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Fowler Vincent Harper
Indiana University School of Law

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THE VALIDITY OF VOID DIVORCES

FOWLER VINCENT HARPER

INTRODUCTION

It is old learning that a decree of divorce, like any other judicial action, must have been rendered by a court which had jurisdiction of the person and of the subject matter. After some competition in the common law as to the proper doctrine in determining requisites for jurisdiction of subject matter,¹ it turned out that domicile was adopted as the point of reference for such questions. This, of course, caused no end of difficulty as soon as the law developed the capacity of spouses to have separate domiciles.² These difficulties are being reasonably well ironed out, in theory at least, so that the rules for jurisdiction in divorce matters can be predicted with some degree of accuracy. Briefly stated, it appears that: (1) the domicile of both parties can divorce them;³ (2) a state where neither party is domiciled cannot divorce them;⁴ (3) the domicile of one party⁵ has jurisdiction to divorce where the absent spouse appears, or consents to or affords cause for the separate domicile;⁶ (4) possibly, in New York at least, the place

¹ Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417, 424.

² Beale, *Constitutional Protection of Divorce Decrees* (1906) 19 HARV. L. REV. 586.

³ CONFLICT OF LAWS RESTATEMENT (AM. L. INST. 1930) § 117 (Hereafter cited "Restatement").

⁴ RESTATEMENT, § 118.

⁵ Frequently, by statute, the plaintiff. See GOODRICH, CONFLICT OF LAWS (1927) 291 n. 24. Such requirements, as to length of residence, are often not treated as jurisdictional. See RESTATEMENT, § 117, comment (b).

⁶ RESTATEMENT, § 119. See Beale, *op. cit. supra* note 1, at 426. These are the only situations in which the domicile of one party alone has jurisdiction for divorce proceedings. This is the position of the American Law Institute and it is, in substance, Professor Beale's doctrine. It is to be admitted that it is not free from doubt so far as the cases are concerned. There are important *dicta* to the effect that a state which is the domicile of the husband only can divorce him even though that domicile were not obtained under the above circumstances, *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525 (1906); and there are eminent critics who refuse to follow Professor Beale to this length in defiance of such *dicta* (See GOODRICH, *op. cit. supra* note 5, 293 *et seq.*).

The position of the RESTATEMENT is adopted here as an authoritative and correct statement of the law, because: (1) there are no decided cases squarely against it; (2) it is a highly desirable doctrine and avoids many of the anomalous and absurd results of a different rule (See GOODRICH, *op. cit. supra* note 5, 297, n. 35); (3) it is the logical and reasonable position for the Supreme

where the parties have lived for an extended time as man and wife has jurisdiction to divorce.⁷ Jurisdiction of the person is acquired by personal service within the state, or, within limits set by the Federal Constitution, through service by publication upon absent residents where authorized by appropriate statutes.

Problems raised by bringing in question a foreign divorce are generally solved by ordinary common law principles governing collateral attack together with the application of the above rules. But sometimes these rules prove inadequate to do justice between the parties or fail adequately to protect the social interest in the security of the domestic relation; and where the result would be particularly offensive to ordinary canons of decency, courts will seek to avoid the rules. A substantial body of law has grown up out of these efforts which materially supplements the generalizations listed above. Thus, although a divorce be rendered by a court which was the domicile of neither party, or of one party only, or which did not have jurisdiction of the defendant, nevertheless it may be accorded some effect, if to deny it any efficacy whatever would defeat the ends of justice. These cases proceed on different and varying grounds and many of them, though satisfactory in the main as to result, are confusing in the rationalization adopted and in the anomalous attempts at doctrinal development which have accompanied them. The questions arise in various ways: as in a subsequent annulment or divorce action between the parties, in a criminal prosecution for bigamy, in proceedings in probate for letters of administration, in bills for a widow's allowance, in petitions for admeasurement of dower or partition, in actions for alienation of affections, and in actions of ejectment or specific performance between grantees and heirs of the principals to the divorce action. Since domicile is the dominant conception of the orthodox Conflict of Laws rules, the cases will be grouped according to the domiciliary situation involved.

Court to take under the Fourteenth Amendment and the Full Faith and Credit clause, and involves no serious reversal of its present position and no overruling of decided cases; (4) when the law develops to the point where a wife may acquire a separate domicile under any and all circumstances, the undesirable social situations where the parties are single in one state and married in another will be doubled if the above stated rule is not correct.

⁷ Gould v. Gould, 235 N. Y. 14, 138 N. E. 490 (1923).

DIVORCE AT DOMICILE OF BOTH PARTIES

Same Forum

No Conflict of Laws question is raised where a divorce decree is questioned in the jurisdiction where it was rendered. Neither is there any question of jurisdiction of subject matter in the common law or Conflict of Laws sense. But since the cases and annotations do not always recognize the distinction between this situation and the one present when the decree is questioned in another state, and for the further reason that the principles involved, though sometimes the same, frequently differ, consideration is taken of the problem thus raised. A distinction must be drawn between a direct attack upon the divorce to vacate the same, and a collateral attack.

Principles upon which a court of equity will act to vacate a divorce decree are not fundamentally different from those applying to relief against any judgment. If there is a statute regulating the proceeding, it will, of course, govern. Usually divorce decrees may be attacked directly when they are voidable for fraud, at the instance of the one defrauded. Success in vacating a divorce depends upon equitable principles;⁸ if the party seeking to vacate the decree was the one who practiced the fraud, he, of course, cannot impeach it.⁹ If he was in any way a party to the fraud, he is in no better position.¹⁰ Thus divorces obtained by collusion between the parties or with the consent of the defendant are immune to direct attack in equity or under a statute. The parties are in *pari delicto* and equity will aid neither.¹¹ It is thought that the dignity of the court, imposed upon by the parties, must be protected, and this, together with the principle that the parties are in no position to seek the aid of a court to relieve them from their own wrong, furnishes the grounds for most decisions. This rule

⁸ But if the decree was void, as for want of jurisdiction of the particular court, it seems that it may be directly attacked by either party regardless of the "equities" between them. See *Davidson v. Ream*, 178 App. Div. 362, 164 N. Y. Supp. 1037 (1917).

⁹ See *Rindge v. Rindge*, 22 Ind. 31 (1864).

¹⁰ *Robinson v. Robinson*, 77 Wash. 663, 138 Pac. 288 (1914).

¹¹ For vacation at the application of both parties, see *Colvin v. Colvin*, 2 Paige 385 (N. Y. 1831) and note 60 L. R. A. 296 (1903).

is applied where an agreement or promise is made by one spouse by which the other is induced to offer no defense to the action. After the unfortunate spouse has failed to realize the consideration for the "shameless bargain", he (or, as is more usual, she) cannot attack the decree.¹² The doctrine is firmly imbedded in the law and the cases frequently quote Willes, C. J., in *Pruden v. Phillips*,¹³ that "if both parties collude in the cheat upon the court, it was never known that either of them could vacate the judgment". In these cases it makes no difference whether the party seeking to avoid the decree was the one who procured the divorce or not. Both are equally without equity.

Sometimes there are additional reasons for denying relief, as where one of the parties remarries. As one court¹⁴ said:

"But when the vacation of a decree of divorce, obtained by collusion, is sought by a willing participant in the fraud, the court, on the principle of the maxim, '*Ex dolo malo non oritur actio*', will refuse to disturb the decree, especially when the opposing party has remarried, and children have sprung from the second union".¹⁵

This applies equally where the one who obtained the decree remarries¹⁶ or where the other party remarries;¹⁷ and whether it is the party attacking the decree¹⁸ or the adverse party who has remarried.¹⁹

¹² *Hubbard v. Hubbard*, 19 Colo. 13, 34 Pac. 170 (1893); *Simmons v. Simmons*, 47 Mich. 253, 10 N. W. 360 (1881); *Orth v. Orth*, 69 Mich. 158, 37 N. W. 67 (1888).

