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Earl Phillips

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Associate Professor of Law, Fordham University School of Law.

EQUITABLE PRECLUSION OF JURISDICTIONAL ATTACKS ON VOID DIVORCES

*EARL PHILLIPS**

THE problem to be discussed arises when a litigant wishes to collaterally attack a foreign divorce in a New York court. The divorce is, in fact, void for want of subject matter jurisdiction[1] and may be collaterally attacked under the Full Faith and Credit clause.[2] However, the New York court is also faced with the question of whether to employ the equitable doctrines of laches, clean hands and estoppel to preclude such collateral

* Associate Professor of Law, Fordham University School of Law.

1. A divorce action is sometimes viewed as an in rem action the subject matter of which is the marital relation which the court is asked to dissolve. The res is thought of as present in a state or country and, hence, potentially subject to the jurisdiction of the divorce courts of that state or country when, for instance, one or both spouses are domiciled in the state or country. A court may validly dissolve a marriage over which it has jurisdiction without personal jurisdiction of the defendant. On the other hand, without jurisdiction over the marital res a court cannot dissolve it even though it has personal jurisdiction of the defendant.

Although the Supreme Court denigrated this analysis in Williams v. North Carolina (II), 325 U.S. 226 (1945), it continues to be helpful.

2. U.S. Const. art. IV, § 1. Full Faith and Credit requires that a sister state divorce be held prima facie to be valid. Williams v. North Carolina, 325 U.S. 226 (1945). However, an ex parte decree may be subjected to collateral attack in another state on the ground that the divorce court lacked jurisdiction of the subject matter of the action, Williams v. North Carolina, supra, except one procured in a proceeding in which the defendant made a special appearance to contest the divorce court's jurisdiction. Davis v. Davis, 305 U.S. 32 (1938). In the latter case, and in the case of a bilateral divorce, one may collaterally attack the decree only when the state which granted the divorce would permit the attack, Johnson v. Muelberger, 340 U.S. 581 (1951); Sherrer v. Sherrer, 334 U.S. 343 (1948). When the law of the granting state is unclear on the question whether a collateral attack is permissible, the attack is prohibited, Weisner v. Weisner, 17 N.Y.2d 799, 218 N.E.2d 300, 271 N.Y.S.2d 252 (1966), because the burden of proof placed by Full Faith and Credit on the attacker requires an affirmative showing that the divorce state permits the attack. Klarish v. Klarish, 19 App. Div. 2d 170, 241 N.Y.S.2d 179 (1963), aff'd mem., 14 N.Y.2d 662, 198 N.E.2d 902, 249 N.Y.S.2d 869 (1964).

Full Faith and Credit does not protect foreign country divorces. Rosenbaum v. Rosenbaum, 309 N.Y. 371, 130 N.E.2d 902 (1955); Gorie v. Gorie, 26 App. Div. 2d 368, 274 N.Y.S.2d 985 (1st Dep't 1966). However, New York recognizes foreign country divorces which are valid in the granting country where there is sufficient contact between the foreign country and the marriage in question to justify the assumption of divorce jurisdiction. See Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965); Arpels v. Arpels, 8 N.Y.2d 339, 170 N.E.2d 670, 207 N.Y.S.2d 663 (1960); Gould v. Gould, 235 N.Y. 14, 138 N.E. 490 (1923). Such divorces are recognized though granted upon grounds which would be insufficient under New York law. E.g., Martens v. Martens, 260 App. Div. 30, 20 N.Y.S.2d 206 (1st Dep't), rev'd on other grounds, 284 N.Y. 363, 31 N.E.2d 489 (1940), reargument denied, 285 N.Y. 607, 33 N.E.2d 542 (1941).

attack. The unsuccessful attempts of the courts to solve the problem were recently described by Judge Justine Wise Polier:

> Reading the cases in this field reveals the tortuous and tortured process by which the courts have sought to uphold the strict rules of law concerning the meaning of a marriage *void ab initio* by reason of incapacity to marry and have also tried to avoid condoning some of the most glaring abuses of that doctrine against innocent parties. They have not been too successful in the latter direction.[3]

A typical case in which a person seeks to collaterally prove that a divorce is void involves a matrimonial action between a previously divorced person and his second spouse. In some cases a husband sues for a declaration of the nullity of his present marriage on the ground of the wife's prior, subsisting marriage alleging that the attempted dissolution of the wife's first marriage was void. But he seeks the declaration of nullity only after he has encouraged the wife to procure the divorce so that he may marry her; financed the divorce; married and cohabited with her for a number of years in reliance on the validity of the divorce; and, perhaps, had children by her.

Another typical case involves a wife's support proceeding against her second husband who married her with knowledge of the facts which make the dissolution of her prior marriage void. The second husband might raise as a defense the nullity of his marriage to the plaintiff.[4]

The purpose of this article will be to offer solutions to these problems which may be easily adopted by the New York courts.

I. Present Law

The problem is one of such difficulty that over the last fifty years the New York courts have been unable to resolve it. The cases are conflicting[5] and their rationales inconsistent.[6] Nevertheless, the results in the cases show a fairly consistent pattern.

Conceivably the availability of estoppel could depend upon various factors: the person who seeks to attack the divorce; the kind of controversy in which the attack on the divorce is made; or the conduct of the parties without reference to the type of action in which the attack is made.

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3. Case v. Case, 54 Misc. 2d 20, 281 N.Y.S.2d 241, 242 (Fam. Ct. 1967).

4. The jurisdiction of the New York Family Court to award support to a wife is based upon the existence of a valid marriage between the parties to the support proceeding. Fleischer v. Fleischer, 24 App. Div. 2d 667, 261 N.Y.S.2d 165 (3d Dep't 1965); Carter v. Carter, 19 App. Div. 2d 513, 240 N.Y.S.2d 141 (1st Dep't 1963); Fishberg v. Fishberg, 16 App. Div. 2d 629, 226 N.Y.S.2d 855 (1st Dep't 1962).

5. Compare, e.g., Landsman v. Landsman, 302 N.Y. 45, 96 N.E.2d 81 (1950), with Packer v. Packer, 6 App. Div. 2d 464, 179 N.Y.S.2d 801 (1st Dep't 1958).

6. Compare, e.g., Stevens v. Stevens, 273 N.Y. 157, 7 N.E.2d 26 (1937), with Krause v. Krause, 282 N.Y. 355, 26 N.E.2d 290 (1940).

The results in the New York cases show that estoppel presently depends upon the first of these: the parties to the purportedly dissolved marriage may be estopped to attack the dissolution, but other persons, whatever their conduct, may not be estopped.

