Fordham Law Review

Volume 7 | Issue 1 Article 3

1938

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Cover Page Footnote
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Judges often commit error. For the harm thus done, they are immune. Public policy requires no less, if justice between man and man is to be administered without fear of personal consequences to the instruments of judicial administration. As said by an English court:[1] "It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him?" On the other hand, there must be some limit to judicial immunity for acts erroneously done. The line has been drawn at that point where jurisdiction ends.

But what is jurisdiction? What is its nature? Where does it begin, and where does it end? Jurisdiction itself is often an abstruse problem, predicated on complicated and conflicting statutes and fine-spun legal theories. So: Was the judge authorized to preside over the court? Is the court something different from the judge who presides over it? Has the court, as distinguished from the judge, jurisdiction? Was the judge's act merely void or voidable? Does it make any difference that the judge was motivated by corrupt or malicious motives? Is it significant that the court involved, was one of general or limited jurisdiction?

Underlying the problem as to where responsibility shall lie for an unerring answer to all of these inquiries, is the question as to whether the judge shall make proper disposition, at his own peril. The answer, dictated by public policy, represents a practical compromise between conflicting legal concepts, resulting in the anomalous situation that a judge, whose acts are void for lack of jurisdiction, may, nevertheless, be immune from legal responsibility because, in fact, he had sufficient jurisdiction for that purpose; and, furthermore, because that which is

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1. Scott v. Stansfield, L. R. 3 Ex. 220, 223 (1868). *Cf.* Karelas v. Baldwin, 237 App. Div. 265, 261 N. Y. Supp. 518 (2d Dep't 1932).

void, as between the parties to a litigation, may still be valid as against third parties; and, finally, because whether or not a judge shall be responsible for his void acts, may depend on whether he purported to act in a court of general or limited jurisdiction.

Mr. Justice Holmes said that "Jurisdiction is authority to decide the case either way."[2] Thus, he held that a circuit court had jurisdiction to determine the questions presented in an alleged patent case even though no patent question was actually presented. It was enough that the plaintiff asserted that there was a patent question. Or, as said by a federal court:[3] "Jurisdiction of the subject matter is the power to deal with the general abstract question, to hear the particular facts in any case, relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court, by the law of its organization, to deal with the abstract question. Nor is this jurisdiction limited to making correct decisions. It empowers the court to determine every issue within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong; and every judgment or decision so rendered is final and conclusive upon the parties to it, unless reversed by writ of error or appeal, or impeached for fraud."

So, also, in *Gaines v. City of New York*,[4] the New York Court of Appeals subscribed to the proposition that "a mistaken belief that the court has jurisdiction, stands on the same plane as any other mistake of law. Questions of jurisdiction are often obscure and intricate. . . . There is nothing in the reason of the rule that calls for a distinction between the consequences of error in respect of the jurisdiction of the court and the consequences of any other error in respect of a suitor's rights." When presented with the argument that an action "dismissed for want of jurisdiction is a nullity in the same sense as if it had never been begun at all," the court answered that such was "an extreme view." "Such an action has at least some of the consequences of an action begun in a court of competent jurisdiction. . . . For some purposes, therefore, we may speak of an action as pending, though the court is without jurisdiction to adjudicate its merits."[5] And, as was said in *Hunt v. Hunt*[6]: "Jurisdiction of the subject matter is power to adjudge

2. The Fair v. Kohler Die and S. Co., 228 U. S. 22, 25 (1913).

3. Foltz v. St. Louis & S. F. Ry., 60 Fed. 316, 318 (C. C. A. 8th, 1894). *Cf.* Board of Commissioners v. Platt, 79 Fed. 567 (C. C. A. 8th, 1897).

4. 215 N. Y. 533, 539-540, 109 N. E. 594, 595 (1915).

5. *Id.* at 540, 109 N. E. at 596.

