

THE STANDING OF THIRD PARTIES TO COLLATERALLY ATTACK FOREIGN DIVORCE DECREES

Introduction

The question of what effect a divorce decree rendered in one state will have in any other state is in fact an aggregate of many problems. A given decree might be binding on certain parties and not binding on others; a decree might be vulnerable if questioned in one type of proceeding but not vulnerable in another type. Many examples might be set forth to illustrate that the foreign divorce decree produces a multitude of issues. We shall consider but one aspect of the over-all problem here—the ability of third parties, those not participating in the original proceeding, to attack collaterally a divorce decree rendered in a foreign state.¹ Without an attempt being made in this note to answer the very difficult question of what constitutes jurisdiction,² it may be stated that the basis of the impeachment of its decree must be the lack of jurisdiction by the divorcing court, since if the original divorcing court possessed sufficient jurisdiction, the decree will be entitled to full faith and credit in every other state under Article IV, Section 1 of the United States Constitution.³ Conversely, if the court rendering the decree lacked jurisdiction, the decree need not be given such recognition. As the United States Supreme Court said in *Williams v. North Carolina II*,⁴ “A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had . . . jurisdiction to render the judgment.”⁵

1. A collateral attack is to be distinguished from a direct attack in that the latter is an attempt to have a decree or judgment declared void in a proceeding instituted for that specific purpose, whereas the former is an attempt to impeach the validity or binding effect of the decree as a side issue or in a proceeding instituted for some other purpose primarily.

2. The requirements said to be necessary to give a court jurisdiction of the marital *res* have not always been the same. Briefly, prior to 1942 the requisite was that the divorcing state be the matrimonial domicile. *Haddock v. Haddock*, 201 U.S. 562 (1906), whereas after 1942 it became sufficient to give the court such jurisdiction if one of the spouses be domiciled within the state and proper service be made upon the other. *Williams v. State of North Carolina*, 317 U.S. 287 (1942).

3. *Williams v. State of North Carolina*, 317 U.S. 287 (1942).

4. 325 U.S. 226 (1944). This case is frequently designated *Williams v. State of North Carolina II* to distinguish it from the first *Williams* case cited, *supra* note 3.

5. *Id.* at 229.

Whether a court has jurisdiction is of course a question which must be determined in a judicial proceeding, and it is obvious that a court in granting a divorce makes such a determination. This judicial finding may not be conclusive. A state court cannot by its own decision confer jurisdiction upon itself, although as to some parties the original finding of jurisdiction may be conclusive. The Supreme Court of the United States has said that where the issue is raised for the second time between the original parties and both of these parties appeared in the original proceedings, the finding of jurisdiction by the first court is as to them *res judicata*; another state court cannot permit them to relitigate the issue.⁶ It is possible that one who was not a party to the original proceeding might institute a judicial proceeding in a second state questioning the jurisdiction of the divorce court. This raises the question as to when a third party may collaterally attack the *jurisdiction* of the divorce court. For aught that appears in the decided case law specifically passing upon attacks by third parties, the holding of the Supreme Court in *German Savings and Loan Association v. Dormitzer*⁷ remains the law today. There the Court said, "It is too late now to deny the right collaterally to impeach a decree of divorce made in another state, by proof that the court had no jurisdiction, even where the record purports to show jurisdiction and the appearance of the other party."⁸ In view of the recent action of the Supreme Court in forbidding some original parties to relitigate the jurisdictional question, the Court might possibly today take a different attitude in applying the full faith and credit clause to third party attacks. Nevertheless, we shall disregard the question of a constitutional mandate upon the state courts to prohibit such assaults and investigate what policies the state courts themselves have adopted with regard to permitting such attacks. Therefore, our attention will be focused not on what is necessary to the existence of jurisdiction as defined by either the Supreme Court or the state courts, but rather on when and by whom the existence of that jurisdiction can be brought into question.

In considering when an attack upon jurisdiction will be per-

6. *Coe v. Coe*, 334 U.S. 378 (1947); *Sherrer v. Sherrer*, 334 U.S. 343 (1947); *Davis v. Davis*, 305 U.S. 32 (1933).

7. 192 U.S. 125 (1904).

8. *Id.* at 128. See *Williams v. State of North Carolina II*, 325 U.S. 226 (1944).

mitted, the particular status of the individual raising the jurisdictional question is the vital factor. In dealing with this problem, it will be considered under two main heads: attack by a subsequent spouse of one of the divorcees, and attack by some other third party.

ATTACK BY SECOND SPOUSES

The Doctrine of Pari Delicto

The situation in which a second spouse seeks to bring the previous divorce into question is most frequently one in which he seeks an annulment of the second marriage on the ground that the first union was never dissolved. Where the issue is raised by a second spouse, the court has squarely before it the disposition of a marital status and realizes that its decision will directly affect the intimate family relations of at least several people. Therefore a court is naturally loath to disturb these family ties which may have existed for many years by telling supposedly married people that they are not lawfully wedded and that their supposedly legitimate children are illegitimate. This situation is not simply the advancement of some property right in which the effect of the decision upon intimate relations erected on the strength of the foreign decree might not be so direct. Thus the fact that the immediate and certain result of the court's action in an annulment will always be as indicated, might well be one reason why a considerable number of courts bar the attack of a second spouse on the foreign divorce decree.

But there is an even more compelling reason why a second spouse is often estopped, for in the bulk of the cases he has been partly responsible for its procurement. This fact is not surprising, since only one aware of the circumstances under which a divorce was procured would be in a position to impeach its validity. The fact that the second spouse has been instrumental in the procurement of the decree supplies the basis upon which a court may foreclose the attack if it chooses. The estoppel, if applied, is most frequently based upon the equitable maxim of *pari delicto*—where the wrong of one party equals that of the other the defendant is in the stronger position. In the case of assistance by the second spouse in procuring the divorce, the parties would seem to be clearly in *pari delicto*. The spouse actually procuring the decree was certainly in the wrong in com-

mitting a fraud upon the foreign court, by falsely asserting his domicile; and the person with whom he later married, having aided and perhaps even financed the divorce, would appear to be equally guilty. A number of courts have applied this doctrine and thus prevented an attack by one who aided in the original divorce, married the divorcee, and later seeks an annulment by asserting the continued efficacy of the original marriage.⁹ The California District Court of Appeals has stated the essence of the doctrine in a very frank and enlightening manner, which well illustrates its applicability. In *Harlan v. Harlan* it said:¹⁰

