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ESTOPPEL TO DENY FEDERAL JURISDICTION— *KLEE* AND *DI FRISCHIA* BREAK GROUND

BY H. A. STEPHENS, JR.*

Some things are remembered only for their futility. In that category a learned jurist placed Justinian's fiat against any commentary on the product of his codifiers.[1] Other things, either from futility or insignificance, are remembered not at all. Such may well be the destiny of this Article. Richer philosophies and more fluent pens have noted the possible existence of a new ground upon which federal jurisdiction may be founded.[2] Congress and the courts appear little concerned about the problem, despite ever-widening concepts of justiciability and intrusion into areas hitherto unoccupied or considered as being of only local significance.[3] This Article will focus attention upon the new doctrine. Its correctness has already been doubted,[4] but minority reasonings have often made useful contributions to jurisprudence, even though rejected.[5]

Federal courts are of limited, not general, jurisdiction and derive their basic authority to hear and determine from either the Constitution of the United States or acts of Congress.[6] Drawing upon language used by the courts, the question of federal jurisdiction *vel non* is said to be ever present and self-asserting.[7] It cannot be conferred by agreement, consent, or collusion of the parties, whether contained in their pleadings or otherwise; and a party cannot be precluded from raising the question by any form of laches, waiver, or estoppel.[8] The court of its own motion must consider a jurisdictional

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1. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 18 (1921).

2. 1A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 450, at 801 n.79 (Wright ed. 1960); HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 719 (1953); 1 MOORE, FEDERAL PRACTICE ¶ 0.60[4] (2d ed. 1961).

3. *E.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Baker v. Carr, 369 U.S. 186 (1962); Brown v. Board of Educ., 347 U.S. 483 (1954); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

4. 1 MOORE, *op. cit. supra* note 2.

5. See Thompson v. Talmadge, 201 Ga. 867, 891, 41 S.E.2d 883, 901 (Jenkins, C.J., dissenting).

6. Kline v. Burke Constr. Co., 260 U.S. 226 (1922); BUNN, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES § 1, at 11 (1949); 3 VOLZ, WEST'S FEDERAL PRACTICE MANUAL § 3025, at 5 (1960).

7. Schell v. Food Mach. Corp., 87 F.2d 385, 387 (5th Cir. 1937).

8. Kaufman v. Liberty Mut. Life Ins. Co., 245 F.2d 918 (3d Cir. 1957); Silvers v. Maryland Cas. Co., 239 F.2d 865, 868 (1955); *In re* Federal Facilities Realty Trust, 227 F.2d 651, 656 (7th Cir. 1955); Page v. Wright, 116 F.2d 449, 453 (7th Cir. 1940). There is a statutory exception in plenary actions by a receiver or trustee in bankruptcy permitting consent by a defendant to the exercise of jurisdiction. Bankruptcy Act § 23(b), 52 Stat. 854 (1938), 11 U.S.C. § 46(b) (1958).

A litigant is not estopped by admission of jurisdictional facts in original pleadings.

issue.[9] It has also been stated: "He who invokes [jurisdiction] may recant and repudiate it after losing the case."[10] The Federal Rules of Civil Procedure apparently adopt the general view, rule 12(h)(2) providing "that, 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."[11] Are these pronouncements, however, wholly immune from limitation?

Substantial doubt has been cast on the premise that federal jurisdiction can *never* exist either upon consent or by virtue of estoppel. A caveat has already been recorded that such a rule is neither needed nor sound. "Such doctrines . . . do not increase respect for judicial administration, and are not necessary for the proper preservation of judicial power."[12] The fact that such doctrines are questioned justifies their careful scrutiny.

Consider a few of the unfortunate results which occur in this area: a defendant successfully moves for dismissal after verdict for the plaintiff;[13] a defendant in a state court removes the case to federal court and after substantial judgment for plaintiff argues on appeal the removal was improper and secures remand to the state court;[14] a plaintiff after judgment of nonsuit wins a dismissal.[15] These are not isolated instances and are by no means exhaustive. In light of these tactics with their incalculable waste of time, effort, energy, and money, selective application of the basic concept of estoppel not only appears called for, but is long overdue.

