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Divorce without Marriage: The Subject Matter Jurisprudence Anomaly in California

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DIVORCE WITHOUT MARRIAGE: THE SUBJECT MATTER JURISDICTION ANOMALY IN CALIFORNIA

INTRODUCTION

There is a growing trend in the law toward paralegalism and self-representation in areas formerly the exclusive domain of the professional. One of the largest areas of the law in which this trend is evident is litigation involving domestic relations. An individual need only go to the nearest bookstore to procure a volume which sets out step-by-step the procedure to follow to obtain a dissolution, an annulment, or a modification of prior decrees. The legal fees thus saved by do-it-yourself divorce manuals attracts more and more *in propia persona* advocates to the courts every day. Unfortunately, however, the law often lays traps for the unwary—traps into which even the most experienced practitioner may fall, and which are certain to ambush the neophyte. Once caught, the litigant may find no avenue of escape, for judicial economy requires that controversy must end at some point.

This comment deals with one legal pitfall in the domestic relations area which generates much fruitless litigation: a decree purporting to dissolve an invalid marriage. What typically transpires is this: two individuals purport to marry, but fail to satisfy some procedural requirement and thus are never legally married. Subsequently, marital difficulties arise and one of the parties sues for divorce.[1] Based on the parties' alleged married status, the divorce court assumes subject matter jurisdiction over the action, grants a divorce and divides the parties' property. However, since a prerequisite to the court's subject matter jurisdiction is a determination by the court that the parties were in fact validly married,[2] the divorce court's decree is, in effect, invalid. Later, one of the parties to the action discovers the inherent invalidity of the marriage and seeks to have the divorce decree overturned. The court bars the party from asserting his or her contention by applying the doctrines of res judicata or equitable estoppel—and the trap is closed.

It is easy to conceive how readily one may become enmeshed in this process, for by applying res judicata or equita-

1. While the California Family Law Act discarded the use of "divorce" in favor of the term "dissolution" in order to reflect the no-fault nature of actions severing marital relations, these terms will be used interchangeably in this comment.

2. *See* text accompanying notes 4-23 *infra*.

ble estoppel, the court is juggling established rules of law in order to reach an arguably desirable, though anomalous, result. The parties to the action, in effect, have been permitted to confer subject matter jurisdiction on the court through their consent and have impliedly waived their right to raise the issue of the jurisdictional defect on appeal. Further, by thus foreclosing attack on the divorce decree, the court often lends a specious *ex post facto* validity to two or even three other invalid acts of the parties or the courts.[3]

This comment will discuss the ramifications of a divorce decree purporting to dissolve an invalid marriage. Determinations in a given factual situation may hinge on collateral questions, such as conflicts of law. Discussion of such questions will be severely limited, the focus of the analysis being the laws of California.

This comment does not purport to offer a conclusive resolution of issues discussed. The decisions of courts confronted with the problem follow no logical pattern; earlier decisions which are held to be precedent often are ignored or rejected outright by trial courts intent on achieving a just result in light of the particular facts of each case. However, the solutions adopted by the courts in this haphazard pursuit of an equitable outcome are, in many instances, of questionable worth in light of the collateral consequences they entail.

SUBJECT MATTER JURISDICTION

Initially, it should be noted that the state has a sufficient interest in the status of its domiciliaries to grant them appropriate relief in controversies involving their marital relations. Since marriage is a matter of public concern, the state's interest extends both to its formation and its dissolution.[4] In order to promote this interest, the state has enacted legislation setting forth the circumstances under which a marriage will be declared to be at an end[5] and the manner in which the parties'

3. For example, where one of the parties formerly was legally married but obtained an invalid divorce in another jurisdiction, this trap precludes the party from contesting not only the invalid second divorce, but also the invalid first divorce and invalid second marriage.

4. Haas v. Haas, 227 Cal. App. 2d 615, 617, 38 Cal. Rptr. 811, 812 (1964); *see* Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020 (1915); Armstrong, *The California Law of Marriage and Divorce: A Survey*, 19 ST. B.J. 160, 162 (1944).

5. CAL. CIV. CODE § 4350 (West 1974); *see* Vasquez v. Vasquez, 109 Cal. App. 2d 280, 283, 240 P.2d 319, 320 (1952).

community property and other incidents of marriage will be disposed of.[6] The power of the state to enter a decree of dissolution is given effect by the judgment of a court of competent jurisdiction decreeing a dissolution of the marriage.[7]

The courts, in construing this grant of power and setting out the requisites of subject matter jurisdiction, have stated that a prerequisite to a judgment of dissolution is a finding establishing the matrimonial relation: that is, the existence of the *res*.[8] The existence of a valid marriage (the *res*) has thus been held to be a jurisdictional prerequisite to the court's right in an action for divorce or separate maintenance to order support, to award costs and counsel fees,[9] and ultimately, to grant a dissolution and to divide the community property.[10] This requirement is logical, for if a valid marriage were not a prerequisite to the court's power to grant a dissolution, the court would, in effect, be declaring an end to a relationship which never existed.

As a practical matter, however, the necessary "finding" of a valid marriage is made without any investigation by the court of the fact of marriage. Rather, the court ordinarily accepts prima facie the parties' representation of a valid marriage. Although it has long been held that parties to an action cannot confer subject matter jurisdiction upon a court by consent,[11] waiver,[12] or even stipulation,[13] the representation of the parties

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6. CAL. CIV. CODE § 4351 *et seq.* (West 1974); Vasquez v. Vasquez, 109 Cal. App. 2d 280, 240 P.2d 319 (1952).