¹³ See note to *Duchess of Kingston's Case* (1776). The case is reported in HARGRAVE, *STATE TRIALS* (1781) 198, from a note by Ford.

¹⁴ *Karren v. Karren*, 25 Utah 87, 93, 69 Pac. 465, 467 (1902).

¹⁵ Plaintiff had agreed to permit her husband to divorce her to enable him to obtain certain property from his father. The husband promised to remarry plaintiff, after he had obtained the property. Instead he got the deed to the property and promptly married someone else.

¹⁶ *Karren v. Karren*, *supra* note 14.

¹⁷ *Sedlack v. Sedlack*, 14 Ore. 540, 13 Pac. 452 (1887).

¹⁸ *Stephens v. Stephens*, 51 Ind. 542 (1875) (pending appeal from divorce decree, appellant remarried. Appeal dismissed).

¹⁹ *Earle v. Earle*, 91 Ind. 27 (1883) (plaintiff attacked decree for fraud after lapse of several years and after defendant had married again). Cf. *Kantor v. Cohen*, 181 App. Div. 400, 168 N. Y. Supp. 846 (1918) (where both parties remarried after a church divorce).

But if the collusion or consent on the part of the defendant in the divorce action is not real so that from the point of view of the equity court the parties are not *in pari delicto*, the result may be different.²⁰ So also in cases where the decree was obtained in the name of the wife, by the husband, without her knowledge or consent.²¹ Sometimes, however, vacation will be denied on the mere ground of laches, as where years have been allowed to elapse after the decree. The delay and lapse of time may be regarded as a constructive consent or consent by acquiescence.²² The same result may also be reached where the "object of the attack is obviously merely alimony" and no genuine merit is disclosed.²³

A Conflict of Laws question may be raised where a vacation of the divorce is pleaded in another jurisdiction. Generally, such a decree is governed by ordinary considerations of jurisdiction of the person and subject matter. If the personal rights of one not a party to the action to vacate are involved, the vacating decree may be denied any effect on such rights in other states,²⁴ whether

²⁰ *Cobb v. Cobb*, 43 S. D. 388, 179 N. W. 498 (1920) (where the wife was not prevented from vacating a decree of absolute divorce in which no alimony had been allowed, although she had procured the divorce. The husband had misrepresented to her that his life was endangered because he continued to live with her). Cf. *Karren v. Karren*, *supra* notes 14, 15.

Although *Daniels v. Benedict*, 50 Fed. 347 (C. C. D. Col. 1892) was not a direct attack, as it was an action in equity for partition against the trustees of the deceased husband, the considerations were regarded by the court as the same. The collateral attack was permitted because the fraud was "extrinsic" to the matter tried. Cf. *Greene v. Greene*, 2 Gray 361 (Mass. 1854) where Chief Justice Shaw treated an action for divorce by a spouse against whom a former decree had been rendered in the same state, all parties being domiciled therein, as a direct attack to vacate the original decree. See also *Johnson v. Johnson*, 182 Ala. 554, 62 So. 701 (1913) in which an action for dower by a former wife who had permitted her husband to institute proceedings for divorce in her name in the same state, was regarded as both a direct and collateral attack. In the *Daniels* case, *supra*, the wife prevailed when it appeared that although she had consented, for a consideration, to the decree, she was at the time ill and in need of money for her immediate wants. It was held that she was not *in pari delicto*.

²¹ *Bradford v. Abend*, 89 Ill. 78 (1878).

²² *Zoellmer v. Zoellmer*, 46 Mich. 511, 9 N. W. 831 (1881).

²³ *Gans v. Gans*, 77 N. J. Eq. 309, 76 Atl. 234 (1910) (wife attacked decree rendered in favor of her husband after she had obtained a "Jewish divorce" on the strength thereof and after she had prosecuted him for cohabiting with her out of wedlock; the parties had made up their differences for a while and had lived together after the divorce).

²⁴ *Passailaigue v. Herron*, 38 F. (2d) 775 (C. C. A. 5th, 1930) (infant son in Florida held not affected by a Louisiana vacation of a Louisiana decree divorcing his mother from her former husband, so far as the son's rights in Florida personal property were concerned).

because of a want of jurisdiction of such third party's rights or because of public policy is not clear.

Until the decree is attacked by one defrauded or wronged thereby, it would seem that it is conclusive upon collateral attack. While some courts have treated a collateral attack where the parties were the same, as in substance direct,²⁵ it is more usual to find courts adhering to the general rule of *res adjudicata* or estoppel of record. Thus where a wife sued for partition of her "husband's" lands at his death, it was held that a former divorce in the same state could not be thus attacked for collusion in a collateral proceeding.²⁶ The same result, of course, would have ensued in a direct attack because of the wife's participation. The doctrine of *res adjudicata* or estoppel of record has been applied in favor of third persons in a somewhat novel manner. In an Iowa case,²⁷ where a husband had obtained a divorce in the wife's name, he was not permitted to deny its validity when pleaded as a defense in an action for alienation of the affections of his wife. The court insisted that:

"The general rule that an adjudication is binding as such only upon the parties to the litigation and their privies may be taken for granted. . . . The difficulty with applying such rule to a divorce case is that, in the eyes of the law, the parties to the case are not the only parties in interest in the litigation. . . . In such a case, the court is dealing with something more than the private rights of the parties to the case. The marriage to be dissolved is not a mere contract, but is a status. In such status, the public interest is involved in a very sensitive way. A decree of divorce dissolves not only the marriage contract, but changes the status of the parties and thereby their relation to the public as well as to each other. The binding force of such decree necessarily enters into the future relations of the parties, not only as between themselves, but affects also their relations with third parties".²⁸

All this, no doubt, is beside the point, but the result seems clearly correct upon orthodox grounds.

²⁵ See *Greene v. Greene and Johnson v. Johnson*, both *supra* note 20.

²⁶ *Friebe v. Elder*, 181 Ind. 597, 105 N. E. 151 (1914).

²⁷ *Hamilton v. McNeill*, 150 Iowa 470, 129 N. W. 480 (1911).

²⁸ *Ibid.* at 477, 129 N. W. at 482.

A collateral attack, of course, may be made where the divorce, although decreed in the same state, is void by reason of a failure of jurisdiction of the court to attach. The rule here is the same as in other actions where service upon the parties fails or is insufficient to meet the demands of due process.²⁹ But it seems that there may be an estoppel or bar³⁰ to challenge the decree upon the same principles which control a collateral attack in another state,³¹ and this regardless of whether the want of jurisdiction went to the subject of the action or to the person. In *Marvin v. Foster*³² the husband deserted his wife and she obtained a divorce from him in Minnesota, the matrimonial domicile and the domicile of both parties at the time. The decree, however, was void in Minnesota³³ for want of proper compliance with the statute governing service of summons. The husband had actual knowledge of the action but did not appear and later remarried. In an action brought to share in his first wife's estate at her decease, it was held that he was barred. The court was moved by the plight of the second wife:

"He may publish his own shame to the world for a money consideration; but this court will not aid him to stig-

²⁹ As by an unreasonable and unconstitutional exercise of jurisdiction, as such term is used in the conflict of laws. See *McDonald v. Mabee*, 243 U. S. 90, 37 Sup. Ct. 343 (1917). See *GOODRICH*, *op. cit. supra* note 5, 138.

