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ATTACK ON DECREES OF DIVORCE BY SECOND SPOUSES¹

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This paper deals with attack on decrees of divorce by second spouses, a problem of considerable importance. Some 200,000 divorces are issued in the United States each year.² Many of the 400,000 persons involved, about one-third,³ relying upon the validity of the divorce, purport to marry again. A marriage contracted during the lifetime of a spouse from whom there has been no effective marital dissolution is void, a mere nullity.⁴ In general it has no civil effects, notwithstanding the good faith of the contracting parties.⁵ A second spouse, in theory, therefore, would be entitled to a decree of nullity.⁶ He could not be called upon to perform any of the marital obligations. Our problem then is to consider the extent to which a second spouse can show that the divorce purporting to dissolve the prior marital status of the person whom he has subsequently married was for some reason defective. Is he in a position thus to attack the decree and in what ways?

In our typical situation *B* procures a divorce from her husband, *A*, and marries *C*. The decree has not been questioned by *B*. Nor could it be under normal circumstances.⁷ Neither has *A* attacked the divorce, though in some instances he is in a position to do so effectively.⁸ At a

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¹ While this subject has been briefly dealt with, Jacobs, *Attack on Decrees of Divorce* (1936) 34 MICH. L. REV. 959, it seemed to merit further consideration.

² Since 1870 the annual divorce rate in the United States in proportion to married couples has increased some four and one half fold. Except for depression years the rate of rise has galloped along at a continuous pace. 1929 witnessed the peak of the trade—201,468 decrees—1.66 per thousand population, or 16.3 for every hundred marriages during the year. The ensuing financial collapse reduced this number to 160,338 in 1932—1.28 per thousand population, but still 16.3 per hundred marriages. Unfortunately 1932 is the last year for which the official figures of the Bureau of Census are available. United States Department of Commerce, Bureau of Census, *Eleventh Annual Report on Marriage and Divorce* (1934). Again the business is picking up. Unofficial estimates place the 1935 divorces at 216,000.

³ 1 RECENT SOCIAL TRENDS IN THE UNITED STATES (1933), 696; CAHEN, STATISTICAL ANALYSIS OF AMERICAN DIVORCE (1932), 98 *et seq.*; WILLCOX, ENC. BRIT. (11th ed. 1910) on *Divorce*; Llewellyn, *Behind the Law of Divorce* (1933) 33 COL. L. REV. 249 at 274. Compare, however, RUBINOW, SOME STATISTICAL ASPECTS OF MARRIAGE AND DIVORCE (1936), 26 *et seq.*, where remarriage among divorced persons is placed much higher.

⁴ D. C. CODE (1929) ti. 14, §1; N. Y. DOMESTIC RELATIONS LAW, §6; N. C. CODE ANN. (Michie, 1935) §2494.

⁵ See, however, LA. CIV. CODE ANN. (Dart, 1932) arts. 117, 118, in regard to the situation where one or both spouses contract such marriage in good faith.

⁶ N. Y. CIV. PRACTICE ACT (Cahill, 1931) §1134.

⁷ See Jacobs, *Attack on Decrees of Divorce* (1936) 34 MICH. L. REV. 749 at 760-778.

⁸ See Jacobs, *supra* note 7, at 778-808.

subsequent date *C* seeks to impeach the decree either in the state of the divorce or elsewhere. For clarity F-1 is here used to designate the state in which the divorce was granted; F-2 a state other than that in which the decree in question was rendered. How successful will such an attack be? If for any reason the decree could be impeached by the divorce respondent, is a second spouse in a similar situation?

A. ATTACK IN F-1

1. *On Non-Jurisdictional Grounds*

Where a court has jurisdiction of the subject matter of divorce⁹ and of the parties,¹⁰ and has the statutory authorization to grant a divorce,¹¹ the resulting decree is jurisdictionally perfect. The divorce, however, may have been procured due to the fraud, duress or perjury¹² of one of the spouses, or because of their collusion.¹³ The decree may have been otherwise defective. But these defects are not available collaterally to the divorce plaintiff¹⁴ or defendant.¹⁵ The only possible remedy is a direct proceeding by the one equitably entitled. Courts, however, have been very reluctant to set aside such decrees even on direct attack. Generally the libellant has failed¹⁶ except where coercion of the defendant had been instrumental in the procurement of the decree.¹⁷ The respondent has naturally met with greater success,¹⁸ but the equitable rules dealing with the vacation of judgments apply. If the divorce party, equitably entitled, fails to attack the decree, the divorce should be conclusive.

⁹ At least one party must be domiciled within the jurisdiction of the court.

¹⁰ The court acquires jurisdiction over a plaintiff who has invoked its aid. Jurisdiction is acquired over the defendant (1) by the service of process upon him personally within the court's territorial jurisdiction, or (2) by his voluntary appearance in the suit, or (3) when he is a domiciled citizen of the state by constructive service.

¹¹ A court has no common law divorce jurisdiction.

¹² Perjury as to the ground for divorce is exceedingly common. See *Collusive and Consensual Divorce and the New York Anomaly* (1936) 36 COL. L. REV. 1121.

¹³ For an excellent discussion indicating the general prevalence of collusive divorce, see note cited, *supra* note 12.

¹⁴ *In re Limber's Estate*, 284 Pa. 346, 131 Atl. 244 (1925); *Miltemore v. Miltemore*, 40 Pa. 151 (1861); *Julier v. Julier*, 62 Ohio St. 90, 56 N. E. 661 (1900).

¹⁵ *Hamilton v. McNeill*, 150 Iowa 470, 129 N. W. 480, Ann. Cas. 1912 D 604 (1911); *Davis v. Davis*, 61 Me. 395 (1873); *Bourne v. Simpson*, 48 Ky. 454 (1849); *De Graw v. De Graw*, 7 Mo. App. 121 (1879); *cf. Daniels v. Benedict*, 50 Fed. 347 (C. C. Colo. 1892).

¹⁶ See *Jacobs, supra* note 7, at 760-765. *Barnette v. Miller*, 131 Ark. 110, 198 S. W. 873 (1917); *Hendricks v. Hendricks*, 216 Cal. 321; 14 P. (2d) 83 (1932); *Henderson v. Henderson*, 32 N. D. 520, 156 N. W. 245 (1916); *Paffen v. Paffen*, 94 N. J. Eq. 356, 120 Atl. 197 (1922).

¹⁷ *Dennis v. Harris*, 179 Iowa 121, 153 N. W. 343 (1917); *Lake v. Lake*, 124 App. Div. 89, 108 N. Y. Supp. 964 (1908); *Holt v. Holt*, 23 Okla. 639, 102 Pac. 137 (1909); *Cobb v. Cobb*, 43 S. D. 388, 179 N. W. 498 (1920).

¹⁸ See *Jacobs, supra* note 7, at 779-787.

Thus, the likelihood of an effective direct attack by one of the parties is small. The libellant's chances are almost *nil*. The respondent generally fails to have a collusive decree vacated.¹⁹ Courts are reluctant to vacate divorce decrees even where "extrinsic" fraud²⁰ exists, relying frequently upon the doctrine of laches or estoppel.²¹ In any event most divorces are friendly proceedings; few are "contested";²² the spouses, therefore, are not interested in instituting vacation proceedings. This being the situation, should a second spouse be in a position thus to question the divorce?