6. 72 N. Y. 217, 229-230 (1878).

concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question. . . . So that there is a more general meaning to the phrase *'subject-matter'* in this connection, than power to act upon a particular state of facts. It is the power to act upon the general, and so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power."

But these generalities, nevertheless, leave subtle distinctions still to be determined, for, obviously, jurisdiction is a concept with varied meanings: "There are three things needed to give jurisdiction: First, power by law to act upon the general subject-matter. . . . Second, jurisdiction of the person. . . . Third, jurisdiction of the particular case."[7] Clearly, a court, acting without jurisdiction of subject-matter, could, as between the parties, arrive at no valid conclusion. Similarly, as to a court lacking jurisdiction of persons, where such jurisdiction was required. And, in any event, even the power to decide questions of jurisdiction, presupposes a minimum showing of facts to justify even the initiation of the process of judging.

It, therefore, becomes necessary to examine more closely the underlying theoretical concepts of the various types of jurisdiction involved.

A court has jurisdiction of subject-matter, when it has the right to adjudicate between given individuals with respect to the field of rights in which the controversy arises. Similarly, a court has jurisdiction of persons when it has the right to adjudicate, within such field of rights, with respect to the persons who are before the court. And there is still a third conception of jurisdiction, *i.e.*, contemplating the *power* of the court to decide whether or not it has jurisdiction of subject-matter and jurisdiction of persons. Obviously, as between the parties to a litigation, judicial proceedings are void, if lacking in jurisdiction of subject-matter, or of persons (where such jurisdiction is necessary). It cannot be important to them that the court had power to decide its own jurisdiction, and was wrong. Nothing less than actual jurisdiction will do; similarly, as to the rights of those whose civil rights depend upon the validity of the adjudication thus made. That the court was wrong on any of the issues in the case, other than jurisdiction, is immaterial. But as to jurisdiction, the court must have been right. Such are the principles applicable on collateral attack.[8] It is only in viewing the

7. Devlin v. Cooper, 84 N. Y. 410, 413, 415 (1881). Accord: Matter of Leggat, 162 N. Y. 437, 56 N. E. 1009 (1900).

8. The difference in judicial view, dependent upon the nature of the attack, *i.e.*, whether direct or collateral, is well-known and quite settled. Familiar instances come readily to mind, in connection with writs of attachment. Haebler v. Bernharth, 115 N. Y. 78, 22

acts of a court, from the point of view of granting immunity to its own personnel, for acts void as between the parties, that the third concept of jurisdiction, *i.e.*, as embracing right, power, and duty to decide its own jurisdiction, becomes material. Jurisdiction, so viewed, takes on a subjective quality. Objectively, *i.e.*, as between the parties, there may, in fact, have been no jurisdiction at all. But, subjectively, *i.e.*, insofar as it is necessary to determine whether the presiding judge should be responsible for such objectively void acts, there was jurisdiction.

But, when we refer to this "immunity" concept of jurisdiction as "subjective," we must remember that we do so only in the sense that it is the judicial system itself which subjects itself to examination and criticism, not for the purpose of determining actual jurisdiction of subject-matter or of persons, but to ascertain whether there was at least the power and duty to determine whether to act. Motives, malice, or honesty of purpose, are of no consequence. The actual state of mind of the judicial officer is, therefore, immaterial.[9] In this sense, the inquiry is by no means subjective. What we seek is that irreducible minimum of facts, justifying the initiation of the judicial process, and requiring the

N. E. 167 (1889). *Cf.* Bloomingdale v. Cook, 35 App. Div. 360, 54 N. Y. Supp. 924 (2d Dep't 1898). Service of process. Murphy v. Shea, 143 N. Y. 78, 37 N. E. 675 (1894); Valz v. Sheepshead Bay Bungalow Corporation, 249 N. Y. 122, 163 N. E. 124 (1928); *In re* McGarren's Estate, 112 App. Div. 503, 98 N. Y. Supp. 415 (1st Dep't 1906). Controversies as to title, predicated upon alleged defects in foreclosure. McMurray v. McMurray, 66 N. Y. 175 (1876); Ingersoll v. Mangam, 84 N. Y. 622 (1881); Crouter v. Crouter, 133 N. Y. 55, 30 N. E. 725 (1892); Taylor v. Emmet, 137 App. Div. 202, 122 N. Y. Supp. 66 (1st Dep't 1910).