7. CAL. CIV. CODE § 4350(2) (West 1974).

8. Borg v. Borg, 25 Cal. App. 2d 25, 29, 76 P.2d 218, 220 (1938); *see* Delanoy v. Delanoy, 216 Cal. 27, 13 P.2d 719 (1932).

9. Colbert v. Colbert, 28 Cal. 2d 276, 279, 169 P.2d 633, 635 (1946); Hinson v. Hinson, 100 Cal. App. 2d 745, 746, 224 P.2d 405, 406 (1950); Parman v. Parman, 56 Cal. App. 2d 67, 69, 132 P.2d 851, 852 (1942); *In re* Cook, 42 Cal. App. 2d 1, 3, 108 P.2d 46, 47 (1940); *cf.* Dietrich v. Dietrich, 41 Cal. 2d 497, 502-503, 261 P.2d 276, 278 (1953); Carbone v. Superior Ct., 18 Cal. 2d 768, 771, 117 P.2d 872, 874 (1941); Carter v. Carter, 192 Cal. App. 2d 838, 844, 13 Cal. Rptr. 922, 925 (1961).

10. *See* Turknette v. Turknette, 100 Cal. App. 2d 271, 274, 223 P.2d 495, 498 (1950); *cf.* Carter v. Carter, 192 Cal. App. 2d 838, 13 Cal. Rptr. 922 (1961).

11. Harrington v. Superior Ct., 194 Cal. 185, 188, 228 P. 15, 16 (1924); *cf.* Harper, *The Validity of Void Divorces,* 79 U. PA. L. REV. 158, 165 (1930).

12. The law in question in this case, as we have construed it, is a limitation upon the power of the court with respect to the subject-matter, so that the court shall not be competent to grant a final divorce at any time during the year succeeding the interlocutory judgment, and so as to require that the interlocutory judgment be first entered. The parties could not waive the proceedings, nor invest power in the court by their consent or acquiescence.

Grannis v. Superior Ct., 146 Cal. 245, 254, 79 P. 891, 895 (1905); *see* Miller v. Miller, 52 Cal. App. 2d 443, 126 P.2d 357 (1942).

13. Miller v. Miller, 52 Cal. App. 2d 443, 444, 126 P.2d 357, 358 (1942).

in effect operates to confer subject matter jurisdiction on the court by consent or waiver of the jurisdictional issue. The fact that the parties to the action may have thought they were married is of no legal consequence, since the jurisdictional defect precludes entry of a valid divorce decree.

Of course, where the parties to the action raise the issue of the marriage's validity in an adversary context and such issue is fully litigated, clearly the court has jurisdiction to enter a valid decree of dissolution if it finds the marriage existed. However, if one of the parties defaults, or the parties merely represent to the court that they are married and the representation is accepted without evidence or inquiry, the crucial "finding" is pro forma; should the representation—and thus the "finding"—later prove inaccurate, one can genuinely maintain that the court's power to act was conferred by the actions of the parties.[14] Properly, it is incumbent upon the court to determine its position in relation to jurisdictional parameters, not the parties to the action.

When a court in California acts without subject matter jurisdiction, the consequences of its act are often far-reaching, since California looks to the laws of the state where the marriage was entered into to determine its validity.[15] If the California court does not make a factually based determination of the existence of a valid marriage, but rather relies on the representation of one or both of the parties, the California divorce court may be validating a heretofore meaningless act by the parties in another state,[16] a power which it does not have. If the parties were never married under the laws of their former domicile, the fact that they are now able to obtain a divorce decree in California is a retroactive, extraterritorial conferral of married status upon the parties by the California court. The situation is even more serious if the invalidity of the foreign marriage was

14. *See* Troxell v. Troxell, 237 Cal. App. 2d 147, 151-52, 46 Cal. Rptr. 723, 725-26 (1965); Carter v. Carter, 192 Cal. App. 2d 838, 13 Cal. Rptr. 922 (1961); Warburton v. Kieferle, 135 Cal. App. 2d 278, 287 P.2d 1 (1955).

15. CAL. CIV. CODE § 4104 (West 1975); *see* Whealton v. Whealton, 67 Cal. 2d 656, 664, 432 P.2d 979, 984, 63 Cal. Rptr. 291, 296 (1967); Jones v. Jones, 182 Cal. App. 2d 80, 82, 5 Cal. Rptr. 803, 804 (1960); Estate of Kieg, 59 Cal. App. 2d 812, 816, 140 P.2d 163, 165 (1943); RESTATEMENT (FIRST) OF THE LAW OF CONFLICT OF LAWS § 121 (1934); *The Supreme Court of California 1967-1968*, 56 CALIF. L. REV. 1612, 1745 (1968); *cf.* Hospelhorn v. Van Dusen, 40 Cal. App. 2d 257, 259, 104 P.2d 888, 889 (1940).

16. Norman v. Norman, 121 Cal. 620, 625, 54 P. 143, 145 (1898); Interstate Lumber Co. v. Tweedy, 28 Cal. App. 2d 208, 82 P.2d 208 (1938); 2 J. BEALE, THE CONFLICTS OF LAW 669-70 (1935); *cf.* Barrons v. United States, 191 F.2d 92 (9th Cir. 1951).

due to the entry of a defective decree of divorce as to one of the parties prior to the alleged marriage. In such a situation, a divorce decree issued by the California court would not only be validating a marriage void under the laws of the state where it was performed, but it would also effectively validate the prior divorce decree. Since, as will be discussed below, the parties are foreclosed from attacking the California divorce decree, the court is compounding and pyramiding invalidities.