In general a third person, not a party to the original action, who had no standing to appeal from the rendition of the decree, in some cases is allowed to attack the judgment collaterally for non-jurisdictional fraud, duress and collusion. Freeman says, however, that

"It is only those strangers who, if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right, that are permitted to impeach the judgment."²³

The cases clearly indicate that a second spouse does not occupy such a position. His pre-existing rights have in no way been impaired.

In *Ruger v. Heckel*,²⁴ a second husband sought an annulment of his marriage to the defendant on the ground that her prior marriage was still in force. He alleged that the divorce which she had obtained from her former husband in New York had been procured by collusion, fraud and false testimony in regard to adultery.²⁵ The jurisdiction of the divorce court was clear. The decree, perfectly regular and valid on its

¹⁹ *Hubbard v. Hubbard*, 19 Colo. 13, 34 Pac. 170 (1893); *Todd v. Rhodes*, 108 Kan. 64, 193 Pac. 894 (1920); *Karren v. Karren*, 25 Utah 87, 69 Pac. 465, 60 L. R. A. 294 (1902).

²⁰ See Jacobs, *supra* note 7, at 782-784.

²¹ See Jacobs, *supra* note 7, at 780-782.

²² 13.3 per cent were "contested" in 1932; 13.9 per cent in 1931; 12.6 per cent in 1930; 11.8 per cent in 1929; and 11.7 per cent in 1928. These figures have been compiled by the Bureau of Census, and include all cases in which an answer is filed. But in not more than 5 per cent of the cases is there a real *bona fide* contest. In half of these it is not over the dissolution of the marriage, but in regard to alimony, property, counsel fees or the custody of children. See MARSHALL AND MAY, *THE DIVORCE COURT—MARYLAND* (1932) 27.

²³ 1 FREEMAN, *JUDGMENTS* (5th ed. 1925) §319, p. 636.

²⁴ 85 N. Y. 483 (1881), *aff'g.* 21 Hun (N. Y. Sup. Ct.) 489 (1880).

²⁵ The parties had been married in 1878 and lived together for nine and a half months. The wife had obtained a divorce in the Court of Common Pleas for New York City and County early in 1874. The plaintiff here claimed that the defendant had represented to him that she was divorced from her former husband and had a right to remarry.

In general perjured testimony as to the ground for divorce is not sufficient to entitle the respondent to a vacation of the decree. *Zeitlin v. Zeitlin*, 202 Mass. 205, 88 N. E. 762 (1909). It is not considered "extrinsic" fraud. "The doctrine is equally well settled that a court will not set aside a judgment because it was founded on * * * perjured evidence." *United States v. Throckmorton*, 98 U. S. 61, 66, 25 L. ed. 93, 95 (1878), per Miller, J.

face, had not been questioned by either party to the divorce. The second spouse was not allowed to impeach it. He had not been defrauded. Mr. Justice Danforth clearly stated the law²⁶

"In bringing this action the plaintiff meddled with a matter which did not concern him. . . . He has had the full benefit of his bargain. No one has questioned his title, and the record which he produces shows a judgment binding on both parties. . . . In refusing to listen to him the court does not aid in giving effect to a judgment obtained by fraud. It regards him as a suitor without a cause of action and rejects his petition because he is not aggrieved."²⁷

In *Robson v. Robson*,²⁸ a wife sued her second husband for divorce. The latter asserted the nullity of the marriage because at the time thereof the complainant had a living husband. But he was not permitted to set up the invalidity of a divorce obtained by the plaintiff from her former spouse, on the ground of certain procedural defects.²⁹

A divorce defective because of non-jurisdictional factors is voidable and not void. It can be collaterally attacked by a second spouse only if he can show that it injuriously affects his pre-existing rights. Mere marriage with one of the parties to the divorce does not clothe him with sufficient interest. Rights which he had at the time of the marriage have not been impaired. Knowledge of the circumstances of the divorce would seem to be immaterial. Further, the divorce has not been otherwise questioned, and, at the time of the attack no one would seem to be

²⁶ 85 N. Y. 483 at 484 (1881).

²⁷ Accord: *Ex parte Edwards*, 183 Ala. 659, 62 So. 775 (1913). A wife sought alimony from her second husband who endeavored unsuccessfully to impeach her prior divorce on the ground of collusion. Per Sayre, J., pp. 661-662, 62 So. 776: "The decree * * * may have been collusively obtained. * * * But the court there had jurisdiction of the subject matter and of the parties, and for aught appearing, the ground of divorce there set up existed, and was proved by trustworthy evidence."

²⁸ 161 Mich. 293, 126 N. W. 216 (1910).

²⁹ The decree had been granted in less than four months from the filing of the complaint. The second husband had known of this defect from the beginning. The doctrine of "laches" was applied.

Corbett v. Corbett, 113 Cal. App. 595, 298 Pac. 819 (1931), is not inconsistent. There a marriage took place before the divorce decree became final. An annulment was granted to the second husband, even though the final divorce had been entered *nunc pro tunc*, as of a date preceding the marriage. The husband was allowed to show that the court had no authority to make such an entry. The *nunc pro tunc* decree being void, collateral attack by a third party was clearly permissible.

In *Lloyd v. Lloyd*, 40 Pa. Co. 595 (1913), a second husband unsuccessfully sought a decree of nullity of his marriage with the defendant on the ground that a divorce obtained by her first husband was void because the libel had asked for a decree on the ground of incompatibility of temper, because no alimony had been provided for or mentioned, and because the divorce costs had not been paid.

In *Morrison v. Morrison*, 64 Mich. 53, 30 N. W. 903 (1887), a second husband unsuccessfully interposed as a defense to a divorce suit that the plaintiff had never been divorced from her former husband because of faulty service by publication.

able to do so. The party to the divorce who has remarried, libellant³⁰ or respondent,³¹ could not. In any event the divorce plaintiff is "estopped." While the non-marrying respondent at one time may have been in a position to attack the decree, his rights have now undoubtedly been lost by "laches."³² The second spouse would seem to be and actually is in no better position. The courts have proceeded along correct lines.

2. On Jurisdictional Grounds

The jurisdictional scheme of divorce is based upon domicil. Divorce is a function of the domicil. In theory no divorce can issue in the absence of domicil of one of the spouses. As some evidence of a change of domicil the statutes of the several states require a period of residence therein before the institution of an action for divorce. The duration of this residence varies materially.³³

Before a court can proceed it must have jurisdiction over the subject matter of divorce, that is, over the matrimonial status. This means that there must be domicil of at least one spouse. The libellant by invoking the judicial powers of the tribunal subjects himself to the jurisdiction of the court. Jurisdiction is acquired over the respondent (1) by the service of process upon him personally within the territorial jurisdiction, or (2) by his voluntary appearance in the suit, or (3) when he is a domiciled citizen of the state by constructive service.

In the divorce litigation F-1 has found either expressly or by implication the presence of the essential jurisdictional factors.³⁴ This finding has not been effectively attacked. The libellant is not permitted to question the jurisdiction of the court either directly³⁵ or collaterally,³⁶ no matter how much the divorce tribunal may have lacked jurisdiction. Remarriage by the respondent generally precludes him from attacking

³⁰ *Barnette v. Miller*, *supra* note 16.