"In determining the sufficiency of this deposition, it should be borne in mind that the proceeding before the justice is attacked collaterally and, therefore, that great latitude of construction should be indulged in." Swart v. Rickard, 148 N. Y. 264, 269, 42 N. E. 665, 666 (1896).

". . . the proceeding is to be regarded with favor, and every reasonable intendment is to be entertained in support of jurisdiction when attacked, as in this case, collaterally. . . . '*A liberal indulgence* must be extended to these proceedings, even upon a question of jurisdiction, if we would not *render them a snare rather than a beneficial remedy*' . . . *although the proof may be slight and inconclusive,* the process will be valid, until it is set aside by a direct proceeding for that purpose." Pratt v. Bogardus, 49 Barb. 89, 94, 95 (N. Y. 1867), quoting in part from Van Alstyne v. Erwine, 11 N. Y. 331, 341 (1854) and Miller v. Brinkerhoff, 4 Denio 118, 120 (N. Y. 1847). Pratt v. Bogardus, *supra,* contains other valuable discussion.

"We may not test the sufficiency of an information, even when attacked directly, by the same rules and standards of technical correctness as were formerly applied to a common-law pleading and, especially, when the attack on the sufficiency of the information is made collaterally 'great latitude of construction should be indulged in'." Vittorio v. St. Regis Paper Co., 239 N. Y. 148, 152, 145 N. E. 913, 914 (1924). Accord: Easton v. Calender, 11 Wend. 91 (N. Y. 1833); Matter of Faulkner, 4 Hill 30 (N. Y. 1842).

9. Gans v. Callaghan, 135 Misc. 881, 238 N. Y. Supp. 599 (Sup. Ct. 1930), *aff'd,* 231 App. Div. 735 (2d Dep't 1930), *appeal dismissed,* 256 N. Y. 552, 177 N. E. 136 (1931).

exercise of it as an incident of judicial function.[10] It is correct for a judge to act in such a setting. This, though his decision be wrong. For error is an inevitable product of the judicial process, and—without taking the risk of it, and giving judges immunity nevertheless—justice itself would be paralyzed.

This leads us, then, to the inquiry as to what is the irreducible minimum which must appear to justify the initiation of the judicial process. Unfortunately, there is no accurate measure. All that can be said is that such facts must appear as to justify belief, on the part of a reasonable judicial officer, that he is called upon to exercise his judicial function, and should not shirk it.

It is at this point that the distinction between courts of general and of limited jurisdiction, must be considered. In New York, it is said that courts of limited jurisdiction decide as to their power, with respect to subject-matter and persons, at the risk of the judge presiding,[11] but that courts of general jurisdiction take no such risk, because they are deemed to have all judicial powers residing in any court.[12] The reasoning is that courts with plenary jurisdiction, in the nature of things, can look to no statute for delimitation of their authority[13]—they must decide their own jurisdiction for themselves—but that courts of limited jurisdiction must not transgress the borders of delegated power;[14] that, for them, the standard is the precise phraseology of creating statutes, not the vague outlines of an undefined reservoir of legal and equitable principles.

The distinction is one of degree, rather than of substance. A judge acting in a court with limited powers, must necessarily show that he kept well within those limitations. For him to establish the subjective concept of "immunity" jurisdiction, he must show the precise facts requiring his court of *limited* jurisdiction to initiate the judicial process.