³⁰ See *Asbury v. Powers*, 23 Ky. L. Rep. 1622, 65 S. W. 605 (1901).

³¹ *Cf.* the somewhat analogous situation in *Goodwin v. Goodwin*, 158 App. Div. 171, 142 N. Y. Supp. 1102 (1923), where the husband was estopped to allege the invalidity of his marriage in an action to annul it by reason of his having a limited divorce based upon his affirmation of the validity of the marriage; also *Woodland v. Woodland*, [1928] P. 169, where the husband was estopped in a proceeding of nullity on the grounds that there was no valid marriage, by the record of a former proceeding instituted by the wife for restitution of conjugal rights, in which proceeding he had filed no answer and the decree had been entered on a finding that there had been a valid marriage. In fact, the marriage was invalid because the wife had no valid divorce from a former husband at the time of the marriage.

³² 61 Minn. 154, 63 N. W. 484 (1895).

³³ *Quære*: as to its validity in other states. There is high authority for the proposition that it is valid elsewhere. *Pemberton v. Hughes*, [1899] 1 Ch. 781. See *RESTATEMENT*, § 474. It is hard to follow the logic of this doctrine, however. A "judgment" is recognized abroad when it is not recognized as a "judgment" at home. Logical complications are to be found with respect to the full faith and credit clause. By hypothesis there is a valid judgment in foreign states, but the Constitution does not compel its recognition. See *RESTATEMENT*, § 474, comment (a). Throughout the following discussion in the text, it is assumed that the doctrine of *Pemberton v. Hughes*, *supra*, is not sound.

matize his second wife as living an adulterous life, nor hold her child is a bastard." ³⁴

The same result was reached in *Arthur v. Israel*,³⁵ although the second spouse was not entitled to the court's solicitous protection. Here, the wife eloped and lived in adultery with her paramour until after her husband obtained a divorce, whereupon she married her affinity. The decree was void for defective service, but the wife was barred from her former husband's estate. The court would not aid one who "accepts and claims the fruits of a void judgment". In *Mohler v. Shanks*,³⁶ the divorced and remarried wife of an insane husband could not challenge a divorce obtained for the insane ward by his guardian although the same was said to be void, since she had "claimed the fruits" of the "decree" by her remarriage. Similarly in *Bourne v. Simpson*,³⁷ although a divorce against an infant was not binding against her, her acceptance of property under the decree and her remarriage did bar her from her first husband's estate. Here, however, the decree was voidable and not void. In *Richeson v. Simons*,³⁸ a legislative divorce, though unconstitutional in Missouri at the time,³⁹ could not be denied after a lapse of years by the divorced husband who had remarried in the meantime. In several of these cases the jurisdictional defect was a want of jurisdiction over the person, in which event the result may clearly rest upon the doctrine of estoppel, in the strict sense. Where the defect goes to the subject matter, the problem is obviously more difficult from a theoretical viewpoint by reason of the dogma that such jurisdiction cannot be extended or enlarged by act or consent of the parties. Most of the cases ignore the distinction.

Different Forum

Where the divorce was decreed at the domicile of both parties there can be no question about jurisdiction of the subject matter

³⁴ *Supra* note 32, at 160, 63 N. W. at 486.

³⁵ 15 Colo. 147, 25 Pac. 81 (1890).

³⁶ 93 Iowa 273, 61 N. W. 981 (1895).

³⁷ 48 Ky. 454 (1849).

³⁸ 42 Mo. 22 (1870).

³⁹ *State v. Fry*, 4 Mo. 120 (1835).

and thus a decree can be attacked only on the grounds of want of jurisdiction of the parties or a want of the jurisdiction of the particular court which rendered the decree. In either case, the grounds upon which the decree could be collaterally attacked in a foreign forum are identical with the ones that would support such an attack in the state where rendered.⁴⁰ Due process as a guarantee of jurisdiction within common law rules is the same for all states. The full faith and credit clause rule will compel no greater recognition abroad than will due process at home.

As to a direct attack, of course, such could be made only in the state which rendered the decree, and this whether the action is under a special statute or by a petition to vacate.⁴¹

DIVORCE AT DOMICILE OF NEITHER PARTY

Where Both Parties Appear

The accepted doctrine as to divorces obtained in a state which is the domicile of neither party is, of course, that they are utterly void for the reason that the court did not have jurisdiction of the subject matter.⁴² Either party may be prosecuted for bigamy upon a subsequent remarriage, for his status is unchanged by the foreign decree.⁴³ This is just as true in the jurisdiction in which the decree was rendered as it is in foreign states,⁴⁴ but where both parties appear, it is quite generally held that, as between themselves, the decree cannot be questioned.⁴⁵ This is true both as to the party obtaining the foreign decree⁴⁶ and the party against whom the decree was entered, if there was no *bona fide* defense upon the merits.⁴⁷ To be sure, the domiciliary state is not re-

⁴⁰ Except, possibly, in the *Pemberton v. Hughes* situation, *supra* note 33.

⁴¹ See *Miltimore v. Miltimore*, 40 Pa. 151 (1851).

⁴² *GOODRICH, op. cit. supra* note 5, 285.

⁴³ *Hood v. State*, 56 Ind. 263 (1877); *People v. Dawell*, 25 Mich. 247 (1872); *Van Fessen v. State*, 37 Ohio St. 317 (1881).

⁴⁴ See *De Bouchet v. Candler*, 296 Fed. 482 (N. D. Ga. 1924).

⁴⁵ *In re Ellis' Estate*, 55 Minn. 401, 56 N. W. 1056 (1893) and cases in notes following. See also *Moor v. Moor*, 63 S. W. 347 (Tex. Civ. App. 1901) where the decree in question was domestic.

⁴⁶ *Ferry v. Troy Laundry*, 238 Fed. 867 (D. Ore. 1917); *Shrady v. Shrady*, 47 Misc. 333, 95 N. Y. Supp. 991 (1905) in which defendant wife did not appear.

⁴⁷ *Loud v. Loud*, 129 Mass. 14 (1880); *Chapman v. Chapman*, 224 Mass. 427, 113 N. W. 359 (1916) in both of which subsequent acts of the parties were regarded as important.

quired to accord such effect to the foreign decree. *Andrews v. Andrews*⁴⁸ would seem to demonstrate that, but the common law of most states does accord that effect to such a decree upon one theory or another; in spite of the fact that the judgment is "void", it is effective as between the parties. Some courts put these decisions on the ground of estoppel;⁴⁹ others, arguing that there is no "strict" estoppel or "estoppel in the ordinary sense", declare the result to follow from the principle that one invoking the jurisdiction of a court will not be heard subsequently to deny the jurisdiction.⁵⁰

Thus, in *Loud v. Loud*,⁵¹ where a husband who had been married and domiciled in Massachusetts left his wife and obtained a divorce in Maine, the wife appearing and the husband remarrying afterward, it was held that the wife could not subsequently dispute the validity of the Maine decree in an action for divorce based upon the cohabitation incident to the second marriage. Said the court:

"The conclusive answer to this libel is, that the wife not only appeared in the suit brought by the husband, but that she afterwards executed a release, reciting the divorce therein obtained by him, and for a pecuniary consideration discharging all her claims upon him or his estate. Having done this, she cannot treat his subsequent marriage and cohabitation with another woman as a violation of his marital obligation to herself. The defence is allowed, not upon the ground of strict estoppel, but because her conduct amounts to a connivance at, or acquiescence in, his subsequent marriage."⁵²

⁴⁸ 188 U. S. 14, 23 Sup. Ct. 237 (1902) holding that Massachusetts need not recognize for purposes of administration, the wife of a deceased who had been divorced from his prior wife in a state in which neither party had been domiciled, although both parties had appeared in that action. The doctrine of estoppel and many of the cases here considered were urged upon the Supreme Court by counsel. See abstract of briefs, 188 U. S. 14, 20-21. The doctrine was urged in the state courts but expressly repudiated on the ground that the local statute forbidding any effect to such decrees covered the case. See *Andrews v. Andrews*, 176 Mass. 92, 95, 57 N. E. 333, 335 (1900).