The consequences of the California court's entry of a divorce decree in the situation presented do not end there. In addition, the enforceability of the decree in sister states is seriously endangered. The courts of a sister state are not obliged to recognize and enforce the decree by the California court under the full faith and credit clause of the United States Constitution if it can be established that such judgment was entered by a court without subject matter jurisdiction and the judgment is thereby subject to attack in the rendering state.[17] Since California both allows[18] and bars[19] attack on a divorce decree entered without subject matter jurisdiction, the courts of another jurisdiction would be hard pressed to determine the enforceability of the California decree.

The United States Supreme Court has provided little guidance as to the application of the full faith and credit clause of the United States Constitution where a court fails to determine the existence of a valid marriage and thus lacks subject matter jurisdiction. In *Sherrer v. Sherrer,*[20] the Court held that where the parties are present and have an opportunity to litigate the jurisdictional question the decree is entitled to full faith and credit. However, this decision turned on a question of the parties' domicile. The jurisdictional prerequisite which we are discussing here is not the domicile of the parties, but rather, the existence of the marriage. Thus, there exists at least the possibility that a party to a California dissolution may be able to avoid its effect by moving to a sister state which would interpret California law as allowing attack on the decree.

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17. Cook v. Cook, 342 U.S. 126 (1951); Johnson v. Muhlberger, 340 U.S. 581, 587 (1951); Williams v. North Carolina, 325 U.S. 226 (1945); *see* Comment, *Stranger Attack on Sister State Decrees of Divorce,* 24 U. CHI. L. REV. 376 (1957); *cf.* Mott v. Secretary of Health, Education & Welfare, 407 F.2d 59 (3d Cir. 1969); Kegley v. Kegley, 16 Cal. App. 2d 216, 220, 60 P.2d 482, 484 (1936). *But cf.* Sherrer v. Sherrer, 334 U.S. 343, 350 (1948).

18. *See* notes 24-38 and accompanying text *infra.*

19. *See* notes 39-63 and accompanying text *infra.*

20. 334 U.S. 343 (1948).

Some commentators have argued that no special sanctity should be given jurisdictional limitations,[21] or that decisions rendered when the court was without jurisdiction should be countenanced as awards in actions for dissolution.[22] While this viewpoint acknowledges that the court's lack of jurisdiction deprives it of power to act as a court, the argument urges that the decision of the court should be viewed in the same light as an arbitration award and so binding on the parties. The decision thus establishes the rights of the parties and puts an end to the controversy. Some courts on the other hand, rely on a presumption that a decree is valid where it does not appear affirmatively that a jurisdictional defect was present.[23] Of course, such arguments can be made as to any decision of a court which acts without jurisdiction. To carry the argument to its logical, albeit absurd end, why have any jurisdictional restraints upon a court at all?

It is an unfortunate circumstance, though perhaps to be expected, that law and equity may not produce a just result in every instance. But when rules of law and the principles of equity which the courts themselves have set forth prove ineffectual in dealing with anomalies within their realm, one must question their present value.

DIRECT AND COLLATERAL ATTACK UPON INVALID DECREES

Direct Attack

Generally, when a court acts without jurisdiction over the parties or subject matter, or grants relief in excess of its power, the resulting judgment is a nullity.[24] Such a judgment is normally attacked in cases where the parties have mistakenly consented to the rendition of a judgment which the court had no power to enter, by a motion made directly to the rendering court pursuant to California Code of Civil Procedure section 473,[25] or by way of suit in equity independent of that section.[26]

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21. *E.g.*, Boskey & Braucher, *Jurisdiction and Collateral Attack: October Term, 1939*, 40 COLUM. L. REV. 1006, 1010 (1939).

22. Gavit, *Jurisdiction of the Subject Matter and Res Judicata*, 80 U. PA. L. REV. 386 (1932).

23. Green v. Green, 100 F.2d 241, 242 (9th Cir. 1938); Olivia v. Suglio, 139 Cal. App. 2d 7, 8-9, 293 P.2d 63, 65 (1956). *But cf.* Dietrich v. Dietrich, 41 Cal. 2d 497, 504, 261 P.2d 269, 272 (1953).

24. Hunter v. Superior Ct., 36 Cal. App. 2d 100, 112, 97 P.2d 492, 499, (1939); *see* Vasquez v. Vasquez, 109 Cal. App. 2d 280, 282, 240 P.2d 319, 320 (1952).

25. "The court may, upon motion of the injured party or its own motion, correct

The necessity for a court's re-examination of its decree is even more compelling where the court has made an implied, non-adversary finding of a valid marriage, as where one of the parties has entered his consent to the divorce.[27]

While a void judgment also may be attacked by a motion for a new trial or by appeal,[28] section 473 of the California Code of Civil Procedure is the quickest, most direct method of correcting an error of the trial court. It allows the trial court to re-examine its decision on its own or a party's motion to determine whether it acted within its grant of authority. This process allows the party allegedly aggrieved by the judgment the opportunity to avoid the lengthy appellate process. Of course, section 473 merely codifies the inherent power of a court to entertain a suit in equity to set aside a void judgment, and need not be utilized by a party directly attacking the judgment.[29] This procedure applies to both interlocutory and final decrees of divorce.[30]

Vacation of a decree pursuant to section 473 of the Califor-

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clerical mistakes in its judgment or order directed and may on the motion of either party set aside any void judgment of order." CAL. CIV. PRO. CODE § 473 (West 1974).