10. *Cf.* the two cases of Roderigas v. East River Savings Institution, 63 N. Y. 460 (1875) and 76 N. Y. 316 (1879). The second Roderigas case, *supra,* held that, where it appeared that the papers upon which discretion of the court was to be exercised, were not before him, no presumption would be indulged in that he acted with jurisdiction. The Court of Appeals of New York pointed out that the "difference in the facts between the two cases, is that in this it was proved and is found by the trial judge that the petition of Mrs. McNeil was not presented to the surrogate, and that he never saw her, and never in fact acted upon the petition, and had no actual knowledge of it, nor of the issuing of the letters, that the business was done by a clerk in the office, who used a blank which had been signed by the surrogate, and left with him, and attached the surrogate's seal." *Id.* at 319.

11. Lange v. Benedict, 73 N. Y. 12 (1878); Austin v. Vrooman, 128 N. Y. 229, 28 N. E. 477 (1891).

12. Bradley v. Fisher, 80 U. S. 335 (1871); Lange v. Benedict, 73 N. Y. 12 (1878).

13. N. Y. CONST., Art. VI, § 1.

14. People *ex rel.* Tweed v. Liscomb, 60 N. Y. 559 (1875).

A judge presiding over a court of general jurisdiction, however, may rely upon a much broader setting, though not without limits. For even the jurisdiction of the Supreme Court is regulated and limited by Constitution, statute and judicial decision. The concept of an unlimited jurisdiction, ever in reserve, all-powerful to act under all circumstances, if only justice requires, is non-existent in practice. However, it is true that for a judge of a court of general jurisdiction, "immunity" jurisdiction is presumed, though rebuttable.[15] For his brother, sitting in a court of limited jurisdiction, it must be shown. But the ultimate issue in both cases, is the same: Were there sufficient facts before the judge to require the exercise of his judicial function in the field of rights allocated to his court?

In addition to the problem of abstract jurisdiction, there must also be considered the difference between the court, as technically constituted, and the judge who presides over it. The court may be duly organized; the judge fully empowered to act as such; yet unauthorized to act as judge of said court. The distinction between court and judge is well-recognized:[16] "A court has been defined to be: 'an organized body, with defined powers, meeting at certain times and places for the hearing and decision of cases and other matters brought before it, and aided in its proper business by its proper officers.' *Matter of Choate*, 24 Abb. N. C. 430-433. 'A place where justice is judiciously administered. * * * A court is properly composed of persons consisting of the judge or judges and other proper officers, united together in a civil organization, and invested by law with the requisite functions for the administration of justice * * * The court is clearly an organization invested by law with certain functions for the administration of justice'."

Therefore, to say that a court does or does not have jurisdiction, is utterly unconcerned with any conclusion which may be reached as to whether a judge presiding over a court is empowered to decide whether he has jurisdiction of either subject-matter or of persons, and to act accordingly. It may very well be that a court has jurisdiction of subject-matter and of persons, but that a judge, presiding over it, was not assigned to that duty, and that, therefore, his personal acts were *coram non judice*.[17] And it may also be that a justice is acting entirely within the authority vested in him, but through a court which is not entitled to act on the subject, as, for instance, in cases in which extraordinary

15. *Ibid.*

16. See People v. Rotolo, 61 Misc. 579, 581, 115 N. Y. Supp. 854, 855 (County Ct. 1908).

17. Matter of Jacobs v. Steinbrink, 242 App. Div. 197, 273 N. Y. Supp. 498 (2d Dep't 1934).

terms of the Supreme Court have been organized, and their acts held to be void when attacks were made upon them.[18]

An examination of the authorities will be found to justify these conclusions, though, for the most part, failing to formulate the basic principles which are involved, as we have stated them. It is not the actual jurisdiction of the judge, but the presence of sufficient facts requiring him to pass on his own jurisdiction, which affords the subjective test for his own immunity, irrespective of what may be the validity of his acts, as between the parties. And this test is the same, for both courts of general and limited jurisdiction.