Plaintiff herein was not technically a party to the Mexican suit [But] He as much as any other, not excepting the defendant, was responsible for the institution of the suit and obtaining the decree. His interest was to procure the result which he now seeks to nullify, after having lived with the defendant as husband and wife for over twelve years. That the sweet may have turned sour does not make it conscionable that the plaintiff should be allowed now to undo what his own hand and mind had so much to do in creating. Plaintiff therefore is not in a position to question the validity of the defendant's divorce. This is the principle of quasi-estoppel which is based on the principle that one cannot blow both hot and cold, or that one with full knowledge of the facts should not be permitted to act in a manner inconsistent with his former position to the injury of another.¹¹

Several courts have shown such enthusiastic adherence to the rule that he who is *pari delicto* shall not receive the aid of the court, that they have refused to enter into the questioning of even the notoriously void "Mexican mail order divorce."¹²

9. *Goodloe v. Hawk*, 113 F.2d 753 (D.C. Cir. 1940); *Mussey v. Mussey*, 251 Ala. 439, 37 So.2d 921 (1948); *Harlan v. Harlan*, 70 Cal. App.2d 657, 161 P.2d 490 (1945); *Margulies v. Margulies*, 109 N.J.E. 391, 157 Atl. 675 (Ch. 1931); *Hubbard v. Hubbard*, 228 N.Y. 81, 126 N.E. 508 (1920).

10. 70 Cal. App.2d 657, 661, 161 P.2d 490, 493 (1945).

11. Another reason for the application of an estoppel is the rule that one who invokes the jurisdiction of a court will not later be heard to question it. I BEALE, *THE CONFLICT OF LAW* 479 (1935). Although technically this doctrine would apply only to the person who filed his bill for divorce, it is not an objectionable extension of the rule to hold that one who has actively aided in the procurement of the decree was in fact a party to the suit and hence cannot question his own invocation of jurisdiction. Several courts have based their decision on this rule. *Oldham v. Oldham*, 174 Misc. 22, 19 N.Y.S.2d 667 (Sup. Ct. 1940); *Kaufmann v. Kaufmann*, 177 App. Div. 162, 163 N.Y. Supp. 566 (1st Dept. 1917). Most of the courts applying an estoppel have mentioned this invocation of jurisdiction rule, but have rested their decisions principally on the *pari delicto* doctrine.

12. The New Jersey courts in particular have been very consistent in

From the foregoing, it would appear that the question whether an attack by a second spouse who was partly responsible for the procurement of the divorce should ever be permitted would easily be answered in the negative. However, there is a corollary to the doctrine under discussion. The maxim is based upon the principle that to give the plaintiff the relief he seeks would run counter to public morals and defeat the good of society. Hence, the complementary rule states that the doctrine of *pari delicto* will not be applied to a situation in which its application would do more harm to the public good than if the relief were granted.¹³ Some courts have taken the position that the case of attack by a second spouse with "unclean hands" is one in which there will be more harm done in not annulling the marriage.¹⁴ Thus the issue becomes plain; the courts are not bound absolutely by a rule of law to adhere to one position or the other, asserting they must or must not permit attack. The question is squarely put to the courts: Will the interests of society be better served by permitting or prohibiting such an assault upon the validity of a foreign divorce? It is not surprising that different courts and even the same court at different times have answered the question inconsistently. There are considerations supporting either position.

In support of the decisions permitting collateral attack, it is pointed out that to decline to do so is, in effect, to sanction the defiance of the divorce laws of the domiciliary state. These laws, specifying the occasions on which a divorce may be procured, are one of the means by which the state performs its function of protecting the public morals. Thus in order for the state to perform this function it is necessary that divorces be procured by its citizens only in accordance with the divorce laws of their domicile. Since the proper protection of the public morals is vital to the general welfare, it is urged that the courts by adopting a

their refusal to hear one who is in *pari delicto*. *Tonti v. Chadwick*, 1 N.J. 531, 64 A.2d 436 (1949); *Weise v. Hughes*, 1 N.J.S. 104, 62 A.2d 695 (Sup. Ct. 1948). See *Pandelides v. Pandelides*, 182 Misc. 819, 47 N.Y.S.2d 247 (Sup. Ct. 1944) (Mail order divorce from the island of Cyprus).

13. "Although the parties are shown to be in *pari delicto* the court will grant relief to one of them if its forbearance will be productive of an offense against public morals or good conscience." *Smith v. Smith*, 72 Ohio App. 203, 217, 50 N.E.2d 889, 896 (1943).

14. *Christopher v. Christopher*, 198 Ga. 361, 31 S.E.2d 818 (1944); *Jardine v. Jardine*, 291 Ill. App. 396, 9 N.E.2d 645 (1937); *Smith v. Smith*, 72 Ohio App. 203, 50 N.E.2d 889 (1943); *Kiesenbeck v. Kiesenbeck*, 145 Ore. 82, 26 P.2d 58 (1933).

policy of estoppel would hinder the state in the performance of a function essential to the welfare of its citizens. The argument is sometimes summed up by the statement that the state is an "interested party" and that the vindication of the public policy as expressed in the divorce laws overrides any other considerations.¹⁵

Those courts which believe that the interests of society are better served by permitting a second spouse to attack a foreign divorce decree collaterally, regardless of the fact that he has "unclean hands," sometimes offer another reason for their holding. They assert that a decree rendered without jurisdiction is essentially a nullity anyway, and that it is better for all concerned that the supposed marriage relation be ended as quickly as possible.¹⁶ Their theory is that such a decree will forever be a nullity, and that the court's declaration of such fact does nothing aside from acting as an estoppel to assert the future validity of the second marriage. For this reason, it is stated to be imperative that the invalidity be recognized in order to prevent the vesting of the rights of innocent people on the relation. This is urged despite the fact that almost invariably the interests of innocent parties have arisen because, they say, these would some day be lost anyway. As one court put it, "To temporize or postpone will only delay the evil day and possibly still further add to the unhappy complications into which they [innocent parties] have been unwittingly led."¹⁷ The fallacy with this argument lies in the fact that, although the decree may be "essentially invalid," it becomes invalid in legal contemplation only when the facts rendering it such have been found in a judicial proceeding to exist, and a court has pronounced that the decree is a nullity. If no one is permitted or no one chooses to question the validity of the the divorce or marriage, it is, for all intents and purposes, valid. If the guilty are not permitted to attack, and the innocent do not choose to do so because it would

15. "But the consideration that would ordinarily be shown one wronged by the party against whom an estoppel is sought must yield to the public interest in so important a matter as the marital status of the citizens of this State." *Christopher v. Christopher*, 198 Ga. 361, 380, 31 S.E.2d 818, 828 (1944); *Risk v. Risk*, 169 Misc. 287, 7 N.Y.S.2d 418 (Sup. Ct. 1938) ("Mexican mail-order divorce"); *Kiesenbeck v. Kiesenbeck*, 145 Ore. 82, 26 P.2d 58 (1933); *Hughey v. Ray*, 207 S.C. 374, 36 S.E.2d 33 (1945).