³¹ *Robson v. Kramer*, 215 Iowa 973, 245 N. W. 341 (1932); *Cummings v. Hudleston*, 99 Okla. 195, 226 Pac. 104 (1924); *Nagle v. Nagle*, 43 Pa. Super. 442 (1910).

³² See *Jacobs*, *supra* note 7, at 780-781.

³³ From five years in Massachusetts (three years where both spouses were inhabitants of the state at the time of the marriage), Mass. GEN. LAWS 1932, c. 208, §5; to six weeks in Nevada, Sess. LAWS 1931, c. 97, §22, p. 161. In Arkansas (Acts 1931, No. 71, p. 201), Florida (GEN. LAWS 1935, p. 444), and Idaho (CODE ANN. 1932, §31-701), the period is ninety days. In Wyoming (Sess. LAWS 1935, §35-109, p. 25), the period is sixty days. The majority of states require a minimum residence of one year. ILL. REV. STAT. (Cahill, 1931), c. 40, §3.

³⁴ *Broduer v. Broduer*, 53 R. I. 450 at 454, 167 Atl. 104, 106 (1933), per *Murdock, J.*, "It is true that he (the trial judge) did not make a specific finding as to residence; but that he so found is implicit in his decision granting the prayer of the petition."

³⁵ *Guggenheim v. Guggenheim*, 189 Ill. App. 146 (1914); *McGraw v. McGraw*, 46 R. I. 426, 138 Atl. 188 (1927).

³⁶ *Ellis v. White*, 61 Iowa 644, 17 N. E. 28 (1883).

even a "void" divorce.³⁷ Appearance by him seems to produce like consequences.³⁸ The difficulty of proving the absence of domicil and the reluctance of courts to disturb decrees of divorce often cause a direct attack by a respondent to fail.³⁹ Seldom has he successfully attacked the F-1 decree collaterally.⁴⁰ To entitle him to do so the jurisdictional defects must appear on the face of the record.

Considering the obstacles to an attack by one of the divorce parties, it is not at all surprising to find that the second spouse has failed to have the divorce decree set aside on the ground that the court lacked jurisdiction.⁴¹

"We need not enter into the question of whether or not the judgment (of divorce) is void, irregular, or erroneous, for the reason that an at-

³⁷ RESTATEMENT, CONFLICT OF LAWS (1934) §112; *Arthur v. Israel*, 15 Colo. 147, 25 Pac. 81 (1890); *Marvin v. Foster*, 61 Minn. 154, 63 N. W. 484 (1895); *contra: In re Christiansen*, 17 Utah 412, 53 Pac. 1003 (1898).

³⁸ *Confer v. District Court*, 49 Nev. 18, 234 Pac. 688 (1925), *rehearing denied*, 49 Nev. 26, 236 Pac. 1097 (1925).

³⁹ In *Clark v. Clark*, 64 Mont. 386, 210 Pac. 93 (1922), the court refused to vacate the divorce because it felt that the fraud in regard to residence was not "extrinsic" to the matter tried by the court. In *Maples v. Maples*, 187 Ark. 127, 58 S. W. (2d) 930 (1933), the court invoked the doctrine of "laches."

For cases where the court has vacated the divorce on direct attack by the respondent, see *Dye v. Dolbeck*, 114 Fla. 866, 154 So. 847 (1934); *Lawrence v. Nelson*, 113 Iowa 277, 85 N. W. 84 (1901); *Edson v. Edson*, 108 Mass. 590 (1867).

⁴⁰ *Edgerton v. Edgerton*, 12 Mont. 122, 29 Pac. 966 (1892).

⁴¹ *James v. James*, 131 Okla. 276, 268 Pac. 726 (1928). *B* obtained a divorce from her husband *A* in November, 1914, and married *C* in July, 1918. *A* also married again and died in January, 1924. *B* died in May, 1926. In October of the same year *C* petitioned for the vacation of the divorce on the ground that the court had lacked jurisdiction. The vacation was denied. Per Curiam, p. 277, 268 Pac. 727: "The plaintiff in error by his marriage (to *B*) acknowledged the validity of the decree of divorce and continued without complaint to acknowledge this validity until after her death. * * * The parties to the judgment did not complain and died accepting the benefits of such judgment and the aid they had received from the court. The plaintiff in error is a suitor without a cause of action, and his motion is rejected because he is not aggrieved."

In *Fairclough v. St. Amand*, 217 Ala. 19, 114 So. 472 (1927), while the vacation proceedings were begun by the first husband (the respondent) on the ground that the decree had been procured through perjured testimony as to the libellant's residence in Alabama, the court here found that they were brought at the instance and instigation of the libellant's second husband. He had instigated and financed the divorce; had married the libellant; had left her and had remarried elsewhere where bigamy proceedings were pending. The court, in refusing to set aside the decree, applied the doctrine of estoppel and "laches." Per Thomas, J., p. 21, 114 So. 473: "And such is the estoppel as to invoking the question of the jurisdiction of the court where the action challenged was invoked or procured by fraud of a party in interest."

In *Van Slyke v. Van Slyke*, 186 Mich. 324, 152 N. W. 921 (1915), it was held that a man who had aided in the instigation of the defendant's divorce suit against her former husband, intending to marry her, could not, after the marriage, maintain a suit to have the decree set aside on the ground of fraud in regard to residence, especially where if such fraud existed, he had participated therein. Per Ostrander, J., p. 328, 152 N. W. 923: "The decree cannot be avoided by the party guilty of the fraud, nor at the instance of third parties, nor can a party who obtains the divorce and accepts its benefits afterwards question the jurisdiction of the court granting it."

tack upon the judgment or decree of divorce cannot be maintained by the plaintiff in error (second husband)."⁴²

The cases consistently adhere to the general rule that a stranger to a suit has no standing to have an invalid judgment set aside. Equitable considerations frequently have aided the courts in the denial of such relief.^{42*}

Most commonly the second spouse has endeavored to obtain an annulment of his marriage on the ground that the divorce had failed effectively to dissolve the defendant's prior marriage. He is seeking to impeach F-1's own decree which has hitherto gone unquestioned. Such an attack has generally failed.⁴³ Courts have done all in their power to uphold the divorce against such attack.⁴⁴ Such has been the case where it was claimed that the residence of the libellant was insufficient,⁴⁵ or that the service of process on the respondent was ineffective.⁴⁶ F-1 is

⁴² Per Curiam, *James v. James*, *supra* note 41, p. 277, 268 Pac. 727.

^{42*} *James v. James*, *supra* note 41; *Fairclough v. St. Amand*, *supra* note 41.

⁴³ *Ewald v. Ewald*, 167 Md. 594, 175 Atl. 464 (1934); *Sodini v. Sodini*, 94 Minn. 301, 102 N. W. 861 (1905); *Werz v. Werz*, 11 Mo. App. 26 (1881); *Routledge v. Githens*, 118 Ore. 70, 245 Pac. 1072, 45 A. L. R. 925 (1926).