Two decisions, *Klee v. Pittsburgh & W. Va. Ry.*[16] and *Di Frischia v. New York Cent. R.R.*,[17] comparatively recently, demonstrated qualities of boldness, daring, and tendency to break with the past. These decisions hopefully may provide a springboard for "assault upon the citadel" of non-waiver and non-consent in federal jurisdiction. *Klee* involved an action against the Pittsburgh and West Virginia Railway Company under the Federal Em-

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from moving under federal rule 60(b) on the basis of newly discovered evidence to set aside a judgment. Resnik v. La Paz Guest Ranch, 289 F.2d 814, 816 (9th Cir. 1961).

9. Mansfield, Coldwater & Lake Mich. Ry. v. Swan, 111 U.S. 379, 382 (1884). This holding has been termed "the first principle of federal jurisdiction." HART & WECHSLER, *op. cit. supra* note 2, at 719.

10. Yankwich, *Jurisdiction of the Federal District Courts*, 6 F.R.D. 507, 509 (1947). See HART & WECHSLER, *op. cit. supra* note 2, at 719-21.

11. The rule makes no mention of "jurisdiction of the person" as to which there is complete recognition of waiver. Petrowski v. Hawkeye-Security Ins. Co., 350 U.S. 495 (1956); 1A BARRON & HOLTZOFF, *op. cit. supra* note 2, § 370, at 509-10.

12. 1 MOORE, *op. cit. supra* note 2, ¶ 0.60[4], at 611.

13. Goldstone v. Payne, 94 F.2d 855 (2d Cir.), *cert. denied*, 304 U.S. 585 (1938).

14. Atchison T. & S.F. Ry. v. Francom, 118 F.2d 712 (9th Cir. 1941); *cf.* Finn v. American Fire & Cas. Co., 207 F.2d 113 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954).

15. Katoaka v. May Dep't Stores Co., 115 F.2d 521 (9th Cir. 1940).

16. 22 F.R.D. 252 (W.D. Pa. 1958).

17. 279 F.2d 141 (3d Cir. 1960).

ployers' Liability Act[18] and against the New York, Chicago and St. Louis Railroad Company (referred to in the opinion as Nickel Plate) based on negligence. The injury complained of occurred March 9, 1956. Klee instituted suit June 29, 1956, alleging he was a Pennsylvania citizen and Nickel Plate was an Ohio corporation. On October 2, 1957, after successfully seeking an order requiring plaintiff to enlarge and expand the allegations of negligence, Nickel Plate answered the amended complaint by admitting Klee's suit was a common-law action based on diversity of citizenship. Four days before the state two-year statute of limitations would have barred the claim, Nickel Plate served a motion to amend its answer and deny jurisdiction by raising multistate citizenship in both Ohio and Pennsylvania.[19] The district court denied leave to amend but rested its denial squarely upon the exercise of discretion under federal rule 15(a). Strong overtones of estoppel nevertheless appear in the opinion, in that Chief Judge Gourley noted that "for all practical purposes plaintiff is rendered helpless to proceed in the state jurisdiction,"[20] and that "it would . . . constitute a monstrous injustice to permit, in effect, a defendant to change its citizenship immediately prior to the running of the statute of limitations and thus deprive the plaintiff of his cause of action."[21] Jurisdiction may have been retained because Nickel Plate was estopped to dispute it.

Di Frischia is even more interesting in that the Court of Appeals for the Third Circuit, while drawing upon *Klee* for support, gives full recognition to the existence of the non-waiver, non-consent axiom and then proceeds to deny its application because of resulting prejudice. A grade-crossing accident was involved which occurred in Ohio. Plaintiff sued in the Western District of Pennsylvania, alleging violation of the Safety Appliance Acts[22] and averring himself to be a Pennsylvania citizen and the defendant to be a New York corporation. Defendant raised the issue of citizenship at the time of answering by alleging in its first defense that both parties were citizens of Pennsylvania. Plaintiff moved pursuant to rule 12(d) for a preliminary hearing on the questions of jurisdiction and venue raised by defendant's answer. On the same day defendant moved for a change of venue to the Southern District of Ohio. Shortly thereafter the parties filed a stipulation signed by counsel for both sides agreeing "that the jurisdiction and venue of the District Court of the United States for the Western District of Pennsyl-

18. 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1958).

19. This would have defeated jurisdiction under the holding in Jacobson v. New York, N.H. & H.R.R., 347 U.S. 909 (1954).

20. 22 F.R.D. at 254.

21. *Id.* at 255.