16. *Simmons v. Simmons*, 19 F.2d 690 (D.C. Cir. 1927); *Jardine v. Jardine*, 291 Ill. App. 396, 9 N.E.2d 645 (1937).

17. *Frey v. Frey*, 59 F.2d 1046, 1048 (D.C. Cir. 1932).

be against their better interest, when are the interests of the innocent parties to be uprooted by a finding of nullity? It is, therefore, submitted that the argument of those courts holding that they are compelled to declare the invalidity begs the question—that it is but a rationalization for the decision after it has been reached upon other considerations. The “essential invalidity” argument will not operate as a bar to the application of an estoppel if other considerations dictate its propriety. Consider the action of the Court of Appeals for the District of Columbia in *Goodloe v. Hawk*.¹⁸ After reviewing the rationale of its own decisions in two previous cases in which the “essential invalidity” of the decree was held to preclude the application of an estoppel, the court stated:

We think it may now be said that the general public policy in this jurisdiction as judicially interpreted no longer prevents application in annulment actions of the laches and estoppel doctrines in determining the effect to be given such divorce decrees.¹⁹

Those courts which have found the application of an estoppel to serve better the interests of society, would appear to advance more persuasive reasons for their position. Frequently the interests of innocent parties have already arisen (such as the legitimacy of a child born to the second union) and it is clear that those not innocent should not be allowed to disturb them. As pointed out previously, in all likelihood the validity of the second marriage will never again be challenged. It has been said that the test should be one of whether the rights of innocent persons will, in each particular case, be adversely affected.²⁰ Their point of view might be summed up as, “Let what was done be done.” It is better that the guilty parties be allowed to flout the laws of the domiciliary state than that the innocent should suffer because of the undoing of the wrong.

But there is an equally compelling reason advanced in favor of the estoppel. Those courts which have declined to apply an estoppel have done so largely on the grounds that the public morals would be harmed by their doing so.²¹ Those courts applying the estoppel have felt it more to the advancement of public

18. 113 F.2d 753 (1940).

19. *Id.* at 757.

20. *Sandberg v. Sandberg*, 269 App. Div. 192, 54 N.Y.S.2d 830 (Sup. Ct. 1945).

21. See note 14 *supra*.

morals that they do so. They point out that if the second spouse enters the marital relation with the knowledge that he can at any time escape from his obligations by pointing to the invalidity of the previous divorce, he will be more likely to favor a void decree. The reasoning is well summarized in *Harlan v. Harlan*:

To hold otherwise protects neither the welfare nor the morals of society but, on the contrary, such holding is a flagrant invitation to others to circumvent the law, cohabit in unlawful state and when tired of such situation apply to the court for relief from the indicia of the marriage status.²²

The Degree of Guilt Required

We have seen that an essential to the doctrine of *pari delicto* is wrongful conduct on the part of the second spouse. What degree of guilt must there be? The necessary guilt might vary in degree from originating the entire idea of divorce and financing the undertaking (an occurrence not at all rare²³) to a mere contracting of the second marriage with knowledge of the circumstances under which the decree was obtained. The New York courts have been rather reluctant to find sufficient guilt in knowledge alone.²⁴ The New Jersey courts, on the other hand, have been quite astute to find that nothing more than knowledge of the circumstances surrounding the decree, or even something less, constitutes sufficient guilt to raise an estoppel.²⁵ The attitude of the New Jersey court, to the extent that actual knowledge

22. 70 Cal. App.2d 657, 663, 161 P.2d 490, 494 (1945).

23. See, for example: *Frey v. Frey*, 59 F.2d 1046 (D.C. Cir. 1932); *Simmons v. Simmons*, 19 F.2d 690 (D.C. Cir. 1927); *Jardine v. Jardine*, 291 Ill. App. 396, 9 N.E.2d 645 (1937); *Margulies v. Margulies*, 109 N.J.E. 391, 157 Atl. 676 (Ch. 1931); *Hubbard v. Hubbard*, 228 N.Y. 81, 126 N.E. 508 (1920); *Oldham v. Oldham*, 174 Misc. 22, 19 N.Y.S.2d 667 (Sup. Ct. 1940); *Kaufmann v. Kaufmann*, 177 App. Div. 162, 163 N.Y. Supp. 566 (1st Dept. 1917).

24. *Lefferts v. Lefferts*, 263 N.Y. 131, 188 N.E. 279 (1933); *Fischer v. Fischer*, 254 N.Y. 463, 173 N.E. 680 (1930). But see *Heller v. Heller*, 172 Misc. 875, 15 N.Y.S.2d 469 (Sup. Ct. 1939) (a more recent case stating that where the second husband learned of the decree during the marriage but continued to live with the divorcee he is estopped because, "He is not at liberty to play fast and loose with the defendant.").

25. In *Weise v. Hughes*, 1 N.J.S. 104, 62, A.2d 695 (Supt. Ct. 1948) mere knowledge was held sufficient. In *Tonti v. Chadwick*, 1 N.J. 531, 64 A.2d 436 (1949) an objective standard was established. The court said: "Inquiry would have disclosed that the decree was void; and it is but fair to presume that he refrained from inquiry because of the fear of unwelcome information. Be this as it may, the duty of inquiry was his." *Id.* at 534, 64 A.2d at 438.

is sufficient, would appear to be the more sound. Certainly, entering into the second marriage relation with knowledge that the decree is invalid is the major wrongful act that a second spouse can commit. It is this act which frequently leads to the injury of innocent parties. Such conduct as encouraging and aiding in the procurement of the divorce merely adds to what alone should be a sufficiently wrongful act. If the courts conclude that the interests of society would be better served by an estoppel, the precise degree of guilt should be a minor issue. The problem of the precise degree of guilt necessary will not arise so very often, for in the bulk of the annulment cases the party challenging the decree will have been involved in some manner prior to its procurement, and the sufficiency of the guilt will not be dwelled upon as a major issue.²⁶ In the more infrequent cases, involving no more than knowledge, another doctrine would be applicable. If a court did not feel that the guilt of the second spouse sufficiently approximated that of the divorcee to make *pari delicto* applicable, but did feel that other considerations dictated the attack should be foreclosed, the doctrine of laches might be applied.

