from the foregoing that *res judicata* involves
two distinct situations. In the first, and most commonly
accepted sense, *res judicata* is a principle of substantive law;
it makes a *valid* judgment “the right” between the parties
and their privies.38

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86 This is old learning. The best summary of it will be found in Herman,
The Law of Estoppel and Res Judicata, Secs. 30, 31 (1886).
87 See Sec. 451, Restatement of Conflict of Laws (1934, Am. L. Inst.).
88 It is outside of the province of this article to discuss the law on this
phase of *res judicata*. The recent significant developments here have been
In the second sense *res judicata* has a bearing on the problem as to whether or not a valid judgment has been created. Has there been also a valid decision on the jurisdictional questions involved? Here *res judicata* has to do with the concept of jurisdiction. It is involved also in the field of the doctrine of the supremacy of the courts. Is a valid judgment *res judicata* as against the legislature and the executive? Here it deals with constitutional jurisdiction.

Thus the powers of a court must be investigated in relation, first, to persons, second, to other courts, and third, to other governmental agencies. It seems desirable to investigate the last situation first.

### III

As to the Federal Government the constitutional doctrine of the separation of powers arises out of a broad interpretation of the Federal Constitution, there is no express provision on the subject. In some states the same situation exists while in most states the matter is covered by express language. In this connection the doctrine may be stated pointed out by the present author in the articles cited *supra*, n. 6. See also Sec. 451, Restatement of Conflict of Laws (1934 Am. L. Inst).


broadly to be that a court may not exercise any power which is not a judicial power, nor may any other department of government exercise a judicial power. The constitutional standard here is a jurisdictional one, for it is a limitation on power. Distinctions must be made therefore between the judicial, the legislative and the executive functions.

It is usually said that the executive function is the enforcement of the law, the legislative function is the making of the law; the judicial function is the application of the law and the settlement of controversies over law and fact. Those statements at best are rather meaningless generalizations. All of them are inaccurate to a very large extent. Thus, although ordinarily the enforcement of the law is an executive function, there are a goodly number of cases where the courts enforce the law. For example in those actions in rem, as in partition, receivership, bankruptcy, and probate, where the court sells property and distributes the proceeds through its own officers the courts are actually enforcing the power of sale asserted by the plaintiff or the creditors. In those cases the executive takes no part in the proceedings, except when he acts as sheriff or marshal in summoning parties, or is specifically called in by the court to assist in contempt or similar proceedings.

On the other hand there are a number of cases where the executive both applies law and determines controversies. A sheriff, for example, may be called upon in the levy of a writ of execution to decide whether certain property is owned by the judgment defendant or by X and to determine the controversy between them. Whichever way he acts is the result of an application of his understanding of the law and the facts. City, county, state and federal executive and adminis-

42 At least if we take the language of the cases at their face value the commissioner, the receiver, the trustee in bankruptcy and the administrator or executor is each an officer of the court and not an executive officer. All desirable results could follow if we called them executive officers, but no reason is perceived why the language of the courts must not be taken at its face value.
trative officials "allow" and "disallow" claims as a regular part of their business. And, of course, the whole field of Administrative Law gives the lie to the general proposition that the application of the law and the determination of controversies is exclusively a judicial function. In truth in executing the law the executive invariably acts upon a conscious or unconscious decision as to what the law is and what the facts are.

The only possible distinction here involves another element; an executive or administrative decision on the law and the facts is not, as an original proposition,\textsuperscript{43} conclusive on the parties, while some judicial decisions on the law and facts are.\textsuperscript{44}

The general distinction between the legislative and judicial functions is obviously non-existent. Both the courts and the legislature "make" law. A Common Law theory of natural law has few (and deserves no) adherents. In the sense that there actually exist certain true rules and principles as to human conduct the concept of a pre-existent Common Law is justly in disrepute. But as suggested above it is possible and has been thought desirable for the courts to operate upon the basis of a pre-existent Common Law as a purely conceptualistic or postulational science. Quite obviously the rules and principles announced by the courts are made by the courts, and under the doctrine of \textit{stare decisis} they are made for the purpose of operating to control future conduct. And they do so operate. The dogma that the courts do not make law is either based upon a metaphysical philosophy of natural law, or it is based upon a conscious fiction employed to deceive the public.

