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Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment

Dan B. Dobbs*

I. THE PROBLEM OF BELATED DIRECT ATTACK UPON SUBJECT MATTER JURISDICTION

Good judicial administration requires that all issues preliminary to the merits of a dispute be raised and disposed of at an early stage of litigation. It would be farcical to try a case fully on the merits and then decide demurrers, objections to venue, or motions to strike inappropriate pleadings afterwards. Since the law is "a ass" only part of the time, it ordinarily requires that all defenses and objections be raised at the beginning of the trial and not at the end or in the middle; and if possible, these preliminary objections are decided first.¹ For example, if the defendant believes that the court has no jurisdiction over his person, he must say so immediately if he appears in the case at all; if he does not object immediately, he waives his objection.²

It is commonly said, however, that parties cannot consent to jurisdiction of the subject matter;³ accordingly, the issue of subject-matter jurisdiction may be raised at any stage of the proceedings, even for the first time on appeal.⁴ Thus, failure

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1. Federal practice is prescribed in Federal Rules of Civil Procedure, Rule 12(h). The 1966 amendments, however, make it easy to postpone decision on preliminary questions. Likewise, if evidence introduced without objection raises a new point, under the liberal amendment rules, a failure to raise the point earlier may carry no adverse consequences. FED. R. CIV. P. 15(b). If a cause of action is not stated in the complaint, it may be attacked tardily. See LOUISELL & HAZARD, PLEADING & PROCEDURE 197-98 (1962); FED. R. CIV. P. 12(h) (2).

2. FED. R. CIV. P. 12; see *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25 (1917); *York v. Texas*, 137 U.S. 15 (1890). Similarly the plaintiff may be held to have waived any objections to jurisdiction over his person because he has, by filing his complaint, submitted to the court's jurisdiction. *Adam v. Saenger*, 303 U.S. 59 (1938).

3. See 1 BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 21 (Wright ed. 1960); 1 MOORE, FEDERAL PRACTICE ¶ 0.60(4) (2d ed. 1959); Dobbs, *The Decline of Jurisdiction by Consent*, 40 N.C.L. REV. 49 (1961).

4. This statement is made repeatedly by both courts and writers, without qualification. The leading case is *Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. 379 (1884), discussed in detail below. This paper, how-

to raise this fundamental issue at the beginning of the litigation is not a waiver—so it is said—for there can be no waiver. On this theory, a court will dismiss a case that has been fully tried on the merits when either party thereafter objects to the jurisdiction,⁵ or may dismiss on its own motion.⁶ This means that a defendant—or a plaintiff in a removed case—may say nothing about the absence of jurisdiction until he sees the verdict. If it is favorable, he will maintain a truly golden silence. If it is unfavorable, he will object to the court's jurisdiction and demand that the verdict be set aside and the case dismissed.⁷ In old-fashioned terminology, this is morally wrong. It is unfair to the winning party. After all, he has won on the merits, and a jurisdictional defect seldom affects the fairness of the trial.⁸ Moreover, it may deprive the winning party of any chance for a trial at all, as where the statute of limitations has run when the dismissal occurs.⁹ Further, it is bad administration of justice; it is inefficient as well as unfair, and it quite properly raises grave public doubts about the judicial system.¹⁰ The best thing that

ever, attempts to show that the statement is accurate only in certain well defined situations. See § II. D. *infra*.

5. *E.g.*, *Page v. Wright*, 116 F.2d 449 (7th Cir. 1950); *Mayhew v. Mayhew*, 376 S.W.2d 324 (Tenn. App. 1963).

6. *E.g.*, *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951); *Landry v. Cornell Constr. Co.*, 87 R.I. 4, 137 A.2d 412 (1957). Federal decisions usually speak of a duty of the court to raise the jurisdictional issue. *E.g.*, *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588 (1939); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 287, n.10 (1938). State courts often say only that they "may" or "can" raise the jurisdictional issue at any time on their own motion. *E.g.*, *Masone v. Zoning Bd.*, 148 Conn. 551, 172 A.2d 891 (1961); *Landry v. Cornell Constr. Co.*, *supra*.

7. See *American Fire & Cas. Co. v. Finn*, *supra* note 6. This has been a point of judicial concern for over 300 years. See Coke's remarks in *The Admiralty Case*, 12 Co. Rep. 77, 77 Eng. Rep. 1355 (K.B. 1610). But no one except the dissenters in *Finn*, who thought that jurisdiction could be given by estoppel, has attempted to do anything about it.

8. Where exclusive jurisdiction is allocated to one tribunal in order to take advantage of its special expertise, it may be said that a trial in a different and less expert court is to some extent unfair, since the parties did not benefit from the expertise of the proper tribunal. This might conceivably be the case, for example, where exclusive jurisdiction over unfair labor practices is allocated to the NLRB. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). Even in this kind of case, however, there is no fundamental lack of fairness.

9. This was the situation in *Di Frischia v. New York Cent. Ry.*, 279 F.2d 141 (3d Cir. 1960). The court in that case, however, refused to follow the accepted general rule and held that the trial court should proceed, even in the absence of jurisdiction. The case is discussed in more detail below. See text accompanying notes 67-90 *infra*. The American Law Institute has proposed a statutory change to take care of this situation. See § III. *infra*.

10. See ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE*

can be said for such procedures is that they are slightly more civilized than the Queen's procedure in *Alice*, where the Queen required "sentence first—verdict afterwards";¹¹ we require "verdicts first, sentence never."

Happily, not all courts have engaged in such foolishness, though most courts have said they do. The Supreme Court has denied collateral attack upon judgments rendered without jurisdiction;¹² it has also held that in certain circumstances the jurisdictional issue may be foreclosed in comparatively early stages of the case.¹³ However, many courts have not recognized the Supreme Court's holdings and appear to be under the impression that they are required to entertain jurisdictional objections at any stage of the case.¹⁴

This article attempts to survey the limits of the doctrines which permit parties to raise jurisdictional issues belatedly, and to point out that the federal courts have sometimes permitted such procedure where they are not required to do so. It should be reiterated that this discussion deals with problems of belated assertion of a defect in subject matter jurisdiction, not with a defect in jurisdiction over the defendant's person, which can be waived and must be timely asserted. Throughout the following discussion, it is assumed that the only objection to jurisdiction is to the power of the court to act on the kind of case involved—for example, the requisite amount in controversy is not involved, or the parties are of the same citizenship.¹⁵

AND FEDERAL COURTS 106 (Proposed Final Draft No. 1, April 19, 1965); 1 MOORE, *FEDERAL PRACTICE* ¶ 0.60(4), at 610 (2d ed. 1959).

11. CARROLL, *ALICE IN WONDERLAND*, ch. 12, p. 161 (The Annotated *Alice*, Gardner ed. 1960).

12. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Dowell v. Applegate*, 152 U.S. 327 (1894); *Des Moines Nav. & R.R. v. Iowa Homestead Co.*, 123 U.S. 552 (1887). The same rule, of course, applies where the defect in jurisdiction is one of jurisdiction over the person rather than jurisdiction of the subject matter, *American Sur. Co. v. Baldwin*, 287 U.S. 156 (1932), and where the defect is one going to jurisdiction over the defendant's property in a quasi in rem suit. *Durfee v. Duke*, 375 U.S. 106 (1963).

13. *Mexican Cent. Ry. v. Pinkney*, 149 U.S. 194 (1893); *Hartog v. Memory*, 116 U.S. 588 (1886), both discussed below. See text accompanying notes 91-109 *infra*.

14. See *Albert v. Brownell*, 219 F.2d 602 (9th Cir. 1955); *Page v. Wright*, 116 F.2d 449 (7th Cir. 1940); *Ambassador East, Inc. v. Orsatti*, 155 F. Supp. 937 (E.D. Pa. 1957), *rev'd on other grounds*, 257 F.2d 79 (3d Cir. 1958). A great many cases state the rule without actually rendering such a broad holding.

15. A court is said to be without jurisdiction of the subject matter or to lack competency when it has not been given power to hear the type

II. DOCTRINES REQUIRING TIMELY ASSERTION OF JURISDICTIONAL OBJECTIONS

A. THE BOOTSTRAP PRINCIPLE

The bootstrap doctrine¹⁶ normally operates to foreclose a collateral attack upon the jurisdiction of a court that has rendered a final judgment.¹⁷ Its premise is that every court has jurisdiction to decide its own jurisdiction, unless the legislature has decreed otherwise.¹⁸ When a court has jurisdiction to decide an issue, it has the power to decide wrongly as well as rightly.¹⁹ Even if its decision in favor of its own jurisdiction is erroneous, it is valid. It may be reversed on appeal, but if an appeal is not taken, the decision stands, and is binding, erroneous or not. The second half of the bootstrap doctrine premises that any unappealed decision, on the jurisdictional issue or otherwise, is res judicata in subsequent litigation. Since the trial court has jurisdiction to decide its own jurisdiction, its decision is not void but is, on the contrary, res judicata, unless policies of res judicata indicate otherwise.²⁰ As a result, the issue of jurisdic-

of case involved. However, courts have no fixed approach to characterization of cases into type, so that a great many defects are said to be defects in subject matter jurisdiction, even when the court obviously has jurisdiction over the general type of action involved. Thus, federal courts have jurisdiction over contract cases, but unless there is diversity or a federal question together with the requisite amount in controversy, there is still a defect in subject matter jurisdiction. See Dobbs, *Trial Court Error as an Excess of Jurisdiction*, 43 TEXAS L. REV. 854 (1965).

16. The term apparently derives from the catchline of a Note in 53 HARV. L. REV. 652 (1940). If it fails to achieve suitable dignity, it is at least expressive and considerably surpasses the wit normally uncovered in that august tome. The implication is, of course, that the trial court by deciding that it had jurisdiction, pulled itself up by its own bootstraps.

17. See cases cited note 12 *supra*.

18. See *Kalb v. Fuerstein*, 308 U.S. 433 (1940). This case is often interpreted as creating a judicial exception to the bootstrap principle when policy is strong against the court's acting beyond its jurisdiction. Cf. RESTATEMENT, JUDGMENTS § 10 (1942). But it appears to be simply a case in which Congress deprived state courts of the power they normally have—that is, the power to decide their own jurisdiction.

19. See the late Professor Chafee's excellent discussion of this idea in his book, *SOME PROBLEMS OF EQUITY*, 296-380 (1950). The cases are, verbally at least, in complete accord. *E.g.*, *State ex rel. Ruffing v. Jameson*, 80 S.D. 362, 123 N.W.2d 654 (1963).

20. Since res judicata is a doctrine reflecting judicially created policy, it is not applied where sound policy reasons dictate a second full trial. See Dobbs, *supra* note 15, at 882-90. Thus in *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506 (1940), the Court held that the normal bootstrap principle would not foreclose a collateral attack for lack of jurisdiction where there was a defect in jurisdiction over the

tion normally can be settled by a final judgment, at least to the extent that the jurisdictional issue cannot be raised again on collateral attack.²¹

Important as the bootstrap doctrine is, it has its limits. Since *res judicata* applies only when a "final judgment" is rendered and not before,²² the traditional rule that permits parties to raise jurisdictional issues at any time operates until such a judgment is rendered. In short, the bootstrap doctrine does not require a party to assert his jurisdictional objection seasonably; it requires only that he assert it before a final judgment is rendered, or on appeal. It is thought to bar a collateral, but not a direct attack.²³

Possibly the bootstrap principle does not even operate on all final judgments. In both state and federal court systems, there are statutory²⁴ or equitable²⁵ procedures that permit post trial review of final judgments by the trial court, even after time for appeal has expired. Under these procedures, many of which are modeled on Rule 60(b) of the Federal Rules,²⁶ a party may move to reopen the case after a final judgment when one of several specified grounds is shown. In this manner really egregious blunders may be corrected and gross unfairness eliminated. This sort of safety valve procedure is useful, though only rarely, and is usually limited in two ways. The case can be reopened only when certain specific grounds²⁷ are shown—

sovereign, since to hold otherwise would in effect permit local government attorneys to waive sovereign immunity.

21. The bootstrap principle may not have the effect of preventing a direct attack (by motion in the original action), even after a final judgment. It was so held in *In re Stern*, 235 F. Supp. 680 (S.D.N.Y. 1964). But see *Jackson v. Irving Trust Co.*, 311 U.S. 494 (1941), and note 38 *infra*.