With regard to the case in which the second spouse knew nothing of the invalidity of the divorce at the time of the second marriage, the bases for estopping him set out above would clearly not apply. The cases in which such has been the situation have been comparatively rare, and the explanation is apparent. Only one with knowledge of the facts surrounding the divorce would be aware of its vulnerability. If the second spouse had no such knowledge at the time of the second marriage, it is unlikely that he would undertake a subsequent investigation. In the few cases involving this situation, the estoppel has not been applied.²⁷

The dicta in several cases have raised an interesting possibility as to the basis on which the attack by an innocent second spouse

26. See note 24 *supra*.

27. *Davis v. Davis*, 279 N.Y. 288, 18 N.E.2d 301 (1938); *Ohlson v. Ohlson*, 54 N.Y.S.2d 900 (Sup. Ct. 1945). But unreasonable delay in bringing the action after discovery of the facts during the course of the second marriage has been held to bar the plaintiff. *Heller v. Heller*, 172 Misc. 875, 15 N.Y.S.2d 469 (Sup. Ct. 1939). Although this might conflict with the New York rule that mere knowledge is not enough to put one in *pari delicto*, the decision could be upheld on the basis of laches.

might be foreclosed.²³ The reasoning advanced in these cases was that a stranger to a decree or judgment should be allowed to impeach it only when it adversely affects an interest of his acquired prior to its rendition. A person subsequently marrying a divorcee has no such prior interest affected by the decree. If the major premise advanced by these dicta be correct, there is a sound basis upon which attack by any second spouse should be denied.²⁹ The second spouse has probably not been hurt in *any* way by the decree. It is to be presumed that it was to his advantage to have been able to secure the divorced spouse as his husband or wife. Considering the question realistically, does the husband bring his action for annulment out of a sudden horror upon the discovery that he has married a woman whose previous divorce was not valid, or does he bring it because he has suddenly discovered a manner in which to end a no longer desirable marital relation without having to show cause or shoulder the burden of alimony? In all probability the latter will be the reason. The only plausible argument showing injury to the plaintiff would be that at some future time someone else might upset the marriage by attacking the original decree and that he would then be stigmatized for having knowingly lived with a woman not validly married to him. But it is unlikely that such an action would ever be brought. The divorcee who procured the divorce is estopped by virtue of his or her action, and if the other original spouse either appeared or remarried he too will be barred.³⁰ It is possible that some other third party might collaterally attack the foreign decree. This possibility will be discussed in detail in the latter part of this article. However, it might be pointed out here that the usual third party collateral attack is brought only after the second marriage has been terminated by the death of one of the parties. Moreover, in the unusual case of an attack during the existence of the second marriage, success in such a suit would not end the marriage for all purposes. It would be res

28. *Gaylord v. Gaylord*, 45 So.2d 507 (Fla. 1950); *Margulies v. Margulies*, 109 N.J.E. 391, 157 Atl. 676 (Ch. 1931). See also *Mumma v. Mumma*, 86 Cal. App.2d 133, 194 P.2d 24 (1948) (action for damages for fraud after invalidity of decree had already been established).

29. Woodward, dealing with collateral attacks generally, states that one may impeach a foreign decree only when it affects an interest of his acquired prior to its rendition. Woodward, *Collateral Attack Upon Judgments On the Ground of Fraud* 65 U. OF PA. L. REV. 103, 126 (1916).

30. 1 BEALE, THE CONFLICT OF LAW 479 ff. See note 6 *supra*.

judicata only as to those involved in the collateral action; any additional effect of the decision in that case would have to arise from the doctrine of stare decisis. Thus on the basis of lack of sufficient injury, the attack of any second spouse should be barred. There is no decided case doing so on that ground alone, however.

The Second Spouse in the Role of a Defendant

The great majority of cases in which the second spouse has questioned the validity of the foreign divorce have been actions for annulment on his part, and thus since he is before the court in the role of plaintiff, the equity maxim as to parties in *pari delicto* has been especially apropos. But what of the more infrequent case in which the foreign decree is attacked defensively?³¹ Where the divorcee brings an action for support or alimony, the second spouse is not seeking affirmative relief, but launches his attack from a defensive position. The New York courts apparently have taken the position that an estoppel should not then be applied.³² The Supreme Court of New Jersey has likewise differentiated between the non-divorcee as a defendant and as a plaintiff. *Tonti v. Chadwick*³³ illustrates this differentiation very strikingly. The second husband of a divorcee brought an action for annulment, alleging that his wife's previous divorce was invalid. She cross-claimed for support. The court found the doctrine of *pari delicto* applicable and refused to annul the marriage. But at the same time it declined to give the affirmative relief of a support order to the wife, for in that aspect of the case the second spouse had assumed the role of a defendant. Other courts have not drawn a distinction between the offensive or defensive position of the second spouse, when considering whether an estoppel should be applied.³⁴

May it not well be asked whether the New Jersey court did

31. It has been suggested that whether a party appears in an offensive or defensive position frequently depends upon whose attorney won the race to file the necessary papers. Lenhoff, *Attack of Vulnerable Foreign Divorces: Outposts of Resistance*, 21 N.Y.U.L.Q., 457 and 959 (1946).

32. *Elmi v. Elmi*, 192 Misc. 926, 81 N.Y.S.2d 10 (Sup. Ct. 1948); *Swanston v. Swanston*, 76 N.Y.S.2d 175 (Sup. Ct. 1947); *Maloney v. Maloney*, 262 App. Div. 936, 29 N.Y.S.2d 419 (4th Dept. 1941). *But see Oldham v. Oldham*, 174 Misc. 22, 19 N.Y.S.2d 667 (Sup. Ct. 1940).

33. 1 N.J. 531, 64 A.2d 436 (1949).

34. *Gaylord v. Gaylord*, 45 So.2d 507 (Fla. 1950) (applying estoppel); *Kiesenbeck v. Kiesenbeck*, 145 Ore. 82, 26 P.2d 58 (1933) (denying estoppel).

not indirectly give the second husband affirmative relief? He is free to disregard the various marital duties with impunity so far as his wife is concerned. Thus in many respects his marriage was brought to an end, and he was in large degree allowed to achieve indirectly what he could not do directly.³⁵ The basic reason for the application of an estoppel is that, in view of all the circumstances present in a given case, the court concludes that one who has "unclean hands" should not be permitted to escape from the marital relation. The principal effect of an escape from the marriage relation is the avoidance of the obligations incident thereto. Hence, the result of a non-application of an estoppel is substantially the same whether the suit be one for annulment by the second spouse or one for support by the divorcee. Therefore, if a court really believes the interests of society are better served by not upsetting the foreign divorce it should not differentiate between the plaintiff attacker and the defendant attacker. Certainly to have people dwelling in the community who have been adjudged joined in the bonds of holy matrimony and yet are incapable of enforcing the obligations arising out of their marriage would appear against the better interests of society. Such decisions as that in *Tonti v. Chadwick* produce situations in which people are in effect "half-married and half-unmarried." The letter of the law should not be permitted to obscure its purpose.