Even in our leading case of *Lange v. Benedict*,[19] the Court of Appeals extended the immunity of judges presiding over courts of general jurisdiction, to a case in which the judge so presiding over a court of limited jurisdiction, had both jurisdiction of subject-matter and of persons in the particular case. And it did so because it considered that the judge, so presiding over the circuit court there involved, should receive the benefits of the rule applicable to courts of general jurisdiction, rather than of that which would normally be applicable to courts of limited jurisdiction, because the circuit court was not really an "inferior" court. That was as far as the court was obliged to go, in the *Lange* case, in order to give immunity to the defendant.

Such is the general tendency. The distinction between courts of general and of limited jurisdiction, lacks fundamental reason for the difference, and is entirely arbitrary. It has served its purpose, in a period of transition. The rule for all judges should be and, in its essence, is the same, *i.e.*: In whatever he did, did he act as judge, as the presiding officer of a court duly constituted to determine the class of cases of which the particular case was one, and, as an incident of his judicial function, so exercised, was he called upon to decide his own power to act? What he did, may have resulted in an act, void as between the parties, yet valid enough to grant him complete immunity. Thus, the cases are clear that a judge may be immune, though he lacks jurisdiction of persons.

So, in *Bradley v. Fisher*,[20] a judge disbarred an attorney without citing him or giving him an opportunity to be heard. The attorney sued the judge. The court held that the judge was immune: ". . . where jurisdiction over the subject matter is invested by law in the judge or the court

18. Gordon v. United States, 117 U. S. 697 (1864); Matter of Richardson, 247 N. Y. 401, 160 N. E. 655 (1928); Matter of Mitchell v. Cropsey, 177 App. Div. 663, 164 N. Y. Supp. 336 (2d Dep't 1917); Matter of McIntyre v. Sawyer, 179 App. Div. 535, 166 N. Y. Supp. 631 (1st Dep't 1917).

19. 73 N. Y. 12 (1878).

20. 80 U. S. 335, 352 (1871).

which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend." In *Ackerly v. Parkinson*[21]—which is the leading English case on the subject—the Vicar General of the Ecclesiastical Court had excommunicated an attorney for his failure to accept the duties of administration of an intestate's estate. Service of process on the attorney was wholly void. The court held that the judge was not liable. Both of these cases were cited in the leading case in this state, *Lange v. Benedict*,[22] in which it was held that a judge of a district court of the United States, who had presided over a circuit court, was immune, though he had illegally sentenced the plaintiff (defendant in a criminal proceeding, before plaintiff in the federal court) to imprisonment, so that defendant's act as judge—as later declared by the Supreme Court of the United States—was void. The reasons stated were these:

"It is the general abstract thing which is the subject-matter. The power to inquire and adjudge whether the facts of each particular case make that case a part or an instance of that general thing—that power is jurisdiction of the subject-matter. . . .

"Let it be conceded, at this point, that the law is now declared, that the act of the defendant was without authority and was void, yet it was not so plain as then to have been beyond the realm of judicial discussion, deliberation and consideration, as is apparent from the fact that four judges, other than the defendant, acting as judges, have agreed with him in his view of the law.

"He was, in fact, sitting in the place of justice; he was at the very time of the act a court; he was bound by his duty to the public and to the plaintiff to pass as such, upon the question growing out of the facts presented to him, and as a court to adjudge whether a case had arisen in which it was the demand of the law, that on the vacating of the unlawful and erroneous sentence or judgment of the court, another sentence or judgment could be pronounced upon the plaintiff. So to adjudge was a judicial act, done as a judge, as a court; though the adjudication was erroneous, and the act based upon it was without authority and void. Where jurisdiction over the subject is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other involved in the case; although upon the correctness of his determination in those particulars, the validity of his judgment may depend. (*Ackerly v. Parkinson, supra*). For such an act, a person acting as judge therein is not liable to civil or criminal action. The power to decide protects, though the decision be erroneous."[23]

21. 3 M. & S. 411, 105 Eng. Reprints 154 (1815).