22. See RESTATEMENT, JUDGMENTS §§ 41, 68 (1942); 1B MOORE, FEDERAL PRACTICE ¶¶ 0.409, 0.441, 0.443 (2d ed. 1965).

23. The court so held in *In re Stern*, 235 F. Supp. 680 (S.D.N.Y. 1964).

24. *E.g.*, CAL. CIV. PROC. CODE § 473; MASS. GEN. LAWS ANN. ch. 250, §§ 14-15 (1956).

25. As to equitable relief, see generally RESTATEMENT, JUDGMENTS §§ 112-30 (1942). FEDERAL RULE 60(b) specifically authorizes independent equitable relief for fraud, apart from the motion provided for by the rule. Some state statutes providing for relief from judgments may provide the exclusive remedy, since state statutes seldom explicitly preserve preexisting rights to equitable relief.

26. *E.g.*, KY. R. CIV. P. 60.02; MINN. R. CIV. P. 60.02.

27. Most commonly these include fraud, mistake, newly discovered evidence or "voidness" of the judgment, but there is a good deal of variation, and even statutes modeled on the federal rules do not always recognize all of these grounds without qualification. *E.g.*, KY. R. CIV. P.

fraud, for example—and then only within stated time limits.²⁸ Federal Rule 60(b) provides such a procedure, and when the ground asserted is that the “judgment is void,” the motion may be made without time limit. On the basis of this rule, it has been held that a tardy jurisdictional attack can be launched even after final judgment, on the ground that if there were no jurisdiction, the judgment was “void” and thus came squarely within the permissive doctrine of 60(b).²⁹ In this view, the bootstrap principle has no application, even to a final judgment, or if it does, it is overpowered by 60(b).

Such a view may be correct. The bootstrap principle is usually thought to operate on the basis of *res judicata*, and *res judicata* comes into play only when there is a final judgment and a collateral attack—that is, when there is a second and distinct suit. Since a motion under Rule 60(b) is a motion in the original suit and is thus a direct attack, there is no *res judicata* involved and the issue of jurisdiction cannot be foreclosed by that doctrine.

But the bootstrap principle is that the trial court has jurisdiction to determine its own jurisdiction. Once it renders a final judgment, it has either expressly or impliedly decided that it has jurisdiction.³⁰ Having decided a point that is within its power to decide, that decision is valid even if erroneous. If it is valid, it is not “void,” and if it is not “void,” then Rule 60(b) may not authorize a post-judgment attack. This reasoning, it must be emphasized, is not usually followed and to some it will seem spurious.³¹ Nevertheless, it has backing in the Supreme Court’s decision in the *Mine Workers* case.³² In that case a federal dis-

60.02, in effect recognizes only “extrinsic” fraud, while Rule 60(b) of the federal rules allows vacation of the judgment for any kind of fraud.

28. Under Rule 60(b), the motion must be made within a reasonable time regardless of the ground asserted; when the ground is mistake, new evidence, or fraud, it must be made within one year. State statutes vary as to time limits, but one year is common. *E.g.*, MASS. GEN. LAWS ANN. ch. 250, § 15 (1956); N.C. GEN. STAT. § 1-220 (1953).

29. *In re Stern*, 235 F. Supp. 680 (S.D.N.Y. 1964).

30. An implied decision by a court that it has jurisdiction normally is sufficient to invoke the bootstrap principle, and the fact that a court acts on the merits implies a finding or conclusion that it has jurisdiction. See *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940).

31. A great many cases say, rather loosely, that a judgment rendered without jurisdiction is “void.” Certainly this is the traditional view, but if the bootstrap principle is accepted—as it must be in federal courts—then it would seem that the trial court’s decision on the jurisdictional issue itself is not void. Nor would the judgment be void in the sense that a collateral attack would be permitted.

32. *United States v. UMW*, 330 U.S. 258 (1947).

strict court enjoined a strike in spite of a statute that specifically said it had "no jurisdiction" to do so. Mr. Lewis, who had been so enjoined, violated the injunction and was charged, along with his union, with contempt of court. His defense was that the court had no jurisdiction. It had always been an accepted defense to a contempt charge.³³ The Supreme Court held, however, that even though the trial court may not have had jurisdiction to issue a permanent injunction, it did have jurisdiction to decide its own jurisdiction. (This will be called "incipient" jurisdiction for convenient reference.) This incipient jurisdiction, like plenary jurisdiction, can be protected from destruction.³⁴ Specifically, the Court held it could be protected by an injunction aimed at preserving the status quo long enough to decide the issue of plenary jurisdiction. The injunction was therefore valid and could not be disobeyed with impunity.

Mine Workers establishes that *res judicata* is not always a requirement of the bootstrap doctrine, since *res judicata* was in no manner involved in the case. The trial court did not decide the issue of jurisdiction, even tacitly, and without a decision on the point there could be no *res judicata*. Indeed, the trial court's decree—a temporary restraining order—was final only in a limited sense,³⁵ and certainly was not based upon an adversary proceeding.³⁶ These reasons alone might justify a refusal to ap-

33. *E.g., Ex parte Bryant*, 155 Tex. 219, 285 S.W.2d 719 (1956); see Cox, *The Void Order and the Duty To Obey*, 16 U. CHI. L. REV. 86 (1948); Annot., 12 A.L.R.2d 1059 (1950).

34. Although Congress has prohibited federal court injunctions against state court proceedings, for example, it has expressly reserved the power of federal courts to protect their own jurisdiction by injunction. 28 U.S.C. § 2283 (1964). State courts also protect their jurisdiction by injunction. *E.g., Wehrhane v. Peyton*, 134 Conn. 486, 58 A.2d 698 (1948); *Thurston v. Thurston*, 256 N.C. 663, 124 S.E.2d 852 (1962).

35. A judgment must be final to support an appeal in many circumstances, and it must be final to support *res judicata*. There is a broad tendency to assume that what is final for one of these purposes is also final for the other. A temporary restraining order, as distinct from a preliminary injunction, is not ordinarily appealable under 28 U.S.C. § 1291 (1964). *Austin v. Altman*, 332 F.2d 273 (2d Cir. 1964). On this basis, the order in *Mine Workers* was probably not final even in the sense that it would support an appeal. Clearly it was not final in the sense that it would bind the trial court on final hearing. It is possible that an appeal from a temporary restraining order would be heard, notwithstanding the usual rule to the contrary, where there is a chance that if it is not heard, the issue will become moot. *Woods v. Wright*, 334 F.2d 369 (5th Cir. 1964) (denial of temporary restraining order reviewed; if nonappealable, decision might become moot). On the meaning of finality generally, see 1B MOORE, *FEDERAL PRACTICE* ¶ 0.409(1) (2d ed. 1964).

36. There is no generally stated requirement that a judgment must

ply res judicata; the absence of a decision on the jurisdictional point most assuredly precludes its use.³⁷ More importantly, there was simply no need for res judicata in *Mine Workers*. The bootstrap premise, that the court has power to determine its own jurisdiction, is followed by the premise that it could protect that incipient jurisdiction, not by the premise that its decision is binding in a collateral attack.

If the same reasoning is followed in motions after final judgment under Rule 60(b), it could be said that when the trial court has jurisdiction to decide its own jurisdiction, any judgment it renders is not void at all, but is at most erroneous and reversible upon appeal only. *Mine Workers* is not direct authority for a 60(b) case; but it does establish that res judicata is not necessary to application of the bootstrap principle, and there seems no real reason to distinguish a post-judgment attack on jurisdiction made by motion from a post-judgment attack made in a separate suit. Rule 60(b) and analogous state statutes serve a good purpose in permitting correction of mistakes that go to the essential fairness of the proceeding; but jurisdictional defects have nothing to do with fairness. By hypothesis, the parties got a fair trial; if they did not, they may have the judgment set aside for mistake or fraud. The only reason for permitting a post-judgment attack on jurisdiction under Rule 60(b) is to permit the parties to do directly what they may do indirectly by a collateral attack. Where the parties cannot collaterally attack a judgment for lack of jurisdiction—which is the usual case in federal courts under the bootstrap doctrine—there is no reason to permit a belated direct attack under Rule 60(b).

A number of federal and state decisions lend support to this view.³⁸ However, even if the jurisdictional issue is foreclosed

result from an adversary proceeding in order to have collateral estoppel effect. However, in a number of instances, a nonadversary proceeding may be denied effect. Professors Moore and Currier advocate a general view to this effect where default or consent judgments are involved. See 1B MOORE, *FEDERAL PRACTICE* ¶ 0.444(1), at 4002 (2d ed. 1965). A different view is that collateral estoppel effect ought to be denied as to jurisdictional issues where there is no *opportunity* for adversary litigation. See Handler, *Juvenile Courts and the Adversary System*, 1965 Wis. L. REV. 7.

37. Not only must there be a decision on an issue before the judgment is binding with respect to that point, but the decision must be clear. If the decision is unnecessary to the disposition of the case, e.g., *Schofield v. Rideout*, 233 Wis. 550, 290 N.W. 155 (1940), or if the precise dimensions of the decision are uncertain, *Hoag v. New Jersey*, 356 U.S. 464 (1958), neither party is bound with respect to that particular point.

38. See *Jackson v. Irving Trust Co.*, 311 U.S. 494 (1941). In that case, the government, having lost in the trial court, launched a direct

after final judgment and cannot be reopened under Rule 60(b), it is perfectly clear that the bootstrap principle does not affect the right of the parties to attack jurisdiction at any time before final judgment is rendered, or even after judgment by raising the issue for the first time on appeal. The bootstrap principle is, then, quite a valuable tool in stopping wasteful litigation, but at best it operates only after a judgment has been rendered and time for appeal has expired. If the issue of subject matter jurisdiction is to be foreclosed at any reasonable stage of litigation, other doctrines must be resorted to.

B. LAW OF THE CASE AND LAW OF THE TRIAL

A doctrine similar to the doctrines of *res judicata* is known as the doctrine of "law of the case."³⁹ Under the rules of law of the case, when an appellate court has decided an issue on an appeal, it will normally not reconsider the issue if there is a second appeal in the same case.⁴⁰ This is not the rule of *res judicata*, because the same case is involved, not a different one. The law of the case rules are more flexible than those of *res judicata*, because the policies against relitigation are not as strong.⁴¹ As a result, most courts will reexamine a wrongly decided question on a second appeal whenever there appears to

attack by motion nine years later. The Supreme Court treated this as if it were a collateral attack, holding that the trial court's jurisdictional decisions established its jurisdiction. See also *Texas & Pac. Ry. v. Gulf, C. & S. Ry.*, 270 U.S. 266 (1926); *First Nat'l Bank v. Klug*, 186 U.S. 202 (1902); *American Nat'l Bank & Trust Co. v. Taussig*, 255 F.2d 765 (7th Cir. 1958) (also discussing acquiescence and acceptance of benefits of judgment). *But see* *Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348 (1920) (direct attack permitted). In *Hogg v. Peterson*, 198 N.E.2d 767 (Ind. 1964) an adoption was granted in 1955; in 1960, a direct attack was made on the adoption decree and it was set aside. The natural parents then brought habeas in another court to gain custody of the children. The second court refused to grant habeas on the ground that the decree was originally rendered with jurisdiction and should not have been set aside. This was affirmed. The court said that the direct attack, coming long after the term of the original decree "amounted to a collateral attack" and that the issue of jurisdiction was *res judicata*. In *New Jersey v. American Can Co.*, 42 N.J. 32, 198 A.2d 753 (1964), a direct attack was denied explicitly on the ground that *res judicata* policies and bootstrap applied to a belated direct attack.

39. See generally 1B MOORE, *FEDERAL PRACTICE* ¶ 0.404 (2d ed. 1965).

40. See, e.g., *Union Light, Heat & Power Co. v. Blackwell*, 291 S.W. 2d 539 (Ky. 1956); *Chandler v. Lafferty*, 282 Pa. 550, 128 Atl. 507 (1925).