ATTACK BY OTHER THIRD PARTIES

Collateral attack by other third parties will involve somewhat different considerations from those which obtain in the case where a second spouse is the assailant. In the case of attack by the former, the basis of the litigation is almost invariably the advancement or protection of a property right. A typical case of attack by a non-spouse third party is the situation in which an heir or devisee of the deceased spouse seeks to bar the surviving husband or wife from sharing in the estate of the decedent on the ground that no valid marriage existed between them. A

35. "The majority opinion denies his right to annul the marriage on the clean hands doctrine. As a result, the appellant, although estopped from annulling the marriage is nevertheless permitted to escape the obligation of support and maintenance. It is a peculiar and strange kind of equity which by its decree prohibits an attack upon the contract itself but abnegates the pecuniary obligation which flows from it." Justice Wachenfeld, dissenting in *Tonti v. Chadwick*, 1 N.J. 531, 538, 64 A.2d 436, 440 (1949).

second distinguishing feature is the fact that in the type of cases now under consideration, the would-be impeacher himself is very seldom chargeable with having aided or abetted the procurement of the divorce.

The general rule with regard to third party collateral attack is that such persons are free to impeach the validity of the decree. Sometimes the court will make some such statement as the following by way of introduction, and then immediately proceed to review the evidence indicating whether there was sufficient jurisdiction possessed by the divorcing court:

When a judgment recovered in one state is pleaded or presented in the courts of another state, either as a cause of action, or a defense, or as evidence, the party sought to be bound or affected by it may always impeach its validity, and escape its effect, by showing that the court that rendered it had no jurisdiction over the parties or the subject matter of the suit.³⁶

However, one exception to the stated general rule is clear. When a person sues in his capacity as executor or administrator, his standing as such does not render him a third party in the legal sense, and he will be deemed to occupy the precise legal status which his decedent occupied. If the latter was barred, so also is his representative.³⁷ Thus the personal representative of one who procured a divorce prior to his remarriage cannot question the second wife's claim in the estate of the deceased, on the ground that the deceased's prior divorce was invalid.³⁸ Nor can the personal representative of the defendant in a divorce suit who took advantage of the decree by remarrying seek to bar the second spouse's claim in the defendant's estate.³⁹ On the other hand if the decedent was in a position to attack, his personal representative in resisting claims upon the estate has not been estopped.⁴⁰

36. *In re Keen's Estate*, 77 S.W.2d 588, 590 (Tex. Civ. App. 1934).

37. "There is such a privity between a decedent and the personal representative of his estate that an estoppel arising by reason of the decedent's conduct may be asserted against his representative." *In re Brandt's Estate*, 67 Ariz. 42, 45, 190 P.2d 497, 499 (1948).

38. *Hynes v. Title Guaranty & Trust Co.*, 273 N.Y. 611, 7 N.E.2d 719 (1937).

39. *Loftis v. Dearing*, 184 Tenn. 474, 201 S.W.2d 655 (1947).

40. *Azar v. Thomas*, 206 Ga. 588, 57 S.E.2d 821 (1950); *Green v. Whately*, 158 So. 628, 123 S.E. 871 (1924).

Attack by an Heir or Devisee on His Decedent's Divorce

The advancement or protection of property rights which most frequently gives rise to an attack upon the validity of a foreign divorce is that by which the heirs or devisees of the decedent seek to bar the surviving spouse of the deceased from sharing in his estate. The basis for such action is that the marriage between the deceased and his surviving spouse was invalid. This marriage will always have been the second for at least one of the spouses. The invalidity of this second marriage may be assigned to one of two causes—that either a prior divorce of the deceased was invalid or that a prior divorce of the survivor was invalid. When the divorce brought into question is that of the decedent, he would have been estopped to question the decree. If he procured it, he would be estopped to deny the jurisdiction which he himself had invoked, and even though he was the defendant in the divorce action, he would nevertheless be barred by his remarriage on the strength of the decree.⁴¹ On the other hand, where the divorce under attack is that of the surviving spouse, we have seen that there is a division of authority as to whether the decedent would have been estopped had he possessed “unclean hands.” It has also been indicated that in the rarer situation involving no aid and no knowledge there probably would have been no estoppel raised against him.

Contrary to what one might expect, the courts have not differentiated to any extent between that situation in which the heir or devisee of the decedent attacks the divorce of the decedent and that type case in which the heir questions a divorce of the decedent's spouse. We shall consider first the former situation. The argument has frequently been advanced that, since the decedent would have been estopped to question his own divorce, his heirs⁴² claiming through him should be found in privity and the estoppel thus applied to them also. This argument has, on the whole, been rejected by the courts. The New York Court of Appeals has plainly taken the position that, though the decedent be estopped, the effect does not carry over to his heirs.

41. See note 30 *supra*.

42. In this note devisees of the deceased will be considered and discussed as his heirs, since the courts have not differentiated between the two in their opinions. This action of the courts is explained by the fact that in all the cases arising the devisee would have in the absence of a will shared in the estate as an heir.

In the leading New York case, *In Re Lindgren's Estate*,⁴³ the decedent had obtained a Florida divorce from his first wife. His first wife, bringing the action as guardian of a child by that first marriage, sought to bar the husband's second wife from administering and sharing in the estate. She was allowed to show that her divorce from her husband was invalid for want of jurisdiction in the Florida court. The Court of Appeals, after pointing out that both decedent and his first wife acting on her own behalf were estopped to question the jurisdiction of the Florida court, said:

. . . the law does not visit upon the child the disability thus imposed upon the parent. The rights which are asserted in this proceedings are not property rights to which either parent has claimed to be entitled We are dealing with matters personal to the claimant, not to the decedent or his estate. As to the child they are independent rights to which she claims to be legally entitled as the sole distributee of her father's estate. Of course, the child was not a party to the Florida divorce action and accordingly the judgment then entered was not conclusive upon her or upon the rights now asserted in her behalf.⁴⁴

The position of the New York Court was reaffirmed very recently in *In Re Johnson's Estate*.⁴⁵ In this latter case, the court concerned itself largely with the constitutional aspect of the case, showing that the full faith and credit clause did not bar such third party collateral attack, even when both spouses had appeared in the foreign divorce suit. The policy of the state itself to permit the attack went unquestioned.⁴⁶

The other cases in which the heirs sought to question the validity of their decedent's divorce in order to bar a subsequent spouse or children of the second marriage have practically all

43. 293 N.Y. 18, 55 N.E.2d 849 (1944).

44. *Id.* at 22, 55 N.E.2d at 850.

45. 301 N.Y. 13, 92 N.E.2d 44 (1950).