26. Mechanics Bank v. Thole, 20 Cal. App. 3d 884, 886, 98 Cal. Rptr. 82, 83 (1971) (motion to set aside judgment on a promissory note); Adamson v. Adamson, 209 Cal. App. 2d 492, 500, 26 Cal. Rptr. 236, 242 (1962) (order modifying an interlocutory judgment of divorce reversed because issues determined were res judicata); Heathnam v. Vant, 172 Cal. App. 2d 639, 648, 343 P.2d 104, 109 (1959) (motion to set aside and annul interlocutory and final decrees of divorce pursuant to section 473 and in equity independent of that section); *cf.* People *ex rel.* Pub. Util. Comm'n v. Ryerson, 241 Cal. App. 2d 115, 119, 122-23, 50 Cal. Rptr. 246, 249, 252 (1966) (decision for shipper set aside on grounds of fraud and lack of subject matter jurisdiction); Necessary v. Necessary, 207 Cal. App. 2d 780, 782, 24 Cal. Rptr. 713, 714 (1962) (motion to set aside entry of a default judgment of divorce pursuant to section 473 based on fraud).

27. Challenge in the lower court is even more essential when the invalidity of the judgment is dependent upon extrinsic facts which the lower court did not have the opportunity to consider. Frazier v. Wasserman, 263 Cal. App. 2d 120, 123, 69 Cal. Rptr. 510, 512 (1968) (collateral attack on judgment of bankruptcy court); *cf.* Carbone v. Superior Ct., 18 Cal. 2d 769, 771-72, 117 P.2d 872, 874 (1942); Sharon v. Sharon, 75 Cal. 1, 16 P. 345 (1888).

28. Adamson v. Adamson, 209 Cal. App. 2d 492, 500, 26 Cal. Rptr. 236, 242, (1962); Heathnam v. Vant, 172 Cal. App. 2d 639, 648, 343 P.2d 104, 109 (1959).

29. *See* cases cited note 26 *supra*. Since equity may act to overcome a void judgment, the statute of limitations prescribed in section 473 will not bar an attack on a void judgment nor will the doctrine of laches. Estate of Pusey, 180 Cal. 368, 181 P. 648 (1917); Estate of Poder, 274 Cal. App. 2d 786, 79 Cal. Rptr. 484 (1969); Garrison v. Blanchard, 127 Cal. App. 616, 16 P. 2d 273 (1932); *cf.* Colbert v. Colbert, 28 Cal. 2d 276, 169 P.2d 633 (1946); Hinson v. Hinson, 100 Cal. App. 2d 745, 224 P.2d 405 (1950).

30. Bancroft v. Bancroft, 178 Cal. 367, 368, 173 P. 579, 581 (1918); Suttman v. Superior Ct., 174 Cal. 243, 244, 162 P. 1032, 1032 (1917); Deyle v. Deyle, 88 Cal. App. 2d 536, 539, 199 P.2d 424, 425-26 (1948); Estate of Hughes, 80 Cal. App. 2d 550, 555,

nia Code of Civil Procedure or by equitable action rests within the discretion of the trial court.[31] In exercising their discretion under section 473, the courts often overlook the fact that the existence of the marriage is a prerequisite to their obtaining subject matter jurisdiction. The parties attacking an invalid decree may compound the court's oversight by failing to raise the lack of a valid marriage *in a jurisdictional context*. Since the jurisdictional character of the existence of the marriage is not readily perceived, the court may subsequently deny the motion out of hand, or erect the bars of res judicata or equitable estoppel. In doing so, the court validates the marriage regardless of the true state of facts.[32]

Collateral Attack

California law gives further relief from a judgment or decree which is void for want of jurisdiction, by providing in California Code of Civil Procedure section 1916, that "[a]ny judicial record may be impeached by evidence of a want of jurisdiction in the court, or judicial officer, or collusion between the parties or of fraud in the party offering the record in respect to the proceedings."[33] Generally speaking, a judgment will be set aside upon collateral attack "for but one of three reasons: lack of jurisdiction of the person, lack of jurisdiction of the subject matter of the action, or an absolute lack of jurisdiction to render such judgment as the one given."[34]

However, when the courts look at interlocutory or final decrees of divorce, collateral attack is limited strictly to the grounds specified in section 1916; such judgments are otherwise immune from collateral attack.[35] Grounds such as extrinsic fraud or undue influence between the parties are ineffectual to overturn the decree.[36]

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182 P.2d 253, 257 (1947); Borg v. Borg, 25 Cal. App. 2d 25, 29, 76 P.2d 218, 220-21 (1938); *cf.* Troxell v. Troxell, 237 Cal. App. 2d 147, 151, 46 Cal. Rptr. 723, 726 (1965).

31. Olson v. Olson, 148 Cal. App. 2d 479, 483, 306 P.2d 1036, 1039 (1957). *See* cases cited note 30 *supra*.

32. Petry v. Petry, 47 Cal. App. 2d 594, 595, 118 P.2d 498, 499 (1941); *see* Dietrich v. Dietrich, 41 Cal. 2d 497, 504, 261 P.2d 269, 273 (1953).

33. CAL. CIV. PRO. CODE § 1916 (West 1974).

34. Baldwin v. Fosser, 157 Cal. 643, 646, 108 P. 714, 716 (1910).

35. Kelsey v. Miller, 203 Cal. 66, 91, 263 P. 200, 212 (1928); Estate of Lee, 200 Cal. 310, 314, 253 P. 145, 147 (1927); Borg v. Borg, 25 Cal. App. 2d 25, 29, 76 P.2d 218, 220 (1938); *cf.* Estate of Casimir, 19 Cal. App. 3d 773, 780, 97 Cal. Rptr. 623, 627 (1971); Frazier v. Wasserman, 263 Cal. App. 2d 120, 69 Cal. Rptr. 510 (1968); Vasquez v. Vasquez, 109 Cal. App. 2d 280, 283, 240 P.2d 319, 320-21 (1952).