41. See *Union Light, Heat & Power Co. v. Blackwell*, *supra* note 40. Even courts purporting to apply law of the case as an "iron rule," in fact treat it as a plastic one when they wish to do so. Compare *Porter v. Hanley*, 10 Ark. 186 (1849), with *American Ry. Express Co. v. Davis*, 158 Ark. 492, 250 S.W. 540 (1923).

be a substantial reason for doing so. Law of the case is seldom applied to issues that were not raised at all on the first appeal,⁴² even where they could and should have been raised. Law of the case, then, resembles a very flexible sort of collateral estoppel more than it resembles merger or bar.⁴³

A variation of law of the case might be called "law of the trial." Many trial courts are staffed with two or more judges. All cases involve various stages, and, if the judges are used effectively, it is likely that Judge I will determine some motions and Judge II will determine others. If Judge I rules against a party on a motion, that party may find a way to raise the same issue again before Judge II, either by presenting the same motion again or by injecting the same issue in a new guise. In such situations, Judge II is usually wise to avoid overruling his colleague. Good judicial administration requires that two judges in the same court do not constantly overrule one another. Appellate courts have recognized this and usually insist that Judge I's decision is final and not subject to reexamination by Judge II.⁴⁴ If it is wrong, it can be reversed on appeal. Since no such policy requires Judge I to follow his own decision on a matter,⁴⁵ he may reverse himself at a later stage of the case if he decides he was in error. However, as a practical matter he cannot rule twice on every issue, and he is likely to refuse reconsideration of former rulings. Like the law of the case rules, these rules are flexible, and in compelling circumstances or when the reasons for them no longer exist, they may not be followed.⁴⁶

42. *Hartford Life Ins. Co. v. Blincoe*, 255 U.S. 129 (1921); *Hayes v. City of Wilmington*, 243 N.C. 525, 91 S.E.2d 673 (1956). *Contra*, *Lowe v. City of Atlanta*, 194 Ga. 317, 21 S.E.2d 171 (1942); *Drummond v. Drummond*, 414 Pa. 548, 200 A.2d 887 (1964). See also *Skillern v. May*, 10 U.S. (6 Cranch) 267 (1810).

43. Merger and bar apply when the cause of action in Suit I and the cause of action in Suit II are identical, and these rules foreclose not only issues that were decided but all that could have been decided. Collateral estoppel applies when the causes of action in Suits I and II are different, and forecloses only issues that were actually litigated. There are many discussions of the distinction. See, e.g., 1B MOORE, *FEDERAL PRACTICE* §§ 0.405, 0.441 (2d ed. 1965).

44. See, e.g., *Price v. Greenway*, 167 F.2d 196 (3d Cir. 1948); *Davis v. Singleton*, 259 N.C. 148, 130 S.E.2d 10 (1963).

45. In *Dictograph Prods. Co. v. Sonotone Corp.*, 230 F.2d 131, 134 (2d Cir. 1956), Judge Learned Hand said: "No one will suggest that the first judge himself may not change his mind and overrule his own order" But in *Keel v. Anderson*, 104 Ga. App. 296, 121 S.E.2d 505 (1961), the court said that it would not even permit the trial judge to overrule himself. It is difficult to make sense of the latter view.

46. See, e.g., *Dictograph Prods. Co. v. Sonotone Corp.*, *supra* note 45 (excellent discussion by Judge Learned Hand). See generally 1B MOORE, *FEDERAL PRACTICE* § 0.404(4) (2d ed. 1965).

These rules have very little power to force an early assertion of jurisdictional defects. In *Price v. Greenway*,⁴⁷ the Court of Appeals for the Third Circuit pointed out that the rules of law of the trial justified Judge II's refusing to reconsider a jurisdictional issue decided earlier by Judge I. But the court recognized its duty as an appellate court to review the evidence on the point, regardless of whether the issue was decided by Judge I or Judge II or both, and it is clear that law of the trial has no permanent effect upon the jurisdictional issue. The rules merely require that trial judges not overrule one another; they do not foreclose appellate consideration of the issue.

However, courts have sometimes applied law of the case not only to issues that were decided on a former appeal, but also to issues that could have been, but were not, presented and decided.⁴⁸ Although the Supreme Court has disapproved such an application of law of the case for nonjurisdictional issues,⁴⁹ it has itself so applied the doctrine to a jurisdictional issue. In *Skillern v. May*,⁵⁰ there was a trial in a partition action and review in the Supreme Court, which remanded with an order that the land involved be partitioned. On remand, the trial court discovered that no jurisdiction had been alleged, so that on the face of the record jurisdiction was absent, at least by federal standards.⁵¹ The trial judge certified a question to the Supreme Court, in response to which the trial court was instructed to carry out the mandate of the Supreme Court on the former review, "although the jurisdiction of that court be not alleged. . . ."⁵² The Court did not use the term "law of the case" although this is obviously an application of the doctrine, and equally obviously, the Court was giving it a scope not normally approved, since the jurisdictional issue had not been presented or litigated on the former appeal. The scope of the decision in *Skillern* is doubtful. The short, almost cryptic, opinion of the Court may mean that law of the case applies to jurisdictional issues not explicitly decided only on the narrow facts of *Skillern*

47. 167 F.2d 196 (3d Cir. 1948).

48. See *Lowe v. City of Atlanta*, 194 Ga. 317, 21 S.E.2d 171 (1942); *Fidelity-Baltimore Nat'l Bank & Trust Co. v. John Hancock Mut. Life Ins. Co.*, 217 Md. 367, 142 A.2d 796 (1958). In both cases the ultimate issue involved was decided on the former appeal and the courts refused merely to examine new theories going to that issue on the second appeal. Very real dangers do exist, however, as illustrated in Manley, "Law of the Case" as a Pitfall, 34 CORNELL L.Q. 397 (1949).

49. *Hartford Life Ins. Co. v. Blincoe*, 255 U.S. 129 (1921).

50. 10 U.S. (6 Cranch) 267 (1810).

51. See, e.g., *Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. 379 (1884).

52. *Skillern v. May*, 10 U.S. (6 Cranch) 267, 268 (1810).

itself. It may be that if the record affirmatively shows a lack of jurisdiction, as where it shows that both parties in a purported diversity action are actually citizens of the same state, a different rule would apply and the jurisdictional issue would remain open.⁵³ There does not seem to be much intrinsic merit in such a narrow approach, but it is left open by the *Skillern* decision.⁵⁴

In *Drummond v. Drummond*,⁵⁵ the Pennsylvania Supreme Court similarly applied the law of the case doctrine to unlitigated jurisdictional issues.⁵⁶ On a second appeal, the defendant urged a jurisdictional objection he had not presented on an earlier appeal. "[E]ven though facts were elicited on trial that may tend to indicate that those [jurisdictional] prerequisites

53. In *In re Stern*, 235 F. Supp. 680 (S.D.N.Y. 1964), *Stern* was held guilty of contempt and appealed. The appellate court required a security deposit as a condition to hearing the appeal. No such deposit was made and the appeal was dismissed, even though the defendant was urging a lack of jurisdiction. Thus the jurisdictional issue was not decided. The defendant then moved in the trial court to set aside the orders adjudging her in contempt. The trial court set aside its own contempt orders on a finding that it was without jurisdiction. This lack of jurisdiction was plain on the face of the record. There was no mention of *Skillern*. If *Skillern* is inapplicable, is it because the jurisdictional defect in *Stern* appeared on the face of the record, or because there was really no appeal at all? See also *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63 (1941), where at an early stage of the litigation the trial court re-aligned the parties according to their real interests in the case and destroyed diversity. On appeal, the court of appeals reversed so as to restore diversity. The Supreme Court denied certiorari. Thereafter, the case was tried on the merits. This time the Court granted certiorari to consider the jurisdictional issue, that is, whether the parties were properly aligned. It concluded that the trial court had been correct in its first action, and held there was no jurisdiction. It added: "And, of course, this Court, by its denial of certiorari when the case was here the first time, could not confer the jurisdiction which Congress has denied." *Id.* at 75. This, of course, is entirely compatible with *Skillern*.

54. The *Skillern* case also leaves open the effect of law of the case on jurisdictional issues where there is no appeal at all. Almost certainly, however, the doctrine would not affect jurisdictional issues where there is no appeal so as to preclude a trial judge from re-examining his own decision, as in *Century Transit Co. v. United States*, 124 F. Supp. 148 (D.N.J. 1954). And even if a second trial judge is precluded from re-examining the decision of another trial judge of the same court, this will not preclude appellate courts from examining the jurisdictional issue. *Price v. Greenway*, 167 F.2d 196 (3d Cir. 1948).

55. 414 Pa. 548, 200 A.2d 887 (1964).

56. The Pennsylvania court characterized the issues as jurisdictional, following its own prior views in this respect. Many courts no doubt would agree, but it must be pointed out that some academic writers, at least, would take the position that the issues involved were not jurisdictional at all. See Dobbs, *Trial Court Error as an Excess of Jurisdiction*, 43 TEXAS L. REV. 854 (1965).

were lacking [t]he defendant is . . . barred from raising this issue in this appeal."⁵⁷ This clearly goes beyond the *Skillern* rule, for no facts in the record there—so far, at least, as the court's opinion reflects—showed an absence of jurisdiction. The Pennsylvania court was willing to apply law of the case even though facts in the record may have shown an absence of jurisdiction.

Perhaps some courts would reject these two cases. Not only do most courts apply the law of the case doctrine flexibly,⁵⁸ but they hesitate to apply it at all to issues not actually litigated on the first appeal.⁵⁹ Such views, when applied to substantive legal or factual issues have a great deal of merit, but they are not necessarily incompatible with the holdings in *Skillern* and *Drummond*. It may be reasonable to permit an appealing party to assert a substantive issue on a second appeal (if he has made an appropriate trial court record) even though he could also have asserted the same issue on the first appeal.⁶⁰ However, it is equally reasonable to treat jurisdictional issues, which do not affect the fairness of the trial, in a different fashion. Furthermore, a technical reason justifies the extension of law of the case to unlitigated jurisdictional issues in the federal courts. Since federal courts are obliged to consider jurisdiction on their own motion when jurisdiction is not properly alleged,⁶¹ it can be said that the jurisdictional issue is always at least tacitly decided on the first appeal. An implied decision on the jurisdictional issue is a sufficient decision for purposes of *res judicata*,⁶² and can be equally sufficient for purposes of law of the case.

There is not much litigation involving these questions. If the *Drummond* rule is followed in other courts—and it should be followed—it will nevertheless have only the narrowest kind of effect. It advances us toward eliminating belated objections

57. 414 Pa. 548, 551, 200 A.2d 887, 888-89 (1964).

58. See cases cited note 41 *supra*.

59. See cases cited note 42 *supra*.

60. Where, however, a party merely seeks to assert a new reason or theory in support of a position on which he has previously lost, there is not much to be said for permitting him to do so. See note 48 *supra*.

61. See *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804); *Mansfield C. & L.M. Ry. v. Swan*, 111 U.S. 379 (1884). A fortiori, the court must raise the jurisdictional issue on its own motion when, though allegations of jurisdiction are adequate, the record affirmatively demonstrates its absence, as where parties believe jurisdiction exists, but are mistaken as to the law. See, e.g., *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951).

62. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940).

to subject matter jurisdiction, but only a very little way.

C. WAIVER, ESTOPPEL AND CONSENT

The established cliché is that the parties may not consent to jurisdiction of the subject matter.⁶³ Waiver of a right—such as a right to object to lack of jurisdiction—involves a knowing relinquishment.⁶⁴ For this reason, it seems reasonably clear that if parties cannot consent to jurisdiction, neither can they be held to have waived their objections. Functionally the two concepts are the same here. Estoppel resembles waiver, but is distinct from it in that one may be estopped to assert a thing without intending to be, and in that estoppel is not invoked unless there is prejudice to another party.⁶⁵ It is therefore conceivable that, although one may not consent to jurisdiction or waive an objection to it, one might be estopped to assert the jurisdictional defect.⁶⁶

In *Di Frischia v. New York Cent. R.R.*,⁶⁷ the plaintiff brought

63. See Dobbs, *The Decline of Jurisdiction by Consent*, 40 N.C.L. REV. 49 (1961).

64. *Souter v. State Mut. Life Assur. Co.*, 273 F.2d 921 (4th Cir. 1960); *General Fin. & Guar. Co. v. Smith*, 309 S.W.2d 531 (Tex. Civ. App. 1958).

65. See, e.g., *Upper Columbia River Towing Co. v. Maryland Cas. Co.*, 313 F.2d 702 (9th Cir. 1963); *Gullett v. Best Shell Homes, Inc.*, 312 F.2d 58 (5th Cir. 1963); *Hall v. Gullett*, 173 So.2d 571 (Ala. 1965) (inconsistent position in another law suit not an estoppel since there was no reliance or prejudice to present party).