⁴⁴ In *Ewald v. Ewald*, *supra* note 43, a second husband in 1932 sued for an annulment of a marriage contracted with the defendant in 1926. The defendant had divorced her first husband, who had subsequently remarried, in 1922. The annulment was refused. Per Urner, J., p. 597, 175 Atl. 465, 466: "The inquiry is not whether a decision upon the evidence as to the question of residence should be affirmed or reversed if it could be considered as an original issue. The question with which we are concerned in this case is whether the decree of the Circuit Court, dissolving a Maryland marriage for a cause arising in Maryland, should be nullified because additional evidence, produced twelve years later, has convinced another chancellor that the decree was erroneous in its determination of the jurisdictional fact of residence. The record fails to present any reason which seems to us adequate for such a review and rescission of the decree thus challenged. It was passed by a court having the power and duty to decide as to the existence of its jurisdiction over the case, and its unappealed decision of that question should not be subject to avoidance under such conditions as those which this case presents."

⁴⁵ *Ewald v. Ewald*, *supra* note 43; *Routledge v. Githens*, *supra* note 43. In *Werz v. Werz*, *supra* note 43, the second husband unsuccessfully sought an annulment of his marriage on the ground that the defendant's divorce from her former spouse was void because she had failed to allege in her petition her residence in the county where she brought suit.

⁴⁶ *Sodini v. Sodini*, *supra* note 43. A second husband sought an annulment of his marriage to the defendant on the ground that her divorce from her former spouse was void on its face because, as he alleged, the record affirmatively showed that the summons and complaint were never in fact served upon the divorce defendant. Service had been in Pennsylvania upon a person whose true name was "Bradley" but who sometimes went by the name of "Nelson" (by which he was known to his wife). The annulment was denied. Per Jaggard, J., pp. 302-304, 102 N. W. 861, 862: "A judgment of a court of superior or general jurisdiction cannot be collaterally attacked unless the record affirmatively shows want of jurisdiction. * * * A default judgment in divorce proceedings is no more subject to such collateral attack than any other judgment. * * * Every intendment is in favor of a construction which will sustain the judgment. There was nothing in the summons and complaint, as served, to deceive the defendant. The real person was in fact served."

much more reluctant to grant an annulment of a marriage based on a local divorce than where an F-2 decree is involved. F-1 is even unwilling to disturb her own divorce decree on a direct attack by the respondent. And further, while it has been assumed in theory that a divorce of F-1 where neither spouse is domiciled therein is void even in F-1,⁴⁷ it has never been decided that such a decree has no effect in F-1.

Of course, if the divorce for some reason is clearly void on its face, the second spouse, the same as anyone else, would seem to be in a position to question marital rights predicated thereon.⁴⁸ The decree being absolutely void, the subsequent marriage is a nullity, open to collateral impeachment. But where the infirmity does not appear on the divorce record but must be proved extrinsically, it is submitted that the court should leave the second spouse where he has placed himself. This is particularly so where he knew the circumstances of the divorce, and even more so where he has instigated or financed the proceedings.⁴⁹

B. ATTACK IN F-2

1. On Non-Jurisdictional Grounds

In but few cases has a second spouse endeavored to attack in F-2 on the ground of some non-jurisdictional defect a marriage predicated on a divorce decree of F-1. In theory third persons are permitted to attack a decree collaterally for certain kinds of fraud, but only where the judgment is injurious to their pre-existing interests.⁵⁰ It is, however, difficult to conceive how a second spouse of one of the divorced parties could be prejudiced by non-jurisdictional fraud. Such a divorce is at the most voidable, generally on direct attack in F-1 by the one equitably entitled.

Thus in *Rupp v. Rupp*,⁵¹ an annulment was refused a second wife who claimed that the South Dakota divorce procured by a former spouse against the defendant had been collusively obtained. No question of jurisdiction could be raised; South Dakota was the domicil of the libel-

⁴⁷ See RESTATEMENT, CONFLICT OF LAWS (1934) §113, comment g.

⁴⁸ In *Hinkle v. Lovelace*, 204 Mo. 208, 102 S. W. 1015 (1907), a second spouse, defendant in an ejectment suit brought by his wife, effectively attacked a decree divorcing the plaintiff from her former husband, on the ground that she had not made the statutory affidavit annexed to her petition for divorce, but such affidavit had been made in her behalf by her next friend (as disclosed by the divorce petition), and therefore the court was without jurisdiction. The infirmity appeared on the face of the record and not extrinsically. The decree was absolutely void, the court having acquired no jurisdiction because of the defective affidavit.

⁴⁹ *Fairclough v. St. Amand*, *supra* note 41; *Van Slyke v. Van Slyke*, *supra* note 41.

⁵⁰ 3 FREEMAN, JUDGMENTS (5th ed. 1925) §1439, p. 2966.

⁵¹ 156 App. Div. 389, 141 N. Y. Supp. 484 (1913).

lant wife; the respondent had appeared. The plaintiff was in no wise injured by the alleged collusion.

"Even if it was collusive, the judgment cannot be attacked collaterally by this plaintiff. She is not aggrieved. . . . If there is any ground upon which the Dakota judgment can be revoked or annulled for fraud or imposition, it is for that court to hear and determine them."⁵²

It would be dangerous indeed to allow a second spouse to avoid every marriage predicated on a divorce tainted with collusion or with perjury in regard to the statutory ground. Collusive divorce is quite the normal practice of the day.⁵³ And in general neither party to a collusive divorce can attack the decree either directly or collaterally.⁵⁴ In a recent case, *Atkinson v. Atkinson*,⁵⁵ the court expressly referred to the fact that neither party to the collusive divorce had attacked it.⁵⁶

Again in *Bater v. Bater*,⁵⁷ an annulment of a marriage was denied a second husband who claimed that the divorce granted to the defendant in New York by a court which had jurisdiction of the subject matter and of the parties was tainted with fraud in that she had suppressed the fact that in a prior divorce suit in England her petition had been denied because of her adultery.⁵⁸

It thus seems clear that a second spouse has no standing to impeach a divorce decree of F-1 for non-jurisdictional defects.

⁵² Per Rich, J., pp. 390-391, 141 N. Y. Supp. 485; *Kinnier v. Kinnier*, 53 Barb. (N. Y.) 454, 455, 456 (1868), per Cardozo, J., "If the courts of this state can entertain a suit to annul the decree of a court of another state, on the ground of fraud, yet this plaintiff is not in a position to ask such relief. Nor can one claim to have a judgment * * * avoided for fraud, unless it injuriously affects him; and such is not the case with this plaintiff."

⁵³ See Comment (1936) 36 COL. L. REV. 1121.

⁵⁴ See Jacobs, *supra* note 7, at 763-764; 785-788.

⁵⁵ 65 App. D. C. 241, 82 F. (2d) 847 (1936). A second husband failed to obtain an annulment of his marriage to the defendant. The defendant's first husband, a *bona fide* resident of Maryland, had obtained a divorce for desertion; service had been by publication. The plaintiff claimed that the divorce was collusive and due to false testimony in regard to desertion.

⁵⁶ Per Robb, J., p. 243, 82 F. (2d) 849: "In our view the Maryland decree may be given operation in the District of Columbia without violating the principles of morality or the public policy of the District. The parties were of mature age and had lived apart for eleven years when the jurisdiction of the Maryland court was invoked. It is not likely that there would have been reconciliation. It is equally apparent that each desired a severance of the marriage tie, as the defendant remarried. Neither party to the decree is attacking it. Under the facts it is more in the interest of public policy to validate the remarriage than to set it aside."

⁵⁷ (1906) Prob. 209.