22. 27 Stat. 65 (1893), 32 Stat. 943 (1903), 36 Stat. 298 (1910), as amended, 45 U.S.C. §§ 1-16 (1958).

vania is recognized in this action"[23] but without prejudice to the pending argument on defendant's motion for change of venue. Five days later the court entered an order reciting that it had proper jurisdiction in the action and that proper venue had been established.[24] No preliminary hearing was held, and the motion to transfer was denied. Over the next twenty-three months there was extensive trial preparation by both parties. There were forty-one intervening docket entries; all discovery was completed; and the case was prepared for pre-trial, defendant failing to file any brief indicating it was contesting jurisdiction as required by a local rule if jurisdiction were contested. Then at pre-trial defendant's counsel called on plaintiff's counsel to admit the railroad was incorporated in Pennsylvania, which plaintiff's counsel did not do. A motion to dismiss for lack of jurisdiction was filed by New York Central with which there was exhibited a certificate from the Secretary of the Commonwealth of Pennsylvania attesting to its incorporation in that state. The district court dismissed the action,[25] although the statute of limitations had then barred Di Frischia's claim.

The Court of Appeals for the Third Circuit met the issue squarely. The court held that by entering into the stipulation regarding jurisdiction defendant had in effect amended its answer and that neither the admonition of rule 12(h) nor the Third Circuit holdings under the non-waiver axiom governed.[26] After recounting the procedural steps which had transpired in the cause, the court determined allowance of an amendment denying jurisdiction would be an abuse of discretion and significantly commented, "A defendant may not play fast and loose with the judicial machinery and deceive the Courts."[27] This cause was retained by the federal courts because the defendant was estopped to question jurisdiction.

These two decisions have been subjected to critical and searching analysis by reviewers who find them expressing decidedly minority views.[28]

23. 279 F.2d at 142.

24. *Id.* at 143.

25. 279 F.2d at 143. The dismissal apparently rested upon Jacobson v. New York, N.H. & H.R.R., 347 U.S. 909 (1954) since New York Central relied on that case on appeal. 279 F.2d at 143.

26. *Id.* at 143-44. Hospoder v. United States, 209 F.2d 427 (3d Cir. 1953) was cited in which that court had stated, "[I]t is axiomatic that jurisdiction may not be conferred or waived by the parties, and the courts at every stage of the proceedings may and must examine into its existence." *Id.* at 429.

27. 279 F.2d at 144.

28. 38 NEB. L. REV. 1058 (1959), citing Gilbert v. David, 235 U.S. 561 (1915), comments that *Klee* "seems in error" and the "running of the statute of limitations, while regrettable is not grounds for finding federal jurisdiction." 38 NEB. L. REV. at 1062. 15 U. MIAMI L. REV. 315 (1961) states that the majority view is adverse to *Di Frischia*, and "it does not appear to conform with the Federal Rules of Civil Procedure." *Id.* at 318. 7 UTAH L. REV. 258 (1960), criticizing *Di Frischia*, declares that the result is "inconsistent in principle with case authority." *Id.* at 261.

The Utah and Miami commentators also point out that suit in fact may not have

As yet, they have generated no creative power; neither has begotten in its own image. Whether they will become a beachhead for further attacks on the now hoary-with-age doctrines of non-waiver and non-consent remains to be seen. Selective application of the principles of estoppel could have a peaceful coexistence with those doctrines.

Examination of holdings in somewhat related areas reveals considerable relaxation of basic thinking in federal jurisprudence. The achievement wrought by *United States v. United Mine Workers*[29] with respect to "jurisdiction to determine jurisdiction" should not escape notice. There the Government, seeking to head off a nationwide coal strike with its attendant paralyzing effects upon the economy, sought and secured a temporary restraining order which the defendant union and its officials made no effort to have vacated but simply ignored, the strike thereby becoming an accomplished fact. In upholding convictions for criminal contempt the Supreme Court, after first recognizing familiar and well-established holdings that orders made by a court having no jurisdiction to enter them may be disregarded with impunity, nonetheless found substantial authority[30] upon which to rest a judgment that the district court had jurisdiction to determine its own jurisdiction and pending such determination could preserve the *status quo*. It is perhaps necessary to concede that the Court may not have been entirely oblivious to the exigencies of the situation and the plight of the nation resulting from the strike. Although the decision immediately evoked critical comment,[31] respect for judicial administration was heightened. The rule of the case has solidified to give void orders temporary dignity and status. The Court adopted[32] in a footnote the following language from *Carter v. United States*:[33] "It cannot now be broadly asserted that a judgment is always a nullity if jurisdiction of some sort or other is wanting."[34]

Other authority can be found not in keeping with the doctrine that a federal court judgment without jurisdiction is void. Very early in our history it was recognized that the judgments of United States courts are binding until

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been barred in *Di Frischia* since a state statute existed permitting a new action within one year after dismissal on other than merits and tolling limitations.