Nor is it true that the courts deal with specific cases and the legislature with general situation, that the court's action is as to the present or past while the legislature's action is always as to the future. In the absence of constitutional limitations against special or retroactive legislation it is within

\textsuperscript{43} Prior to the time when a judicial review is cut off by a statute of limitations of some sort, or a similar limitation in the law or equity or appellate jurisdiction.

\textsuperscript{44} All could be, but there are courts which are not given complete power.
the legislative function to enact a rule for a specific case, or to enact a civil law having retroactive effect. In the earlier legal history of this country such legislative acts were frequent and they were upheld unless they impaired the obligation of a contract, or were *ex post facto* announcements in the field of criminal law.

The Federal Constitution does not impose the doctrine of the separation of powers upon the several states. The provision against *ex post facto* state legislation applies only to criminal or forfeiture laws. The only clause of the Federal Constitution which originally prohibited retroactive or special civil state legislation was the clause against the impairment of the obligations of a contract. There has always been respectable authority for the proposition that such legislation did not violate the provisions in state constitutions declaring the separation of powers.

Despite the force of the position announced in *Holman v. Bank of Norfolk,* and similar cases, there developed a controlling judicial distaste for special and retroactive substantive legislation which culminated in repeated pronouncements that such legislation was an unjustifiable invasion of the judicial function. Many states now have adopted specific constitu-

46 Ibid.
47 Ibid. See also, *Holman v. Bank of Norfolk,* 12 Ala. 369 (1847) and Merrill v. Sherbourne, infra n. 48.
49 See supra n. 47.
tional provisions prohibiting special and retroactive legislation, but even in the absence of such additions to a state constitution this legislative practice is effectively terminated in so far as it unreasonably interferes with "vested rights" by the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution. That clause is a limitation upon the legislative power, however, and is not the grant of additional judicial power; it is a protection to the individual and not to the courts. A case today involving special or retroactive substantive legislation might properly be decided under the Fourteenth Amendment in any event and not under the doctrine of the separation of powers.

The result is that because of the Fourteenth Amendment a state legislature must now normally enact a law which is both general and future in its application. But except as modified by the Fourteenth Amendment, the clause against *ex post facto* criminal legislation and the clause against legislation impairing the obligation of contract the legislative power in its field seems supreme. Outside of those limitations it seems competent for the legislature to change the Common Law, or to promulgate any rule it sees fit. A few expressions or decisions to the contrary should be labelled erroneous. The

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61 Willoughby, Constitution of the United States (2nd ed. 1929) Sec. 1117 (due process), *ibid.*, Sec. 1267 et seq. (equal protection).


63 A state legislature may provide for the submission of the question of the repeal of the Eighteenth Amendment to a popular election. People *ex rel.* Peaks v. Voorhis, 243 N. Y. 420, 153 N. E. 854 (1926). In the case cited the court said: "Except for such restrictions (in the constitutions) the legislative power granted to the legislature is plenary and the power includes the right to enact the statute under consideration."

64 James *v.* State, 45 Tex. Cr. R. 592, 78 S. W 951 (1904). In this case the court said: "It is insisted that, although this may have been the law prior
matter is summed up in the common expression that the wisdom of legislation is not a judicial question. A little reflection demonstrates, therefore, that any general definition of the legislative and judicial functions in terms of the power "to make law" is meaningless and inaccurate. Each includes the power to make law, although in a large field it must be conceded that when the legislature acts its pronouncement is controlling. About all that can be said truthfully on the subject is that both the legislature and the court have power to "make law" but the legislature has power to supercede judicial law.