⁵⁸ The court pointed out that where F-2 refuses to recognize a decree procured by fraud or collusion in F-1, "When those cases are examined * * * the collusion or fraud which was referred to was in every case * * * collusion or fraud relating to that which went to the root of the matter, namely, the jurisdiction of the Court." P. 218.

See also *Deyette v. Deyette*, 92 Vt. 305, 104 Atl. 232, 233, 234 (1918). Cf., however, *Conway v. Beazley*, 3 Hagg. Eccl. Rep. 639 (1831).

2. On Jurisdictional Grounds

Before we can proceed with this situation we must review the law concerning the recognition in F-2 of the divorce decrees of F-1. Where both spouses are *bona fide* domiciliaries of F-1, the courts thereof are the only appropriate divorce tribunal. Provided the respondent is given a reasonable notice of the pendency of the libel, a decree of F-1 will be entitled to full faith and credit everywhere.⁵⁹ Personal jurisdiction over the defendant is not necessary. Where only one spouse is domiciled in F-1, but F-1 is the last matrimonial domicile of the parties, the last place where they have lived together as husband and wife, and reasonable notice has been given to the respondent, under the decisions of the Supreme Court,⁶⁰ the F-1 decree is entitled to full faith and credit. If F-1 is not the last matrimonial domicile of the spouses, but the domicile of the libellant only, then if the respondent is personally served in F-1 or if he voluntarily appeared and submitted to the jurisdiction of the court, the decree is entitled to full faith and credit.⁶¹ If, however, the service be constructive only and no appearance is entered, the full faith and credit clause does not protect the divorce. But on the ground of comity the majority of states will recognize an *ex parte* divorce obtained at the domicile of the libellant.⁶² The local policy of some few states, however, sanctioned by *Haddock v. Haddock*, is strongly against such recognition where the respondent is a citizen thereof.⁶³ In the absence of the domicile of either spouse in theory F-1 has no jurisdiction to grant a divorce.

Domicil is a jurisdictional fact and may be raised collaterally by a

⁵⁹ RESTATEMENT, CONFLICT OF LAWS (1934) §110, comment b; see *Haddock v. Haddock*, 201 U. S. 562, 571, 26 Sup. Ct. 525, 527, 50 L. ed. 867, 870, 5 Ann. Cas. 26 (1906).

⁶⁰ *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794 (1901); *Haddock v. Haddock*, *supra* note 59; *Thompson v. Thompson*, 226 U. S. 551, 33 Sup. Ct. 129, 57 L. ed. 347 (1913).

⁶¹ See *Haddock v. Haddock*, *supra* note 59; RESTATEMENT, CONFLICT OF LAWS (1934) §113a (iii), and comment g.

⁶² *Gildersleeve v. Gildersleeve*, 88 Conn. 689, 92 Atl. 684 (1914); *Miller v. Miller*, 200 Iowa 1193, 206 N. W. 262 (1925).

⁶³ *People v. Baker*, 76 N. Y. 78 (1879). In *Greenberg v. Greenberg*, 218 App. Div. 104 at 112, 218 N. Y. Supp. 87, 94 (1926), it was said per Dowling, J., "This State has settled as its adjudged policy to refuse to recognize as binding a decree of divorce obtained in a court of a sister State * * * when the divorce defendant resided in this State and was not personally served with process and did not appear in the action."

For New York policy where the divorce defendant is not a resident of New York, see *Dean v. Dean*, 241 N. Y. 240, 149 N. E. 844 (1925); *Ball v. Cross*, 231 N. Y. 329, 132 N. E. 106 (1921).

For states having a policy somewhat similar to that of New York, see: *Irby v. Wilson*, 21 N. C. 568 (1837); *Harris v. Harris*, 115 N. C. 587, 20 S. E. 187 (1894); *Duncan v. Duncan*, 265 Pa. 464, 109 Atl. 220 (1920); *State v. Duncan*, 110 S. C. 253, 96 S. E. 294 (1918); *McCreery v. Davis*, 44 S. C. 195, 22 S. E. 178 (1895).

respondent who was not before the court.⁶⁴ If he can show the lack of domicile of the libellant in F-1 and no remarriage by himself, the decree would be ineffective as to him. And further the *ex parte* decree rendered at the domicile of the libellant only may be contrary to the established policy of F-2, which policy the respondent, if a resident of F-2 at the time of the divorce, may effectively invoke. Thus as against a respondent not subject to the personal jurisdiction of the court, the decree would be "void" and open to attack.

To what extent then is the F-1 decree impeachable by the second spouse? Does the answer to this question depend merely upon the view of F-2 in regard to the decree of F-1, upon the form of the attack, or upon the character of the conduct of such spouse in regard to the divorce?

The typical method of attack has been a suit for a decree of nullity of the marriage brought by the second spouse on the ground that the divorce failed effectively to dissolve the defendant's prior marriage. In a number of cases the decision has turned merely on the attitude of F-2 towards the F-1 decree. This has been decided on the basis of the policy of F-2 already discussed. For example, if F-2 refuses to recognize an *ex parte* decree obtained at the domicile of the libellant against a resident of F-2, a marriage based thereon has frequently been declared a nullity.⁶⁵ Thus in *Pridgen v. Pridgen*,⁶⁶ the defendant's first husband had procured an *ex parte* divorce in Georgia in 1917, the service of summons having been by publication. The defendant had always resided in

⁶⁴ RESTATEMENT, CONFLICT OF LAWS (1934) §111, comment a.

⁶⁵ *O'Dea v. O'Dea*, 101 N. Y. 23, 4 N. E. 110 (1885) (no personal service over the respondent); *Gilson v. Airy*, 181 App. Div. 761, 169 N. Y. Supp. 242 (1918) (no personal service over the respondent); *Knill v. Knill*, 119 Misc. 186, 195 N. Y. Supp. 398 (1922) (the domicile of the libellant in Nevada was not *bona fide*); *Davis v. Davis*, 2 Misc. 549, 22 N. Y. Supp. 191 (1893) (no personal service over the respondent).

In *Hindermann v. Hindermann*, 245 App. Div. 246, 280 N. Y. Supp. 449 (1935), an appearance entered *nunc pro tunc* in the Nevada divorce proceedings was held ineffective to make the divorce good in New York. A second spouse was granted an annulment of the marriage. Per Johnston, J., p. 247, 280 N. Y. Supp. 451: "The Nevada court, however, never acquired jurisdiction of appellant (defendant) until May 4, 1934, which was nearly thirteen months after her marriage with respondent and more than eight months after the institution of the instant action. Appellant's marriage with respondent was void under our statute, and was not made valid by the modified decree of the Nevada court."

In the following cases the annulment of the second marriage has been refused: *Ball v. Cross*, *supra* note 63, where a new trial was ordered to ascertain if the residence of the respondent at the time of the divorce would have recognized the *ex parte* Reno decree; *Rocco v. Rocco*, 131 Misc. 867, 228 N. Y. Supp. 405 (1928), where the annulment was refused because the defendant's domicile at the time of the *ex parte* divorce would recognize the decree; *Schenker v. Schenker*, 181 App. Div. 621, 169 N. Y. Supp. 35 (1918); *Beischer v. Beischer*, 226 App. Div. 454, 235 N. Y. Supp. 652 (1929); *Richards v. Richards*, 132 Misc. 551, 230 N. Y. Supp. 579 (1928).