66. This is not accepted doctrine. Where the jurisdictional defect is apparent on the face of the record, the Supreme Court has refused to apply estoppel to prevent objection to the jurisdictional defect. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951). However, a statement I made elsewhere, see Dobbs, *supra* note 63, that estoppel and consent are functionally equivalent is misleading. Estoppel and consent may be functionally equivalent, but this is no answer to the problem. Functional equivalence does not mean legal equivalence, and there are many instances in which the law carefully locks the front door, only to open the back. This procedure often seems foolish, because entrance through the back door is functionally equivalent to entrance through the front. But it is not always as foolish as it seems. A housewife may lock the front door to keep muddy children off a freshly cleaned floor, but she may be perfectly willing to have them enter from the back. And if they have already muddied the floor, there seems no point in pitching them out again. The law may wish to lock the doors of the courts to prevent entrance by consent, but at the same time permit the parties to stay in court once entrance has been effected, at least if the entrance was not in bad faith.

67. 279 F.2d 141 (3d Cir. 1960), 15 U. MIAMI L. REV. 315 (1961), 7 UTAH L. REV. 258 (1960). See also, on a similar decision, Comment, 38 NEB. L. REV. 1058 (1959). Both cases are discussed and approved in

a diversity action in federal court. The defendant first objected to the jurisdiction of the court, charging a lack of diversity, but later withdrew his objection. For well over two years after the suit was brought the parties engaged in various pretrial preparations. During this period the statute of limitations ran upon the plaintiff's claim. After the statute of limitations had run, the defendant renewed its objection to the court's jurisdiction by moving to dismiss. The trial court, feeling itself bound to entertain a jurisdictional objection at any stage of the case, heard the motion, concluded that diversity was absent, and dismissed. Reversing, the Third Circuit said that the trial court had abused its discretion in hearing the belated motion to dismiss. Pointing out that defendant had admitted the existence of diversity and had participated in extensive pretrial preparations, the court thought that "a further attempt to amend its answer to return to its previous defense of lack of diversity could certainly not be made as of right."⁶⁸ The court added: "A defendant may not play fast and loose with the judicial machinery and deceive the courts."⁶⁹ On similar facts a similar result had been reached several years earlier by a federal district court.⁷⁰ The Seventh⁷¹ and Fifth Circuits⁷² and perhaps others⁷³ had still earlier rendered decisions that gave some support to the decision. But on the whole *Di Frischia* seemed to those who have written about it—and perhaps to the court itself—a striking departure from the accepted rules.⁷⁴ This is understandable because the court gave very little support for its decision. It recognized the rule against jurisdiction by consent, announced that it did not apply, and held, without explaining why, that the defendant

Stephens, *Estoppel to Deny Federal Jurisdiction—Klee and Di Frischia Break Ground*, 68 DICK. L. REV. 39 (1963).

68. 279 F.2d at 44.

69. *Ibid.*

70. *Klee v. Pittsburgh & W. Va. Ry.*, 22 F.R.D. 252 (W.D. Pa. 1958).

See Comment, 38 NEB. L. REV. 1058 (1959) criticizing this decision.

71. *Young v. Handwork*, 179 F.2d 70 (7th Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

72. *Murphy v. Sun Oil Co.*, 86 F.2d 895 (5th Cir. 1936), *cert. denied*, 300 U.S. 683 (1937).

73. The *Di Frischia* court relied only upon the 5th and 7th Circuit cases, *supra* notes 71 & 72, but the Supreme Court, as well as a majority of the circuits, has said that a party may admit jurisdictional facts. See the cases cited notes 96 & 124 *infra*.

74. See materials cited note 67 *supra*. The leading commentators, Professors Moore and Wright, appear to agree that *Di Frischia* is a departure from the norm. See 2A MOORE, FEDERAL PRACTICE ¶ 12.23 (Supp. 1966); 1 & 1A BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE §§ 21, 450 (Supp. 1966).

could not raise the jurisdictional issue at such a belated stage of the case.

Perhaps because the court did not adequately explain its decision, there has been some thought that it was based upon estoppel.⁷⁵ It may have been. Certainly there is nothing unconstitutional about jurisdiction by estoppel.⁷⁶ Yet the case itself did not propound any such theory and, had it attempted to do so, troublesome questions would have been provoked. Estoppel should be no broader than the plaintiff's prejudice.⁷⁷ It should prevent the defendant from pleading the statute of limitations, but it should not prevent him from attacking the court's jurisdiction. Indeed, had the case been dismissed for want of jurisdiction, the plaintiff probably could have maintained his action in the state court, because the state court would have denied the defendant the right to plead the statute of limitations under these circumstances.⁷⁸ If this is true, estoppel certainly has no place in the *Di Frischia* decision.

If, on the facts of *Di Frischia*, the state courts would refuse to hear the plaintiff's claim, perhaps estoppel ought to be invoked if necessary, even though this might stretch the already elastic concept of estoppel.⁷⁹ At best, however, estoppel will foreclose jurisdictional issues only in a very small percentage of the cases. If no prejudice to the opposing party is shown, there is no estoppel.⁸⁰ Prejudice to the administration of justice would not, under any extension of estoppel now conceivable, be sufficient to foreclose the issue and prevent belated attacks upon jurisdiction. Furthermore, the estoppel theory has a gross de-

75. See Stephens, *supra* note 67.

76. See text accompanying notes 139-44 *infra*.

77. See *Baker v. Wood*, 157 U.S. 212 (1895); *May v. City of Kearney*, 145 Neb. 475, 17 N.W.2d 448 (1945) (estoppel is commensurate with thing represented).

78. See OHIO REV. CODE § 2305.19 (Anderson 1953): "[I]f the plaintiff fails otherwise than upon the merits . . . the plaintiff . . . may commence a new action within one year. . . ." A plaintiff whose federal suit was dismissed for lack of diversity was allowed to come under the statute in *Wasyk v. Trent*, 174 Ohio St. 525, 191 N.E.2d 58 (1963), 33 U. CINC. L. REV. 113 (1964). The claim in *Di Frischia* arose in Ohio, so that his action clearly would not be barred in that state.

79. The American Law Institute has proposed providing for the statute of limitations problem discussed here, not by estoppel, but by statutory fiat. See ALL STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 24-25 (Proposed Final Draft No. 1, April 19, 1965). Courts do express willingness to stretch estoppel to fit notions of justice, however. See, e.g., *May v. City of Kearney*, 145 Neb. 475, 17 N.W.2d 448 (1945).

80. See cases cited note 65 *supra*.

fect, for if there were any doubt about prejudice, a hearing would have to be held on that issue. If prejudice were found, estoppel could be invoked and the case could proceed to trial. But this would mean a trial on the merits plus a trial on the estoppel issue. Instead of minimizing litigation, the estoppel theory might well increase it, so far as estoppel depends upon proof of prejudice. Of course, on the facts of *Di Frischia*, the prejudice to the plaintiff was quite clear and no additional hearing would have been required under the estoppel theory. However, on slightly different facts, the estoppel issue could well provoke needless litigation. The conclusion to be drawn is that estoppel was not the basis of the decision in *Di Frischia*, nor should it have been. If estoppel may sometimes bar a party from belated assertion of jurisdictional issues, well and good; but it will seldom do so.

The bootstrap principle, the law of the case doctrines, and estoppel all offer opportunities to foreclose jurisdictional issues at some relatively early stage of litigation. But none of these concepts is operative across the full range of need; none works except in limited circumstances. And none, incidentally, will explain the *Di Frischia* case. Is there a broader basis for requiring timely assertion of jurisdictional defects to protect courts and litigants from inefficiency and unfairness? Of course there is. There is no reason why ordinary procedural rules cannot apply to issues of jurisdiction so that objections not timely raised are deemed waived. Both scholarly and judicial opinion grossly exaggerate existing rules that permit tardy jurisdictional attacks, and thus it becomes relevant to examine the exact scope of the present rules.

D. PROCEDURAL RULES FORECLOSING TARDY JURISDICTIONAL OBJECTIONS

1. *The Mansfield-Hartog Rules*

The decision in *Di Frischia*, and a similar decision by another federal court,⁸¹ aroused surprise and some disagreement.⁸² These cases were thought to violate the traditional rule laid down by the Supreme Court in *Mansfield, C. & L.M. Ry. v. Swan*,⁸³ which permitted a tardy jurisdictional attack.⁸⁴ On the basis of the *Mansfield* decision, courts and writers have generally believed

81. *Klee v. Pittsburgh & W. Va. Ry.*, 22 F.R.D. 252 (W.D. Pa. 1958).

82. See materials cited note 67 *supra*.

83. 111 U.S. 379 (1884).

84. See also *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804).

that ordinary procedural rules have no application to issues of jurisdiction, so that, while most issues must be raised in early pleadings or by motion before answer,⁸⁵ jurisdictional issues can be raised at any time. However, the *Mansfield* rule does not justify such a broad proposition, and in fact the *Di Frischia* decision is quite consistent with the actual rule in *Mansfield*. The *Mansfield* plaintiffs had filed a state court action against corporate defendants. One of the plaintiffs was a citizen of Ohio, as was one of the corporate defendants. The defendants removed the case to federal court asserting diversity jurisdiction and sought to escape the obvious lack of diversity by alleging in their removal petition that the Ohio plaintiff had left Ohio and was now a citizen of some other state or territory unknown. This was a defective allegation of citizenship because, as the record showed, there was no diversity at the time the suit was filed in state court.⁸⁶ Furthermore, defendant's allegation was insufficient because even if the plaintiff were no longer an Ohio citizen, he might have been a citizen of one of the territories or of Michigan, where some of the defendants were incorporated, which would have destroyed diversity.⁸⁷ No one noticed these defects, however, and the case went to trial in the federal court. Trial resulted in a verdict for the plaintiffs in excess of \$350,000. On appeal, the Supreme Court noted the lack of diversity jurisdiction and ordered the trial court to vacate the judgment and remand the case to state court.

Although *Mansfield* has frequently been erroneously cited as supporting the rule that jurisdictional objections may be raised at any time by the parties or by the courts, it holds simply and narrowly that the question can be raised at any time when "the want of jurisdiction appears affirmatively from the record."⁸⁸ Some passages in the Court's opinion suggest that jurisdictional objections can be raised at any time, not only when the want of jurisdiction appears affirmatively from the record, but also when there is neither pleading nor proof in the record supporting jurisdiction.⁸⁹ But these passages are, on the facts, clearly

85. See, e.g., FED. R. CIV. P. 12(h).

86. 111 U.S. 379, 382 (1884).

87. *Id.* at 381.

88. *Id.* at 386.

89. *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804), supports the rule expressed in the *Mansfield* dicta. Most modern cases, though they have not overruled *Capron*, in fact do not go beyond *Mansfield*; that is, they require a tardy examination of jurisdictional issues when the defect in jurisdiction is apparent on the face of the record. See, e.g., *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951);

dicta. Even if they are not dicta, they formulate a rule considerably narrower than the rule usually stated today. If *Mansfield* states the governing rule, then it is apparent that *Di Frischia* is correct, or at least that it does not contravene *Mansfield*. Recall that in *Di Frischia* the defendant having admitted well-pleaded allegations of jurisdiction, there was record support for the court's jurisdiction, and certainly the record did not show affirmatively that jurisdiction was lacking.⁹⁰

Two years after *Mansfield* the Court decided *Hartog v. Memory*⁹¹ which made the limits of the *Mansfield* rule abundantly clear. In that case the plaintiff clearly set up diversity by alleging he was a citizen of Holland and defendant was a citizen of Illinois. Without suggesting any jurisdictional defect, the defendant answered to the merits. During the trial, however, the defendant testified he was a citizen of Great Britain. If this testimony was true—and defendant's use of the word "citizen" rather than "subject" suggests it may be spurious—diversity would have been destroyed, since the suit would have been between two foreign nationals.⁹² However, with the probable exception of defendant's counsel, no one appeared to appreciate the significance of this testimony and the trial proceeded to a verdict for the plaintiff. Having lost on the merits, the defendant then, for the first time, objected to the court's jurisdiction, pointing to the defendant's testimony as destroying diversity. The trial court granted defendant's motion to dismiss, but the Supreme Court reversed. Two alternative reasons were

United States v. Griffin, 303 U.S. 226 (1938); United States v. Corrick, 298 U.S. 435 (1936); Mitchell v. Maurer, 293 U.S. 237 (1934); Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908). Clark v. Paul Gray, Inc., 306 U.S. 583 (1939), may go as far as *Capron*, since the absence of jurisdiction in *Clark* was not apparent on the face of the record and the Court held merely that the allegation of jurisdiction was insufficient. Even this case, however, may be consistent with the more limited rule in *Mansfield*, for the Court may well have taken judicial notice that the amount in controversy could not have been in excess of the minimum then required. *Capron* is still the law. The point here is merely that *Capron* has had very little application as a matter of fact.