Upon further investigation here it will be found that a disturbing factor is the doctrine of the Supremacy of the Courts. Whether this doctrine is a part of the doctrine of the Separation of Powers or a separate doctrine is immaterial. The doctrine of the Separation of Powers allocates the power of the three departments of government into three mutually exclusive categories. The doctrine of the Supremacy of the Courts concedes to the courts to the exclusion of the legislature or executive the power of finally deciding whether the doctrine of the Separation of Powers has been violated. It is the most significant American contribution to the philosophy of government. Most countries allocate governmental functions to an executive, a legislative and a judicial department, but being equal in power, each decides its own limitations, the restraints imposed by the doctrine of the separation of powers are ultimately self-executed, if they are observed.

to the act of the 27th legislature (p. 262) the effect of that enactment was to change the rule. We reply that it is not competent for the legislature to define a sale and fix its locus, regardless of the known rules of law, which authorize parties to make their own contracts, making the place of the sale depend on the place where the property is transferred and title passed. Much less is it competent for the legislature to reverse the decisions of the court upon questions of this character." See also, cases cited supra n. 50.

See, e.g., Townsend v. State, 147 Ind. 624, 47 N. E. 19, 37 L. R. A. 294, 62 A. S. R. 477 (1897). The general expression may be accurate enough if it be conceded that "wisdom" and "reasonableness" are different concepts. The "reasonableness" of legislative action is always an open question under the due process clauses. See Willoughby, Constitution of the United States (2nd ed. 1929) Sec. 1168 et seq.
Since the case of *Marbury v. Madison*\(^5\) it has been accepted doctrine in this country, however, that finally the question of constitutional jurisdiction is exclusively a judicial question, and thus it is that a constitutional question (which is usually a jurisdictional one) is always open.\(^5\) There are, of course, courts which have no power to pass on constitutional questions.\(^5\) Those situations do not detract from the general

\(^5\) The common expression that the question of just compensation in eminent domain proceedings is a judicial and not a legislative question is simply a statement of the same proposition in specific terms. The constitutions require "just compensation," so that legislative, executive or judicial power is limited to a taking of property upon that condition. The condition is a jurisdictional one and the courts only can finally determine whether or not it has been complied with. See, e.g., *In re. Forty-Second Street Spur of Manhattan Ry.*, 216 N. Y. S. 2, 126 Misc. 879 (1926), *Birmingham Drainage District v. Chicago, B. & Q. R.*, 274 Mo. 140, 202 S. W. 404 (1918), *Chapman v. City of Bozeman*, 68 Mont. 435, 219 P. 810 (1923), *Bland v. Miller*, 175 Ark. 98, 298 S. W. 995 (1927), *State ex rel. Dawson v. Falkenhauer*, 321 Mo. 1042, 15 S. W. (2nd) 342 (1929), *Calhoun v. McLendon*, 42 Ga. 405 (1871).

The common expression that the question of just compensation in eminent domain proceedings is a judicial and not a legislative question is simply a statement of the same proposition in specific terms. The constitutions require "just compensation," so that legislative, executive or judicial power is limited to a taking of property upon that condition. The condition is a jurisdictional one and the courts only can finally determine whether or not it has been complied with. See, e.g., *In re. Forty-Second Street Spur of Manhattan Ry.*, 216 N. Y. S. 2, 126 Misc. 879 (1926), *Birmingham Drainage District v. Chicago, B. & Q. R.*, 274 Mo. 140, 202 S. W. 404 (1918), *Chapman v. City of Bozeman*, 68 Mont. 435, 219 P. 810 (1923), *Bland v. Miller*, 175 Ark. 98, 298 S. W. 995 (1927), *State ex rel. Dawson v. Falkenhauer*, 321 Mo. 1042, 15 S. W. (2nd) 342 (1929), *Calhoun v. McLendon*, 42 Ga. 405 (1871).
proposition, for they are a result of a failure or refusal to grant to some courts complete judicial power, rather than a limitation upon the concept of judicial power as such.

Thus a court may determine whether a legislature has legislated or has, for example, acted judicially, and therefore in one sense judicial power is always superior to legislative power. But the supremacy is on the power to decide constitutional jurisdiction, not the power to supercede a valid legislative function.

In the light of this additional doctrine it is worth while to investigate some of the more usual situations where the question of the dividing line between judicial, legislative and executive power has been presented for decision.