⁶⁶ 203 N. C. 533, 166 S. E. 591 (1932).

North Carolina. The Georgia decree was declared a nullity in North Carolina. Thus the divorce being void, so with the marriage; it creates no rights nor duties. It is a nullity even without the aid of a court decree. It is to be expected that the cases on this point would arise in a jurisdiction having a peculiar local policy in regard to F-1 decrees. And such has been the case. There is no necessity of proving no legal domicile on the part of the libellant but only the lack of personal jurisdiction over the respondent.

The divorce has been considered void as to the second spouse even though it could not, under principles already considered, have been impeached by the libellant, or even by the respondent because of his remarriage.⁶⁷ The second spouse has thus been allowed to show the invalidity of the decree because of the lack of legal residence in F-1, or because of the lack of personal jurisdiction over a respondent residing in a state with a peculiar local policy such as New York. The F-2 court here had to choose between holding the remarriage a nullity because of the void character of the divorce, and departing from the ordinary policy of the state in regard to *ex parte* decrees. It is submitted that F-2, when such an attack is made, should earnestly endeavor to give effect to the F-1 decree; every presumption should be invoked in its favor.⁶⁸ Particularly is this so when it is remembered that the attacking spouse is typically the husband, obviously regretful of his present marital ties based on a divorce which has not otherwise been questioned.

In the cases hitherto discussed the second spouse has, according to the available evidence, in no way participated in or instigated the F-1 divorce. And typically the respondent has not appeared in the F-1 proceedings. Where the respondent has participated in the divorce suit, the case against the second spouse's attack is all the stronger. The divorce then cannot be questioned by the libellant or by the respondent. And it should not be by a person who has married one of the divorced parties.⁶⁹ In *Kinnier v. Kinnier*,⁷⁰ the second husband sought an annul-

⁶⁷ *Frey v. Frey*, 61 App. D. C. 232, 59 F. (2d) 1046 (1932).

⁶⁸ See cases cited in the last paragraph of note 65 *supra*.

In *Farr v. Farr*, 190 Iowa 1005, 181 N. W. 268 (1921), the second husband was denied an annulment on his complaint that the Illinois court, in granting a divorce, had lacked jurisdiction over the defendant's first husband. The court, even assuming the service was ineffective, felt that the plaintiff was not entitled to an annulment, pointing out that the respondent by laches might have debarred himself from the right to attack the divorce in a direct action.

In *French v. French*, 74 Misc. 626, 131 N. Y. Supp. 1053 (1911), an annulment was denied to a second wife who sought to impeach a South Dakota divorce procured by the defendant's first wife by the latter's testimony that she had not been a *bona fide* resident of South Dakota.

⁶⁹ In *Hindermann v. Hindermann*, *supra* note 65, an appearance entered *nunc pro tunc* was held ineffective. ⁷⁰ 45 N. Y. 535 (1871).

ment of his marriage to the defendant on the ground that the latter was still married to her first husband. The complaint alleged that the defendant had been divorced, some sixteen years before, by her former spouse in Illinois in a suit in which she had appeared and answered; that the libellant had never been domiciled in Illinois, as a consequence of which the decree was a nullity. On a demurrer to the complaint the court decided that the Illinois decree could not be thus impeached.

"The question whether he (divorce plaintiff) was a resident there (Illinois), so as to enable him to file his bill, was for that court to determine, and although it may have decided erroneously, the decision cannot affect the validity of the judgment. The status of all persons within a state is exclusively for that state to determine for itself."⁷¹

We must now determine whether the courts of F-2 will, under any circumstances, consider whether the second spouse comes into court with "clean hands." Suppose he has known of the circumstances of the F-1 decree; that he has instigated or financed the proceedings there.

In *Kaufman v. Kaufman*,⁷² the New York Appellate Division held that the second husband could not obtain an annulment of his marriage with the defendant. He had contended that the Nevada divorce procured by the defendant was invalid under the special New York rule. The complainant in the annulment suit had financed and induced the Nevada proceedings. He was held estopped from invoking the state policy of New York, even though the service of summons in the divorce case had been by publication only and the respondent had not appeared.⁷³

"If, as claimed by the plaintiff, the marriage between him and the defendant was absolutely void, no decree of the court is required to declare its invalidity. . . . He, however, seeks a judicial decree annulling it in order that he may be sure of his status. If, in any circumstances, the court would be warranted in refusing to grant a decree annulling a void marriage upon grounds of equitable considerations or estoppel, I am of opinion that the facts shown by the evidence and found by the trial court justify withholding a decree in the case at bar."⁷⁴

⁷¹ Per Church, J., p. 540. In *Kinnier v. Kinnier* the parties to the divorce were probably domiciled in Massachusetts at the time of the collusive Illinois decree.

⁷² 177 App. Div. 162, 163 N. Y. Supp. 566 (1917).

⁷³ The Nevada court had found the wife to be a *bona fide* resident of Nevada. There was some doubt as to the New York residence of the first husband at the time of the divorce. But it was held that even if he were a resident thereof, the second husband was in no position to take advantage of the New York policy which had been adopted to protect New York respondents. Per Laughlin, J., p. 166, 163 N. Y. Supp. 570: "The plaintiff, who induced the defendant to obtain the foreign divorce and financed her in so doing, should be precluded from obtaining a judicial annulment of the marriage predicated on the invalidity of the divorce."

⁷⁴ Per Laughlin, J., p. 165, 163 N. Y. Supp. 569. In *Hubbard v. Hubbard*, 228 N. Y. 81 at 87, 126 N. E. 508, 510 (1920), in refusing an annulment, Collin, J., said by way of dictum: "A finding of the trial court was that he (the second husband)

Even if the divorce were void, and so, therefore, the marriage predicated thereon, the court because of the plaintiff's conduct, refused the aid of its decree to define his status. No one else had questioned the divorce. Unless and until it has been effectively impeached by the divorce respondent, the second spouse would seem to have no standing to seek an annulment of his marriage. Certainly not where he has instigated and financed the divorce. The principles of equitable estoppel would seem to apply. An equitable estoppel has been said to arise

"where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his previous position,"

and

"the former is concluded from averring against the latter a different state of things as existing at the same time."⁷⁵

The second spouse has induced the defendant to believe in the efficacy of the divorce and in reliance on that belief to marry him.⁷⁶ Even if the divorce were void, for some reason or other, it is submitted that the court should refuse a decree of nullity to the second spouse. Until someone entitled to do so proves the lack of jurisdictional factors, the decree is valid. These factors the second spouse who has known of or who has induced the divorce should not be entitled to prove.⁷⁷

instigated the procurement of the divorce. The moral or legal principles adopted by the state will not be weakened or deteriorated by the refusal to declare unlawful and void the marriage between the parties." The court apparently indicated its approval of the decision in *Kaufman v. Kaufman*, *supra* note 72. No question of New York policy was involved.

⁷⁵ BIGELOW, ESTOPPEL (6th ed. 1913) 607.

⁷⁶ The court in *Kaufman v. Kaufman*, *supra* note 72, felt that the plaintiff was attempting "to use the court to enable him to perpetrate an outrage against society as well as an injustice on the defendant, who in marrying him acted in entire good faith and in the belief, induced by him, that the marriage would be valid." P. 165, 163 N. Y. Supp. 569.