36. *Id.*

Here, again, courts and attorneys often overlook the fundamental nature of a factual determination of a valid marriage as a prerequisite to subject matter jurisdiction. Attorneys tend to point to the *fact* that the couple were never married while failing to assert that, as a result, the court entering the decree did not have jurisdiction over the subject matter. They point to the illogical aspect of the situation, the absurdity of retroactively conferring a status on the parties which they never had; but they fail to indicate the jurisdictional character of a valid marriage. Courts, on the other hand, also fail to perceive the fundamental nature of a factual determination of a valid marriage. A party is often barred from raising the invalidity of the marriage as grounds for overturning the divorce decree because the court sees this as a simple question of fact or procedure and not as a question of jurisdiction. This result contradicts the principles set forth above, as well as the principle that questions as to the subject matter of a court may be raised for the first time on appeal[37] and are never waived.[38]

RES JUDICATA

When a court, subsequent to the entry of a decree of dissolution, applies the rule of res judicata, it bars the parties or their privies to the action from relitigating all issues that were or could have been litigated, including the parties' status with relation to each other.[39] The language of the court of appeal in *Petry v. Petry*[40] indicates the force with which res judicata is applied and represents the most rigid stance the courts have adopted.

> It is well established in this state that a final decree of divorce conclusively determines, as between the parties thereto that they were legally married and this is true regardless of the true fact . . . and seemingly despite the most flagrant fraud practiced by one of the parties. Such

37. Colbert v. Colbert, 28 Cal. 2d 276, 279, 169 P.2d 633, 635 (1946); Frazier v. Wasserman, 263 Cal. App. 2d 120, 123, 69 Cal. Rptr. 510, 512, (1968); Hinson v. Hinson, 100 Cal. App. 2d 745, 746, 224 P.2d 405, 406 (1920); *see* Parman v. Parman, 56 Cal. App. 2d 67, 132 P.2d 85 (1942); Borg v. Borg, 25 Cal. App. 2d 25, 76 P.2d 218 (1938).

38. *See* note 12 *supra*.

39. Redicker v. Redicker, 35 Cal. 2d 796, 801, 221 P.2d 1, 4 (1950); *cf.* Sherrer v. Sherrer, 334 U.S. 343 (1948); Kelsey v. Miller, 203 Cal. 61, 263 P. 200 (1928); Estate of Lee, 200 Cal. 310, 253 P. 145 (1927); 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Husband and Wife* § 52, at 4947 (8th ed. 1974); *see* note 17 *supra*.

40. 47 Cal. App. 2d 594, 118 P.2d 498 (1941).

> being the case, the decree of divorce may not be collaterally attacked by the parties thereto and all the facts therein found, such as the fact of marriage, are conclusive upon the parties in subsequent proceedings whether they pertain to divorce or not.[41]

This practice of supplying a court retroactively with subject matter jurisdiction through the application of res judicata has caused confusion in the courts. Often, a court will state that a prior decree of divorce is res judicata as to the status of the parties, but will allow attack on the decree on grounds of subject matter jurisdiction.[42] Clearly, this evidences the court's misunderstanding of the law in this area. Since without jurisdiction the resulting judgment is a nullity, it is obvious that the court fails to perceive that a factual determination of marital status is a prerequisite not simply to subject matter jurisdiction, but also to the adjudication of status.

Confusion arises because a valid marriage is necessary for jurisdiction in addition to domicile. A valid marriage establishes the existence of the *res;* domicile establishes that the *res* is within the state, and thus subject to the court's power. While domicile thus does supply one element of subject matter jurisdiction, it is not the only ground which can be used to show want of jurisdiction pursuant to section 1916,[43] a fact consistently overlooked.

Yet more difficulty develops because many divorces presently are being litigated by the parties themselves without the aid of attorneys. It is unlikely a lay person would perceive a jurisdictional issue, much less place it properly before the court. Certainly, if the party claiming lack of subject matter jurisdiction presented the issue to the trial court in an adversary context, he or she should subsequently be barred from collaterally attacking the decree on those grounds, but it seems self-serving to allow the court to seize jurisdiction by reason of the parties' ignorance, and unfair to penalize that ignorance so severely. It should be incumbent on the trial court to establish the fact that it has power to proceed. That is, the court should require the parties to provide sufficient information to enable the court to examine the facts surrounding the marriage, prior divorces, and other relevant events. Were this done, a claim

41. *Id.* at 595, 118 P.2d at 499.
42. *See* cases cited note 35 *supra.*
43. *See* text accompanying note 33 *supra.*

that subject matter jurisdiction was conferred on the court by the parties' representation or consent would be wholly specious; if the court failed to uncover the inherent invalidity of the marriage, at least the factual basis for the jurisdictional claims would have been presented and examined.

Such action would protect both the court and the parties. The court would not be acting without jurisdiction, and the parties would not run the risk of having conferred upon them a status they never had. Such an inquiry would certainly save much judicial time either at that moment or in future litigation. Property settlements would accord with the parties real, factually based status, rather than with their mistaken status. Collateral areas such as the validity of antenuptial agreements,[44] due to certain presumptions which arise only upon marriage,[45] might be greatly affected. For instance, the presumption that there is a confidential relationship between married individuals[46] would not arise. Thus, the rules setting forth the presumption of fraud or undue influence where one married party has gained an advantage over the other[47] would not apply. Finally, settled principles of law would not have to be so severely strained to reach questionable results.