22. 73 N. Y. 12 (1878).

23. *Id.* at 28, 32-33.

Similarly, in *Gans v. Callaghan*,[24] the court held that a justice of the Supreme Court was immune, even though it was alleged that he acted maliciously. No question of actual or apparent jurisdiction was involved. In *Little v. Moore*,[25] an action was brought against two defendants. One of them appeared before the justice, and confessed judgment on a note purporting to have been signed by both defendants. Upon this confession, the justice entered judgment and issued execution against both defendants—actually issuing the execution himself. The defendant who had not confessed judgment, asserted that the justice had acted maliciously, and sued to recover damages. The court held that the justice was immune.[26]

In *Langen v. Borkowski*,[27] it appeared that a judge adjudged an individual to be in contempt, and imprisoned him. When suit was brought against the judge, the highest court of Wisconsin assumed that the process by which the contempt proceeding was initiated, was void, and that, accordingly, no jurisdiction of the person of the individual had been obtained. Yet, the judge was held to be immune. In *McCall v. Cohen*,[28] a justice of the peace had caused a judgment to be entered which was void. It was held that he was immune from responsibility in connection therewith, even though no jurisdiction of the person of the defendant had been obtained. The older authorities reached the same result, upon the theory of "color of jurisdiction."

The leading New York case, often referred to in the authorities, is *Miller v. Brinkerhoff*,[29] in which it was said that "when the proof has a legal tendency to make out a proper case, in all its parts, for issuing the process, then, although the proof may be slight and inconclusive, the process will be valid until it is set aside by a direct proceeding for that purpose."[30] In *Miller v. Adams*,[31] the court said: "When the evidence presented to the court or officer has a tendency to prove the facts required to be proved to confer jurisdiction, the decision protects the

24. 135 Misc. 881, 238 N. Y. Supp. 599 (Sup. Ct. 1930), *aff'd*, 231 App. Div. 775 (2d Dep't 1930), *appeal dismissed*, 256 N. Y. 552, 177 N. E. 136 (1931). Accord: Grove v. Van Duyn, 44 N. J. L. 654 (1882).

25. 4 N. J. L. 84 (1818).

26. Compare Shenson v. I. Shainin & Co. Inc., 268 N. Y. 567, 198 N. E. 407 (1935), in which it was held that, on direct attack, a judgment entered by confession was void, with Solomon v. Smith, 248 App. Div. 703, 816 (1st Dep't 1936), *motion for leave denied*, 272 N. Y. 679 (1936), in which, on collateral attack, the Justice of the Supreme Court who had directed the entry of the void judgment, was, nevertheless, held to be immune from liability.

27. 188 Wis. 277, 206 N. W. 181 (1925).

28. 16 S. C. 445 (1881).

29. 4 Denio 118 (N. Y. 1847).

30. *Id.* at 120.

31. 7 Lans. 131 (N. Y. 1872), *aff'd*, 52 N. Y. 409 (1873).

court or officer, and also the party."[32] In *Pratt v. Bogardus*,[33] the court held that a magistrate was protected from liability in issuing a warrant of arrest upon an affidavit, on the ground that "the evidence upon which the warrant was issued was colorable, and sufficient to call upon the justice to exercise his judgment in determining the propriety of issuing process, and having acted in good faith, he should be protected."[34]

In *Landt v. Hilts*,[35] the judge issued an order of arrest, upon an affidavit which was subsequently determined to be insufficient. It was held that the justice and all who acted upon the authority of his order, were immune from liability, because the judge had jurisdiction of the subject-matter, and a colorable case was made out, and that was sufficient. In *Bocock v. Cochran*,[36] a magistrate issued a warrant upon an affidavit which was subsequently held to be invalid. In an action against him for false imprisonment, it was held that even though the facts stated were insufficient to establish the commission of an offense over which he had jurisdiction, yet the facts were positively sworn to and were enough to render the action of the justice, in passing upon their sufficiency, a judicial one, and to protect him from liability.