46. The situation in which the children of the first marriage of the decedent attack the legitimacy of those of his second marriage is analogous and governed by the same principles set forth in the foregoing cases. See *In re Thomann's Estate*, 144 Misc. 497, 258 N.Y. Supp. 838 (1932). *A fortiori*, the children of the first marriage will be allowed to attack the legitimacy of those of the second when the "legitimate children" or "lawful issue" of the deceased divorcee take by purchase in a will of someone other than the deceased himself. *In re Knowlton's Will*, 192 Misc. 1032, 81 N.Y.S.2d 752 (Surr. Ct. 1948); *Harry v. Dodge*, 66 Misc. 302, 123 N.Y. Supp. 37 (Sup. Ct. 1910); *Olmstead v. Olmstead*, 190 N.Y. 458, 83 N.E. 569 (1908). *Accord: In re Thorn's Estate*, 353 Pa. 603, 46 A.2d 258 (1946).

concurred with the New York policy.⁴⁷ The tenor of the opinions indicates that the courts regard the heirship of the attackers as a vested right existing independently of the rights of the deceased. They consider it a right to be held sacrosanct and inviolate. It is to be noted that there is little talk of the best interests of society or of the vindication of the public policy of the state, both of which are considerations characterizing the opinions in the second spouse cases. Rather the courts seem to dwell here more upon the protection of the somehow vested property rights of the individual heir. On the whole, however, it may be stated that outside of New York there are insufficient cases involving an attack upon the deceased's divorce to provide a pattern, although the tendency is certainly in favor of permitting an attack.

Attack Upon the Divorce of the Surviving Spouse

Where the attack by the heirs of the decedent goes against the divorce decree of the spouse whom he married, the courts have likewise been prone to permit collateral attack. In only a few of the cases permitting attack upon the claimant spouse's divorce is it brought out clearly that the decedent had "unclean hands" with regard to the invalid divorce.⁴⁸ Whether under such circumstances he would have been permitted to question his spouse's divorce himself would depend upon the resolution of the problems set out in the first part of this note.⁴⁹ It is worthy of attention that some of the courts which permit attack upon the decree, despite the fact that the deceased was an aider or abettor of the divorce, do so with some reservations; these courts have pointed out that they limit their decisions to the particular

47. *In re Paul's Estate*, 77 Cal. App.2d 403, 175 P.2d 284 (1946); *Adams v. Adams*, 154 Mass. 290, 28 N.E. 260 (1891); *In re Grossman's Estate*, 263 Pa. 139, 106 Atl. 86 (1919). *Cf. In re Estate of Hancock*, 156 Cal. 804, 106 Pac. 59 (1909). The value of this case may be seriously questioned, for the court said, "As that questions [estoppel of the heirs] has not been discussed . . . we deem it proper to declare that this opinion shall not be taken as establishing the law of the case thereon." *Id.* at 808, 106 Pac. at 62. (Nevertheless the case has been cited affirmatively thereafter). *Contra: Watson v. Watson*, 172 S.C. 362, 174 S.E. 33 (1934).

48. *Ainscow v. Alexander*, 39 A.2d 54 (Del. 1944); *In re Ferry's Estate*, 155 Misc. 198, 279 N.Y. Supp. 919 (Surr. Ct. 1935); *Ex parte Nimmer*, 212 S.C. 311, 47 S.E.2d 716 (1948); *In re Keen's Estate*, 77 S.W.2d 589 (Tex. Civ. App. 1934).

49. Whether the deceased would have been estopped in this type case would appear to be immaterial to those courts which decline to estop the heirs when the attack is upon the deceased's divorce.

facts before them, and thus leave the way open for future changes of heart. For example, the South Carolina court in *Ex Parte Nimmer* said:

In conclusion, we wish to emphasize that our decision is confined to the precise facts before us. . . . There are no children of the marriage upon whom the imputation of illegitimacy may be cast. We leave untouched the question of an estoppel under circumstances other than those now presented.⁵⁰

Thus the *ratio decidendi* of these cases centers on the facts peculiar to them. No other facts appearing, the interest of the heir will be protected. But by dicta, the courts indicate that should other facts appear (such as the birth of a child to the second union), facts which would indicate to the judges a case of hardship upon innocent parties, then they might well deem the public interest better served by the imposition of an estoppel.

Several cases have held that where the deceased had "unclean hands" with regard to the divorce of his spouse-later-to-be, his heirs are to be denied the privilege of questioning the divorcee's claim in his estate.⁵¹ In a case decided by the California District Court of Appeals,⁵² it was held that since the decedent was active in the procurement of the claimant's divorce, he would have been estopped and that his heirs "being in privity" with their ancestor are to be estopped also. No unusually compelling reasons for the application of an estoppel appeared, and the court offered little explanation for the result, aside from the fact that "heirs are in privity with the ancestor." What the Supreme Court of California might have done with the case is moot.⁵³ In *Kelsey v. Miller*⁵⁴ that court had a similar problem before it, and although a review of the evidence revealed the validity of the second marriage, the court did use language indicating it might have re-

50. 212 S.C. 311, 325, 47 S.E.2d 716, 722 (1948). Similarly the Delaware court said, after pointing out that both parties to the marriage were dead and there were no children to be illegitimized said, "Our decision is confined to the precise facts before us. . . . Here we have no extraneous circumstances to induce a search for reasons for applying the principle of estoppel, or any kindred principle of preclusion based on connivance or acquiescence." *Ainscow v. Alexander*, 39 A.2d 54, 61 (1944).

51. *In re Davis' Estate*, 38 Cal. App.2d 579, 101 P.2d 761 (1940); *Waldo v. Waldo*, 52 Mich. 94, 17 N.W. 710 (1883); *In re Anderson's Estate*, 121 Mont. 515, 194 P.2d 621 (1948). Cf. *Kelsey v. Miller*, 203 Cal. 61, 263 Pac. 200 (1928).

52. *In re Davis' Estate*, 38 Cal. App.2d 579, 101 P.2d 761 (1940).

53. See *In re Estate of Hancock* and comment thereon, note 47 *supra*.

54. 203 Cal. 61, 263 Pac. 200 (1928).

sorted to an estoppel if necessary.⁵⁵ Thus the decision might well embody the policy of the California courts, especially in view of the consistency with which California has applied an estoppel in other situations.⁵⁶

These decisions in which the estoppel of the deceased is carried over to his heirs are few however. Even where it is manifest that the deceased had "unclean hands," more often than not the court goes no further than discussing the possibility of an estoppel. Of course any state which has definitely adopted a policy of permitting the heirs to attack the decedent's divorce, in order to be consistent should allow an attack upon his husband's or wife's divorce, despite the fact that he aided in obtaining the decree.