⁷⁷ In *Hall v. Hall*, 139 App. Div. 120, 123 N. Y. Supp. 1056 (1910), reversing 67 Misc. 267, 122 N. Y. Supp. 401 (1910), an annulment was refused a second husband. He had known that the divorce was to be procured by the defendant in order to enable him to marry her. He had alleged in his complaint that the Colorado divorce based on constructive service was void because the court lacked jurisdiction over the respondent; also that the Colorado libellant had used fraud in obtaining the decree. Colorado was the matrimonial domicile. Per Laughlin, J., p. 125, 123 N. Y. Supp. 1061: "Her former husband, if living, may avoid it for fraud, but he had not done so. If it (the divorce) be duly annulled, the plaintiff may then be in a position to annul his marriage to the defendant, but he has no standing to avoid it for fraud, because he is not injuriously affected by it; but on the contrary, by virtue of it, he got just what he wanted (marriage with the defendant here)."

In *Sorenson v. Sorenson*, 219 App. Div. 344, 220 N. Y. Supp. 242 (1927), in denying a second husband an annulment of his marriage with the defendant, it was said, per Kapper, J., pp. 349-351, 220 N. Y. Supp. 246, 248: "In the circumstances I do not think the plaintiff can be heard to attack the validity of the Danish decree. This does not proceed upon the theory of estoppel, but upon the

In several cases, however, even though the second spouse has known of or has been instrumental in the procurement of the divorce in F-1, the courts of F-2 have been willing to grant him a decree of nullity of his marriage on the ground of the invalidity of the divorce.⁷⁸ In most of the cases a suit for divorce or separation has been brought against the second spouse and the latter has filed a cross-bill for a decree of nullity. The divorce being considered a nullity, the marriage is void, and these courts have allowed the second spouse to prove this no matter how unconscionable his conduct may have been,⁷⁹ and even though the rights of innocent third persons are involved. The marriage

ground that the attack on the decree must be made by the parties to it and cannot be made by the plaintiff, a second husband, claiming such a decree, of which he had full cognizance, to be invalid. * * * If the defendant in the divorce decree does not complain of that, then the second husband is in no position to make the claim where he had full knowledge of the decree, and no fraud was practiced upon him."

See also *Cesareo v. Cesareo*, 134 Misc. 88, 234 N. Y. Supp. 44, 45 (1929).

⁷⁸ *Frey v. Frey*, *supra* note 67; *Simmons v. Simmons*, 57 App. D. C. 216, 19 F. (2d) 690, 54 A. L. R. 80 (1927); *Kiessenbeck v. Kiessenbeck*, 145 Ore. 82, 26 P. (2d) 58 (1933).

⁷⁹ In *Frey v. Frey*, *supra* note 67, *A* sued his wife *B* for divorce in the District of Columbia, naming *C* as a correspondent. *C*, a lawyer, later induced *A* to dismiss the suit in order that *A*'s wife might obtain a divorce in Virginia for desertion, as she did in 1925. In 1926 *A* married again in good faith and has two children. In 1927 *C* married *B*. *B* now sues *C* for a limited divorce and for maintenance. *C* files a cross-bill for annulment of the marriage. The marriage was set aside as void. The trial court found that the Virginia divorce was fraudulent and void and that *C* "devised the plan by which such fraud was practiced"; that the divorce was collusive; that *B*, as the parties knew, was not domiciled in Virginia; that perjured testimony was given; that *A* had a complete defense to the divorce because *B* and *C* were living together at the time thereof. "If it were open to us to choose the course we should take in such circumstances, we should decline to have the processes of the court used to judicially annul the subsequent marriage of appellant (*B*) and appellee (*C*), but should consider it our duty to deny to the one the monetary relief which she (*B*) seeks, and to the other release from responsibilities which he has grown to regret, and instead, to apply in their case that wise and salutary principle that the law estops a party to allege in a court of justice his own wrong. But the difficulty confronting us grows out of the fact that here the marriage between appellant and appellee is a void marriage, and this is so because the court below has found, and we must find, that the Virginia court was wholly without jurisdiction to grant a divorce." P. 234, 59 F. (2d) 1084.

In *Simmons v. Simmons*, *supra* note 78, a wife sued for divorce on the ground of adultery. The defendant answered and asked for an annulment of the marriage because there had been no legal divorce dissolving the plaintiff's prior marriage. The plaintiff had procured a divorce in Virginia in 1918 and had married the defendant in the same year, and had been living with him since that time. The court found that the Virginia divorce had been procured by fraud both in regard to residence and desertion. Apparently the defendant had furnished the plaintiff with money to carry on the suit. The marriage being declared void by statute, the court refused to apply the doctrine of *in pari delicto* or clean hands. The state being an interested party, the court felt that it was without power to validate the marriage. The marriage was void in law "and the courts have no alternative when the matter is presented, either directly or collaterally, in any manner in which it becomes an issue, but to declare it so." Per Van Orsdel, J., p. 219, 19 F. (2d) 693.

being void, the decree of nullity, the courts feel, adds nothing, but simply acts as an estoppel against setting up the validity of the marriage in any subsequent controversy. The property rights of the parties are left where they were before. The decree merely shows that there never was a valid marriage.

"If the complaint were acquiring any rights by virtue of his suit, other than the determination of his status in society, a different rule might apply, but he is acquiring none."⁸⁰

In these cases the interest of the state in the suit is emphasized.⁸¹ Therefore, there is no alternative but to grant the annulment. It is submitted that these cases are wrong. A second spouse should not get the benefit of a decree of nullity. He should be left where he has seen fit to place himself.

In the cases already discussed the second spouse has sought "affirmative relief" from the court in the form of an annulment of his marriage with the party to the divorce. In two recent cases in the New York Court of Appeals, *Fischer v. Fischer*,⁸² and *Lefferts v. Lefferts*,⁸³ the libellant wife, following an *ex parte* decree in Nevada, had remarried, and sued the second husband in New York for separation and maintenance. In each case the second husband was allowed to invoke the special New York rule to show the invalidity of the F-1 decree. In the *Lefferts* case the second husband had advised the libellant as to procuring the Reno divorce.⁸⁴ The court refused to raise an estoppel against

⁸⁰ *Heflinger v. Heflinger*, 136 Va. 289, 302, 118 S. E. 316, 320 (1923), per Burk, J.

In *Kiessenbeck v. Kiessenbeck*, *supra* note 78, a wife sued for support and maintenance. The defendant's cross-bill for annulment of the marriage was granted. A divorce obtained by the plaintiff wife in Texas was held void because she had not satisfied the residence requirements, as appeared by her own testimony. The defendant had advised her as to the procurement of the divorce. Per Belt, J., p. 87, 26 P. (2d) 60: "The interest of the state is paramount and, notwithstanding the laches involved and the fact that the defendant was not the victim of any fraud, equity, even at this late day (fifteen years after the divorce), will, on the ground of public policy, terminate a social relationship polygamous in character."

⁸¹ In any event there is no estoppel as against the state: *People v. Dawell*, 25 Mich. 247 (1872); *People v. Baker*, 76 N. Y. 78 (1879); *Van Fossen v. State*, 37 Ohio St. 317 (1881).

⁸² 254 N. Y. 463, 173 N. E. 680 (1930). The respondent was a resident of New York. The wife's residence in Nevada was found to be colorable, merely for the purpose of the divorce. Five months after the decree she had married the defendant and lived with him less than three months.