A. *Attack Upon a Divorce by Its Procurer*

It seems that, with the exception of one who has obtained a Mexican decree, the procurer of a divorce is always estopped to collaterally question its validity. Thus a void Mexican divorce[7] may be impeached in any action by anyone, even by its procurer,[8] since such a decree, *e.g.*, a mail-

7. An ex parte or bilateral Mexican dissolution of the marriage of New York residents procured by mail is void in New York. An ex parte Mexican divorce between New York residents is void regardless of the fact that the plaintiff was present in Mexico for one day at the trial, Heine v. Heine, 10 App. Div. 2d 864, 199 N.Y.S.2d 788, motion for leave to appeal denied and opinion amended, 10 App. Div. 2d 967, 202 N.Y.S.2d 253 (2d Dep't 1960); Molnar v. Molnar, 284 App. Div. 948, 135 N.Y.S.2d 623 (1st Dep't 1954); Verdone v. Verdone, 20 Misc. 2d 970, 188 N.Y.S.2d 689 (Sup. Ct. 1959); Kurman v. Kurman, 11 Misc. 2d 1035, 174 N.Y.S.2d 128 (Sup. Ct. 1958); or for several weeks, Imbrioscia v. Quayle, 278 App. Div. 144, 103 N.Y.S.2d 593 (1951), aff'd mem., 303 N.Y. 841, 104 N.E.2d 378 (1952); Maltese v. Maltese, 32 Misc. 2d 993, 224 N.Y.S.2d 946 (Sup. Ct. 1962); Katz v. Katz, 16 Misc. 2d 653, 184 N.Y.S.2d 715 (Sup. Ct. 1959). Thus, an ex parte Mexican divorce involving New York residents, who have had no contact with Mexico except for the plaintiff's sojourn there for the purpose of procuring the divorce, is ineffective in New York. Fishberg v. Fishberg, 16 App. Div. 2d 629, 226 N.Y.S.2d 855 (1st Dep't 1962); Marum v. Marum, 8 App. Div. 2d 975, 190 N.Y.S.2d 812 (2d Dep't 1959); Stampler v. Stampler, 26 Misc. 2d 505, 205 N.Y.S.2d 944 (Sup. Ct. 1960); Vesci v. Vesci, 15 Misc. 2d 791, 181 N.Y.S.2d 221 (Sup. Ct. 1958).

However, a bilateral Mexican decree granted to a plaintiff present in Mexico at the trial is valid. Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965).

8. Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E.2d 60 (1948) (separation action); Querze v. Querze, 290 N.Y. 13, 47 N.E.2d 423 (1943) (divorce action); Vose v. Vose, 280 N.Y. 779, 21 N.E.2d 616 (1939) (separation action); Fishberg v. Fishberg, 16 App. Div. 2d 629, 226 N.Y.S. 2d 855 (1st Dep't 1962) (support proceeding); Marum v. Marum, 8 App. Div. 2d 975, 190 N.Y.S.2d 812 (2d Dep't 1959) (separation action); Alfaro v. Alfaro, 5 App. Div. 2d 770, 169 N.Y.S.2d 943 (1958), aff'd mem., 7 N.Y.2d 949, 165 N.E.2d 880, 198 N.Y.S.2d 318 (1960) (separation action); Case v. Case, 54 Misc. 2d 20, 281 N.Y.S.2d 241 (Fam. Ct. 1967) (dictum) (support proceeding). Contra, Zeitlan v. Zeitlan, 27 App. Div. 2d 846, 278 N.Y.S.2d 86 (2d Dep't 1967) (separation action) (the procurer of a Mexican divorce not estopped to attack its validity merely because he procured the decree, but his remarriage might be cause for estoppel); Farber v. Farber, 25 App. Div. 2d 850, 269 N.Y.S.2d 608 (2d Dep't 1966) (action to rescind a separation agreement and a transfer of stock made pursuant thereto and for separation; it is not clear whether the person attacking the Mexican divorce was the procurer of it or the defendant in the divorce action); Frankiel v. Frankiel, 23 App. Div. 2d 770, 258 N.Y.S.2d 816 (2d Dep't 1965) (separation action) (procurer's remarriage might estop him from attacking his Mexican divorce); Considine v. Rawl, 39 Misc. 2d 1021, 242 N.Y.S.2d 456 (Sup. Ct. 1963) (in an action by a wife to declare the nullity of her husband's second marriage, but brought against the second wife after the husband's death for the ultimate purpose of acquiring insurance and civil service retirement benefits, the Alfaro,

order divorce, is granted by a court without the slightest semblance of jurisdiction.[9] Consequently, a void Mexican decree has too little substance to raise an estoppel. On the other hand, a sister state decree has considerable substance, even when investigation would reveal it to be void, since under *Cook v. Cook*[10] it must, as a matter of Full Faith and Credit, prima facie be considered valid.[11] Therefore, one who obtains a divorce within the United States can be and is estopped to attack its validity in a subsequent New York action. He is estopped when, for example, he seeks to maintain a second divorce suit or a separation action against the same defendant.[12] Nor can the procurer attack his own divorce for defensive purposes. Should he remarry and then be sued for divorce or separation by his second spouse, the procurer of the previous divorce is estopped to question it,[13] and were the procurer to sue his second spouse for a declaration of the nullity of their marriage he would again be estopped.[14] Insofar as is relevant here, there is no substantial difference between an action to declare the nullity of a marriage[15] and a declaratory judgment action[16] for a judgment declaring a marriage to be void.[17] Presumably, then, one who had obtained a divorce would be estopped to attack it in such a declaratory judgment action against his second spouse.

New York law has a somewhat odd provision which permits one

Caldwell and Querze cases, supra, were distinguished on the ground that those cases involved matrimonial actions while the instant case was essentially one to establish a property right); Dorn v. Dorn, 202 Misc. 1057, 112 N.Y.S.2d 90 (Sup. Ct. 1952), aff'd on other grounds, 282 App. Div. 597, 126 N.Y.S.2d 713 (2d Dep't 1953) (in a contract action to enforce support provisions of a separation agreement, the Caldwell, Querze and Vose cases, supra, were distinguished on the ground that those cases involved matrimonial actions in which an estoppel is inappropriate).

9. Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E.2d 60 (1948); Marum v. Marum, 8 App. Div. 2d 975, 190 N.Y.S.2d 812 (2d Dep't 1959).

10. 342 U.S. 126 (1951).

11. Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E.2d 60 (1948).

12. Senor v. Senor, 272 App. Div. 306, 70 N.Y.S.2d 909 (1947), aff'd mem., 297 N.Y. 800, 78 N.E.2d 20 (1948); Sommer v. Sommer, 36 Misc. 2d 379, 232 N.Y.S.2d 558 (Sup. Ct. 1962); Sommer v. Sommer, 31 Misc. 2d 826, 221 N.Y.S.2d 707 (Sup. Ct. 1961), aff'd, 16 App. Div. 2d 629, 226 N.Y.S.2d 730 (1st Dep't 1962). These cases involved separation actions. But, if the procurer of a divorce is estopped to collaterally attack the divorce in a separation action against the same defendant, there can be no logical reason for permitting an attack in a divorce action. Contra, Stevens v. Stevens, 273 N.Y. 157, 7 N.E.2d (1937).

13. Krause v. Krause, 282 N.Y. 355, 26 N.E.2d 290 (1940) (separation action).

14. Packer v. Packer, 6 App. Div. 2d 464, 179 N.Y.S.2d 801 (1st Dep't 1958) (dictum).

15. An action brought pursuant to N.Y. Dom. Rel. Law § 140.

16. An action brought pursuant to N.Y. C.P.L.R. 3001.

17. See Presbrey v. Presbrey, 6 App. Div. 2d 477, 179 N.Y.S.2d 788 (1958), aff'd mem., 8 N.Y.2d 797, 168 N.E.2d 135, 201 N.Y.S.2d 807 (1960).

spouse to maintain an action against his former spouse to declare the nullity of the defendant's second marriage on the ground that their prior marriage subsists.[18] But the procurer of the divorce probably cannot successfully maintain the action. Since he may not impeach his divorce for the purpose of obtaining a declaratory judgment that the second marriage of his former spouse is void,[19] he should be estopped to question the dissolution of his marriage to the defendant in an action to declare the nullity of the defendant's second marriage.

Finally, one who procures a divorce from a jurisdiction within the United States may not later attack it either for the purpose of asserting a property right[20] or for the purpose of defeating such a right asserted by another.[21]

B. *Attack by the Divorce Defendant*

Like the procurer of a divorce, the divorce defendant may not in a subsequent matrimonial action impeach the dissolution when he has acquiesced in the divorce court's assumption of jurisdiction by actively cooperating in the procurement of the decree,[22] by voluntarily appear-

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18. N.Y. Dom. Rel. Law § 140(a).