The next situation to be considered is that in which the decedent was not in *pari delicto* with the divorcee. No case barring the heirs has been found where, for aught that appeared, the deceased second spouse was innocent as regards the foreign divorce.⁵⁷ In New York that result is of course to be expected.⁵⁸

55. "From a consideration of the marriage status of the persons that may be seriously affected by this proceeding, the policy of the law would require the sustaining of the judgment of the trial court if it can reasonably be done. It is not necessary for us to rely on such an exigency in this case, as the evidence and the law impels an affirmation of the judgment." *Id.* at 91, 263 Pac. 212. *But see: In re Pusey's Estate*, 177 Cal. 367, 170 Pac. 846 (1918).

56. *Brugiere v. Brugiere*, 172 Cal. 199, 155 Pac. 988 (1916); *Harlan v. Harlan*, 70 Cal. App.2d 657, 161 P.2d 490 (1945). The Montana Supreme Court also has held that where the decedent aided in the procurement of the surviving wife's divorce his heirs are estopped to challenge it. The court said it mattered little what name was assigned to the doctrine by which the decedent and his heirs were barred—call it quasi-estoppel, ratification, inconsistency of conduct or the like. Although the court spoke in terms signifying a policy of recognizing foreign divorces whenever possible the case may not indicate so very liberal a policy. For the grounds upon which the Nevada decree was procured were also available in Montana, and thus there was no real clash between the public policies of the two states. *In re Anderson's Estate*, 121 Mont. 515, 194 P.2d 621 (1948).

57. More frequently than not any guilt or lack of guilt of the decedent is not even discussed in the cases. At first blush, we might assume that in such cases, owing to the failure of the court to mention it, there was a lack of participation or knowledge on the part of the decedent. However, knowledge of the circumstances under which the divorce was obtained had to devolve upon the heirs somehow in order for them to be in a position to attack it, and the most likely source of their information was the decedent himself. Therefore, it might well be assumed that in some of the cases there was at least knowledge on the part of the decedent, but that the judge simply neglected to mention it because he considered it relatively unimportant. However, in the absence of a statement to the contrary, we must treat these cases as situations in which there was no participation by the second spouse.

58. The precedents extend well back into the nineteenth century. Brad-

The decided cases outside of New York concur in this result.⁵⁹ However, it should be pointed out that the value of each of these decisions (outside of New York) may be distinctly limited. The view that any third party may always impeach a foreign decree for lack of jurisdiction when it adversely affects him is stated as a preface to these cases. This assertion is followed by a statement that the burden of proof lies very heavily on the assailant of the decree.⁶⁰ But then in each of these cases, upon an examination of the facts, it is found that the foreign court did have jurisdiction. Thus, though the heirs were permitted to attack, the attack failed. Hence these cases cannot be said to support very strongly the proposition that an attack will be permitted, for an estoppel was not necessary to the protection of the decree. The courts in these cases were never forced into a position where they had to say definitely whether they would permit attack by the heirs in a case involving a patent defect in the jurisdiction. Perhaps, in the circumstances of these cases, an estoppel or the like was not even pleaded before them.

Thus, outside of New York, the precedents for any attack by heirs on the divorce of either the decedent or of his spouse would not appear to be absolutely binding. In a case where definite hardship would be inflicted upon innocent parties by a non-recognition of the decree, a lawyer could argue plausibly and with some hope of success for a bar upon the attack. Where an heir or devisee questions a foreign decree, the courts approach the problem with an apparently preconceived idea that he is free to make the attack. Certainly a cursory review of the precedents would give the courts that idea. Thus the task of

shaw v. Heath, 13 Wend. 487 (1835); Baker's Will, 2 Redf. Surr. (1876); *In re Kimball's Estate*, 155 N.Y. 62, 49 N.E. 331 (1898); *In re Higgins*, 65 Misc. 415, 121 N.Y. Supp. 907 (Sur. Ct. 1909); *In re Petersen's Estate*, 192 Misc. 243, 78 N.Y.S.2d 572 (Sur. Ct. 1948). In *Bell v. Little*, 204 App. Div. 235, 197 N.Y. Supp. 674 (4th Dept. 1922) the decedent clearly entered the marriage cognizant of the circumstances of the divorce, but clearly had not aided therein. The Appellate Division, with two judges dissenting, permitted an attack by his heirs.

59. *In re Pusey's Estate*, 177 Cal. 367, 170 Pac. 846 (1918); *Hobson v. Dempsey Co.*, 232 Ia. 1226, 7 N.W.2d 896 (1943); *McHenry v. Bracken*, 93 Minn. 510, 101 N.W. 960 (1908); *In re Sayle's Estate*, 80 N.E.2d 229 (Ohio App. 1948).

60. For example, "Courts very properly manifest great reluctance in setting aside decrees of divorce after a second marriage has taken place, and will not do so save upon the most satisfactory showing," *Hobson v. Dempsey Const. Co.*, 232 Ia. 1226, 1229, 7 N.W.2d 896, 898 (1943) (involving a dispute as to who was entitled to deceased's compensation insurance).

persuading the courts to adopt a new position falls upon him who contends for the preclusion of the attack but, given a proper case of hardship upon innocent parties, it might not be an impossible task. In a situation where the benefits to be derived from an upsetting of the decree would be slight when compared with the magnitude of the harm to be inflicted upon others, many courts might well say that the attack is not to be permitted.

Attack by Third Parties Other Than Heirs or Devisees

In mostly all of the foregoing attack-by-heir cases, the invasion by the decree of a sufficient interest of the heir to enable him to bring the divorce into question has been assumed.⁶¹ In each of these cases the heir claimed property rights in an estate which was ready for distribution, and thus the rights were clearly ripe for enjoyment. A few cases, however, have involved attacks by children during the lifetime of their parents, and thus the children are not suing as heirs or devisees. In such cases the question of what interest of the child has been invaded becomes an important one. Ostensibly the purpose of the suit may be to insure the support of the child or to establish his legitimacy, where he was conceived prior to, but born after, the divorce.⁶² Such attacks have not met with success, as the courts have pointed out that there is some other method by which the relief desired may be obtained, and that no vital interest of the child has been put in jeopardy.⁶³ The courts have probably real-

61. See, however, the suggestion *In re Driscoll's Will*, 194 Misc. 711, 714, 86 N.Y.S.2d 742, 745 (Sup. Ct. 1949). There the guardian of a child by the first marriage of his father sought to bar the children of his father's second marriage from a trust fund set up by his grandfather. The ground assigned was that the father's Florida divorce ending the first marriage was invalid, and that thus the children of the second marriage were illegitimate. "In effect the guardian seeks to set aside the decree for fraud. Such a result, however, may only be achieved by one whose rights have been directly invaded. The child's legitimacy being unquestioned, the divorce did not invade his rights on that score. . . . While the remarriage of his father and the birth of five additional children to him reduced the child's share in the trust fund herein from the whole to a one-sixth interest, that same result might have followed had his parents never severed their marital relationship, and the birth of other children of the union, or had his mother died and is father remarried with issue born of the second marriage."