90. The plaintiff in *Di Frischia* alleged that he was a citizen of Pennsylvania and that the defendant railroad was incorporated in and a citizen of New York. Defendant alleged it was also a citizen of Pennsylvania, but later stipulated to the contrary by agreeing to recognize the jurisdiction and venue of the Pennsylvania District Court.

91. 116 U.S. 588 (1886).

92. Under the 1875 statute, 18 Stat. 470, § 1 (1875), diversity jurisdiction was granted in controversies "between citizens of a State and foreign states, citizens, or subjects . . ." but not between two foreign nationals. The present statute contains similar wording. 28 U.S.C. § 1332 (1964).

given. One was that, regardless of any other rule that might be involved, the plaintiff was entitled to have a hearing on the jurisdictional facts and an opportunity to rebut defendant's surprise testimony.⁹³ The other reason was that, once jurisdiction had been appropriately pleaded, evidence controverting the jurisdiction could be received only if offered pursuant to a proper objection to the jurisdiction. The parties, having failed to raise the jurisdictional issue after the record showed the jurisdictional facts, had no standing to do so during trial. The Court went on to say that the trial judge should, in his discretion, permit a party to amend pleadings if the judge suspects that his jurisdiction has been imposed upon by collusion or otherwise. Moreover, the judge could exercise his discretion to raise the issue himself, although he is under no obligation to make a jurisdictional defect appear. In effect, the trial judge may, but need not, permit a tardy objection to jurisdiction where the record does not show affirmatively that jurisdiction is lacking. Only when the record—by pleadings or by such amendments or proof as the trial judge permits—affirmatively shows the want of jurisdiction is the judge required to permit a belated assertion of a jurisdictional defect. Again, *Di Frischia* is not only consistent with *Mansfield*, but is simply following *Hartog*.

It should not be surprising that crowded courts, working to clear dockets, should be led to accept the broad, unadorned, and quite erroneous statement that jurisdictional issues can be raised at any time. Further, the Supreme Court gave some credence to this view by its decision in *Morris v. Gilmer*.⁹⁴ After his plea of res judicata was overruled, defendant obtained leave of the trial court to show a lack of diversity. It was shown that plaintiff, whose citizenship had been the same as defendant's, had moved out of the state only temporarily and had not acquired citizenship elsewhere. The facts tended to show, not collusion, but a more or less deliberate fraud by the plaintiff in order to gain federal jurisdiction, presumably because he had already lost a similar claim in the state court. The Supreme Court held that the jurisdictional issue could be considered and required a dismissal for lack of jurisdiction. That was all it could hold, because the trial court had given leave to the defendant to raise

93. In *Morris v. Gilmer*, 129 U.S. 315 (1889), discussed below, the Court said that this was the only holding in *Hartog*. However, this statement is itself a dictum, and seems incorrect. The *Hartog* requirement of a hearing on the jurisdictional issue was an alternative holding, but not the only holding.

94. 129 U.S. 315 (1889).

the jurisdictional point—a power clearly resting in the trial court under the *Hartog* rule. Had the trial court refused to permit the tardy jurisdictional attack, the Court might have made its holding broader, but the *Hartog* rule was not in issue. Nevertheless, the Supreme Court took this occasion to expound on the problem of raising jurisdiction and in a series of dicta criticized the *Hartog* rule. These dicta, if taken seriously, as they were by some lower courts,⁹⁵ would sabotage the judicial system; they would extend the limited holding in *Mansfield*, abolish the distinction that reconciled *Mansfield* and *Hartog*, and destroy the long settled rule that parties could admit jurisdictional facts.⁹⁶ Thus, the *Morris* dicta, had enormous potential, some of which has been realized in the lower courts, though not in the Supreme Court itself. While *Morris* is not the last word, it has been a misleading word contributing greatly to the general misunderstanding of the rules about raising jurisdictional issues.

The dicta in *Morris* were not alone responsible for the prevalent misconception that jurisdiction could be attacked at any time. The Court relied heavily on the Judiciary Act of 1875.⁹⁷ Most of the act—which was later codified as Section 80 of the old Judicial Code and now survives in part in Rule 12(h) of the Federal Rules⁹⁸—was concerned with new and expanded removal provisions.⁹⁹ Counterbalancing the expanded removal rights granted by the act, section 5 provided if it

shall appear to the satisfaction of the said circuit [now federal district] court, at any time [that the suit] does not really and substantially involve a dispute or controversy properly within the jurisdiction of the said circuit court, or that the parties have been improperly or collusively joined . . . the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed. . . .¹⁰⁰

The *Morris* Court took the position, in dictum, that although

95. *E.g.*, Page v. Wright, 116 F.2d 449 (7th Cir. 1940).

96. See *Pittsburg, C. & St. L. Ry. v. Ramsey*, 89 U.S. (22 Wall.) 322 (1875). See also *United States v. Clarke* (the Confiscation Cases), 87 U.S. (20 Wall.) 92 (1874) (dictum) (not involving subject matter jurisdiction). Most of the courts of appeal decisions in contemporary cases are in accord. See cases cited note 124 *infra*.

97. 18 Stat. 470, § 5 (1875).

98. The problem of collusive attempts to gain jurisdiction is covered presently in 28 U.S.C. § 1359 (1964). Federal Rule 12(h), which deals with the time for raising jurisdictional issues, is discussed below. See text accompanying notes 135-36 *infra*.

99. See 1 MOORE, FEDERAL PRACTICE ¶ 0.71(4-3) (2d ed. 1964) for discussion of the expanded removal provisions of the 1875 act.

100. 18 Stat. 470 (1875).

before the 1875 Act, jurisdictional objections had to be raised by pleas in abatement or not at all,¹⁰¹ the statute required a different result. The Court ignored the fact that both *Mansfield* and *Hartog* were decided after the statute had been passed. This statute, as interpreted in *Morris*, has been primarily responsible for the belief that jurisdiction may be attacked at any time, even if the defect in jurisdiction does not show on the face of the record.

The 1875 statute, however, does not bear such an interpretation. Once it is recognized that the *Mansfield* rule was established long before the statute was passed¹⁰² and that it is a very narrow rule indeed, it becomes apparent that the statute only codified the rule that *Mansfield* expressed in final form. At least, if the statute was intended to do more, it is an extraordinarily badly drafted work—which, it must be admitted, is the case in any event. The statute requires the trial court to dismiss when it appears to the satisfaction of the trial judge that jurisdiction is lacking. It is quite clear that the statute did not give such authority to *appellate* courts, as the Supreme Court itself recognized in *Morris*.¹⁰³ The most likely construction of this language would seem to be that Congress intended the trial courts, as well as the appellate courts, to dismiss when jurisdictional defects appeared on the face of the record, but that it did not intend to require anything more. Such an interpretation of the statute would explain why the statute applies by its terms only to trial courts.

This conclusion is borne out in other ways as well. The statute is specifically addressed to two situations. It speaks of one in which it appears that the suit does not really and substantially involve a dispute within the court's jurisdiction, and it speaks also of one in which it appears that the parties have been improperly or collusively joined. Although this may be mere verbosity, rules of statutory construction demand that all language in a statute be given meaning if possible.¹⁰⁴ Why then did Congress write of two situations—one in which jurisdiction appeared to be absent and one in which collusion ap-

101. *E.g.*, *Smith v. Kernochen*, 48 U.S. (7 How.) 198, 216 (1849): "The objection came too late, after the general issue. For when taken to the jurisdiction on the ground of citizenship, it must be taken by a plea in abatement, and cannot be raised in the trial on the merits."

102. *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804).

103. "[T]he Act of 1875 imposes upon the *Circuit Court* the duty of dismissing. . . ." *Morris v. Gilmer*, 129 U.S. 315, 326 (1889). (Emphasis added.)

104. See, *e.g.*, *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

peared? If the parties collusively admitted or staged jurisdictional facts, wouldn't this be covered by the first portion of the statute? If the statute was meant to cover both the situation in which a lack of jurisdiction affirmatively appeared on the record and the situation where it did not, it seems clear that the second portion of the statute was quite unnecessary. But if the statute was aimed only at the *Mansfield* situation, the first portion of it would not cover collusion and a separate clause was needed to do so. This is so because, if the parties collusively alleged and admitted jurisdictional facts, the record would show jurisdiction existed, and under the *Mansfield-Hartog* rules (and the earlier established rule that parties could admit jurisdictional facts) there could be no tardy jurisdictional objection. The separate clause for the collusion situation thus makes sense on the postulate that the statute, except for this clause, is aimed solely at codifying the narrow rule in *Mansfield*. It is hard to see how it makes much sense if the statute were intended to do more.

In addition to all this, the language of the statute itself at least suggests the same conclusion and perhaps requires it. It directs the trial judge to dismiss when it appears that jurisdiction is lacking. It does not say how this appearance is to take place nor does it prescribe any procedural rules for raising the issue. Thus it may be presumed that the normal procedural rules would govern. In the light of prior law, the most reasonable conclusion would be that the jurisdictional defect was to appear from the record—the pleadings, or such proof as the trial judge admitted in his discretion. The statute certainly does not contain the remotest suggestion that the parties have standing to make a belated jurisdictional attack. Nor does it impose upon the judge a duty to hear or initiate such an attack. What it does is simple: when a jurisdictional defect *does* appear, the judge must dismiss. There is no implication that the judge must act to make the defect appear or that the parties may do so other than by ordinary modes of procedure. This view of the statute, though not a common one today, is precisely the view held by the Supreme Court in the *Hartog* case, which was decided some eleven years after the statute was passed.¹⁰⁵

The *Mansfield-Hartog* rules make it plain that if a lack of jurisdiction appears on the face of the record, dismissal is required at any stage; but if it does not so appear, the trial judge may exercise his discretion whether to permit amendments and

105. This view is even more clearly expressed in *Mexican Cent. Ry. v. Pinkney*, 149 U.S. 194 (1893), discussed in more detail *infra*.

proof that raise the issue after answer. Against these rules were pitched a series of dicta in *Morris* and a grossly loose construction of the 1875 statute. If, as concluded here, the statute does not compel a dismissal at any stage of the case unless the defect appears on the record, it is apparent that the *Mansfield-Hartog* rules stand unless affected by subsequent authority.

The excruciating nonsense in *Morris* might, of course, have petrified into law with the passage of time and simple repetition, and for that reason these dicta cannot be disregarded. However, just four years after that case, the Court specifically said in *Mexican Cent. Ry. v. Pinkney*,¹⁰⁶ that a party could not raise jurisdictional objections in the course of trial without the trial court's permission. Whatever standing the dicta in *Morris* might have had, this is a clear return to *Hartog*. The Court pointed out that the 1875 statute did not require any other result. Specifically, the statute did not require the judge to permit a tardy jurisdictional objection. The issue in the case was cast as whether the trial court could refuse "leave to file a plea, during the progress of the trial, on the question of plaintiff's citizenship . . ."¹⁰⁷ The Court's answer was cast in equally plain terms: it is "well settled that mere matters of procedure . . . are purely discretionary matters for the consideration of the trial court . . ."¹⁰⁸ On several other occasions after *Morris*—the last one in 1900—the Court approved the *Hartog* case.¹⁰⁹ This seems to leave the dicta in *Morris* as entirely spent forces.

The Supreme Court decisions of the twentieth century lead to the same conclusion. A large number of them cite the *Mansfield* case, and at times the broad dictum is laid down that jurisdictional questions may be raised at any time,¹¹⁰ but all of the

106. 149 U.S. 194 (1893).

107. *Id.* at 200-01.

108. *Id.* at 201.