19. Shapiro v. Shapiro, 18 App. Div. 2d 34, 238 N.Y.S.2d 102 (1st Dep't), motion to dismiss appeal denied, 13 N.Y.2d 1060, 195 N.E.2d 764, 246 N.Y.S.2d 38 (1963).

20. Starbuck v. Starbuck, 173 N.Y. 503, 66 N.E. 193 (1903) (wife estopped to attack her void divorce in an action against deceased husband's distributees to recover dower); In re Swales, 60 App. Div. 599, 70 N.Y.S. 220 (1901), aff'd mem., 172 N.Y. 651, 65 N.E. 1122 (1902) (wife estopped to attack her void divorce in application for letters of administration of deceased husband's estate); In re Morrison, 52 Hun 102, 5 N.Y.S. 90, aff'd mem., 117 N.Y. 638, 22 N.E. 1130 (1889); Cavallo v. Cavallo, 45 Misc. 2d 467, 257 N.Y.S.2d 186 (Sup. Ct. 1964) (alternative holding) (wife estopped to attack her void divorce in action against husband for judgment declaring the nullity of the divorce and of a support and property settlement incorporated therein).

N.Y. E.P.T.L. § 5-1.2(a)(4) in effect codifies the rule stated in the text, In re Rathscheck, 300 N.Y. 346, 90 N.E.2d 887 (1950), where the procurer seeks to inherit from the deceased defendant in the divorce action, to elect against the latter's will, to claim an exemption against the latter's estate and to share in the distribution of damages recovered for the latter's wrongful death.

21. Hynes v. Title Guar. & Trust Co., 273 N.Y. 612, 7 N.E.2d 719 (1937) (because husband would be estopped to collaterally attack his divorce of his first wife, the husband's executor was estopped to do so in the second wife's action for dower); Starbuck v. Starbuck, 173 N.Y. 503, 66 N.E. 193 (1903) (dictum); Brown v. Brown, 242 App. Div. 33, 272 N.Y.S. 877 (1934), aff'd mem., 266 N.Y. 532, 195 N.E. 186 (1935), where the husband was estopped to question the validity of his divorce against his first wife and of his marriage to his second wife for the purpose of defeating the second wife's action upon a contract dependent upon a marriage between husband and the second wife, apparently an antenuptial agreement.

22. Packer v. Packer, 6 App. Div. 2d 464, 179 N.Y.S.2d 801 (1st Dep't 1958) (alternative holding).

ing in the action,[23] by accepting alimony awarded by the divorce court for many years,[24] or by remarrying on the strength of the purported dissolution.[25] However, it seems that mere inaction, *i.e.*, a failure to question the validity of the divorce before the divorce plaintiff remarries, cannot give rise in a matrimonial action to laches or estoppel against the divorce defendant.[26] On the other hand, the divorce defendant, like the procurer, is permitted to collaterally impeach a void Mexican decree whatever his conduct. Since the procurer of a Mexican divorce cannot be estopped to attack it,[27] a fortiori the defendant should not be.[28]

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23. Schneider v. Schneider, 232 App. Div. 71, 249 N.Y.S. 131 (2d Dep't 1931) (alternative holding).

24. Weiner v. Weiner, 13 App. Div. 2d 937, 216 N.Y.S.2d 788 (per curiam), leave to appeal denied, 14 App. Div. 2d 671, 219 N.Y.S.2d 944 (1st Dep't 1961), where the wife accepted alimony awarded her in the husband's ex parte Florida dissolution of their marriage and delayed her attack on the divorce and husband's second marriage for seven and a half years after his remarriage, the court stated that "acts" indicating acquiescence in the divorce could raise an estoppel and ordered a new trial for a full exploration of the facts.

25. Carbulon v. Carbulon, 293 N.Y. 375, 57 N.E.2d 59 (1944); Packer v. Packer, 6 App. Div. 2d 464, 179 N.Y.S.2d 801 (1st Dep't 1958) (alternative holding); Kelsey v. Kelsey, 204 App. Div. 116, 197 N.Y.S. 371 (1922), aff'd mem., 237 N.Y. 520, 143 N.E. 726 (1923).

26. See Krieger v. Krieger, 29 App. Div. 2d 43, 285 N.Y.S.2d 811 (1st Dep't 1967), motion to dismiss appeal denied, 21 N.Y.2d 912, 236 N.E.2d 859, 289 N.Y.S.2d 628 (1968); Christensen v. Christensen, 39 Misc. 2d 370, 240 N.Y.S.2d 797 (Sup. Ct. 1963); cf. Campbell v. Campbell, 239 App. Div. 682, 268 N.Y.S. 789, aff'd per curiam, 264 N.Y. 616, 191 N.E. 592 (1934). But see the cases in which the one attacking the divorce sought to ultimately establish a property right and in which laches was held to be a defense, Sorrentino v. Mierzwa, 30 App. Div. 2d 549, 290 N.Y.S.2d 585 (2d Dep't 1968) (3-2 decision); Farber v. Farber, 25 App. Div. 2d 850, 269 N.Y.S.2d 608 (2d Dep't 1966); Harges v. Harges, 46 Misc. 2d 994, 261 N.Y.S.2d 713 (Sup. Ct. 1965).

27. Cases cited note 8 supra.

28. But see Farber v. Farber, 25 App. Div. 2d 850, 269 N.Y.S.2d 608 (2d Dep't 1966); Van Dover v. Van Dover, 247 App. Div. 813, 286 N.Y.S. 328 (2d Dep't 1936); Weber v. Weber, 135 Misc. 717, 238 N.Y.S. 333 (Sup. Ct. 1929). The Farber opinion does not make clear whether the Mexican divorce in question was a void Mexican decree or a valid, bilateral "Rosenstiel" decree. It may be, then, that the Farber case is similar to Stone v. Stone, 29 App. Div. 2d 866, 288 N.Y.S.2d 393 (2d Dep't 1968); Laye v. Shepard, 48 Misc. 2d 478, 265 N.Y.S.2d 142 (Sup. Ct. 1965), aff'd mem., 25 App. Div. 2d 498, 267 N.Y.S.2d 477 (1st Dep't 1966); Harges v. Harges, 46 Misc. 2d 994, 261 N.Y.S.2d 713 (Sup. Ct. 1965); and Leviton v. Leviton, 6 N.Y.S.2d 535 (Sup. Ct.), modified, 254 App. Div. 670, 4 N.Y.S.2d 992 (1st Dep't 1938). These cases do not contradict the statement in the text, that the divorce defendant will not be estopped to attack a void Mexican decree, since in these cases the divorce defendant was prevented from questioning a bilateral Mexican divorce granted after a trial at which the plaintiff was physically present and at which the defendant appeared either in person or by counsel. Such Mexican divorces have always been valid in New York; see, e.g., Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965); Leviton v. Leviton, supra (alternative holding); Caswell v. Caswell, 111 N.Y.S.2d 875 (Sup. Ct.), aff'd

Where the divorce defendant seeks to attack the divorce in other than a matrimonial action, he is estopped to do so if he voluntarily appeared in the divorce proceeding,[29] or remarried following the divorce.[30] However, the divorce defendant is probably permitted to attack a void Mexican decree. Again, if the decree has too little substance to raise an estoppel against the one who obtained it,[31] a fortiori it has too little substance to estop the defendant.[32]

C. *Attack By a Divorcee's Second Spouse*

When a divorced person remarries, his second spouse may have occasion to assert, either affirmatively or defensively, the nullity of their marriage on the ground that the divorcee's prior marriage was never validly dissolved. The second spouse of a divorcee is never estopped to collaterally question the jurisdiction of the divorce court and the validity of the dissolution of the prior marriage.[33] For example, the second spouse may attack the divorce when he seeks affirmative relief in an action to declare the nullity of his marriage to the divorcee.[34] He may also do so

mem., 280 App. Div. 969, 117 N.Y.S.2d 326 (1st Dep't 1952). Thus, the Stone, Leviton, Laye and Harges cases, supra, can be construed as merely giving recognition to valid decrees.