In *Butler v. Potter*,[37] the plaintiff sued the defendant, a justice of the peace, for trespass and false imprisonment. It appeared that the justice of the peace, on a confession of judgment, rendered against the plaintiff and another, had issued execution against the plaintiff, by reason of which the plaintiff was committed to jail. It was argued by the plaintiff that, inasmuch as the costs were greater than those allowed by statute, the execution was void. The trial court held that the execution was void, and directed a verdict for the plaintiff. On appeal, the court said that the judgment issued by the justice of the peace "was an erroneous, not a void judgment. . . . We have decided that, where a justice has jurisdiction to issue an attachment, but proceeds erroneously in doing so, he is not, therefore, a trespasser."[38] In so ruling, the court relied on *Prigg v. Adams*.[39] There, under facts substantially the same, it was said that "the question was whether the judgment was so far void, that the party should take advantage of it in this collateral action? And the court held that it was not; but that it was only voidable by plea or error. . . ." In *Griffin v. Mitchell*,[40] there was again an action for

32. *Id.* at 136.
33. 49 Barb. 89 (N. Y. 1867).
34. *Id.* at 95.
35. 19 Barb. 283 (N. Y. 1835).
36. 32 Hun 521 (N. Y. 1884).
37. 17 Johns. 145 (N. Y. 1819).
38. *Id.* at 146.
39. 2 Salk. 674, 91 Eng. Reprints 573 (1795).
40. 2 Cow. 548 (N. Y. 1824).

false imprisonment against a justice of the peace, who had issued execution on a confession of judgment—the objection being taken that the judgment was void, because it did not set forth the particular items of the demand, nor was the statement, in connection therewith, verified, as the law required. Referring to the *Butler*[41] and *Prigg*[42] cases, the court said: "Upon demurrer, the question was, as it is here, whether the judgment was so far void that the party should take advantage of it in this collateral action; and the court held that it was not, but that it was only voidable, by plea or error."[43]

In *Ayers v. Russell,*[44] where it was sought to hold liable a recorder who wrongfully approved a certificate of lunacy, the court said: "The defendant, the recorder, had the powers of a judge of a court of record. His approval of the certificate of the physicians was a judicial act. It was an act analogous to the issuing of a warrant for the arrest of an alleged criminal upon information verified by oath. If the information fills the requirements of the statute, the magistrate's jurisdiction is complete. But the information may be incomplete in fact; some essential specified in the statute may be omitted; the magistrate may not be learned in the law, or if learned, not always sound in judgment; he looks at this information and decides that a case exists, when, in fact and in law, there is no case; he issues his warrant when he ought not, and the result is that a man who has committed no crime, and against whom no crime is alleged, is arrested and temporarily deprived of his liberty. In one aspect of the case, the magistrate had no jurisdiction because the law gives him no jurisdiction to issue a warrant unless it appears that an offense has been committed and there is reasonable cause to believe that the accused committed it. A judge, upon *habeas corpus,* ought to decide that the magistrate had no jurisdiction to issue the warrant. Why, then, cannot the magistrate be pursued by the injured individual? Because, when the information was presented to him, it was his duty to decide what his duty was respecting it. He had jurisdiction of that question, and his wrong decision upon it was a judicial error. He had a duty to perform, and the law does not punish him for a mistake in trying to do it right."[45]

Again, in *Harman v. Brotherson,*[46] an officer allowed plaintiff to bail upon an affidavit which was presented to him. The court decided that the officer was not liable because "he had jurisdiction of the matter and

