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Res Judicata: Principle Applies Even Where Prior Court Lacked Subject Matter Jurisdiction

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In refusing to give the earlier decision res judicata effect, the court was restating the settled law in New York: "Res judicata effect is not given to a legal proceeding unless there has been a final judgment." [119]

The dissent, while agreeing that the doctrine of res judicata does not generally apply in the absence of the entry of a final judgment, would have been willing to endorse an exception to the rule making a decision or verdict binding because of the parties' acquiescence to it.[120] The dissent felt that an exception should be allowed in the instant case, especially in light of the recent pragmatic approach to the doctrine of res judicata by the Court of Appeals.[121]

Where, as in the instant case, the issues have been previously litigated, and only the ministerial function of entering judgment remains, it seems that there is little to be gained from a technical application of res judicata principles.[122] Not only is the refusal to afford a res judicata defense unfair to the defendant, but the liberal spirit of recent Court of Appeals decisions in the area[123] is circumvented.

Res judicata: Principle applies even where prior court lacked subject matter jurisdiction.

Jurisdiction is the power of a court to reach and affect legal interests.[124] Before a court may effectively render a judgment, it must have jurisdiction over the persons or things involved, as well as subject matter jurisdiction, *i.e.*, competency to decide the particular litigation in question. The judgment of a court proceeding without these two prerequisites is

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[119] 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5011.10 (1966).

[120] Mandracchia v. Russo, 53 Misc. 2d 1018, 1020, 280 N.Y.S.2d 429, 432 (App. T. 2d Dep't 1967). In support of this proposition the court cited Kannel v. Kennedy, 94 F.2d 487 (3d Cir. 1937).

[121] 53 Misc. 2d at 1020, 280 N.Y.S.2d at 432.

[122] New York recognizes the following exception to the general rule: "In certain instances the final judgment requirement is ignored. When an order adjudicating a fully litigated and central motion in the first action determines the subject matter of the second action and the order was not subject to modification at a later point in the first suit, it is binding on the parties in the subsequent suit. Similarly, when an issue is heard before a referee to hear and report and his report is confirmed by the court, the referee's determination is given res judicata effect." 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 5011.10 (1966).

[123] *See, e.g.*, B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967); Cummings v. Dresher, 18 N.Y.2d 105, 218 N.E. 2d 688, 271 N.Y.S.2d 976 (1966).

[124] 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 301.01 (1966).

subject to attack either directly or collaterally[125] in a subsequent action even though res judicata would otherwise be a defense. While this is true as a general rule, if the lack of jurisdiction is specifically put into issue in the first action, the court's determination of its own jurisdiction is conclusive. In this case, the court's finding can be attacked by direct appeal, but not by collateral attack.[126]

Friedman v. State[127] is an illustration of this proposition. In *Friedman*, the claimant, a removed supreme court justice, sought to recover back salary, contending that the Court on the Judiciary was incompetent to remove him because it lacked subject matter jurisdiction. The Court of Claims held that while the claim was ostensibly an action at law for accrued salary, it was, in actuality, a collateral attack upon the jurisdiction of the Court on the Judiciary. Since Friedman had litigated the issue of that court's jurisdiction while before it, his proper remedy was by direct appeal to the Court of Appeals. No direct appeal having been taken, the doctrine of res judicata precluded an exercise of jurisdiction by the Court of Claims, thus forcing a dismissal of the claim.

Collateral estoppel: Defensive use of doctrine in derivative liability case.

The doctrine of mutuality of estoppel provides that since nonparties and non-privies are not bound by a judgment, normally they cannot attempt to benefit therefrom.[128] Recent years have seen a gradual erosion of the doctrine. Frequently, persons who were not parties or privies to a prior litigation have been permitted to assert the prior judgment as res judicata against an adversary, even though they would not have been bound had the prior result been to the contrary.[129] The original exceptions to the doctrine of mutuality were found in derivative liability cases involving suits brought against the absentee owners of automobiles to recover for the alleged negligence of their operators.[130] At first, these owners, whose liability was derived from their operator's conduct, were allowed to rely on the doctrine of collateral estoppel defensively.[131] More recently, the Court of Appeals has allowed the offensive use of collateral estoppel in these derivative

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[125] *Id.* ¶ 301.02.
[126] 5 *id.* ¶¶ 5011.16, 5011.43.
[127] 53 Misc. 2d 955, 278 N.Y.S.2d 999 (Ct. Cl. 1967).
[128] WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 347 (2d ed. 1966).
[129] *See, e.g.*, Israel v. Wood Dolson Co., 1 N.Y.2d 116, 118-120, 134 N.E.2d 97, 98-100, 151 N.Y.S.2d 1, 3-5 (1956).
[130] WACHTELL, *supra* note 128, at 348.
[131] *See, e.g.*, Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937).