⁴⁹ *Ferry v. Troy Laundry*, *supra* note 46.

⁵⁰ *Starbuck v. Starbuck*, 173 N. Y. 503, 66 N. E. 193 (1903); *Cf. Re Swales' Estates*, 60 App. Div. 599, 70 N. Y. Supp. 220 (1901).

⁵¹ *Supra* note 47.

⁵² *Ibid.* at 18.

If there were no doctrinal difficulties to prevent one from being estopped to deny the jurisdiction of the court over the subject matter, it would be difficult to find a stronger case of strict estoppel. There are the inconsistent positions of the wife; prejudicial reliance by the husband in the pecuniary consideration and subsequent marriage; an innocent third party misled by the wife's action; inducement as to both the husband and the innocent third party. However, in other cases, where there has been no remarriage by either party, it may well be that a "strict" estoppel is not present. In any event, the courts are uncertain as to the precise grounds, although they usually refuse to permit the parties to deny the validity of the divorce.

This has been held, even in favor of third persons. In *Bledsoe v. Seaman*⁵³ the husband and wife were domiciled in Kansas. The husband started a divorce action in South Dakota to which the wife answered and obtained a decree on her cross action. In a subsequent action in Kansas for the alienation of her husband's affections, based on acts done after the foreign decree, the South Dakota divorce was held a good defense. The court was uncertain as to the appropriate doctrine, repeating the language used in previous cases:

"While the rule applied in this case does not rest upon the doctrine of estoppel as that term is ordinarily understood, yet there are some facts present which indicate that an ordinary estoppel might be applied. The plaintiff complains of the defendant for having alienated the affections of her husband. Her right to recover for the acts complained of which occurred before the divorce was granted, has been long since barred by the statute of limitations. When the plaintiff procured the divorce, the defendant, having knowledge thereof, had a right to assume that the plaintiff no longer had or claimed any rights to the affections or society of her former husband, and that any relations which she might assume with him thereafter would not in any way infringe upon the rights of the plaintiff."⁵⁴

⁵³ 77 Kan. 679, 95 Pac. 576 (1908).

⁵⁴ *Ibid.* at 687, 95 Pac. at 579.

It is to be noted here that the wife had procured the divorce. *Quære*: would the result have been different had the husband obtained it, the wife having appeared and having contested the action in good faith?

Some courts, however, have declined to recognize the doctrine in any form. They deny any effect whatever to a void decree, either upon the ground of estoppel or the doctrine that one who invokes the jurisdiction of the court cannot thereafter deny it. This result has been reached both where the party who obtained the divorce sought to repudiate it by filing another divorce action⁵⁵ or in a collateral proceeding.⁵⁶ The result was given additional support in one case by the theory that the party asserting the estoppel was in no better position, so far as the fraud upon the court was concerned, than the party sought to be estopped, and it was thought that before a party could maintain a right by estoppel, he must be in a position to assert that right.⁵⁷ In other cases, where no remarriage has taken place, the result is reached by a failure to find the necessary elements of estoppel.⁵⁸ These cases, however, are in the minority, and in Massachusetts may be partly explained by the local statute.

The general principle which complicates the doctrines in the cases is the proposition that one is not estopped from denying the jurisdiction of a court over the subject matter of an action, even though he has formerly taken an inconsistent position.⁵⁹ Where

⁵⁵ *Smith v. Smith*, 13 Gray 209 (Mass. 1859).

⁵⁶ *Hardy v. Smith*, 136 Mass. 328 (1884). The Massachusetts statute is supposed to require this result. See Holmes, C. J., in *Andrews v. Andrews*, *supra* note 48. This may account for the apparent conflict in some of the Massachusetts cases. The Loud case, *supra* note 47, is supposed to be distinguishable by the fact that it was an action for divorce based on the alleged adultery of the second marriage, instead of an action for dower. See opinion of Holmes, C. J., 176 Mass. 92, 95, 57 N. E. 333, 335.

⁵⁷ *Hardy v. Smith*, *supra* note 56, in which the parties were domiciled in Massachusetts and the wife swore to and signed a petition, procured by collusion, and acknowledgment of service upon her husband, and prepared evidence by deposition. These papers were forwarded to Utah where they were presented to the court which rendered the decree. Neither party had ever lived in Utah. The husband was permitted to claim a distributive share in the wife's property.

⁵⁸ See *Todd v. Kerr*, 42 Barb. 317 (N. Y. 1864), in which the court indulged in considerable dubious language: "Besides every estoppel must be reciprocal and binding on both parties. . . . And it is another principle of that law of estoppel, that one who is not bound by it cannot claim the advantage of it."

⁵⁹ *Grubb v. Public Utilities Commission*, 281 U. S. 470, 50 Sup. Ct. 374 (1930).

neither party is domiciled in the state in which the decree is rendered, there is a failure of jurisdiction over the subject matter and it is a plausible argument that neither would ever be estopped from subsequently attacking the decree. With this principle in view some courts hold the parties bound upon a third theory, namely, that since a divorce decree has two aspects, being both an adjudication of the status of the parties *inter se*, and also a determination of their legal status relative to the state, the decree may be valid as to the one and void as to the other. The argument is rather elaborately developed in some cases. Thus in *In re Ellis' Estate* ⁶⁰ it was said:

“It may seem anomalous that a judgment of divorce can be so far effectual between the parties as to extinguish all rights of property dependent on the marriage relation, without being effectual to protect them from accountability to the state for their subsequent acts. One reason why they ought not to be permitted, by going into another State and procuring a divorce, to escape accountability to the laws of their State, is that their act is a fraud upon the State, and an attempt to evade its laws, to which it in no wise consents, and it may therefore complain. But the parties do consent, and why should they be heard to complain of the consequences to them of what they have done?” ⁶¹

On the other hand, courts have refused to accord any effect to such a decree for divorce, although it is conceded that divorce does more than merely determine the “contractual” rights of the parties. The Massachusetts court has said:

“If this were a mere private action, or suit in which the personal rights of the parties alone were concerned, there would be strong reason for applying the doctrine of estoppel, to the act of the husband, in resisting the present motion of the wife. But a suit for divorce is of a very different character; it is one in which the public have an interest, and in the conduct and result of which the best interests of society are concerned. . . . Marriage is undoubtedly a contract, but it is a contract sanctioned by law, controlled by consider-

⁶⁰ *Supra* note 45.