29. Borenstein v. Borenstein, 151 Misc. 160, 270 N.Y.S. 688 (Sup. Ct.), aff'd mem., 242 App. Div. 761, 274 N.Y.S. 1011 (1934), aff'd mem., 272 N.Y. 407, 33 N.E.2d 844 (1936) (action to reduce to judgment a claim for money founded upon a California divorce judgment).

30. Topilow v. Peltz, 43 Misc. 2d 947, 252 N.Y.S.2d 530 (Sup. Ct. 1964), aff'd, 25 App. Div. 2d 874, 270 N.Y.S.2d 116 (2d Dep't 1966); In re Bingham's Estate, 178 Misc. 801, 36 N.Y.S.2d 584 (Sur. Ct. 1942) (alternative holding), aff'd, 265 App. Div. 463, 39 N.Y.S.2d 756 (2d Dep't), leave to appeal denied, 290 N.Y. 929, 48 N.E.2d 713, motion for reargument denied, 266 App. Div. 669, 41 N.Y.S.2d 180 (1943); Greene v. Greene, 236 N.Y.S.2d 732 (N.Y. City Civ. Ct. 1963).

31. Cases cited note 8 supra.

32. See note 28 supra.

33. Packer v. Packer, 6 App. Div. 2d 464, 179 N.Y.S.2d 801 (1st Dep't 1958) (dictum).

34. Davis v. Davis, 279 N.Y. 657, 18 N.E.2d 301 (1938); Magowan v. Magowan, 24 App. Div. 2d 840, 263 N.Y.S.2d 947 (1st Dep't 1965), aff'g 45 Misc. 2d 972, 258 N.Y.S.2d 516 (Sup. Ct. 1964), rev'd on other grounds, 19 N.Y.2d 296, 226 N.E.2d 304, 279 N.Y.S.2d 513 (1967); Serra v. Serra, 11 App. Div. 2d 699, 205 N.Y.S.2d 1 (2d Dep't 1960) (by implication); Jackson v. Jackson, 274 App. Div. 43, 79 N.Y.S.2d 736 (1st Dep't), motion to dismiss appeal denied, 298 N.Y. 794, 83 N.E.2d 478 (1948); Yenoff v. Yenoff, 50 Misc. 2d 798, 271 N.Y.S.2d 844 (Sup. Ct. 1966); Duffy v. Duffy, 23 Misc. 2d 268, 201 N.Y.S.2d 351 (Sup. Ct. 1960); Whittleton v. Whittleton, 3 Misc. 2d 542, 152 N.Y.S.2d 117 (Sup. Ct. 1956); Brunel v. Brunel, 64 N.Y.S.2d 295 (Sup. Ct. 1946); Heusner v. Heusner, 181 Misc. 1015, 42 N.Y.S.2d 850 (Sup. Ct. 1943); cf. Markowitz v. Markowitz, 19 App. Div. 2d 207, 242 N.Y.S.2d 257 (2d Dep't 1963). Contra, Heller v. Heller, 259 App. Div. 852, 19 N.Y.S.2d 509 (2d Dep't), motion for reargument denied, 259 App. Div. 1029, 21 N.Y.S.2d 389, leave to appeal granted, 283 N.Y. 778 (1940), aff'd on other grounds, 285 N.Y. 572, 33 N.E.2d 247 (1941) (the court of appeals expressly left open the question of estoppel); Kaufman v. Kaufman, 177 App. Div. 162, 163 N.Y.S. 566 (1st Dep't 1917) (questioned in Fischer v.

for the purpose of defeating the divorcee's separation or divorce action against him.[35] Moreover, the second spouse is permitted to attack the divorce in proceedings other than matrimonial actions.[36]

Though the second spouse induced the divorcee to marry by convincing her of the validity of the dissolution of her first marriage, he may nevertheless thereafter assert the nullity of the dissolution in an action to declare the nullity of his marriage to the divorcee.[37] That the second spouse knew of the divorce when he married the divorcee and/or that he cohabited with her for a long time will not estop him to attack the divorce and will not provide the defense of laches in either an action to annul his marriage to the divorcee[38] or in the divorcee's action against him for a separation or divorce.[39] Nor will the fact that the second spouse encouraged or facilitated the divorce estop him to question its validity in either an annulment action against the divorcee[40] or in a separation or di-

Fischer, 254 N.Y. 463, 173 N.E. 680 (1930)); Merino v. Merino, 56 Misc. 2d 854, 290 N.Y.S.2d 462 (Sup. Ct. 1968); cf. Hall v. Hall, 139 App. Div. 120, 123 N.Y.S. 1056 (1st Dep't 1910).

35. Maloney v. Maloney, 288 N.Y. 532, 41 N.E.2d 934 (1942), aff'g 262 App. Div. 936, 29 N.Y.S.2d 419 (4th Dep't 1941), aff'g 22 N.Y.S.2d 334 (Sup. Ct. 1940); Lefferts v. Lefferts, 263 N.Y. 131, 188 N.E. 279 (1933) (by implication); Fischer v. Fischer, 254 N.Y. 463, 173 N.E. 680 (1930); Russell v. Russell, 27 App. Div. 2d 563, 276 N.Y.S.2d 49 (2d Dep't 1966) (concurring opinion); Gruttemeyer v. Gruttemeyer, 285 App. Div. 1185, 141 N.Y.S.2d 227 (2d Dep't 1955); Honig v. Honig, 267 App. Div. 908, 47 N.Y.S.2d 623 (2d Dep't), appeal dismissed, 293 N.Y. 856, 59 N.E.2d 444 (1944); Swanston v. Swanston, 76 N.Y.S.2d 175 (Sup. Ct. 1947); see Russell v. Russell, supra (majority opinion). Contra, Merino v. Merino, 56 Misc. 2d 854, 290 N.Y.S.2d 462 (Sup. Ct. 1968); Yenoff v. Yenoff, 50 Misc. 2d 798, 271 N.Y.S.2d 844 (Sup. Ct. 1966) (dictum); Oldham v. Oldham, 174 Misc. 22, 19 N.Y.S.2d 667 (Sup. Ct. 1940).

36. Bell v. Little, 237 N.Y. 519, 143 N.E. 726 (1923), modifying 204 App. Div. 235, 197 N.Y.S. 674 (4th Dep't 1922).

37. Davis v. Davis, 279 N.Y. 657, 18 N.E.2d 301 (1938).

38. Magowan v. Magowan, 24 App. Div. 2d 840, 263 N.Y.S.2d 947 (1st Dep't 1965), aff'g 45 Misc. 2d 972, 258 N.Y.S.2d 516 (Sup. Ct. 1964), rev'd on other grounds, 19 N.Y.2d 296, 226 N.E.2d 304, 279 N.Y.S.2d 513 (1967); Serra v. Serra, 11 App. Div. 2d 699, 205 N.Y.S.2d 1 (2d Dep't 1960) (by implication); Duffy v. Duffy, 23 Misc. 2d 268, 201 N.Y.S.2d 351 (Sup. Ct. 1960); Whittleton v. Whittleton, 3 Misc. 2d 542, 152 N.Y.S.2d 117 (Sup. Ct. 1956). Contra, Heller v. Heller, 259 App. Div. 852, 19 N.Y.S.2d 509 (2d Dep't), motion for reargument denied, 259 App. Div. 1029, 21 N.Y.S.2d 389, leave to appeal granted, 283 N.Y. 778 (1940), aff'd on other grounds, 285 N.Y. 572, 33 N.E.2d 247 (1941) (the court of appeals expressly left open the question of estoppel).