62. *Farah v. Farah*, 196 Misc. 460, 92 N.Y.S.2d 187 (Sup. Ct. 1949); *King v. King*, 189 Misc. 288, 74 N.Y.S.2d 181 (Sup. Ct. 1947).

63. An exception is the highly unusual case of *Urquhart v. Urquhart*, 272 App. Div. 60, 69 N.Y.S.2d 57 (1st Dept. 1947). There, after the child's parents had secured a void decree they continued to have intercourse, despite of the fact that his father had remarried. Several years after the di-

ized that the true purpose of such suits was undoubtedly the setting aside of the decree for the benefit of one of the divorcees who was himself barred from questioning it.

A few scattered cases have involved attacks upon foreign decrees by grantees of real property, who found it necessary to impeach the decree in furtherance of their property rights. A long standing California case held that where the grantor of the attacker would have been estopped because he procured the fraudulent decree, his grantee was in no better position. The grantee was not permitted to bring the decree into question even though such action was necessary to the establishment of his title.⁶⁴ In *Sammons v. Pike*,⁶⁵ the Minnesota court permitted the grantee of one who had been a defendant in a foreign divorce proceeding to attack the decree. In the divorce action, the grantor had been a defendant who did not appear. This situation would indicate that the defendant-grantor himself would have been able to question the jurisdiction of the foreign court. However, the opponent of the grantee in the ejectment suit urged that since the grantor, although aware of the divorce, spent some seven years without attacking, she would have been barred by laches and her grantee could be in no better position. The court seemed to assume that the grantee stood in the shoes of his grantor, but did not accept the contention of the grantee's opponent that the grantor would have been barred. It is significant to note that the court took pains to point out that it was limiting its decision to the particular facts before it. It said there would be no laches allowed since there were no interests of innocent parties to be adversely affected by a finding that the decree was void. It intimated that if there were children who would be illegitimized or other hardships of that nature worked, the court might then subordinate the property right of the plaintiff to the interest of innocent parties. In other cases the attacker's grantor probably would not have been estopped. There the sole question was whether a grantee of real property should be allowed to relitigate the question of jurisdiction, and

orce, the plaintiff was conceived as a result of this supposedly extra-marital intercourse. He was permitted to show the foreign decree was void in an action for a declaratory judgment that he was legitimate.

64. *Elliot v. Wohlfrom*, 55 Cal. 384 (1880).

65. 108 Minn. 291, 120 N.W. 540 (1909).

the grantee was allowed to do so.⁶⁶ Thus the few grantee cases on record hold as one might expect. There is such a privity between grantor and grantee, that an estoppel of the former will bind his grantee. If the grantor were free to attack, there is no basis on which to estop his grantee, and his property right does provide a sufficient interest to justify the attack.

We have seen that the almost universal basis upon which an attack is barred is some faulty conduct on the part of the attacker or someone through whom he claims.⁶⁷ That this is the most consistent rationale of the cases is borne out by the decisions in those situations where the attack is made by someone to whom no faulty conduct can be ascribed, and who clearly can not conceivably be found in privity with any guilty person. Such cases have unanimously allowed a collateral attack. For example, in one instance the plaintiff, a vendor, sued a husband in quasi-contract for essentials furnished his wife. The husband pleaded as a defence a foreign divorce which he had previously procured from his wife, but the plaintiff was allowed to show that the decree was void.⁶⁸ Similarly, a federal court allowed a defendant in a suit for workman's compensation by a supposed widow to show that she was really not the widow of the deceased. This fact was established by the defendant's proving the invalidity of a divorce granted the plaintiff from a previous husband.⁶⁹ The other cases in which the third party is one who could not possibly be deemed in privity with anyone who would be estopped are in accord.⁷⁰ They import the idea that there is no basis upon which the attack might be foreclosed, provided the third party shows a sufficient harm to his interest so as to justify his attack upon the decree.

66. *Ross v. Beale*, 215 S.W.2d 285 (Tex. Civ. App. 1948); *Blondin v. Brooks*, 83 Vt. 472, 76 Alt. 184 (1910).

67. It is possible that fault is not actually the basic reason in all such cases, but rather merely provides the occasion on which the judges may justifiably prevent the collateral impeachment of a divorce issue apparently once settled. But at any rate, faulty conduct on the part of someone is the most generally assigned reason.

68. *Lorrick v. Walters*, 39 Ohio App. 363, 177 N.E. 642 (1930).

69. *Sherman v. Federal Security Agency*, 166 F.2d 451 (3rd Cir. 1948). *Accord: MacArthur v. Industrial Accident Commission*, 20 P.2d 70 (Cal. App. 1933).

70. *Meade v. Mueller*, 139 N.J.E. 491, 52 A.2d 157 (Ch. 1947); *Wick v. Dawson*, 48 W. Va. 469, 37 S.E. 639 (1900).

Conclusion

This note has approached the problem of attack upon foreign divorces from the standpoint of the status of the individual questioning the decree. The problem has perhaps been oversimplified here—after all, the preclusion or non-preclusion of the attack upon a foreign decree is simply another way of carrying out the state's policy with regard to the recognition of foreign divorces. Many other factors undoubtedly influence the decision. Among them are: the similarity of the causes available in the divorcing state and the second state, just how close the divorcees did come to meeting the jurisdictional requirements, the degree of hardship that will be inflicted on other persons, etc. But the primary determinant and certainly the first problem to be considered is the status of the party seeking to bring the decree into question. The rationale of the cases is largely that fault, whether it be on the part of the attacker or imputed to him from another, will (if anything is to do so) evoke an estoppel. This is the bare reasoning advanced by the courts. Whether it provides the occasion rather than the reason might well be considered.

Should not the real question be whether third parties, in *any* case, have a standing to attack the decree? Have these parties really been hurt by the divorce? Certainly no right existing at the time of its rendition was adversely affected. It is only later that the course of events reveals that it would be advantageous to attack the decree. Might the decree not be taken as one of the many events of life which later prove to have a disadvantageous effect upon an individual, events which one can do nothing about?⁷¹

It is submitted that a third party really should have no standing to attack a foreign divorce decree. Only incidentally has he been affected by it, and he is affected by the happening of many past events of which he cannot later complain. Why not treat the marriage relation as a concern solely of the parties thereto, and let the state enforce its own public policy by means of bigamy prosecutions, support orders, and the like?

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71. See note 62 *supra*.