⁶¹ *Ibid.* at 413, 56 N. W. at 1059.

ations of public policy vital to the order and harmony of social life, and in its nature indissoluble, except by violations of duty on the one part, to be taken advantage of in a special manner, provided by law, on the other. Neither party can do any act, by way of release, grant, stipulation or agreement, to dissolve such contract; and yet by any of those acts one could estop himself in a matter of private right." ⁶²

The theory of the former case, it is seen, circumvents this difficulty by recognizing the validity of the foreign decree as to the personal rights under the marriage contract, but declaring it void as to the status of marriage where the interest of the state is involved. If this is the rationale employed, the doctrine of estoppel is in no way involved. The foreign court had jurisdiction, as to the contractual rights, as both parties were before it. Hence, the decree is binding upon them by elementary principles of the doctrine of *res adjudicata*. The result follows logically as soon as it is conceded that the divorce decree need not necessarily be void, so far as personal rights are concerned, merely because it is impotent to determine status.

A similar, but more satisfactory theory is available by distinguishing between the status of matrimony itself, and the personal rights *incident* thereto. When it is recognized that marriage, as a status, involves various incidents which may be affected in many ways other than by divorce, there appears little difficulty about the present problem. The decree may effectually adjudicate the incidents of the status without being effectual to terminate it. There is high authority for this doctrine:

"The interests involved in divorce are of two kinds: the interest of the State and the interest of each party in the other. The States interested are the States in which the parties are domiciled, and either should have power to grant the divorce. But the interest of the defendant spouse in the other should be divested only by a State which has jurisdiction over him or a State to which he has submitted his interest." ⁶³

⁶² *Smith v. Smith*, *supra* note 55, at 210. The result in the Massachusetts cases may be explained by the local statute (See *supra* notes 48, 56).

⁶³ RESTATEMENT (tentative draft No. 2, 1926) § 118, special note III.

It is upon this theory that it is urged that one spouse cannot wrongfully acquire a new and separate domicile and procure a valid divorce unless the court rendering the decree has jurisdiction of the defendant's person.⁶⁴ It is true that here the divorce is void in entirety, but this may well result from the impossibility of terminating the status and at the same time preserving the incidents thereto in the absence of a statute.⁶⁵ It does not follow that the incidents may not be abolished, but the status retained. In fact this is not uncommon in the Conflict of Laws pertaining to status. A status may be recognized as created by the proper personal law of the parties, although the incidents thereof are ignored because of the current notion of justice or policy at the forum.⁶⁶ So, in our present problem, public policy may demand that the status remain according to the proper personal law of the parties, although the rights ordinarily incident thereto be effectually terminated by any court having jurisdiction of the parties.

In the discussion of *ex parte* divorces, the argument of the American Law Institute proceeds in this manner :

"Two interests are involved in the granting of a divorce ; that of the state of the domicil in the existence of the status and that of the defendant spouse in the plaintiff spouse. Since the result of the action is to deprive the defendant spouse of his interest in the other spouse, the court must in some way acquire jurisdiction over that interest."⁶⁷

The doctrine now advanced is that a court obtains jurisdiction of the respective interests of both spouses when they appear, and having obtained jurisdiction over those interests, it may adjudicate them, although it may not thus acquire jurisdiction over the status and consequently adjudicate that.

There are analogies to support this result and its doctrinal implications. A result much the converse occurs in the ordinary action *quasi in rem*, upon attachment proceedings in an action against a non-appearing, non-resident defendant after service by

⁶⁴ *Ibid.* comment (b).

⁶⁵ This is what happens under statutes preserving dower after divorce.

⁶⁶ *Polydore v. Prince*, Fed. Cas. No. 11,257 (D. Me. 1837).

⁶⁷ RESTATEMENT, § 119, comment (a).

publication. The judgment is void as a personal judgment, but valid as determining the rights of the parties in the *res*.⁶⁸ Better still is the analogy when a court, with the parties before it, adjudicates their respective rights in foreign realty and decrees that one party execute a conveyance to the other. The decree is recognized by the situs of the *res* as an effectual adjudication as to the respective personal rights of the parties therein,⁶⁹ although it does not directly affect the *res*.

There is ample ground in the cases to make the application of this doctrine plausible. In *In re Ellis' Estate*⁷⁰ Chief Justice Gilfilian observed that:

"A judgment operating on a *res* may be binding between the parties to the action without binding one not a party, but interested in the *res*. In an action for divorce the *res* upon which the judgment operates is the *status* of the parties. There are three parties interested in that,—the husband, the wife, and the State of their residence."⁷¹

Later in the same case, he remarked that:

". . . while the State cannot be bound by its resident citizens appearing in and consenting to the jurisdiction of a court in another State in an action for divorce, the parties may so bind themselves in respect to their individual interests."⁷²

If this theory is sound and such judgments are valid as personal judgments on the grounds that the court actually has jurisdiction of the parties, it follows that they are binding everywhere and the Constitution of the United States will guarantee their full faith and credit to such extent. The contrary, however, has been held by the Supreme Court, although the present view was not pressed or presented to the Court.⁷³

Still other theories, as yet unexploited, may be available for these cases. Where both parties appear before a court in a state

⁶⁸ *Pennoyer v. Neff*, 95 U. S. 714 (1877). Cf. RESTATEMENT, § 119, comment (f).

⁶⁹ *Burnley v. Stevenson*, 24 Ohio St. 474 (1873).

⁷⁰ *Supra* note 45, at 411, 56 N. W. at 1059.

⁷¹ Cf. *Cooley, J.*, in *People v. Dawell*, 25 Mich. 247 (1872).

⁷² At 412, 56 N. W. at 1059.

⁷³ See *Andrews v. Andrews*, *supra* note 48.

not the domicile of either, it may be argued that the decree of the court, though ineffectual to terminate the marital status, nevertheless embodies the terms and conditions of a contract entered into between the parties by which their personal rights are determined. It might well be found that there is here a contract implied in fact, to which both parties have assented. Such a contract, if expressed, would be valid and enforceable everywhere;⁷⁴ and it is difficult to see how it is the less valid because the assent is implied from submission to the court or from subsequent conduct. Consideration is present, since the release from marital and property obligations is mutual. Such grounds would satisfactorily solve the particular problem presented by this class of cases.

Again, the foreign decree might be regarded as a "contract of record" in itself, as to which there is some judicial recognition.⁷⁵ It is not an illogical extension of the "debt of record", supporting an action *ex contractu*, jurisdiction for which is present when the parties are before the court.⁷⁶

Where Defendant Does Not Appear

Where, however, the divorce is obtained in a state in which neither party was domiciled and the absent defendant fails or refuses to appear, such defendant is not ordinarily prevented from subsequently denying the validity of the decree⁷⁷ unless he remarries⁷⁸ or is barred by an estoppel of record.⁷⁹ The person

⁷⁴ *Polson v. Stewart*, 167 Mass. 211, 45 N. E. 737 (1897); *Winter v. Winter*, 191 N. Y. 462, 84 N. E. 382 (1908).

⁷⁵ Cf. *Matson v. Matson*, 186 Iowa 607, 173 N. W. 127 (1919).

⁷⁶ *Spilde v. Johnson*, 132 Iowa 484, 109 N. W. 1023 (1906). *Contra*: *Berkson v. Cox*, 73 Miss. 339, 18 So. 934 (1895).

⁷⁷ *Sammons v. Pike*, 108 Minn. 291, 122 N. W. 168 (1909) (husband procured a divorce in Dakota which was the residence [domicile] of neither party. Neither party remarried. On rehearing, the court called special attention to the fact that the rights or status of no innocent third party were involved); *Field v. Field*, 215 Ill. 496, 74 N. E. 443 (1905); *Beeman v. Kitzman*, 124 Iowa 86, 99 N. W. 17 (1904).