39. Maloney v. Maloney, 288 N.Y. 532, 41 N.E.2d 934 (1942), aff'g 262 App. Div. 936, 29 N.Y.S.2d 419 (1941), aff'g 22 N.Y.S.2d 334 (Sup. Ct. 1940); Lefferts v. Lefferts, 263 N.Y. 131, 188 N.E. 279 (1933) (by implication); Fischer v. Fischer, 254 N.Y. 463, 173 N.E. 680 (1930).

40. Yenoff v. Yenoff, 50 Misc. 2d 798, 271 N.Y.S.2d 844 (Sup. Ct. 1966); Brunel v. Brunel, 64 N.Y.S.2d 295 (Sup. Ct. 1946).

vorce action brought by the divorcee.[41] In addition, the second spouse is permitted to prove the invalidity of the divorce in matrimonial actions between himself and the procurer of the divorce though it was the second spouse who financed the divorce.[42] In addition, since the second spouse may collaterally attack an United States decree, it is not surprising that he may also question a Mexican dissolution.[43]

Finally, third persons in addition to the second spouse of one of the divorcees are permitted to collaterally attack a void foreign divorce whether obtained in the United States[44] or in a foreign country.[45] Of course, these persons will have occasion to mount an attack only in non-matrimonial actions.

II. Other Approaches to the Problem

A. *Traditional Objections to Estoppel*

There can be no easy answer to the question whether estoppel should be permitted since an estoppel results in the recognition, even if for a limited purpose, of a void, migratory divorce granted by a court without subject matter jurisdiction. The state of a person's domicile has a peculiar interest in and jurisdiction over his marital status which justifies its refusal to recognize a void, foreign dissolution of its domiciliary's marriage, and it is eminently proper that a state apply its own laws to the marital difficulties of its citizens. When a state precludes an attack

41. Gruttemeyer v. Gruttemeyer, 285 App. Div. 1185, 141 N.Y.S.2d 227 (2d Dep't 1955). Contra, Merino v. Merino, 56 Misc. 2d 854, 290 N.Y.S.2d 462 (Sup. Ct. 1968).

42. Russell v. Russell, 27 App. Div. 2d 563, 276 N.Y.S.2d 49 (2d Dep't 1966) (concurring opinion); Jackson v. Jackson, 274 App. Div. 43, 79 N.Y.S.2d 736 (1st Dep't), motion to dismiss appeal denied, 298 N.Y. 794, 83 N.E.2d 478 (1948); Honig v. Honig, 267 App. Div. 908, 47 N.Y.S.2d 623 (2d Dep't), appeal dismissed, 293 N.Y. 856, 59 N.E.2d 444 (1944); Swanston v. Swanston, 76 N.Y.S.2d 175 (Sup. Ct. 1947); Heusner v. Heusner, 181 Misc. 1015, 42 N.Y.S.2d 850 (Sup. Ct. 1943); see Russell v. Russell, supra (majority opinion). Contra, Kaufman v. Kaufman, 177 App. Div. 162, 163 N.Y.S. 566 (1st Dep't 1917) (questioned in Fischer v. Fischer, 254 N.Y. 463, 173 N.E. 680 (1930)); Yenoff v. Yenoff, 50 Misc. 2d 798, 271 N.Y.S.2d 844 (Sup. Ct. 1966) (dictum); Oldham v. Oldham, 174 Misc. 22, 19 N.Y.S.2d 667 (Sup. Ct. 1940).

43. Fricke v. Bechtold, 8 Misc. 2d 844, 168 N.Y.S.2d 197 (Sup. Ct. 1957) (dictum); Laff v. Laff, 5 Misc. 2d 554, 160 N.Y.S.2d 933 (Sup. Ct.) (dictum), aff'd mem., 4 App. Div. 2d 874, 166 N.Y.S.2d 678, motion for leave to appeal denied, 4 App. Div. 2d 959, 168 N.Y.S.2d 470 (2d Dep't 1957); cf. Markowitz v. Markowitz, 19 App. Div. 2d 207, 242 N.Y.S.2d 257 (2d Dep't 1963). But see Mountain v. Mountain, 109 N.Y.S.2d 828 (Sup. Ct. 1952).

44. Silva v. Scherer, 23 App. Div. 2d 580, 256 N.Y.S.2d 733 (2d Dep't 1965) (by implication).

45. In re Lieberman's Estate, 44 Misc. 2d 191, 253 N.Y.S.2d 461 (Sur. Ct. 1963).

on an invalid, foreign divorce it condones an evasion[46] of its divorce laws[47] and countenances an officious[48] interference in the family affairs of its citizens by the courts of a divorce-mill jurisdiction.

Since the divorce is a legal nullity, to give it effect is to permit dissolutions at the unilateral will of one spouse in the case of an ex parte divorce obtained without the consent of the defendant; likewise, recognition of a void, bilateral divorce amounts to divorce by consent. This violates the policy prohibiting contracts to alter or dissolve a marriage.[49]

If the divorce is one procured by fraud and perjury as to the plaintiff's domicile and the divorce court's jurisdiction, and perhaps as to the grounds alleged as well,[50] to recognize the divorce is to tolerate illegal conduct and even make it effectual. Then too, recognition of a void divorce frequently confers a semblance of legitimacy upon a bigamous second marriage.

The above considerations could lead a state to reject estoppel and to

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46. New York sometimes condones similar evasions. It has recognized marriages of New York residents contracted abroad to evade the prohibition against remarriage by a person divorced for his adultery. Moore v. Hegeman, 92 N.Y. 521 (1883); D'Arcangelo v. D'Arcangelo, 197 Misc. 46, 91 N.Y.S.2d 101 (Sup. Ct. 1949); Taegen v. Taegen, 61 N.Y.S.2d 869 (Sup. Ct. 1946); Brooks v. Brooks, 38 N.Y.S.2d 224 (Sup. Ct. 1942). It has also recognized the marriage of New York residents contracted abroad to evade the prohibition against marriage between an uncle and a niece. In re May's Estate, 305 N.Y. 486, 114 N.E.2d 4 (1953). However, New York holds that the age of consent to marry of New York residents is controlled by New York law even when they marry abroad to evade the New York law. Cunningham v. Cunningham, 206 N.Y. 341, 99 N.E. 848 (1912).

47. This is essentially what New York has done by granting recognition to certain Mexican divorces though both parties are residents of New York. Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965). However, unlike divorces granted upon a fictitious domicile, Rosenstiel divorces are valid in the jurisdiction granting the divorce.

48. I.e., without a substantial interest in the marriage or the status of the parties which might serve as a basis for jurisdiction. If the country or state granting the divorce has such an interest, it can assume divorce jurisdiction over the marriage and its decree will be valid in this state. Arpels v. Arpels, 8 N.Y.2d 339, 170 N.E.2d 670, 207 N.Y.S.2d 663 (1960); Gould v. Gould, 235 N.Y. 14, 138 N.E. 490 (1923), even though the divorce is granted for a cause insufficient for divorce here; Martens v. Martens, 260 App. Div. 30, 20 N.Y.S.2d 206 (1st Dep't), rev'd on other grounds, 284 N.Y. 363, 31 N.E.2d 489 (1940), reargument denied, 285 N.Y. 607, 33 N.E.2d 542 (1941); see Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965).