⁸³ 263 N. Y. 131, 188 N. E. 279 (1933). The Appellate Division and the Court of Appeals held that the plaintiff's residence in Nevada was colorable. She married the defendant in 1917 and lived with him until 1930. The court felt bound by *Fischer v. Fischer*.

⁸⁴ In the Appellate Division, *Lefferts v. Lefferts*, 238 App. Div. 37 at 38, 262 N. Y. Supp. 671, 673 (1933), Sherman, J., said: "While the conduct of the defendant in entering this plea is to be regarded as thoroughly reprehensible, nevertheless the declared public policy of this State requires that the court may not grant potency to the decree of the Nevada court."

the second spouse to attack the decree on the ground that the wife had not been a *bona fide* resident of F-1.⁸⁵ In view of these cases it is by no means clear as to whether *Kaufman v. Kaufman*⁸⁶ is still good law. In *Fischer v. Fischer*, Mr. Justice O'Brien said:

"The theory upon which the plaintiff has succeeded (in the courts below) rests upon a supposed resemblance in principle to *Kaufman v. Kaufman* and upon the judicial declaration that defendant is estopped from assailing the validity of a foreign judgment. The judgment in the *Kaufman* case was never reviewed by this court. In *Hubbard v. Hubbard*⁸⁷ it was cited on the briefs but was not mentioned in the opinion. Even if approval of its doctrine were to be assumed, its essential facts are so unlike those at bar as to prevent the application of the rule. There the New York citizenship and residence of the first husband were unproved. Also the complaint in that action by the second husband for an annulment demanded affirmative relief. Here defendant does not come into court with demand for affirmative relief. He merely alleges plaintiff's marriage with Dolinsky (first husband), denies plaintiff's allegation concerning his own marriage with her and puts her to her proof to show that such allegation is correct."⁸⁸

The distinction drawn in regard to affirmative relief is hard to justify. By denying the wife support in her separation action, the court refuses to recognize the usual incidents of the marriage. The position would be just the same if there had been a judicial decree of nullity.⁸⁹

In other jurisdictions there are decisions which seem to be contrary to the recent New York cases. In *Margulies v. Margulies*,⁹⁰ an application for alimony *pendente lite* was resisted by a second husband on the ground that the parties were not married because the plaintiff had ob-

⁸⁵ See Derby, *Obligation of Invalid Divorce on Person Who Induced It and Married Party Procuring It* (1934) 12 N. Y. U. L. Q. REV. 31.

⁸⁶ *Supra* note 72.

⁸⁷ *Supra* note 74.

⁸⁸ 254 N. Y. 466, 173 N. E. 681.

The idea of affirmative relief has cropped up elsewhere in the New York cases. In *Brown v. Brown*, 242 App. Div. 33, 272 N. Y. Supp. 877 (1934), *affirmed* 266 N. Y. 532, 195 N. E. 186 (1935), an action was brought for money spent for maintenance from the time of abandonment by the defendant to the commencement of the action. The defendant husband was not allowed to show that the divorce he had obtained from his former wife in South Dakota was void for lack of jurisdiction. The Appellate Division, however, was troubled by the matter of affirmative relief. Two judges dissented, p. 34, 272 N. Y. Supp. 878: "As defendant is not seeking affirmative relief it is proper for him to assert the invalidity of the South Dakota divorce proceeding as a defense to this action."

⁸⁹ Derby, *supra* note 85, at 37: "It may well be observed that the Court of Appeals in permitting the defendant to attack the validity of his marriage in both the *Fischer* and *Lefferts* cases, by establishing the invalidity of the plaintiff's prior divorce, created precisely the same result as if the defendant had secured an annulment. He was thereby relieved of all marital obligations, and the nullity of his marriage was declared. It would seem that a court of equity should care more about the substance than the form.

⁹⁰ 109 N. J. Eq. 391, 157 Atl. 676 (1931).

tained a Virginia divorce by a fraud on the court in as much as she was not a *bona fide* resident thereof. The defendant had given her money to go to Virginia. He knew of the fraud and later married her. He lived with her for about seven years. The alimony was allowed. He was estopped from setting up the invalidity of the divorce.⁹¹ This, it is submitted, is the more sensible view. Legal theory, as well as a sense of social justice, should preclude even this type of attack by a second spouse. No one has questioned his marital status. The unfair conduct of the person impeaching the validity of the divorce should make it inequitable for him to attack it, whether affirmatively or not.

Conclusion

The cases are clear that a second spouse cannot attack in F-1 a marriage predicated on an F-1 divorce because of non-jurisdictional grounds, such as fraud, duress, collusion or perjury. As a stranger to the divorce judgment his pre-existing rights have in no wise been impaired, and it is difficult to see how they could be. Until the divorce decree has been annulled in appropriate proceedings, it should be conclusive against him. When he purports to attack the decree in F-2 on such grounds, the case against him is even stronger. A respondent is not even permitted to make such an attack.⁹² When the attack on the F-1 decree is made in F-1 on jurisdictional grounds, different considerations enter the picture. The divorce court has found the existence of the essential jurisdictional factors. To be valid in F-1 until set aside by the respondent, the divorce does not have to be one that would be effective elsewhere. It is submitted that except where the decree is clearly void, as appears from the record, no attack thereon should be permitted to the second spouse. And even then if he knew of the circumstances or aided in or instigated its procurement, he should be debarred from impeaching it. It is easier to make an effective jurisdictional attack on a divorce in F-2. And in a number of cases a second spouse has been permitted to make such an attack because a respondent not subject to the jurisdiction of the F-1 court would have been able to do so. This would seem to be on the theory that a divorce decree is always good or always bad. This, it is submitted, is incorrect. Just

⁹¹ Per Church, V. C., at p. 392, 157 Atl. 677: "If there were fraud, which does not conclusively appear, he participated in it, and this court will not allow him to take advantage of his own wrong."

In *Cromarty v. Cromarty*, 38 Ont. L. 481, 33 D. L. R. 151 (1917), per Middleton, J., at p. 484: "At this point of time, the defendant has no right to complain. He accepted the situation and married the plaintiff upon the faith of the status thus conferred upon her; and it would be a monstrous thing to hold that this marriage conferred upon him any status to attack the earlier divorce and so annul his marriage."

⁹² See Jacobs, *supra* note 7, at 794-795.

as the law of property recognizes the doctrine of the relativity of estates, so we suggest a doctrine of the relativity of divorces. Frequently the decree is good as against some persons, a nullity when attacked by others. A divorce good as to the libellant may not be when attacked by the respondent. And so divorces, while perhaps invalid as to the respondent, should not be without effect for some purposes, particularly as to a second spouse, when unquestioned by the respondent. Especially would this seem to be the case where the second spouse knew of the circumstances of the divorce or aided or instigated or financed its procurement. And in any event, on an attack by the second spouse, every presumption should be employed in favor of the decree.

A second spouse typically considers an attack on the marriage predicated on the invalidity of the divorce as an easy way out of an unsatisfactory marital relationship. It is often highly advantageous from a financial standpoint because, in the absence of express statutes, no property interests are acquired in his estate. Further proof of this is indicated by the fact that in the great majority of cases the attacking second spouse is the husband.⁹³

⁹³ This is true in thirty-nine of the forty-three cases considered.