⁷⁸ *Bruguiere v. Bruguiere*, 172 Cal. 199, 155 Pac. 988 (1916). In *Appeal of Richardson*, 132 Pa. 292, 19 Atl. 82 (1880), both parties had remarried.

⁷⁹ *Hood v. Hood*, 110 Mass. 463 (1872), where the husband procured a decree in Illinois and the wife subsequently sued for divorce in Massachusetts and still later for dower in the husband's Massachusetts land. In the dower action the wife sought to impeach the Illinois decree on the ground that neither party had been domiciled in Illinois at the time. It was held that the failure of

obtaining the decree cannot attack it, however, even though he has remarried.⁸⁰ Mere lapse of time will not prevent the absent, non-appearing spouse from denying the validity of the divorce. In one case where the husband had procured the divorce, the wife successfully claimed her share in his property six years later,⁸¹ while in another similar situation sixteen years had elapsed and the husband had remarried.⁸² These cases are to be distinguished from those where the divorce decree was obtained at the domicile of both parties, but by reason of fraud is voidable. Under such circumstances, delay of the one who has a right to avoid the decree until some innocent third party is involved, may very well induce a court of equity to refuse to exercise jurisdiction for laches.⁸³

It may seem illogical to prevent a non-appearing defendant in a foreign divorce to deny the same when he or she has remarried, but to allow such denial when the other spouse has remarried, as a third person is injured quite as much in the one instance as in the other. The spouse's situation, however, is distinctly different. Where such spouse has remarried, it is a deliberate deception of the third party, for such third party is induced thereby to assume the validity of the foreign divorce. But where the spouse who is at fault is allowed to defeat the absent, non-appearing spouse's right to dispute the foreign decree by a hasty remarriage, it permits such spouse to accomplish by two wrongs what he could not accomplish by the first one, and would obviously put a premium upon his second marriage.

Some Unsatisfactory Cases

In *Gould v. Gould*⁸⁴ the doctrine that one who submits to the jurisdiction of a court cannot later deny it, or the doctrine that a

the wife to obtain a divorce in her Massachusetts action was conclusive as to the validity of the Illinois decree. It was not shown that the jurisdictional question was raised in the Massachusetts case, but it might have been, since the husband pleaded his Illinois decree in defense. *Cf.* cases cited *supra* note 31.

⁸⁰ *Re Swales' Estates*; *Starbuck v. Starbuck*, both *supra* note 50. *Contra*: *McCreary v. Davis*, 44 S. C. 195, 22 S. E. 178 (1898).

⁸¹ *Sammons v. Pike*, *supra* note 77.

⁸² *Field v. Field*, *supra* note 77.

⁸³ See *Evans v. Woodsworth*, 213 Ill. 404, 72 N. W. 1082 (1904).

⁸⁴ 235 N. Y. 14, 138 N. E. 490 (1923).

court having jurisdiction of the parties has jurisdiction to adjudicate their personal interests in each other and the personal rights incident to the status of matrimony might well have been employed. As it stands, the case is authority for a very doubtful proposition, and one that has no support whatever in authority or doctrine. The parties were domiciled in New York; they both appeared in a French court which rendered a decree in favor of the husband, and later the wife sued for divorce in New York. It was held that the French decree was binding. Although the opinion in the Court of Appeals is ambiguous, the Appellate Division found that the French Court had jurisdiction to divorce the parties because it was the place where they had lived for a number of years as man and wife. Quoting from the opinion of the Appellate Division:

“While it is true that a man can have but one domicile, it does not necessarily follow that the husband and wife may not establish a matrimonial domicile different from that of the husband.”⁸⁵

This novel opinion seems to impute jurisdiction to divorce in the state of the “matrimonial domicile” that is “different from that of the husband.”⁸⁶ As is shown, such reasoning is quite uncalled for to rationalize the result.

In other cases, the doctrines herein developed might have been employed to arrive at appropriate results, rather than reliance upon clearly erroneous reasoning. In *Monroe Co. Bank v. Yeoman*,⁸⁷ it was held that a wife who had been domiciled in New York and who had obtained a divorce in Ohio upon grounds not recognized in New York, without personal service upon her husband, was barred from dower in his lands. The court apparently regarded the marital relationship as terminated. This was, of course, not true. Ohio, not being the domicile of either party, could not render a valid decree. Had the wife the capacity and had she actually obtained a separate domicile there, the decree should be recognized by New York. In any event, under the New

⁸⁵ 201 App. Div. 670, 673, 194 N. Y. Supp. 745, 747 (1922).

⁸⁶ But see the appraisal of the case in (1923) 36 HARV. L. REV. 880.

⁸⁷ 119 Misc. 226, 195 N. Y. Supp. 531 (1922).

York law, a divorce for reasons other than the wife's misconduct⁸⁸ will not bar her dower,⁸⁹ except as to property acquired after the divorce.⁹⁰ Consequently, it has been argued that the wife's action in procuring the Ohio divorce was such "misconduct" as to bar her dower.⁹¹ This is unsatisfactory for several reasons: in the first place, "misconduct" under this statute means adultery only;⁹² secondly, it obviously contemplates "misconduct" of the wife as grounds for a divorce procured by the husband, and could not apply where the wife obtained the decree; finally, the argument concedes that the divorce was valid when it was not. And yet the case is quite correct in its result. The statute expressly preserving dower upon divorce, in derogation of the common law,⁹³ contemplates a valid divorce. In this case there was none, yet she could not deny the jurisdiction of the Ohio court to adjudicate her personal rights upon principles considered herein. Thus she could not claim dower as the widow of her husband nor could she invoke a statute preserving dower to spouses validly divorced. Accordingly, she had no basis upon which to predicate a claim to a share in his property.⁹⁴

⁸⁸ N. Y. ANN. CONS. LAWS (Cum. Supp. 1924) c. 51, §§ 190, 196.

⁸⁹ *Van Blaricum v. Larson*, 205 N. Y. 355, 98 N. E. 488 (1912).

⁹⁰ *Starbuck v. Starbuck*, *supra* note 50.

⁹¹ See (1923) 36 HARV. L. REV. 345.

⁹² See *Van Cleaf v. Burns*, 133 N. Y. 540, 30 N. E. 661 (1892). This was recognized in (1923) 36 HARV. L. REV. 345.

⁹³ At common law, a divorce terminates all dower interests. *Barrett v. Failing*, 111 U. S. 523, 4 Sup. Ct. 598 (1884).

⁹⁴ In (1923) 23 COL. L. REV. 188 it is suggested that, the Ohio decree being void, the wife's subsequent remarriage afforded her New York husband grounds, recognized in New York, and such as to forfeit dower under the statute. The note also suggests that the result obtained is contrary to that in the *Van Blaricum* case, *supra* note 89, and the "quasi estoppel" theory repudiated therein. This is not true, for in the *Van Blaricum* case, the New York court conceded that the wife had been properly domiciled in the foreign state when she obtained her divorce. This made the divorce valid everywhere, and the only question was whether it cut off her dower under the New York statute.