49. N.Y. Gen. Obligations Law § 5-311. This policy was weakened by the recent divorce "reform," Laws of 1966, ch. 254, § 12, which amended § 5-311 so as to overrule Viles v. Viles, 14 N.Y.2d 365, 200 N.E.2d 567, 251 N.Y.S.2d 672 (1964).

50. One thing in favor of Rosenstiel divorces procured in Mexico is that they involve neither fraud nor perjury as to the divorce court's jurisdiction, since that is not based on domicile, nor as to the grounds. See Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965).

permit collateral attack upon a void divorce in any case that might arise. The trouble with this extreme, never adopted in New York, is that it might sometimes work unacceptable inequity.[51]

B. *A Sociological Approach to Estoppel*[52]

The sociological approach is premised upon the assumption that, when a marriage has, in fact, failed beyond the possibility of a reconciliation between the spouses, no socially useful purpose is served by insisting upon the legal continuation of the marriage. Therefore, for instance, it should be possible to dissolve the marriage even though none of the usual fault grounds for divorce exist. A refusal to grant a divorce in such a case is thought to be worse than useless because the spouses are going to remain as estranged as ever and, moreover, would be prevented from entering other, hopefully successful, marriages. Thus, the argument goes, the divorce law should permit divorce upon clear proof that a marriage has in fact dissolved; which is to say, the law should be guided by the de facto situation which the spouses have created.

This approach also suggests a rule that might be adopted as to the availability of estoppel to collaterally attack a void divorce: an attack should be estopped whenever the facts show the attack to be inequitable. The idea is that, where a situation has been created which supposes the dissolution of a marriage, the law should not hold that the de facto terminated marriage legally subsists if it would be inequitable to do so. Thus, "if the person attacking the divorce is, in doing so, taking a position inconsistent with his past conduct, or if the parties to the action have relied upon the divorce, and if, in addition, holding the divorce invalid will upset relationships or expectations formed in reliance upon the divorce, then estoppel will preclude calling the divorce in question."[53]

When a court estops a litigant to question the validity of a void divorce, the court may then decide the case before it according to the "real" situation in which the marriage has, in fact, been terminated rather than on the unreal, legalistic basis that it subsists because the divorce was void.

This position will avoid the inequity which can result from the traditionalist approach. However, it has two weaknesses. First, it can result in uncertainty and ambiguity as to a person's marital status and his ca-

51. E.g., Dwyer v. Folsom, 139 F. Supp. 571 (E.D.N.Y. 1950), where applying New York law, the court denied social security benefits to a deceased wage earner's putative wife of almost a quarter of a century whom the decedent had attempted to marry following a void dissolution of the wife's prior marriage.

52. See H. Clark, Law of Domestic Relations § 11.3 (1968).

53. Id. at 305.

pacity to marry.[54] This is undesirable because the ambiguity could conceivably lead a person to refrain from a marriage he could validly contract. More importantly, judicial ambiguity relative to a person's status can encourage him to attempt a bigamous marriage he would not attempt in the face of a forthright determination that his prior marriage subsisted. Then too, estoppel can prevent a valid dissolution of a prior dead marriage and, consequently, the regularization of a bigamous remarriage that has been attempted.

A second weakness is that it is not likely that the New York courts can or will adopt the rule of estoppel suggested by the sociological approach.[55] However far New York has gone toward the adoption of the sociological view of divorce,[56] it has moved in fits and starts and confusion against a considerable opposition and a strong tradition. Yet the adoption of some rule is needed to resolve the present contradictions in the cases, to make the law predictable and to insure equity.

III. A Resolution of the Problem

On most questions, *e.g.*, the conditions upon which a divorce will be granted, the answers of the traditional and sociological approaches to divorce will differ. Yet, on the question of a rule concerning jurisdictional attacks on void divorces, the two approaches can be reconciled sufficiently to formulate a rule which involves no radical departure from the traditional view of divorce and which, at the same time, would make for certainty concerning status and capacity to marry without inequitably upsetting relationships and expectations formed in reliance upon the divorce in question.

The proposed rule is simple: a person should be estopped to attack the jurisdiction of a divorce court in non-matrimonial actions if his conduct has made the attack inequitable; but any person may attack a divorce in any subsequent matrimonial action.

Adoption of this rule would change New York law in that both divorcees would be permitted to attack an United States divorce in matrimonial actions whereas only the second spouse of a divorcee presently may. Mexican decrees would remain subject to collateral questioning in matrimonial actions. Another change would see the second spouse of a divorcee and other third persons estopped from questioning an United

54. H. Clark recognizes this but believes another rule would result in just as much uncertainty. Id. at 304.

55. Research has revealed only one case which has done so expressly. Merino v. Merino, 56 Misc. 2d 854, 290 N.Y.S.2d 462 (Sup. Ct. 1968).

56. See, e.g., N.Y. Dom. Rel. Law § 170(5), (6) (Supp. 1968) which provides two nonfault grounds for divorce.

States divorce in non-matrimonial actions when their conduct would justify an estoppel. Moreover, in non-matrimonial actions anyone could be estopped to inequitably attack a Mexican decree which is probably not now the case. It remains to justify these changes.

A. *A Distinction Between Causes of Action*

The distinction between matrimonial actions and other actions justifies the proposed rule rejecting estoppel in the former while permitting it in the latter. The former include actions to declare the nullity of a void marriage, for separation and for divorce. Non-matrimonial actions in which foreign divorce decrees might come under attack are exemplified by actions to enforce a right of election against a deceased spouse's will and by a woman's proceeding to enforce an alleged right to support.

A right of election depends upon the marital status of the decedent at the time of death. A petitioner's right to an award of support depends upon the existence of a valid, subsisting marriage between the petitioner and the defendant.[57] However, in a non-matrimonial action, the ultimate adjudication does not affect or determine marital status but rather the property right involved. The determination of marital status is only incidental.[58] The ultimate purpose of a matrimonial action, on the other hand, is precisely to have an adjudication upon the marital status of the parties to the action.

Society has a special interest in the marital status of its members[59] which justifies the distinction between matrimonial and other actions.[60] Marriage creates the family upon which society depends for most of the

57. Goodman v. Goodman, 25 App. Div. 2d 646, 268 N.Y.S.2d 545 (1st Dep't 1966); Fleischer v. Fleischer, 24 App. Div. 2d 667, 261 N.Y.S.2d 165 (3d Dep't 1965); Carter v. Carter, 19 App. Div. 2d 513, 240 N.Y.S.2d 141 (1st Dep't 1963); Fishberg v. Fishberg, 16 App. Div. 2d 629, 226 N.Y.S.2d 855 (1st Dep't 1962); Glass v. Glass, 57 Misc. 2d 76, 291 N.Y.S.2d 487 (Fam. Ct. 1968); Medici v. Medici, 53 Misc. 2d 826, 279 N.Y.S.2d 910 (Fam. Ct. 1967).

58. The finding of the family court as to the validity of the marriage of the parties to a support proceeding does not even make the question res judicata in a subsequent matrimonial action in supreme court. Loomis v. Loomis, 288 N.Y. 222, 42 N.E.2d 495 (1942); Fishberg v. Fishberg, 16 App. Div. 2d 629, 226 N.Y.S.2d 855 (1st Dep't 1962).