109. See *Huntington v. Laidley*, 176 U.S. 668 (1900); *Wetmore v. Rymer*, 169 U.S. 115 (1898).

110. See *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (opinion of Mr. Justice Brennan); *City of Gainesville v. Brown-Crummer Inv. Co.*, 277 U.S. 54 (1928). Even such dicta are rare in the Supreme Court decisions. Most of the Court's statements on the subject are precisely limited to the *Mansfield* rule. Thus in *Saint Paul Mercury Indem. Co. v. Red Cab. Co.*, 303 U.S. 283 (1938), the Court said that since the 1875 statute, it has been the duty of the trial courts

not only to act upon a motion to dismiss . . . or, if the state practice permits, upon a denial of jurisdiction in the answer, . . . but to act *sua sponte* . . . upon any disclosure, whether in the pleadings or the proofs, which satisfies the court, in the exercise of a sound judicial discretion, that the plaintiff did not in fact have a claim for the jurisdictional amount or value, and knew, or reasonably ought to have known, that fact. . . .

cases citing *Mansfield* are cases applying the narrow rule in *Mansfield*. Time and again the Court has permitted tardy jurisdictional objection where the lack of jurisdiction shows on the face of the record, but the Court does not seem to have gone any further than this. If the jurisdictional amount is not sufficiently alleged, no answer of the defendant admits the jurisdictional amount, since there is nothing to admit.¹¹¹ The same is true if neither diversity nor a federal question appears in the record, in which case either a tardy objection or a sua sponte dismissal is proper under *Mansfield*.¹¹² And of course if a federal question is alleged, but as a matter of law on the admitted facts the complaint does not raise a federal question, the defect in jurisdiction is apparent on the face of the record.¹¹³ This is equally true when as a matter of law diversity does not exist on the facts pleaded.¹¹⁴ In either case a tardy attack is permitted. The parties may misapprehend the law: they may believe that where complete diversity is lacking there is nevertheless a separate and independent cause of action between two diverse citizens that would justify removal;¹¹⁵ or they may believe that diversity exists because they have erroneously aligned the parties;¹¹⁶ or they may have concluded that diversity existed because they considered the citizenship of the wrong persons.¹¹⁷

Id. at 287, n.10. It is perfectly clear from this statement that the Court thought ordinary rules of practice could determine the time and manner in which jurisdictional issues could be raised.

111. In *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), where there were several plaintiffs, a general allegation that the amount in controversy exceeded the required three thousand dollars was insufficient to allege the jurisdictional amount, since the requirement is that each plaintiff have such an amount involved. *Stevens v. Nichols*, 130 U.S. 230 (1889), held the allegation of diversity in present tense defective, since it must appear on record that diversity existed at commencement of the action.

112. See *Continental Nat'l Bank v. Buford*, 191 U.S. 119, 120 (1903) (question arises upon the face of the record); *Great So. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900); *Peper v. Fordyce*, 119 U.S. 469 (1886); *Continental Ins. Co. v. Rhoads*, 119 U.S. 237 (1886) (jurisdictional facts must appear on face of record); *Thayer v. Life Ass'n of America*, 112 U.S. 717 (1885) (citizenship of party not on record; infer it would prevent removal); *Hancock v. Holbrook*, 112 U.S. 229 (1884) (diversity not on face of record in removal action; remand ordered).

113. See *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908).

114. See *Mitchell v. Maurer*, 293 U.S. 237 (1934).

115. See, e.g., *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951); *Graves v. Corbin*, 132 U.S. 571, 584 (1890) (under separable controversy test).

116. See *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63 (1941) (Supreme Court would realign parties even though it had denied certiorari on this issue at an earlier portion of the litigation).

117. See *Mitchell v. Maurer*, 293 U.S. 237 (1934).

But again, in each of these cases, lack of jurisdiction appeared on the face of the record, even if it did not appear with much clarity to the parties themselves. A similar situation exists where the parties assume that the case is one for a three judge court when under the law it is one for a single judge or vice versa.¹¹⁸ In all these situations the defect in jurisdiction exists on the record and they are all properly within the *Mansfield* rule. These are the cases currently cited by courts and writers to sustain the broad proposition that jurisdiction may be raised at any time.¹¹⁹ It seems clear that they do not sustain any such proposition, though the Supreme Court itself occasionally states the rule with equal breadth in dicta.¹²⁰

In addition to the fact that the Supreme Court has kept itself within the *Mansfield-Hartog* rules, it has again and again formulated the rules in terms of a record-appearing defect.¹²¹ The Court will dismiss "if the record discloses that the lower court was without jurisdiction,"¹²² but otherwise the matter is in the trial judge's discretion. The conclusion to be drawn from all this is simply that the Court has followed a consistent pattern in adhering to the *Mansfield-Hartog* rules. The dicta in *Morris* are dead, as they always were.

But the law of the Supreme Court is not always the law in practice. Although most of the courts of appeal—as well as the Supreme Court¹²³—have held that jurisdictional facts can be admitted,¹²⁴ and although the bulk of cases in the courts of appeal are cases consistent with the narrow *Mansfield-Hartog*

118. See *United States v. Griffin*, 303 U.S. 226 (1938); *United States v. Corrick*, 298 U.S. 435 (1936).

119. See, e.g., 1 MOORE, *FEDERAL PRACTICE* ¶ 0.60(4) (2d ed. 1964) (criticizing the rule, but stating it broadly).

120. See cases cited note 110 *supra*.

121. See, e.g., *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938); *Parker v. Ormsby*, 141 U.S. 81 (1891); *Stevens v. Nichols*, 130 U.S. 230 (1889); *Metcalf v. Watertown*, 128 U.S. 586 (1888); *King Bridge Co. v. Otoe County*, 120 U.S. 225 (1887); *Continental Ins. Co. v. Rhoads*, 119 U.S. 237 (1886); *Hancock v. Holbrook*, 112 U.S. 229 (1884).

122. *United States v. Corrick*, 298 U.S. 435, 436 (1936).

123. See cases cited note 96 *supra*.

124. See, e.g., *Di Frischia v. New York Cent. R.R.*, 279 F.2d 141 (3d Cir. 1960); *NLRB v. Townsend*, 185 F.2d 378 (9th Cir. 1950); *Young v. Handwork*, 179 F.2d 70 (7th Cir. 1949) (alternative holding); *Murphy v. Sun Oil Co.*, 86 F.2d 985 (5th Cir. 1936); *United States v. Wilson*, 78 F.2d 465 (10th Cir. 1935); *Vincent v. United States*, 76 F.2d 428 (D.C. Cir. 1935); *United States v. Ellison*, 74 F.2d 864 (4th Cir. 1935); *United States v. Kiles*, 70 F.2d 880 (8th Cir. 1934). See also *Jackson v. Southern Ry.*, 317 F.2d 532 (5th Cir. 1963); *Harlee v. City of Gulfport*, 120 F.2d 41 (5th Cir. 1941).

rules,¹²⁵ a few cases seem to have applied a broader rule. Most notable of these is *Page v. Wright*¹²⁶ which is usually cited for the proposition that a jurisdictional objection can be made at any time.¹²⁷ In *Page* plaintiff pleaded diversity by alleging his Florida citizenship and by alleging on information and belief, defendant's Kentucky citizenship. The defendant answered and admitted "that this court has jurisdiction of the parties hereto, and of the subject matter hereof."¹²⁸ The case then proceeded to judgment on the merits in favor of plaintiff, whereupon defendant's counsel suddenly discovered that he had "overlooked" the little matter of diversity of citizenship and that his client was not, as he had admitted, a citizen of Kentucky at all, but a citizen of Florida. He thereupon moved to dismiss for want of jurisdiction, alleging that no diversity existed. The trial court denied him leave to file an amended answer and denied him leave to file the motion to dismiss. The Seventh Circuit reversed, holding that the trial court was bound to entertain the objection and hear testimony on the jurisdictional issue. One of the court's alternative reasons for this ruling was based squarely upon the ground that jurisdictional issues could be raised at any time. The appellate court thought that *Hartog* was overruled by the dicta in *Morris*. The subsequent decision in *Mexican Cent. Ry. v. Pinkney*, which clearly returned to the *Hartog* position, puzzled the court, but was distinguished on rather meaningless grounds.¹²⁹ This holding in *Page v. Wright* is the clearest de-

125. The following cases, by no means an exhaustive list, are consistent with the narrow rule in *Mansfield*, although most of them have been cited at one time or another, for the broader proposition that jurisdictional issues can be raised at any time: *Thompson v. United States*, 291 F.2d 67 (10th Cir. 1961); *Resnick v. La Paz Guest Ranch*, 289 F.2d 814 (9th Cir. 1961); *Ambassador East, Inc. v. Orsatti, Inc.*, 257 F.2d 79 (3d Cir. 1958); *La Fever v. United States*, 257 F.2d 271 (7th Cir. 1958); *Parmelee v. Ackerman*, 252 F.2d 721 (6th Cir. 1958); *Reconstruction Fin. Corp. v. Riverview State Bank*, 217 F.2d 455 (10th Cir. 1954); *Lee Wing Hong v. Dulles*, 214 F.2d 753 (7th Cir. 1954); *Hospoder v. United States*, 209 F.2d 427 (3d Cir. 1953); *Zank v. Landon*, 205 F.2d 615 (9th Cir. 1953); *Martyn v. United States*, 176 F.2d 609 (8th Cir. 1949); *Orth v. Transit Inv. Corp.*, 132 F.2d 938 (3d Cir. 1942); *Hackner v. Guaranty Trust Co.*, 117 F.2d 95 (2d Cir. 1941); *Farr v. Detroit Trust Co.*, 116 F.2d 807 (6th Cir. 1941). See also cases cited note 124 *supra*.

126. 116 F.2d 449 (7th Cir. 1940).

127. See, e.g., ALLI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 106 (Proposed Final Draft No. 1, April 19, 1965).

128. 116 F.2d at 450.

129. The Seventh Circuit thought that, although the *Pinkney* case gave discretion to the trial judge to refuse to accept an amended answer asserting the jurisdictional defect, the trial judge was still required to

parture from the *Mansfield-Hartog* rules in modern times. And even *Page v. Wright* has some qualifications, for the court took pains to offer two alternative holdings. First, it said—or at least implied—that the defendant could admit jurisdictional facts, but held that his answer here had not done so because it was couched in conclusory rather than factual terms.¹³⁰ Second, the court brought the case within the *Mansfield-Hartog* rules by holding that the record did not affirmatively support jurisdiction; plaintiff had alleged defendant's Kentucky citizenship only on information and belief, and this was an insufficient record showing of jurisdiction. Although there seems no reason why this allegation, interpreted in the light of defendant's answer, is not sufficient to show jurisdiction, if one grants the court's premise that it does not, the decision is in accord with *Mansfield*.

Among the cases commonly cited by writers on the subject, only one other court of appeals decision goes beyond the *Mansfield-Hartog* rules. *Albert v. Brownell*,¹³¹ a decision of the Ninth Circuit, is perhaps understandable in the light of the court's comments on rehearing, where it intimated that its decision was in reality based upon the merits and not upon a jurisdictional issue at all.¹³² The plaintiff sued claiming title to property seized by the Alien Property Custodian. To recover, she was required to show that she was neither an enemy nor an ally of an enemy. She alleged that she was not. The government submitted certain affidavits and moved for summary judgment on the merits. The trial court gave summary judgment for the government, but on appeal the court held that a judgment upon the merits could not be rendered until the jurisdictional

hear a motion to dismiss for want of jurisdiction. If this is correct, the Supreme Court was engaging in meaningless formalism in deciding *Pinkney*. This, of course, is not impossible, but there seems no reason for a gratuitous presumption. Furthermore, it overlooks the real principle upon which *Pinkney* was clearly decided, namely, that the defendant "was not entitled to present any objection to the jurisdiction of the court over the principle cause . . ." unless he did so timely. *Huntington v. Laidley*, 176 U.S. 668, 678 (1900).

130. Plaintiff's argument is predicated upon the premise that the defendant "specifically admitted the jurisdictional allegations of the complaint." This is an overstatement of defendant's admission. Defendant's admission was that the court had jurisdiction. Nothing was admitted regarding the factual allegations of the complaint upon which jurisdiction was claimed.

116 F.2d at 451. "The answer of the defendant conceding jurisdiction amounted to no more than consent. . . ." *Id.* at 453.

131. 219 F.2d 602 (9th Cir. 1954).

132. *Id.* at 605, n.6, noting that summary judgment was improper because "plaintiff also claims with some apparent merit that there were other genuine issues of fact . . ."

facts had been proven. Since the plaintiff had not proved her allegation that she was neither enemy nor an ally of one, which was considered jurisdictional,¹³³ the court remanded and vacated the judgment. It reasoned that since the parties could not consent to jurisdiction, the jurisdictional facts had to be proved. The decision is so fantastic that it virtually defies comment. In the first place, it seems contrary to the earlier decision of the same circuit that jurisdictional facts can be admitted.¹³⁴ In the second place, it seems to challenge the validity and certainly the effectiveness of Federal Rule 56, which provides for summary judgment. This is so, since there are always jurisdictional facts to be proved, and since in the *Albert* case no admission would make this proof unnecessary. Finally the decision is squarely contrary to the *Mansfield-Hartog* rules and to accepted practice.