Somewhat similar situations were presented in *Brown v. O'Barn*, 120 Misc. 550, 199 N. Y. Supp. 824 (1923), and *Sullivan v. Sullivan*, 122 Misc. 104, 203 N. Y. Supp. 140 (1923). In the latter case, plaintiff had married defendant in violation of a decree of divorce obtained by her former husband. After marriage with defendant, plaintiff had procured a divorce in Colorado for grounds not recognized by New York law. It appeared, however, that she actually acquired a Colorado domicile. The court recognized the difficulty of denying plaintiff her bill for admeasurement of dower, but finally denied relief on the broad doctrine of clean hands. In the former, the wife had left her New York husband and obtained a divorce in Indiana for cruel and inhuman treatment. There

It might seem that one who marries a divorcee with knowledge that the divorce had been obtained in a state in which neither of the spouses had been domiciled would likewise be barred from subsequently questioning the decree. In *Bell v. Little*,⁹⁵ however, plaintiff had abandoned her husband in New York and had gone to Pennsylvania for the sole purpose of obtaining a divorce. Bell, with knowledge of these facts, went to Pennsylvania and married plaintiff there. At his death plaintiff was denied dower in his lands. The court insisted that plaintiff was still the wife of her first husband against whom she had successfully defended a divorce action by reason of his misconduct.⁹⁶ The Appellate Division declared that she could not claim dower in his lands since she had herself obtained the Pennsylvania decree.⁹⁷ It would seem that, as between Bell and all claiming under him, and the plaintiff, the plaintiff's rights in his property were secure although both the Pennsylvania divorce and the subsequent marriage were void. At common law, Bell would have been entitled to her property, at least as against everyone but her former husband,⁹⁸ and Bell probably could not have annulled the marriage.⁹⁹ Why should he and his heirs be allowed to dispute the validity of the marriage?¹⁰⁰

was no personal service on the husband. She was allowed to share in her husband's lands. It may have been that the circumstances under which she left her husband would entitle her to acquire a separate domicile for purposes of divorce. See RESTATEMENT, §§ 29, 30, 119 and comments. Cruel and inhuman treatment would entitle her to a limited divorce in New York, of which fact the court took particular note. Apparently both cases are satisfactory. The Appellate Division, however, reversed the Sullivan case, *supra*, on the grounds that the "clean hands" maxim had nothing to do with the wife's claim for dower under the Van Blaricum decision. *Sullivan v. Sullivan*, 209 App. Div. 910, 205 N. Y. Supp. 955 (1924).

⁹⁵ 237 N. Y. 519, 143 N. E. 726 (1923).

⁹⁶ *Kelsey v. Kelsey*, 204 App. Div. 116, 197 N. Y. Supp. 371 (1923).

⁹⁷ *Bell v. Little*, 204 App. Div. 235, 237, 197 N. Y. Supp. 674, 677 (1922).

⁹⁸ *Cropsey v. McKinney*, 30 Barb. 47 (N. Y. 1859).

⁹⁹ *Taylor v. Taylor*, 63 App. Div. 231, 71 N. Y. Supp. 411 (1901).

¹⁰⁰ *Cf. Kaufman v. Kaufman*, 177 App. Div. 162, 163 N. Y. Supp. 566 (1917), where plaintiff could not annul a marriage on the ground that defendant had a living husband when he had induced her to go to Nevada and procure a divorce on constructive service. It was conceded, however, that the wife acquired *bona fide* domicile in Nevada. Her first husband had abandoned her in New York. The Court, however, puts the decision on the ground of estoppel and unconscionable conduct by the plaintiff. The court thought that the full faith and credit clause did not require recognition of the foreign decree even though the wife were legally domiciled in the foreign state. This view, of course, is rejected by modern scholars.

DIVORCE AT DOMICILE OF ONE PARTY

Where the divorce is procured at the domicile of plaintiff only, the problem of the effect of a "void" decree may be presented if the defendant is served only by publication and does not personally appear, and the plaintiff's domicile was improper for divorce purposes, as, for example, if it was acquired under circumstances that amount in fact to desertion of the defendant spouse. In case of appearance, of course, the decree is valid for the court has jurisdiction both of persons and subject matter.¹⁰¹ There is no necessity for employing any exceptional grounds to support such a decree, although the courts sometimes do so, apparently under the impression that the decree is questionable under orthodox rules.¹⁰²

It is suggested in some of the cases¹⁰³ that there should be a distinction between a voidable decree and one that is absolutely void, the inference being that in case of the former there may be the so-called estoppel which, for some reason, cannot be applied to the latter case. Apparently the thought is that one may be estopped from avoiding a decree, thus leaving it a valid record, but where the decree is what is described as void for want of jurisdiction of party or subject matter this result cannot be obtained. Again, it is thought that there is a difference between a decree which is void for want of jurisdiction of the subject matter and a decree by a court which wanted only jurisdiction of the defendant. In the former case it is supposed to be impossible to estop the parties or either of them, although quite possible to do so in the latter situation. But if the decree is a voidable one,¹⁰⁴ it cannot

¹⁰¹ GOODRICH, *op. cit. supra* note 5, 298, n. 37. It is entitled to full faith and credit. *Cheever v. Wilson*, 9 Wall. 108 (U. S. 1869).

¹⁰² See *Lacey v. Lacey*, 38 Misc. 196, 77 N. Y. Supp. 235 (1902); *France v. France*, 79 App. Div. 291, 79 N. Y. Supp. 579 (1903) *semble*. It may be in the *France* case that neither party was domiciled in North Dakota where the decree was rendered.

¹⁰³ See note 23 L. R. A. (N. S.) 1254, 1255 (1910).

¹⁰⁴ The distinction is frequently obscured. In *Elliot v. Wohlfrom*, 55 Cal. 384 (1880), a grantee of one who had obtained a divorce in Indiana sued in ejectment a grantee of the defendant in the divorce action. The defendant wife had appeared by attorney, but the attorney was not authorized. The court thought that the decree was voidable for fraud, but not void. But since the husband had

be attacked collaterally at all. If the person originally entitled to avoid it is barred, it is, by reason of some well established doctrine of equity, such as laches, delay, *pari delicto*, etc., beyond avoidance, and in any event, the attack could only be made directly. In the case of a void decree, it may be suggested that it makes no logical difference whether the decree is void by reason of a want of jurisdiction over the parties or want of jurisdiction of the subject matter.¹⁰⁵ The entire doctrine of estoppel is a fiction and the decree is quite as void in the one case as in the other. It is precisely this type of situation that demands some exceptional doctrine.

It is somewhat difficult in many cases to determine whether the decree rendered at the alleged domicile of one party is void or not. If the domicile were the matrimonial domicile or a separate domicile acquired without fault in the plaintiff and under circumstances which would not constitute desertion, or by permission of the other spouse, the decree is valid for all purposes and will be recognized in other states.¹⁰⁶ If the domicile of the plaintiff is a separate one, not acquired under the above circumstances, the decree is, unless the defendant appears,¹⁰⁷ presumably void in the state where it was rendered, and surely so elsewhere under the

procured the fraudulent decree, neither he nor his grantees could challenge it. If the appearance by an unauthorized attorney rendered the decree voidable [Carpenter v. Oakland, 30 Cal. 440 (1866)] rather than void [Hess v. Cole, 23 N. J. L. 116 (1851)], the reason for barring the husband and those claiming under him is obviously that the matter is *res judicata* and binding upon all parties until set aside, in a direct action by the wife. Until this is done, not even the wife could collaterally dispute its validity.

¹⁰⁵ Cf. the rule of the federal courts that a litigant may "waive" the objections to jurisdiction of the federal courts on the grounds of diverse citizenship, although the same is a "jurisdictional" fact, going to jurisdiction of the subject matter. See Evers v. Watson, 156 U. S. 527, 533, 15 Sup. Ct. 430, 432 (1895).

¹⁰⁶ RESTATEMENT, § 119.