It has been argued that res judicata, in a sense, is an award in and of itself and not necessarily a validation of a court's prior invalid decree where the trial court acted without some jurisdictional requisite. This argument places the judge in the role of arbitrator: an individual acting without state authority but upholding the principle of peaceful settlement of disputes. While the state is not bound by the judge's decision, the parties are held to the rights and interests they have been awarded once res judicata applies to foreclose attack upon and to sanction the ruling.[48]

This bit of legal sophistry fails to explain adequately the

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44. Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398 (1934); Estate of Cover, 188 Cal. 133, 204 P.583 (1922); Estate of Dokoozlian, 219 Cal. App. 2d 531, 33 Cal. Rptr. 151 (1963); Estate of Cummins, 130 Cal. App. 2d 821, 280 P. 128 (1955); Handley v. Handley, 113 Cal. App. 2d 280, 248 P.2d 59 (1952); Estate of Piatt, 81 Cal. App. 2d 348, 183 P.2d 919 (1948).

45. Estate of Cover, 188 Cal. 133, 204 P. 583 (1922); Morris v. Berman, 159 Cal. App. 2d 770, 324 P.2d 601 (1958); Patterson v. Davis, 121 Cal. App. 2d 152, 262 P.2d 681 (1953); Handley v. Handley, 113 Cal. App. 2d 280, 248 P.2d 59 (1952); Marsiglia v. Marsiglia, 78 Cal. App. 2d 701, 178 P.2d 478 (1947).

46. *Id.*

47. *Id.*

48. Gavit, *Jurisdiction of the Subject Matter and Res Judicata*, 80 U. PA. L. REV. 158 (1932).

real reason that courts apply the doctrine of res judicata, thereby barring a party from asserting an otherwise valid claim. The function of the res judicata rule is to put an end to litigation that might otherwise drag on indefinitely through a series of collateral attacks.[49] Difficulties arise as to when and where to apply the rule, but it was not designed to confer jurisdiction nor to give *ex post facto* validity to decisions that the court was without power to make. Necessarily it is a judge who, in the exercise of his discretion, ultimately decides the point at which res judicata will be applied. Perhaps it is this element of uncertainty, coupled with the distortion to which settled jurisdictional requisites must be subjected in order to utilize res judicata, which has led the preferred use of equitable estoppel to bar attack on an invalid decree.

EQUITABLE ESTOPPEL

Initially, it should be noted that while a party under proper circumstances may be estopped to deny personal jurisdiction,[50] subject matter jurisdiction cannot be conferred on a court by estoppel.[51] However, in dissolution actions, the courts consistently overlook this principle and hold that while the application of estoppel does not validate an invalid marriage, the party is estopped from asserting that the dissolution was invalid.[52] The effect is to confer subject matter jurisdiction where it did not in fact exist. This abrogation of settled principles is said to be justified by the conduct of the parties.[53] That is, estoppel is invoked when, subsequent to the entry of the decree of dissolution, the complaining party has engaged in conduct inconsistent with the assertion that the decree is in-

49. *See* authorities cited note 17 *supra*. *See generally* H. CLARK, LAW OF DOMESTIC RELATIONS, DIVORCE, ALIMONY AND CUSTODY § 11.2, at 291 (1968).

50. Summers v. Superior Ct., 53 Cal. 2d 295, 347 P.2d 668, 1 Cal. Rptr. 324 (1959).

51. *Id.*; Roberts v. Roberts, 81 Cal. App. 2d 871, 881, 185 P.2d 381, 386 (1947), *partially disapproved*, Spellens v. Spellens, 49 Cal. 2d 210, 219, 317 P.2d 613, 619 (1957); Kegley v. Kegley, 16 Cal. App. 2d 216, 220, 60 P.2d 482, 484 (1936); 1 B. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 10 at 534 (2d ed. 1971); *cf.* notes 9-11 *supra*.

52. Spellens v. Spellens, 49 Cal. 2d 210, 219, 317 P.2d 613, 619 (1957); Union Bank & Trust Co. v. Gordon, 116 Cal. App. 2d 681, 254 P.2d 644 (1953); *cf.* Estate of Atherley, 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975); Estate of Vargas, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974); Stoner v. Nethercutt, 8 Cal. App. 3d 667, 87 Cal. Rptr. 659 (1970); Brown v. Brown, 274 Cal. App. 2d 178, 82 Cal. Rptr. 238 (1969).

53. *See* Rosenberg, *How Void is a Void Decree, or The Estoppel Effect of Invalid Divorce Decrees*, 8 FAM. L.Q. 207 (1974) [hereinafter cited as Rosenberg].

valid, usually meriting the application of estoppel. Thus, estoppel has been defined as

> [t]he effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, or contract, or of remedy.[54]

Estoppel is applied by the courts in various situations involving different conduct by the parties. Knowledge,[55] including rumors,[56] of the circumstances surrounding an invalid marriage may preclude a party from later asserting its invalidity, as where the party is aware that a prior divorce decree is invalid. Similarly, remarriage of one of the parties weighs heavily in favor of applying estoppel,[57] as well as lengthy delay in asserting the invalidity.[58] While estoppel generally is applied only against "wrongdoers,"[59] the court also may use it to prevent a party from procuring a windfall.[60] That is, the court generally will apply estoppel if it would be unfair to let a party take advantage of the invalidity of the marriage. Estoppel, as applied in matrimonial disputes, is thus broader than traditional estoppel in that elements of detrimental reliance are of less importance to the court's decision.[61]

The courts have utilized the notion of divisible divorce, wherein the marital status of the parties is viewed as separate and distinct from their respective property rights,[62] in attempt-

54. Brown v. Brown, 274 Cal. App. 2d 178, 188, 82 Cal. Rptr. 238, 244-45 (1969).

55. Dietrich v. Dietrich, 41 Cal. 2d 497, 261 P.2d 269 (1953); Schotte v. Schotte, 203 Cal. App. 2d 28, 21 Cal. Rptr. 220 (1962); Rudnick v. Rudnick, 131 Cal. App. 2d 227, 280 P.2d 96 (1955).