59. See, e.g., "[M]arriage is an institution in which the public as a third party has a vital interest." Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 76, 209 N.E.2d 709, 714, 262 N.Y.S.2d 86, 93 (1965) (Desmond, C.J., concurring in part). "Marriage is more than a personal relation between a man and woman. It is a status founded on contract and established by law. It constitutes an institution involving the highest interests of society. It is regulated and controlled by law based upon principles of public policy affecting the welfare of the people of the State. . . . There are, in effect, three parties to every marriage, the man, the woman and the State." Fearon v. Treanor, 272 N.Y. 268, 272, 5 N.E.2d 815, 816 (1936).

60. See Stevens v. Stevens, 273 N.Y. 157, 7 N.E.2d 26 (1937).

educational, material and affective needs of the great majority of its members.[61]

The social importance of marriage justifies a rule which requires that marital status always be truly adjudicated[62] upon real facts rather than upon a fictitious divorce. Hence, it is proper to hold that there can be no estoppel to collaterally attack a void divorce in matrimonial actions since the estoppel would prevent a true determination of the marital status in question.[63] On the other hand, an estoppel could be raised, when appropriate, in non-matrimonial cases concerning a property right in which society does not have the special interest it has in marital status.[64]

The conclusion that there should be no estoppel in matrimonial actions is strengthened by the fact that a void divorce amounts to nothing more than private conduct or agreement. But "[a] husband and wife cannot contract to alter or dissolve the marriage . . . ."[65] Furthermore, marriage is "a relationship which no stipulation or conduct of the parties could alter."[66] Therefore, a void divorce should not be permitted to influence an adjudication of marital status.[67] Any person should be permitted to show the nullity of a void decree for the purpose of adjudicating status as required in separation and divorce actions and in actions for the declaration of the nullity of a void marriage.

61. At no time has the value of the social work done by a stable family been more evident than in our own. The contemporary breakdown of family life has left unsatisfied needs which swamp thousands of professional social workers and educators with millions of dollars at their disposal.

62. Maloney v. Maloney, 288 N.Y. 532, 41 N.E.2d 934 (1942), aff'g 262 App. Div. 936, 29 N.Y.S.2d 419 (1941), aff'g 22 N.Y.S.2d 334 (Sup. Ct. 1940); Senor v. Senor, 272 App. Div. 306, 314, 70 N.Y.S.2d 909, 916 (1947) (dissenting opinion), aff'd mem., 297 N.Y. 800, 78 N.E.2d 20 (1948); Beaudoin v. Beaudoin, 270 App. Div. 631, 62 N.Y.S.2d 920 (3d Dep't 1946); Heusner v. Heusner, 181 Misc. 1015, 42 N.Y.S.2d 850 (Sup. Ct. 1943).

63. Querze v. Querze, 290 N.Y. 13, 47 N.E.2d 423 (1943); Maloney v. Maloney, 288 N.Y. 532, 41 N.E.2d 934 (1942), aff'g 262 App. Div. 936, 29 N.Y.S.2d 419 (1941), aff'g 22 N.Y.S.2d 334 (Sup. Ct. 1940); Stevens v. Stevens, 273 N.Y. 157, 7 N.E.2d 26 (1937); Considine v. Rawl, 39 Misc. 2d 1021, 242 N.Y.S.2d 456 (Sup. Ct. 1963) (where while recognizing the principle stated in the text, the court held a divorcee estopped to attack the divorce in her action to declare the nullity of the other divorcee's second marriage because the plaintiff sought the declaration of nullity only as a means of acquiring certain death benefits); Dorn v. Dorn, 202 Misc. 1057, 112 N.Y.S.2d 90 (Sup. Ct. 1952) (dictum), aff'd on other grounds, 282 App. Div. 597, 126 N.Y.S.2d 713 (2d Dep't 1953); cf. Beaudoin v. Beaudoin 270 App. Div. 631, 62 N.Y.S.2d 920 (3d Dep't 1946). Contra, Krause v. Krause, 282 N.Y. 355, 26 N.E.2d 290 (1940).

64. See cases cited note 63 supra.

65. N.Y. Gen. Obligations Law § 5-311.

66. Stevens v. Stevens, 273 N.Y. 157, 159, 7 N.E.2d 26, 26-27 (1937).

67. Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E.2d 60 (1948); Querze v. Querze, 290 N.Y. 13, 47 N.E.2d 423 (1943); Stevens v. Stevens, 273 N.Y. 157, 7 N.E.2d 26 (1937); Senor v. Senor, 272 App. Div. 306, 314, 70 N.Y.S.2d 909, 916 (1st Dep't 1947) (dissenting opinion), aff'd mem., 297 N.Y. 800, 78 N.E.2d 20 (1948).

The New York Court of Appeals has held that a void marriage "create[s] neither right nor duty; it [gives] neither scope for recrimination nor room for any counteractive estoppel."[68] This holding was made in a case in which the husband had induced the wife to marry while the annulment of her prior, voidable marriage was interlocutory. He did so by representing that the interlocutory decree permitted a valid remarriage. Relying on the principle just quoted the court held that the husband was not estopped to maintain an action to declare the nullity of his marriage though he came to court with unclean hands.[69] The logic of the principle clearly permits a plaintiff to attack a void divorce for the purpose of declaring the nullity of a divorcee's second marriage[70] whether the plaintiff be the second spouse or the divorcee.[71] But if there can be no estoppel to question the validity of a marriage and, hence, the divorce upon which the marriage depends, in an action to declare the nullity of the marriage, there can logically be no estoppel when the attack is made as a defense in divorce and separation actions.[72]

68. Landsman v. Landsman, 302 N.Y. 45, 48, 96 N.E.2d 81, 82 (1950).

69. Id.; accord, Stokes v. Stokes, 198 N.Y. 301, 91 N.E. 793 (1910) (but the opinion contains a dictum that there may be extreme cases raising an estoppel); Villafana v. Villafana, 278 App. Div. 697, 103 N.Y.S.2d 1013 (1st Dep't 1951); Marion v. Marion, 277 App. Div. 1115, 101 N.Y.S.2d 1022 (1st Dep't 1950); Slater v. Kenny, 265 App. Div. 963, 38 N.Y.S.2d 595 (2d Dep't 1942), rev'g 176 Misc. 690, 27 N.Y.S.2d 303 (Sup. Ct. 1941); Brown v. Brown, 153 App. Div. 645, 138 N.Y.S. 602 (1st Dep't 1912); Grossman v. Grossman, 40 Misc. 2d 739, 243 N.Y.S.2d 578 (Sup. Ct. 1963). Earlier decisions conflicting with Landsman v. Villafana, supra, rev'g upon reargument (after the Landsman decision), 275 App. Div. 1003, 52 N.Y.S.2d 119 (2d Dep't 1944) and Berry v. Berry, 130 App. Div. 53, 114 N.Y.S. 497 (1st Dep't 1909), are necessarily overruled by the Landsman case, supra. See Villafana v. Villafana, supra, rev'd upon reargument (after the Landsman decision), 275 App. Div. 810, 89 N.Y.S.2d 389 (1st Dep't 1949).

70. See Magowan v. Magowan, 45 Misc. 2d 972, 258 N.Y.S.2d 516 (Sup. Ct. 1964), aff'd mem., 24 App. Div. 2d 840, 263 N.Y.S.2d 947 (1st Dep't 1965), rev'd on other grounds, 19 N.Y.2d 296, 226 N.E.2d 304, 279 N.Y.S.2d 513 (1967); Duffy v. Duffy, 201 N.Y.S.2d 351 (Sup. Ct. 1960).