29. 330 U.S. 258 (1947).

30. The Court cited the following cases: Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); United States v. Shipp, 203 U.S. 563 (1906); and Carter v. United States, 135 F.2d 858 (5th Cir. 1943). 330 U.S. at 290-92.

31. Cox, *The Void Order and the Duty to Obey*, 16 U. CHI. L. REV. 86, 103 n.56 (1948); Watt, *The Divine Right of Government by Judiciary*, 14 U. CHI. L. REV. 409 (1947).

32. 330 U.S. at 292 n.57.

33. 135 F.2d 858 (5th Cir. 1943).

34. *Id.* at 861. Contrast this language with the dissent of Mr. Justice Holmes in Southern Pac. Co. v. Jensen, 244 U.S. 205 (1916), where he states, "The common law is not a brooding omnipresence in the sky . . . ." *Id.* at 222.

reversed even though no jurisdiction is shown on the record.[35] This is true both as to jurisdiction over the person[36] and as to jurisdiction over the subject matter.[37] The underlying philosophy is briefly but cogently stated by the Supreme Court: "One trial of an issue is enough. The principles of res judicata apply to questions of jurisdiction as well as to other issues . . . ."[38] Collateral attack on a judgment is foreclosed. A conflict exists with the traditional notion that a void judgment is subject to attack at any time by any person in any proceeding.[39] Unless a litigant makes a direct attack on review, he is forever bound thereby even though the court lacked jurisdiction.[40] Considerations of estoppel are lurking in the background. Although estoppel does not establish jurisdiction where none exists,[41] under its principles parties may lose the right to urge such absence of jurisdiction.[42]

Historical support exists for the existence of federal estoppel. Prior to 1875 an interesting situation existed. When want of jurisdiction did not appear on the face of the complaint, it could be raised only by plea in abatement. Failure to file such special plea at the time of answering constituted

35. McCormick v. Sullivant, 23 U.S. (10 Wheat.) 192 (1825).

36. Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); American Sur. Co. v. Baldwin, 287 U.S. 156 (1932); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931).

37. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); Stoll v. Gottlieb, 305 U.S. 165 (1938). It must be conceded, however, that these two decisions involve bankruptcy as to which there is a statutory exception. *Supra* note 8. This exception has been characterized as "in effect an additional ground for federal jurisdiction." Coffman v. Cobra Mfg. Co., 214 F.2d 489, 491 (9th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955).

Of *Chicot* Mr. Justice Reed, in United States v. United States Fid. & Guar. Co., 309 U.S. 506 (1940), stated that "the case definitely extended the area of adjudications that may not be the subject of collateral attack." *Id.* at 514.

38. Treinies v. Sunshine Mining Co., 308 U.S. 66, 78 (1939); *accord*, Sunshine Coal Co. v. Adkins, 310 U.S. 381, 403 (1940); Windholz v. Everett, 74 F.2d 834 (4th Cir. 1935); *cf.* Dowell v. Applegate, 152 U.S. 327 (1894).

39. 30A AM. JUR. *Judgments* § 880 (1958); 49 C.J.S. *Judgments* § 401 (1947).

40. See Boskey & Baucher, *Jurisdiction and Collateral Attack*, 40 COLUM. L. REV. 1006 (1940) stating that "this development has passed from the tranquility of infancy to a rowdy adolescence." *Ibid.*

Another interesting facet of the problem is seen in City and County of Denver v. Denver Tramway Corp., 23 F.2d 287 (10th Cir. 1927), utilizing "law of the case" as its basis for the result. See also Stewart v. United States, 199 F.2d 517 (7th Cir. 1952), holding the exceptions from jurisdiction contained in the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2680(a) (1958) are matters of defense and subject to waiver when not so pleaded.

An apparent exception to the doctrine exists where the policy underlying res judicata is outweighed by the policy against permitting a court to act beyond its jurisdiction. RESTATEMENT, JUDGMENTS § 10 (1942); 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 21, at 22 & n.9.8 (Supp. 1962).