56. Smith v. Smith, 157 Cal. App. 2d 46, 320 P.2d 100 (1958).

57. Spellens v. Spellens, 49 Cal. 2d 210, 219, 317 P.2d 613, 619 (1957); Estate of Atherley, 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975); Chilcott v. Chilcott, 257 Cal. App. 2d 868, 65 Cal. Rptr. 263 (1968).

58. Brown v. Brown, 274 Cal. App. 2d 178, 82 Cal. Rptr. 238 (1969).

59. *Id.;* Roberts v. Roberts, 81 Cal. App. 2d 871, 185 P.2d 381 (1947), *partially disapproved*, Spellens v. Spellens, 49 Cal. 2d 210, 219, 317 P.2d 613, 619 (1957).

60. Stoner v. Nethercutt, 8 Cal. App. 3d 667, 87 Cal. Rptr. 659 (1970); Brown v. Brown, 274 Cal. App. 2d 178, 82 Cal. Rptr. 238 (1969); Estate of Shank, 154 Cal. App. 2d 808, 316 P.2d 710 (1957).

61. *See* Rosenburg, *supra* note 53.

62. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Estin v. Estin, 334 U.S. 541 (1948).

ing to cure the collateral ills of the application of estoppel; but this concept has proved more confusing than salutory.[63] Indeed, this concept is more of a stop-gap measure which has been utilized to bridge the interval between the older, more stringent laws regarding marital relations and newer, more liberal laws.

It would seem that at the present time, given the state of the law and the basis upon which it is applied, equitable estoppel is a lesser evil than res judicata as a solution to problems presented by a party's attack on an invalid divorce decree.[64] Since the application of estoppel turns on the conduct of the parties, the chances that by its application a just result will ensue are greatly enhanced. Questions of conduct are qualitative, while res judicata deals only with whether the party had an opportunity to present his claim, not with the merits of that claim.

However, rather than turning the validity of a judicial act on an issue of subsequent behavior of the parties, it would seem that the better solution would be either to change jurisdictional requisites or to require a more exhaustive, more complete investigation by the court into the facts surrounding the marriage of the parties, regardless of whether or not one of the parties raised the issue of the marriage's validity. Since California courts currently find themselves dividing community assets where there is no community, jurisdictional rules should change to conform to reality or the courts should accept responsibility for their actions. The current practice of foisting the blame on the parties only encourages subsequent litigation, and overlooks the fact that it was the *court* which made the erroneous "finding," as a consequence of its ready acceptance of the parties' representation.

In support of present practices, one can argue that jurisdictional parameters need not be rigidly observed, since

> [t]he law of jurisdiction of the courts is neither procedural nor substantive law. It has nothing to do with either the

63. Rosenburg, *supra* note 53, at 208.

64. Equity acts in order to meet the requirements of every case, and to satisfy the need of progressive social conditions in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed. Wuest v. Wuest, 53 Cal. App. 2d 339, 346, 127 P.2d 934, 937 (1942), *as cited* in Estate of Vargas, 36 Cal. App. 3d 714, 718, 111 Cal. Rptr. 779, 781 (1974).

> creation or recognition of substantive rights, it is simply a limitation on the power of a court to act as a court.[65]

Nonetheless, if the court unknowingly acts without jurisdiction, without the power which the legislature and the courts themselves have declared is necessary for the entry of a valid decree, the court's judgment is imposed upon the parties unless it is brought to the attention of the court that it has so acted. If the decree is subsequently held to be immune from attack irrespective of its inherent invalidity due to lack of jurisdiction, the court's decree still is operative upon the parties and will be enforced. Although theoretically jurisdictional requisites are only operative upon the power of the court, certainly it cannot be gainsaid that jurisdictional decisions do subsequently affect the substantive rights of the parties. If a party is left without a forum in which to assert his or her rights, the result is as much a binding determination as a full-scale trial on the merits of the case. If one is barred from raising a jurisdictional defect and the illegal act of a court is thereby deemed effective, certainly one must question whether the party adversely affected was afforded due process of law.

DUE PROCESS

One of an individual's most important due process rights is that without an opportunity to be heard by a body competent to determine such matters, an individual may not be deprived of his freedom or property. His right to due process may be violated by the judicial as well as the executive and legislative branches of government.[66] "The court must have jurisdiction over the parties and the subject matter of the action, and . . . the parties must have reasonable notice and an opportunity for hearing."[67]

Thus, the due process issue is not the correctness of a given decision, but the power of the court to determine the issue presented—that is, its jurisdiction:

> [D]ue process of law is met where, as here, the court has

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65. Gavit, *Jurisdiction of the Subject Matter and Res Judicata*, 80 U. PA. L. REV. 386, 386 (1932).