These decisions cannot be justified on the basis of Rule 12 of the Federal Rules, although it is often cited in support of the broad proposition that jurisdiction can be attacked at any time. Rule 12(h) provides in effect that all issues must be raised by answer, or before answer by motion. If they are not thus raised, they may not be raised later. The rule then provides an exception where the issue is one of subject matter jurisdiction. On this issue, the rule provides that "whenever it appears by suggestion of the parties or otherwise that a court lacks jurisdiction of the subject matter, the court shall dismiss the action."¹³⁵ The Advisory Committee made it clear that Rule 12(h) goes no further than the 1875 statute,¹³⁶ and that statute, as already shown, requires the trial judge to dismiss only when the defect is timely raised or when it appears on the face of the record.

The same conclusion results from a consideration of the rule's specific reference, before the 1966 amendments, to Rule 15(b).¹³⁷ Before the amendments, Rule 12(h) concluded, imme-

133. As is so often the case, the alleged jurisdictional defect is not properly labeled jurisdiction at all. *Id.* at 604.

134. *NLRB v. Townsend*, 185 F.2d 378 (9th Cir. 1950).

135. *FED. R. CIV. P.* 12(h).

136. See 2 MOORE, *FEDERAL PRACTICE* ¶ 12.01(24) (2d ed. 1964). As to use of committee notes in construction of the rules, see *id.* at ¶ 1.13(2) (2d ed. 1964).

137. The 1964 proposal of the Advisory Committee for amendment of Rule 12(h) eliminates the reference to Rule 15(b), which in the present rules literally refers jurisdictional as well as other issues to the discretion of the judge under 15(b). The proposed amendment is: "(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." The committee comments make no mention of this portion of the amendments. 34 F.R.D. 371, 373 (1964).

diately after reference to tardy jurisdictional objections, by stating that the "objection . . . if made at the trial, shall be disposed of as provided in Rule 15(b)" ¹³⁸ Rule 15(b) then expressly left the question of amendment of pleadings to the discretion of the district judge. Clearly, this meant that the district judge could reject belated amendments to pleadings that would raise jurisdictional issues. Although this reference to the rule of discretion has now been eliminated, the Advisory Committee's notes do not indicate any intent to affect the point made here.

Therefore, the effect of Rule 12(h) is to confirm rather than to overrule the *Mansfield-Hartog-Mexican Cent. Ry.* limits on tardy jurisdictional objections. This appears to leave the aberrant decisions of the courts of appeal without support.

Perhaps to all this, it should be added that there is no real question of constitutionality involved in foreclosing jurisdictional issues at an early stage of litigation. Due process no doubt requires a fair opportunity to present jurisdictional issues, but there is no reason to suppose that it requires any more opportunity than is required on an issue of venue or jurisdiction of the person. It is true that the federal constitution limits jurisdiction of federal courts to certain specified cases, such as those involving diversity, and if a federal court decides a case in which there is "really" ¹³⁹ no diversity, it is in a sense transcending constitutional limits upon federal power. Nevertheless, since the Constitution did not prescribe any particular method by which jurisdictional issues would be determined, the drafters no doubt intended that courts would pass on the issues of jurisdiction and that they would do so by ordinary procedures. The Judiciary Act of 1789 ¹⁴⁰ contained at least one clause that had the effect of foreclosing a tardy assertion of jurisdictional objections, ¹⁴¹ and the Supreme Court early in its history held that

138. FED. R. CIV. P. 12(h). The rule was so amended in 1966.

139. Of course, a judge seldom knows what the facts "really" are; he knows only what he, as a fallible being finds them to be, and the Constitution undoubtedly did not demand infallibility. See Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 315 (1957); Dobbs, *Trial Court Error as an Excess of Jurisdiction*, 43 TEXAS L. REV. 854 (1965).

140. 1 Stat. 80 (1789).

141. Section 12 provided for removal to federal court by either party of land title disputes where either party relied upon a grant of land from a state "other than that in which the suit is pending. . . ." It then provided that "neither party removing the cause, shall be allowed to plead or give evidence of any other title than that by him stated as aforesaid. . . ." This seems to mean that the party removing is bound by his own jurisdictional allegations.

jurisdictional objections could be raised only by a plea in abatement except where the defect in jurisdiction appeared on the face of the record.¹⁴² The Court has also held that jurisdictional facts may be admitted by the parties,¹⁴³ and has promulgated a number of rules that in fact, if not in form, foreclose the raising of tardy objections to subject matter jurisdiction.¹⁴⁴ The short of it is that no one should suspect a constitutional issue lurking in the background; the issue is purely an issue of civilized and efficient administration of justice.

2. *The Meaning and Limits of the Mansfield-Hartog Rules*

Once it is agreed that jurisdictional objections can be foreclosed at early stages of litigation, much as other issues can be, it becomes necessary to point out the limits and significance of such a rule.

In the first place, the rule is not merely a rule that binds parties by their admissions of jurisdictional facts, although certainly they are so bound.¹⁴⁵ What the *Mansfield-Hartog* rules say is that a jurisdictional objection may not be tardily raised unless the defect in jurisdiction is apparent on the record, or jurisdiction is inadequately alleged. As often as not, jurisdiction is a question of law rather than one of fact, and when this is so, if there is no jurisdiction, it will appear on the record as a matter of law applied to admitted facts. It is likewise true that a proper allegation of jurisdiction ought to have at least some factual element in it; it ought to allege, for example, diversity of citizenship, and not merely "that this court has jurisdiction." Nevertheless, the Supreme Court has not based its holdings on distinctions between fact and law. If the plaintiff alleges the bald conclusion that the court has jurisdiction and the defendant does not attack that conclusion timely, a tardy attack need not

142. *Smith v. Kernochen*, 48 U.S. (7 How.) 198, 216 (1849).

143. See cases cited note 96 *supra*.

144. For example, the Supreme Court has approved a number of rules fixing the time as of which jurisdiction is to be judged, or has limited the manner in which it may be judged. A plaintiff's prayer for relief controls in determining the jurisdictional amount, unless to a legal certainty he cannot recover that amount. See *WRIGHT, FEDERAL COURTS* § 33 (1963). In form, this postulates standards for judging jurisdiction; in fact it means that the plaintiff cannot show that his claim is "really" worth less than the jurisdictional amount. Similar rules apply concerning citizenship; it is judged as of the time the suit is commenced, and a subsequent change in citizenship will not affect jurisdiction, even if a party "really" moves to disestablish diversity. See *WRIGHT, supra*, § 28.

145. See cases cited note 124 *supra*.

be permitted. Only if facts in the record show that the conclusory allegation is wrong, or probably wrong,¹⁴⁶ is there any requirement that the defendant be permitted a tardy jurisdictional objection as of right. Thus in *Di Frischia* the defendant probably could have shown facts that would have demonstrated as a matter of law that no diversity existed. But, having admitted generally that it did exist, he was denied the right to do so belatedly. The point seems obvious enough. Yet it is precisely the point at which the Seventh Circuit left the trail in *Page v. Wright*,¹⁴⁷ when it treated the problem as one of judicial admissions and held that only specific facts could be admitted. That is not, however, what the *Mansfield-Hartog* rules say. The basis for foreclosing the issue of jurisdiction is not so much that the parties have admitted jurisdictional facts as it is that procedural rules require timely assertion of jurisdictional objections, whether those objections are couched in terms of legal conclusions or factual assertions. Only when neither pleadings, proof, nor admissions show any assertion of jurisdiction at all—or when, notwithstanding such an assertion it is clear that jurisdiction is absent—is the trial judge required to hear a tardy jurisdictional objection.

If all this is correct, the rule permitting tardy jurisdictional objections is considerably more limited than is generally thought. Yet it is broad enough to do considerable harm, and certainly it is broad enough to protect the courts against collusive assault on their dockets by unethical attorneys. Collusion need not be tolerated under the *Mansfield-Hartog* rules because the trial judge always has discretion to permit a belated attack on his jurisdiction. If he suspects collusion, he should no doubt act at any stage of the case to investigate it in an appropriate hearing. In a case where no collusion exists, he may still entertain a tardy objection and permit amendments and proof to sustain it, and again, no doubt, would ordinarily do so if the objection comes at a reasonably early stage of the litigation so that there is little or no prejudice to the opposing party.¹⁴⁸ This rule of discretion is a good one, though it seems commonly misunderstood.

146. *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), may support the view that an improbable conclusory allegation of jurisdiction is insufficient.

147. 116 F.2d 449 (7th Cir. 1940).

148. See, considering elements affecting judicial discretion in permitting tardy amendments, Donnici, *The Amendment of Pleadings—A Study of the Operation of Judicial Discretion in the Federal Courts*, 37 So. CAL. L. REV. 529 (1964).

In addition to this discretion, the trial judge may be obliged to permit a tardy objection, not only where the record affirmatively shows, without amendment, a jurisdictional defect, but also where the jurisdictional defect is so serious that even a collateral attack would be permitted. Under the bootstrap principle, it is said that a trial judge normally has the power to determine his own jurisdiction, and that after judgment is rendered, his decision, even a tacit or implied one, is *res judicata*, so that no objection to his jurisdiction can be made in a collateral action.¹⁴⁹ But under this rule there are exceptions in special cases. If the policy against the judge's acting in such a case is a strong one, a collateral attack may be permitted in spite of the bootstrap principle.¹⁵⁰ Now obviously when the jurisdictional objection is the kind that would be heard even on collateral attack—in another case—the trial judge should also hear it when it is made belatedly in the original suit. Thus if, in a suit against the sovereign, the plea of sovereign immunity is not timely made, courts may properly permit a belated plea of immunity,¹⁵¹ since such an objection could be made collaterally in a second action in any event.¹⁵²

Although trial judge's discretion is an entirely adequate bulwark against collusion, the *Mansfield-Hartog* rules are too severe in not leaving the entire matter to the trial judge's discretion. They compel him to entertain a tardy jurisdictional objection whenever the jurisdictional defect appears on the face of the record. If parties could always know what jurisdictional law is, this might be fair enough; but whether a court has jurisdiction is quite often uncertain. In some cases it appears that jurisdiction exists, but a new judicial decision at a later date may show that appearances were wrong. Something like this happened in *Finn*¹⁵³ where the plaintiff, a Texas citizen, sued a Texas insurance broker and two non-Texas insurance companies. The insurers removed the action to federal court under Section 1441 (c) of the Judicial Code on the theory that, as to them, there was a separate and independent cause of action stated, even though

149. See cases cited note 12 *supra*.

150. See RESTATEMENT, JUDGMENTS § 10 (1942). This is an oversimplified statement and certainly not definitive, but it is sufficiently accurate.

151. *Hospoder v. United States*, 209 F.2d 427 (3d Cir. 1953), was a situation of this sort, although the court did not rely on this point in entertaining the jurisdictional issue.

152. *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506 (1940).

153. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951).

the individual defendant was nondiverse. The plaintiff objected to removal, but his objection was overruled. Trial resulted in a verdict for the plaintiff against one of the removing insurance companies. The Supreme Court held that, even though the insurer had removed the action to federal court, the jurisdictional issue could be raised belatedly to its advantage. The case was remanded because the Court concluded that no separate and independent cause of action had been shown against the diverse insurers, and that absent such a separate cause of action, there was no removal jurisdiction, since the nondiverse individual defendant's presence destroyed diversity. This is extremely bad law that no high-minded talk of states' rights or limited judicial power can obscure.¹⁵⁴ Nevertheless it is law authorized by *Mansfield*, because the jurisdictional defect appeared on the face of the record, even though it may not have been very apparent to anyone but the Supreme Court.¹⁵⁵

The *Mansfield* rule, though narrower than usually thought, requires the kind of judicial action that leads—quite understandably—to public contempt for the law that a democratic society cannot afford. In conception, the *Mansfield* doctrine may be judicious; in practice it is merely iniquitous. There is no reason why it should not be overruled, since it is not a constitutional doctrine. It would be quite sufficient to deny all tardy objections to jurisdiction, unless the trial judge in his discretion saw fit to permit them. There is certainly no need for a distinction between jurisdictional defects appearing on the face of the record and those that can be shown only by introducing new amendments or new testimony. Doubtless, however, the modernization of *Mansfield* is a dim prospect at best, and perhaps one should be content if courts come to realize that *Mansfield*, as bad as it is, is still a quite limited doctrine. There is, however, hope of legislative change both on the state and federal level, and this hope is worth brief comment.

154. There is usually talk of "judicial statesmanship," cf. HART & WESCHLER, *THE FEDERAL COURTS & THE FEDERAL SYSTEM* 719 (1953), or of "avoiding offense to state sensitiveness," *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941), as if states were like sulky children, demanding work they do not want simply to prevent others from having it.