¹⁰⁷ In Nichols v. Nichols, 25 N. J. Eq. 60 (1874) the husband established his domicile in Indiana, which was not the matrimonial domicile of the parties. In a divorce action there, the wife appeared. It was held that she could not attack the decree in New Jersey four years later. The court seemed to attach significance to the delay; see also Yorston v. Yorston, 32 N. J. Eq. 495 (1880). Such reasoning is beside the point. If the husband was domiciled in Indiana (which was not questioned) and if the wife appeared (which she did), the decree was valid to all purposes in all states until set aside.

better view.¹⁰⁸ Only in such cases is it necessary to resort to the doctrines discussed here.¹⁰⁹

It is evident that this situation will arise only with respect to the husband. The wife could not acquire a legal domicile apart from him except under conditions which would render a divorce in that state valid as against the husband whether he appeared or not.¹¹⁰ The husband, however, might obtain a domicile under conditions which would not empower the courts of that state to render a divorce, valid against a non-appearing non-resident wife. Here the doctrine in question may be invoked as against the husband obtaining the decree,¹¹¹ in such a situation, will the doctrine

¹⁰⁸ See *supra* note 6.

¹⁰⁹ In *Gibson v. Gibson*, 81 Misc. 508, 143 N. Y. Supp. 37 (1913), a wife, in a suit for past maintenance allowed under a New York decree of separation, was "estopped" by reason of a subsequent absolute divorce obtained by her in another state on constructive service. Under the established rules governing a wife's separate domicile (see RESTATEMENT, § 31) the foreign decree would be valid and hence *res judicata*.

In *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761 (1893), it was said that a husband was "estopped" from objecting to a decree obtained in another state by the wife where he had conspired with her in the matter. Again, if the wife had had a *bona fide* domicile in the foreign state, the decree was valid by reason of the husband's permission to the wife to obtain a separate domicile. If the wife had no domicile there, the decree was, of course, void, and an exceptional theory is necessary to bar the husband from attacking it. Similarly in *Guggenheim v. Guggenheim*, 135 App. Div. 914, 119 N. Y. Supp. 1127 (1911), *aff'd* in 201 N. Y. 602, 95 N. E. 1129 (1911), the wife suing in New York for divorce, was barred by reason of a decree previously rendered in her favor in Illinois in an action in which her husband appeared. If she had been actually domiciled in Illinois, the decree would have been valid to all purposes and *res judicata*. In *Scheper v. Scheper*, 125 S. C. 89, 118 S. E. 178 (1923), the court assumed that the husband, after a limited divorce in North Carolina, had acquired a domicile in Georgia and obtained a divorce there. He would, however, be estopped to impeach it. Had he not been living apart from his wife by his own fault (as determined by the North Carolina decree) the Georgia decree would have been valid and no one could have impeached it collaterally. Cf. *Parmelee v. Hutchins*, *infra* note 112; *Way v. Way*, 132 S. C. 288, 128 S. E. 705 (1925) (this case does not disclose whether the foreign decree was in fact invalid or valid). It may be that in some of the cases the courts use the term "estoppel" to mean *res judicata*.

¹¹⁰ See RESTATEMENT, §§ 29, 30.

¹¹¹ Cf. *Scheper v. Scheper*, *supra* note 109; *People v. Chase*, 27 Hun. 256 (N. Y. 1882), presented a peculiar situation and one in which the court might have adopted the doctrine of these cases to excellent advantage. Defendant was prosecuted for bigamy and successfully contended that he was not guilty, as charged, because he was not "married" to either of the women named in the indictment. He was married to a third, a former wife from whom his "divorce" rendered in his favor in a former state was invalid, being an *ex parte* proceeding not recognized in New York.

ever be applied against the wife? In *Parmelee v. Hutchins*¹¹² a divorce was obtained by a husband in Illinois without personal service on the wife and under conditions which made it invalid. The Massachusetts wife, however, remarried on the strength of the foreign decree. Having treated the divorce as valid, it was held that she could not subsequently claim a widow's allowance on the death of her former husband. Here the party against whom the foreign decree was obtained was barred from disputing it. The rights of innocent third parties may well account for the decision, and it is no doubt perfectly sound.

SUMMARY

1. Where the divorce is obtained at the domicile of both parties, it will usually be a valid decree, unless jurisdiction of the local court failed for some reason to attach. If procured by fraud, the party defrauded may avoid it in a direct action, providing the petitioner satisfies the usual requirements of equity where one seeks to vacate a judgment. If the one originally entitled to avoid it remarries or waits an unreasonable time, the inconsistent conduct or laches may defeat the bill. The party guilty of the fraud is concluded by the decree. Until set aside, it is *res adjudicata*. No collateral attack can be made in another state except under circumstances that would support such an attack in the state where the decree was rendered.

2. Where the decree was rendered in a state that was, at the time, the domicile of neither party, the divorce will not terminate the marital relation, but will be effective to terminate and adjudicate the personal rights of the parties under the following circumstances: (a) where both parties appear; (b) where the non-appearing spouse consents to the decree, *i. e.* where it was procured by collusion of the parties; (c) where although but one party

¹¹² 238 Mass. 561, 131 N. E. 443 (1921). Like the case of *Scheper v. Scheper*, *supra* note 109, the husband acquired a domicile in the foreign state, under circumstances which did not accord jurisdiction there for a valid divorce. He was living apart from his wife by reason of his own fault, as judicially determined by the New York decree of separation. Hence the Illinois decree was void, yet he was prevented from asserting its invalidity, and similarly the wife, where she acquiesced in it for many years and remarried on the strength thereof.

appeared, such party subsequently seeks to repudiate the decree; (d) where, although but one party appeared, the absent party subsequently remarries.

The rationalization that will support these results is as follows:

In (a) the decree is valid and binding as to the personal rights that are incident to the marital status because the court had jurisdiction of the parties which alone is sufficient to enable it to render such a decree; or, it may be argued that since both parties appeared, the decree embodies the terms of a contract, implied in fact from the action of the parties in appearing before the court and in their subsequent conduct; or, it may be argued that, since both appeared, the decree is a "contract of record", which is binding as to the personal and property rights of the parties thereto, and subject to specific performance thereafter.

In (b) practically the same considerations are available to support the decree between the parties. If either party remarries, there are the rights of an innocent third party to be considered. The party who remarries should not be allowed to question the decree, as public policy forbids such unconscionable conduct. In no event should the party who obtained the decree be permitted to assail it.

In (c) there is a strong public policy in refusing to permit one who obtains a decree in his favor, by a fraud upon the court, subsequently to repudiate the decree regardless of whether there has been a remarriage by either party. If there has been a remarriage there is the *a fortiori* argument.

In (d) remarriage by the non-appearing spouse is the only sound ground for barring a collateral attack. Lapse of time, remarriage of the other spouse or any other conduct short of remarriage by the wronged party should be unavailing to work a quasi-stoppel. However, where the party wronged by the decree has availed himself thereof by remarriage, the decree must be regarded as final between the parties on grounds of public policy.

3. Where the decree was rendered at the domicile of the plaintiff only, it will be valid if the party retaining or acquiring the separate domicile was not guilty of desertion or if the defend-

ant appears. If the acquisition of the domicile amounted to desertion of defendant spouse, the divorce is void. Thus, only the husband could obtain a void decree at what was his but not his wife's domicile since under the present state of the law, the wife could not acquire such a domicile. If he dies, those claiming through him cannot impeach it, for public policy will not permit them to set up the invalidity of a decree obtained by his own fraud upon the courts and upon the wife, for the purpose of defeating her rights. If the absent, non-appearing, innocent wife subsequently remarries, the court will protect her second husband by barring her from impeaching the foreign divorce.