66. 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 281, at 3571 (8th ed. 1974); *cf.* Cugat v. Cugat, 102 Cal. App. 2d 760, 762, 228 P.2d 31, 32 (1951).

67. Datta v. Staab, 173 Cal. App. 2d 613, 621, 343 P.2d 977, 982 (1959); *cf.* Harrington v. Superior Ct., 194 Cal. 185, 188, 228 P. 15, 16 (1924); Scott v. McNeal, 154 U.S. 34, 37-38 (1894); R. MOTT, DUE PROCESS OF LAW, 596 (1973).

> jurisdiction of the subject matter and the parties, even though the court might erroneously determine a question within that jurisdiction. Jurisdiction implies the power of the court to decide a question wrongly as well as rightly.[68]

The due process test is not satisfied merely because a court is empowered to hear the kind of case before it if the court fails to perform some act necessary to acquire jurisdiction.

> If the statute requires as the initial step in the process of depriving a man of his property the performance of a specifically defined act, unless that act be performed substantially no jurisdictional power exists for further action in the proceeding against him.[69]

Indeed, in such circumstances, an act by a court which operates to establish its jurisdiction is a prerequisite to due process.[70]

A court which fails to make adequate inquiry into the basis of its jurisdiction by accepting the representation of the parties rather than making its own examination of the jurisdictional facts, may be said to deny due process. Unfortunately, while it seems sound to argue that an individual has been denied due process of law when a court acts without its jurisdiction and materially affects the individuals interests and rights, this view has little support where the party had an opportunity to raise the jurisdictional defect and failed to do so.

The obstacle to a successful due process argument against the practice of barring collateral attack on an invalid decree of dissolution is that a party who had notice of the pending divorce proceedings and made an appearance or chose not to appear, had ample opportunity to raise the jurisdictional defect during the proceeding. Ignorance at the time of the decree of facts which gave rise to his or her subsequent application for relief has been held to afford no defense in such situations.[71] Further, it has also been held that long usage of a given procedure will be sufficient to fulfill the requirements of due pro-

68. Taliaferro v. Bekin Realty Co., 176 Cal. App. 2d 240, 243, 1 Cal. Rptr. 385, 386 (1959); *see* Datta v. Staab, 173 Cal. App. 2d 613, 621-22, 343 P.2d 977, 982 (1959).

69. Beck v. Ransome Crummery Co., 42 Cal. App. 674, 679, 184 P. 431, 433 (1919); *cf.* Overall v. Overall, 18 Cal. App. 2d 499, 502, 64 P.2d 483, 484 (1937).

70. *Cf.* Abelleria v. Dist. Ct. Appeals, 17 Cal. 2d 280, 291, 109 P.2d 942, 948 (1941).

71. *See* Williams v. North Carolina, 325 U.S. 226 (1946); *cf.* United States v. Balint, 258 U.S. 250, 252 (1922).

cess[72] where ignorance is claimed.[73] Indeed, the United States Supreme Court has held that due process does not require a judicial proceeding,[74] implying that if a judicial body acts without jurisdiction, the individual is still afforded due process.

CONCLUSION

It is evident that the problems presented by a party's attack on an invalid decree of dissolution are paradoxical and complex. The solutions currently being effected by the courts are attempts to reach a just result in a given case. In practice, invoking equitable estoppel generally does produce a fair result.

However, the violence done to jurisdictional parameters and to the individual's right to appeal the jurisdictional error of the court, raises serious questions as to the worth of these solutions. It is true, of course, that the courts must attempt to resolve controversies which are not readily accessible to present legal remedies. But when the attempted resolution creates a significant line of cases in conflict with basic legal principles, it becomes evident that a new approach is required. Where the need to do justice leaves the court no choice but to create a category of legal aberrations, the law must change to meet the challenge.

The need for a reconsideration of jurisdictional requisites in domestic relations litigation is clear. Jurisdictional parameters currently in force are ineffectual in this area and are more often overlooked than followed.[75] With the rising frequency of *in propia persona* dissolution actions, the chance that the jurisdictional defect will not be discovered during the proceedings, and that an unjust result will ensue, increases commensurately. The law establishes rules and procedures in order to settle disputes amicably and establish guidelines for prospective litigants. When these rules and procedures are not followed, the resultant confusion leads to more litigation, more judicial time expended. Thus, the individual who ventures to settle his own marital dispute seriously jeopardizes his interests. Even the aid of an attorney will not immunize him from the misunderstanding which pervades this area of the law.

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72. Frank v. Maryland, 359 U.S. 360 (1959).

73. Snyder v. Massachusetts, 291 U.S. 97 (1934); Twinning v. New Jersey, 211 U.S. 79 (1908).

74. Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944).

75. Harper, *The Validity of Void Divorces*, 79 U. PA. L. REV. 158, 165 (1930).

It would seem that a fuller investigation by the court of the circumstances surrounding the parties' marriage, or a requirement that the basic forms of pleading include a full statement of the jurisdictional facts which the court must notice before making its finding, would justify the current reliance on res judicata or equitable estoppel. However, the current practice of accepting without question the litigants' bald representation that they are validly married provides little basis for their application. While it is doubtful that the suggested investigation would prove overly burdensome to the courts, another alternative is to change the jurisdictional requisites, perhaps explicitly allowing the parties to a divorce action to consent to the jurisdiction of the court.

The state's interest in the marital status of the parties surely cannot be said to extend to retroactive conferral of a marital status on individuals, when the only reason for its interest is to give effect to the mutual desire and consent of the parties. The state cannot be said to desire to dissolve a status which never existed, to desire divorce without marriage.

Randall M. Widmann