155. The rule in *Finn* so narrowed the grounds for removal under the "separate and independent claim or cause of action" test that in the only cases left removable, there is a serious doubt as to the constitutionality of the statute as construed. 28 U.S.C. § 1441(c) (1964). See also WRIGHT, *FEDERAL COURTS* § 39 (1963). It seems clear that no lawyer could have foretold a view of the statute that would have raised serious doubts about its constitutionality.

III. THE COMING LEGISLATIVE REFORM

The preceding discussion has shown that the judicial system—at least in the federal courts—is not quite so archaic as it is reputed to be. Except in the *Mansfield* situation, parties are not entitled as a matter of right to raise jurisdictional issues belatedly. But, as also shown, even the *Mansfield* rule produces some egregiously bad results, justifiable only on a radical view of “states’ rights” in the judicial sphere. Two major changes by way of legislative reform are in sight, and may affect the problem substantially within the near future.

The American Law Institute has drafted, at the suggestion of the Chief Justice, a proposed revision of the federal judicial code.¹⁵⁶ The Institute’s proposal, in statutory form, is that “no court of the United States shall consider, either on its own motion or at the instance of any party, a question of jurisdiction. . . .” after trial is commenced or there is a disposition upon the merits.¹⁵⁷ Of the four exceptions recognized, the principal one is that jurisdiction may be considered after trial where there is collusion between adverse parties on jurisdictional points and where a party could not reasonably have raised the jurisdictional issue at an earlier stage.¹⁵⁸ The proposal is a major step in the right direction. When applicable, it clearly overrules the *Mansfield* doctrine, for, after commencement of the trial, the court is told it may not consider the jurisdictional issue, and there is no exception made where the defect in jurisdiction appears on the face of the pleadings.

This proposal, good as it is, is not entirely satisfactory. The prohibition against raising jurisdictional issues begins at the commencement of the trial. Prior to trial—unless the statute of limitations has run, in which case there is a special provision¹⁵⁹—presently existing rules would apply. This means that before

156. See ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Official Draft, 1965).

157. *Id.* at § 1308 (Official Draft, 1965) (diversity jurisdiction); § 1386 (Tent. Draft No. 4, 1966) (federal question). The latter has not been officially approved by the Institute and was included in the 1966 Tentative Draft to indicate the “present views” of the reporters and their advisors.

158. *Id.* at § 1308(4) (Official Draft, 1965); § 1386(4) (Tent. Draft No. 4, 1966). Jurisdictional issues may also be considered after trial is commenced where the court has previously deferred resolution of the question and where the “question arises on appeal . . . of a decision with respect to such question not rendered contrary to the provisions of this section”

159. *Id.* at § 1308(b) (Official Draft, 1965); § 1386(b) (Tent. Draft No. 4, 1966).

trial is "commenced" the judge would have discretion to permit an amendment attacking his jurisdiction if the jurisdictional facts were adequately pleaded (*Hartog*), but that he would be required to hear a jurisdictional objection if the jurisdictional facts had not been properly pleaded or if the objection to jurisdiction were apparent upon the admitted facts (*Mansfield*). This means that so long as the statute of limitations has not run the jurisdictional issue can be raised where it is apparent from the record up until the day of the trial—or perhaps even on that day, depending upon when one regards a trial as commencing.¹⁶⁰

Since a number of states do not permit their statutes of limitations to run while an action is pending, even if it is pending in a court without jurisdiction,¹⁶¹ the statute might never run so long as the case pends. Under such circumstances, if the federal case did not come to trial for five years, the defendant might wait five years (less a day) to raise his jurisdictional objection. If the congestion time in state court is also five years, a plaintiff might be forced to wait ten years to have his action heard on the merits. Of course this is a deliberate example of an unusually bad situation, but it serves to indicate the kind of result the Institute's draft would permit. Perhaps it would be preferable to eliminate *Mansfield*, not merely from the time trial commences, but from the time of the answer or the first motion, or in a removed case, after a given time period.

The Institute's proposal is also subject to another objection. There would be a considerable advantage in giving the trial judge discretion, even after commencement of trial, to entertain jurisdictional objections thus extending *Hartog's* rule of discretion. In view of the lifelong habits of judges, it may be a good idea not to provide such discretion initially, since many judges would undoubtedly exercise it in favor of hearing belated jurisdictional arguments. But ultimately, there ought to be room for dismissal at relatively late stages of a case where the jurisdictional

160. The confident use of the "commencement of trial" standard by the American Law Institute suggests that there is some tradition indicating at what point this occurs. *Id.* at § 1308(a) (Official Draft, 1965); § 1386(a) (Tent. Draft No. 4, 1966). Perhaps there is, but if so, I am ignorant of it and other lawyers may be also. Is the trial "commenced" when the case is called, when the attorneys announce ready, when it is scheduled on the calendar, when a jury is empaneled, or when the judge takes his seat? See *Berri v. Superior Court*, 43 Cal. 2d 856, 279 P.2d 8 (1955) (discussing two lines of authority). The present draft recognizes that, in addition to the trial commencement cut-off, jurisdictional issues should not be considered after prior-to-trial disposition of the case on the merits.

161. See materials cited note 78 *supra*.

objection is one that is truly serious and where dismissal will not prejudice any party. It is barely possible, for example, that a dismissal ought to be granted even belatedly if it is discovered that the litigation is within the exclusive jurisdiction of the National Labor Relations Board.¹⁶²

The Institute's draft seems, therefore, both too broad and too narrow. Once trial has commenced the proposed section leaves no place for a belated consideration of jurisdictional objections that may be truly important; on the other hand, it makes possible the most unjust sort of tardy attacks on jurisdiction, so long as they are made before trial is commenced.

The second legislative change in sight affects the state judicial systems—which perhaps need reform even more than the federal system. Several states have now adopted¹⁶³ the unified court system, which somewhat resembles the system under the English Judicature Acts,¹⁶⁴ and which postulates a single court for the state with various divisions to which particular cases are assigned. This revolutionary system eliminates altogether the sprawling mass of inferior courts common in state judicial systems. Since a single court is created for the state, there is virtually no problem of jurisdiction. If suit is filed in the wrong division of that court, it is still filed in the only court available and there is no question of a belated attack on jurisdiction if any division of the court has jurisdiction. Only if the suit is of a kind committed to an administrative agency or one over which no court of the state would have jurisdiction, is any jurisdictional point put in issue at all.

This is not the place to expound upon unified court plans. It is enough to say that such plans are considerably more far reaching and potentially more effective for good judicial administration than the limited reforms suggested by the ALI. And, of course, they go far beyond the present rules that limit jurisdictional objections in the trial judge's discretion.

Perhaps in the distant future even these radical systems will prove insufficient. Even if the ALI reforms are adopted and even if all states some day adopt a unified court system, there will remain a great gulf between that power which belongs to

162. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), indicating something of the importance attached to the Board's exclusive jurisdiction.

163. *E.g.*, ILL. CONST. art. 6, § 9 (1964); N.C. GEN. STAT. §§ 7A-1 to -401 (Supp. 1965), particularly §§ 7A-240, 7A-257.

164. *Supreme Court Judicature of 1873*, 36 & 37 Vict., c. 66. See *HOLDSWORTH, HISTORY OF ENGLISH LAW* 638-45 (6th ed. 1938).

the state courts and that which belongs to the federal. There will remain the omnipresent possibility that a state court judgment is void because the case was within exclusive federal jurisdiction,¹⁶⁵ and the same possibility that a federal judgment will be void because the case was within exclusive state jurisdiction. A similar gulf will exist between courts and administrative agencies.¹⁶⁶ Viewed in this perspective, the rules existing today that deny belated jurisdictional objections in many instances, are obviously insufficient, and even the reforms proposed by the ALI and the unified court schemes are modest. Perhaps some day it will prove desirable to unify the state and federal courts, to the extent at least that free transferability of cases between them can be made.¹⁶⁷ For the moment, the modest reform proposals will be a useful step.

IV. SUMMARY AND CONCLUSION

It has generally been stated that objections to jurisdiction of the subject matter may be raised at any time. This is correct, however, only in two situations: if the record does not show jurisdiction (or shows that jurisdiction is absent), the objection may be made at any time; and an objection to the jurisdiction of the appellate court hearing the case can be made at any time.¹⁶⁸ State courts¹⁶⁹ and many lower federal courts¹⁷⁰ appear

165. Federal jurisdiction is exclusive in several areas, and this often creates judicial problems in which there is a good deal of wasted motion. See, e.g., *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184 (2d Cir. 1955).

166. This too frequently requires—or at least produces—bizarre results. *Amalgamated Clothing Workers v. Richman*, 348 U.S. 511 (1955), held that a federal court could not enjoin a state court's usurpation of jurisdiction vested exclusively in the National Labor Relations Board, since a federal court could issue an injunction only to protect its own jurisdiction and it had no more jurisdiction than the state court.

167. This is not to suggest certification of questions to state courts, as was done under FLA. STAT. ANN. § 25.031 (Supp. 1961), at the urging of Justice Frankfurter in *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960). This practice has been an abysmal failure, as would be expected by any but the academic mind. This is very different, however, from transferring an entire case from federal to state courts, or vice versa, where the original court lacks jurisdiction.

168. The law is quite clear that, as distinct from a tardy objection to trial court jurisdiction, an objection to appellate court jurisdiction may be made at any time. Obviously, however, an objection to the appellate court's jurisdiction cannot be made in the trial court and can hardly be described as tardy when urged for the first time after appeal is perfected. A large number of cases state this rule, e.g., *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 293 U.S. 449 (1935); *Stoudenmire v. Braxton*, 299 F.2d 846 (5th Cir. 1962).

169. Many state courts have not yet accepted the bootstrap principle, and where they do not, of course, they permit not only tardy direct

to assume that jurisdictional objections may be urged at any time, not only in these, but in any other situation. The correct rule, however, is that if the record shows jurisdiction, by allegation or admission of the parties as to jurisdictional facts, the trial judge may refuse to hear a jurisdictional objection urged after an answer is filed to the merits. In addition, the bootstrap principle should preclude a jurisdictional attack launched after a final judgment, and rules concerning law of the case may preclude such attacks after an appeal and remand. There is nothing unconstitutional about any of these rules, even though they tend to controvert deep-rooted assumptions.

It remains true, however, that a great many cases must be dismissed because after a trial on the merits a losing party discovers as a matter of law that there is no jurisdiction. This is the law today as approved by the United States Supreme Court and generally accepted everywhere in this country. Nothing prevents judicial reform of these rules except traditional judicial inertia and perhaps a misconceived notion, surely inherited from the Middle Ages, that it would be insulting for federal courts to try cases "belonging" to state courts. In the case of state courts, nothing prevents judicial reform of these rules but inertia and a common lawyer's inclination to make the law as unreasonable as possible. Since there is no indication of immediate judicial reform, however, the ALI proposals for the federal courts and the unified court system proposals for the state courts should be adopted (though perhaps with modifications) as quickly as possible.

attacks, but collateral attacks as well. A number of these cases are cited and discussed in Dobbs, *Trial Court Error as an Excess of Jurisdiction*, 43 TEXAS L. REV. 854 (1965). On the other hand, many of the state court decisions go no further than the *Mansfield* rule. See, e.g., *Mayhew v. Mayhew*, 376 S.W.2d 324 (Tenn. App. 1963). And some merely say that the courts can or may dismiss for want of jurisdiction upon a belated attack. E.g., *Masone v. Zoning Bd.*, 148 Conn. 551, 172 A.2d 891 (1961); *Landry v. Cornell Constr. Co.*, 87 R.I. 4, 137 A.2d 412 (1957).

170. District court decisions are not often contrary to the *Mansfield-Hartog* rules, because those rules recognize the power of the district judge to hear tardy jurisdictional objections in his discretion. However, the district judges uniformly appear to feel compelled and not merely permitted to hear belated objections. See, e.g., *Ambassador East, Inc. v. Orsatti, Inc.*, 155 F. Supp. 937 (E.D. Pa. 1957), *rev'd on other grounds*, 257 F.2d 79 (3d Cir. 1958); *Mills v. United Ass'n of Journeymen*, 83 F. Supp. 240 (W.D. Mo. 1949). Many of the district court decisions are, even so, consistent with the *Mansfield-Hartog* rules, in that the defect in jurisdiction is apparent upon the face of the record. See, e.g., *Fugle v. United States*, 157 F. Supp. 81 (D. Mont. 1957); *Clemente Eng'r Co. v. Deliso Constr. Co.*, 53 F. Supp. 434 (D. Conn. 1944).