41. See note 37, *supra.*
42. See note 39, *supra.*
43. 2 Cow. 548, 550 (N. Y. 1824).
44. 50 Hun 282 (N. Y. 1824).
45. *Id.* at 287, 288.
46. 1 Denio 537, 540 (N. Y. 1845).

acted judicially in making the order; and it is entirely clear that he cannot be made answerable as a trespasser for an error in judgment." In *Rush v. Buckley*,[47] and in *Calhoun v. Little*,[48] where the judges acted under an ordinance, the courts, relying upon *Bradley v. Fisher*,[49] adhered to the rule that, if a judge, whether of general or limited authority, has jurisdiction of the subject-matter, he is not liable for any mistake which he may make in attempting to exercise his authority upon any individual. In other words, the only test of liability is jurisdiction of the subject-matter. They state the rule as follows: ". . . where the court has jurisdiction of the subject-matter of the offense, and the presiding officer erroneously decides that the court has jurisdiction of the person committing it, or commits an act in excess of his jurisdiction, he will not be liable in a civil action for damages."[50] The effect of all these cases may be summarized in the statement that whenever a court is "authorized to adjudicate as to the existence of the facts entitling the party to the right, its act in so doing would clearly be judicial. . . . It is certainly clear, as a general rule, that whenever the law confers a right, and authorizes an application to a court of justice to enforce that right, the proceedings upon such an application are to be regarded as of a judicial nature. . . ."[51]

The correct principle—applicable to all courts—and free from arbitrary distinction between courts of general and of limited jurisdiction (though not stated in a case involving a problem of judicial immunity), is well summarized by the New York Court of Appeals,[52] as follows: "There is no branch of the law more difficult of solution than to define when and under what circumstances the proceedings of inferior as well as superior courts may be attacked, and when they are a protection to persons acting under them. They may be held valid when the question is presented in one form, and invalid in another, and they may protect some persons and not others. The books are full of decisions, some of which are conflicting, recognizing distinctions and refinements which render the subject intricate and perplexing to deal with. I have examined the numerous authorities cited by the learned counsel engaged in this case and many others, and they are somewhat calculated to impress one with the uncertainty of the law. The apparent conflict, however, arises more from the difficulty of applying principles in particular cases, than in principles themselves. I have neither the time nor

47. 100 Me. 322, 61 Atl. 774 (1905).
48. 106 Ga. 336, 32 S. E. 86 (1898).
49. 80 U. S. 335 (1871).
50. Calhoun v. Little, 106 Ga. 336, 337, 32 S. E. 86, 89 (1898).
51. Matter of Cooper, 22 N. Y. 67, 86 (1860).
52. Roderigas v. East River Savings Institution, 76 N. Y. 316, 320-321 (1879).

inclination to review the authorities, nor do I think it profitable to do so. There are some general rules that are well settled. One is that the proceedings of courts, especially of limited jurisdiction, may be attacked collaterally for want of jurisdiction over the subject-matter. Another is that if the court or officer has jurisdiction of the subject-matter, then the exercise of that jurisdiction however irregular or erroneous is conclusive until reversed. Surrogates' courts have a stinted jurisdiction, but their decrees and orders are protected, when acting within their jurisdiction. If the surrogate has jurisdiction of the general subject-matter, and may exercise that jurisdiction in a variety of cases depending upon residence and the like, his decision after a hearing of the parties upon the question whether the case calling for the exercise of jurisdiction exists or not, is protected from collateral attack. In other words, it is enough if he has general jurisdiction of the subject-matter."[53]

53. The opinion continues: "This general rule is sustained by the current of authority, but within this rule are many distinctions and qualifications. An elaborate review of the authorities will be found in 2 Cowen & Hill's Notes, 987." Roderigas v. East River Savings Institution, 76 N. Y. 316, 321 (1879).

FORDHAM LAW REVIEW

Published in January, May and November

VOLUME VII JANUARY, 1938 NUMBER 1

Subscription price, $2.00 a year *Single issue, 75 cents*

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