41. Cutright v. National Union Fire Ins. Co., 65 Ga. App. 173, 15 S.E.2d 540 (1941); Life & Cas. Ins. Co. v. Carter, 55 Ga. App. 622, 191 S.E. 153 (1937).

42. Iselin v. La Coste, 147 F.2d 791, 795 (5th Cir. 1945); 2 CYCLOPEDIA OF FEDERAL PROCEDURE § 2.450, at 152 (3d ed. 1951-53).

a final waiver of such defect.[43] If the lack of jurisdiction did not appear until the trial the court would not then dismiss.[44] In 1875 Congress passed a statute which considerably altered the situation by providing that if, in a suit begun in a United States court or removed to it from a state court,

> it shall appear to the satisfaction of said court, at any time after such suit has been brought or removed thereto that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction . . . the said . . . court shall proceed no further therein, but shall dismiss the suit or remand it . . . .[45]

This statute remained in existence until June 25, 1948, when Congress adopted the present Judicial Code. When the Code was adopted, the Act of 1875 was omitted from it by deliberate choice of the revisers "as unnecessary" since "any court will dismiss a case not within its jurisdiction when its attention is drawn to the fact, or even on its own motion."[46] Suggestion has been made that Congress may have created a situation it did not intend because the statutory mandate providing for summary dismissal on jurisdictional grounds no longer exists.[47]

Except for the provisions of rule 12(h), the statutory scheme today is identical with that which prevailed prior to 1875. *Klee* and *Di Frischia*, therefore, disregarded no statutory mandate from Congress in retaining jurisdiction under the particular circumstances there presented. The Federal Rules of Civil Procedure, of course, have all the effect of law and supersede inconsistent statutes.[48] Nonetheless, it has many times been said that the federal rules are devised to promote the ends of justice, not to defeat them.[49] Whether those ends be achieved by denial of the right to amend as an exercise of discretion under rule 15(a) or by considering facts as conclusively established due to intervening equities and injustice which the opposite party would suffer from reinvestigation, seems relatively unimportant. It remains

43. Des Moines Nav. & R.R. v. Iowa Homestead Co., 123 U.S. 552, 559 (1887). Compare Mitchell v. Maurer, 293 U.S. 237, 244 (1937); Rader v. Manufacturers' Cas. Ins. Co., 242 F.2d 419, 427-28 (2d Cir. 1957).

44. Hill v. Walker, 167 Fed. 241 (8th Cir. 1909) contains an interesting portrayal of the practice prevailing prior to 1875 and the background of this legislation. *Cf.* McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936); Farmington v. Pillsbury, 114 U.S. 138 (1884).

45. Act of March 3, 1875, ch. 137, § 5, 18 Stat. 472. Interestingly enough, Congress was moved to enact this statute because "the jurisdiction of the courts was frequently imposed upon; but the courts, though cognizant of the wrong, felt themselves powerless to afford a remedy without the aid of legislation." Hill v. Walker, *supra* note 44, at 246.

46. Revisers' Notes to 28 U.S.C. § 1359 (1958).

47. HART & WECHSLER, *op. cit. supra* note 2, at 720-21.

48. United States v. Hvass, 355 U.S. 570 (1958); American Fed'n of Musicians v. Stein, 213 F.2d 679 (6th Cir.), *cert. denied*, 348 U.S. 873 (1954).

49. *E.g.*, Hormel v. Helvering, 312 U.S. 552, 557 (1941); Leedom v. International Bhd. of Elec. Workers, 278 F.2d 237, 244 (D.C. Cir. 1960).

the paramount function of the courts to achieve justice under law and, as pointed out by Judge Amidon,

> [I]t is a grievous hardship for litigants to be led over the long course of federal justice in the belief that they are having their rights adjudicated, only to learn at the end that the entire proceeding is a nullity. Such a result should be strictly confined to the necessity which affords its only jurisdiction.[50]

Two eminent scholars have posed, without undertaking to answer, the following questions regarding summary dismissals for lack of jurisdiction:

> Is it fetichism? Or is it grounded in solid considerations of policy and of legislative and judicial statesmanship? Why should not a party who has invoked federal jurisdiction, or failed seasonably to object to it, be held to have waived any defect, or be estopped from asserting it?[51]

Klee and *Di Frischia* have answered.

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50. Hill v. Walker, 167 Fed. 241, 247 (8th Cir. 1909).
51. HART & WECHSLER, *op. cit. supra* note 2, at 719.