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Res Judicata: Jurisdictional Question Can Be Reopened Unless Based on Litigated Question of Fact

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Judge Breitel, with whom Judge Bergan concurred, dissented on the ground that CPLR 3216 empowered the courts to dismiss an action "on the merits," and the effect of the majority opinion would be to abrogate this power. Moreover, the lower court's dismissal with prejudice, *a fortiori,* holds that Noto's claim is inferior to that of plaintiff. The logical extension of that proposition, is that Noto cannot now reassert a claim of title in contradiction to the prior judgment. To allow him to do so is repugnant to any application of res judicata. Finally, the dissent reasoned that an affirmance would not leave title to the property unsettled, because title would be awarded to plaintiffs, who claim legal title, while defendant's affirmative defenses would be barred.

It is somewhat confusing why the majority chose to don this case *sui generis,* a label which renders the case sterile in precedental value. On the basis of the reported decision, the dissent seems to have expounded the preferred view of the law.

Res Judicata: Jurisdictional question can be reopened unless based on litigated question of fact.

The scope of res judicata in questions of subject matter jurisdiction has rarely been discussed by New York courts. Ordinarily the issue arises only when a collateral attack is being made on a foreign judgment, in which case full faith and credit requires that New York employ the res judicata rule of the foreign state.[139] However, in a recent case, *Friedman v. State,*[140] the judgment of the New York Court on the Judiciary [141] was attacked as having been rendered by an improperly constituted tribunal.

The claimant, a removed Supreme Court Justice, instituted a suit to recover his salary. The Court of Claims, dismissed the claim finding that the judgment of the Court on the Judiciary, removing claimant from office, was safe from collateral attack.[142] In so doing, the court relied on the federal court rule,[143] which grants to every court the power to conclusively determine its own jurisdiction, subject only to direct review. This decision has recently been reversed by the appellate division, third department, which allowed attack under the liberal rule of *O'Donoghue v. Boies* [144]

[139] Langerman v. Langerman, 303 N.Y. 465, 473-74, 104 N.E.2d 857, 861 (1952).

[140] 29 App. Div. 2d 162, 286 N.Y.S.2d 525 (3d Dep't 1968).

[141] *In re* Friedman, 12 N.Y.2d [a]-[e] (Court on the Judiciary 1963).

[142] 53 Misc. 2d 455, 278 N.Y.S.2d 999 (Ct. Cl. 1967). For a discussion of this case, see *The Quarterly Survey of New York Practice,* 42 St. John's L. Rev. 436, 461 (1968).

[143] Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940); Stoll v. Gottlieb, 305 U.S. 165 (1938).

[144] 159 N.Y. 87, 53 N.E. 537 (1899).

that *any* jurisdictional question can be reopened unless based solely on a litigated question of fact.

Although the federal rule is quite restrictive on a litigant's ability to question a jurisdictional determination, it seems that the appellate division has unnecessarily gone to the other extreme. A more moderate rule is the Restatement rule: "When a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment . . . unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction." [145] This principle would permit review of the jurisdictional basis where the court was one of limited jurisdiction or where the lack of jurisdiction seemed obvious,[146] without opening the courts to collateral attacks on every judgment except the few based solely on issues of fact.

Collateral Estoppel: Glaser v. Huette *followed.*

In *Glaser v. Huette*,[147] the Court of Appeals held, that where parties to a former suit were not adversaries, but rather co-fendants, an adjudication in that suit settles nothing with respect to the liability of the co-defendants *inter se* in subsequent actions.

Subsequent to *Glaser*, the technical requirements necessary to interpose collateral estoppel defensively were liberalized by the Court of Appeals.[148] More recently, the Court of Appeals has allowed the offensive use of collateral estoppel and some doubt has been thrown upon the continuing validity of the *Glaser* rule by *Cummings v. Dresher*.[149] However, cases involving joint tort-feasors have continued to apply the *Glaser* rule.

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[145] RESTATEMENT OF JUDGMENTS § 10(1) (1942). This principle was adopted in Peri v. Groves, 183 Misc. 579, 50 N.Y.S.2d 300 (Sup. Ct. N.Y. County 1944).

[146] Other pertinent factors indicated by the Restatement include: whether the issue was one of law or of fact; whether the issue of jurisdiction was actually litigated; and whether there is a strong policy against the court's exceeding its jurisdiction. RESTATEMENT OF JUDGMENTS § 10(2) (1942).

[147] 256 N.Y. 686, 177 N.E. 193, *aff'g*, 232 App. Div. 119, 249 N.Y.S. 374 (1st Dep't 1931). A number of lower court rumblings have held contra. *See* Thornton, *Further Comment on Collateral Estoppel*, 28 BROOKLYN L. REV. 250 (1962); *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 128, 152 (1967).

[148] Israel v. Wood Dolson Co., 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).

[149] 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 976 (1966). For a further discussion of this case, see *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 128, 153 (1967).