71. But see Packer v. Packer, 6 App. Div. 2d 464, 179 N.Y.S.2d 801 (1st Dep't 1958), where a wife, who aided her first husband in the procurement of a void dissolution of their marriage and then married her second husband knowing the dissolution was void, was held estopped to collaterally attack the divorce for the purpose of obtaining a declaration of the nullity of her marriage to the second husband. Landsman v. Landsman, 302 N.Y. 45, 78 N.E.2d 20 (1950), was limited to the proposition that there can be no estoppel to question a divorce against the second spouse of the divorcee. See also Magowan v. Magowan, 45 Misc. 2d 972, 258 N.Y.S.2d 516 (Sup. Ct. 1964), aff'd mem., 24 App. Div. 2d 840, 263 N.Y.S.2d 947 (1st Dep't 1965), rev'd on other grounds, 19 N.Y.2d 296, 226 N.E.2d 304, 279 N.Y.S.2d 513 (1967); and Duffy v. Duffy, 201 N.Y.S.2d 351 (Sup. Ct. 1960), which relied upon Landsman v. Landsman, supra, to permit a plaintiff with unclean hands to question the dissolution of the defendant's prior marriage in an action to declare the nullity of the marriage of the plaintiff with the defendant. Both were cases in which it was the second spouse who sought the declaration of nullity.

72. See Sophian v. Sophian, 279 App. Div. 651, 108 N.Y.S.2d 185 (1st Dep't 1951)

Thus, a substantial[73] distinction can be made between matrimonial actions and others which permits a rejection of estoppel in matrimonial cases in order that the court may truly determine the marital status of the parties before it and grant the appropriate relief with the resultant certainty as to their status and capacity to marry. In other actions concerning a property right dependent upon marital status, one who would inequitably question the validity of a divorce may be estopped to do so. The public interest in marital status which precludes an estoppel in matrimonial cases is absent in others.[74]

B. *Purpose of the Rule Against Estoppel in Matrimonial Actions: Certainty as to Marital Status and the Avoidance of Inequity*

Since the distinction between matrimonial actions and other types justifies estoppel in non-matrimonial cases, both the traditionalist and the sociological judge could agree to permit estoppel in such cases.

The sociologist would also permit estoppel in matrimonial actions, but the traditionalist would not. The difference results because the two attach greater importance to and seek the achievement of different ends. The virtue of the rule rejecting estoppel is that it results in certainty as to a person's status and his capacity to marry and, therefore, should tend to minimize bigamous marriages. In addition the rule would tend to encourage the validation of void marriages. The sociologist recognizes the undesirability of ambiguity as to marital status which results when estoppel is permitted but feels that ambiguity is inevitable[75] and would permit estoppel to avoid inequitably upsetting relationships and expectations formed in reliance on the putative divorce.[76]

(husband married wife while dissolution of his previous marriage was interlocutory. In wife's suit for separation, held, citing Landsman v. Landsman, 302 N.Y. 45, 96 N.E.2d 81 (1950), husband not estopped to prove nullity of the marriage as a defense to wife's action); Beaudoin v. Beaudoin, 270 App. Div. 631, 62 N.Y.S.2d 920 (3d Dep't 1946) (husband attempted a marriage void because he had been divorced by his previous wife for adultery; in wife's suit for divorce, held, husband not estopped to prove nullity of the marriage as a defense to wife's action).

73. In Merino v. Merino, 56 Misc. 2d 854, 290 N.Y.S.2d 462 (Sup. Ct. 1968), the court thought the distinction was without substance. But other courts would welcome it. For instance, in Case v. Case, 54 Misc. 2d 20, 281 N.Y.S.2d 241 (Fam. Ct. 1967), a support proceeding, the court reluctantly felt itself bound by precedent to permit the defendant, the second spouse of the divorced plaintiff, to show the nullity of the dissolution of the plaintiff's first marriage. Had the court made the distinction, for which there is ample authority, it could have estopped the defendant and decreed support.

74. Maloney v. Maloney, 22 N.Y.S.2d 334 (Sup. Ct. 1924), aff'd per curiam, 262 App. Div. 936, 29 N.Y.S.2d 419 (4th Dep't 1941), aff'd per curiam, 288 N.Y. 532, 41 N.E.2d 934 (1942).

75. H. Clark, supra note 52, at 304.

76. Id. at 305.

The relationship which the sociologist wishes to avoid upsetting is a second marriage by a supposed divorcee. But, as should be seen in the discussion that follows, no real inequity is involved in a finding that a divorcee's remarriage is void when the finding is made in a matrimonial action. The marriage is bigamous and, therefore, void even if a court refuses to so find.

The expectations that might be inequitably upset in a matrimonial action by a showing that a previous divorce is void are the expectations of the parties as to the woman's right to support and the expectation that the children of the second marriage of a divorcee are legitimate. But New York law is such that a woman's right to an award of alimony does not depend upon the marital status of the parties to the action in which the award is requested. The marital status of the parties can be truly found or declared by the court without either inequitably withholding alimony from the wife or inequitably imposing a duty of support on the husband. Moreover, the supreme court has a broad power to legitimatize the children of a void marriage.

Consequently New York is fortunate: it can adopt the rule rejecting estoppel in matrimonial actions so that the marital status of the parties before its courts can be unambiguously adjudicated and, at the same time, the inequity feared by the sociologist can be avoided. Therefore, in New York at least, the traditionalist judge and the sociologist should be able to agree that there is to be no estoppel in divorce and separation actions, and none in actions to declare the nullity of a void marriage. A comparison of the different rules in typical cases will demonstrate the superiority of the suggested rule.

C. *Analysis of Typical Cases*

In a separation or divorce action brought by one divorcee against the other, a prior dissolution of their marriage is attacked by the plaintiff for the purpose of showing that the marriage of the parties subsists and that, therefore, the separation or divorce action can be maintained, the previous decree notwithstanding.[77] When an attack on the earlier divorce is precluded, it appears that the parties are no longer married and that the second action must be dismissed.[78]

The dismissal in this fashion is undesirable. Since there has been no

77. A separation and divorce action can be maintained only when there is a valid, subsisting marriage between the parties. Statter v. Statter, 2 N.Y.2d 668, 143 N.E.2d 10, 163 N.Y.S.2d 13 (1957); Garvin v. Garvin, 306 N.Y. 118, 116 N.E.2d 73 (1953); Fischer v. Fischer, 254 N.Y. 463, 173 N.E. 680 (1930); Jones v. Jones, 108 N.Y. 415, 15 N.E. 707 (1888).

78. Fischer v. Fischer, 254 N.Y. 463, 173 N.E. 680 (1930).

forthright adjudication of the invalidity of the questionable divorce, the marital status of the supposed divorcees and their capacity to remarry is ambiguous. This uncertainty may induce one or both to attempt a second marriage which would be bigamous and void. Estoppel in these actions can contribute to total confusion.

On the other hand, the sociological approach should also suggest that the dismissal is undesirable. The marriage in question has clearly failed but it has not been legally terminated. Paradoxically, it would be best to recognize that the marriage legally subsists so that the court could proceed to adjudicate the status of the parties and grant a separation or valid divorce. Should the latter be decreed, both parties may then validly remarry. Should a separation be decreed, either party could after two years convert the separation into a dissolution, again permitting both to validly remarry.

In an action for the declaration of the nullity of the second marriage of a divorcee brought by the divorcee against his second spouse, by the second spouse against the divorcee, or by one divorced person against the other and the latter's second spouse, the dissolution of the prior marriage is attacked by the plaintiff for the purpose of showing that the first marriage subsisted at the time of the second and that the second is, therefore, void.[79] The divorce will be attacked for the same purpose by the defendant in an action for separation or divorce brought by a divorcee against his second spouse; or by the second spouse against the divorcee, since these actions can only be maintained between persons who are validly married.[80]

From the traditional viewpoint, the evil of an estoppel in these cases is that the estoppel precludes a showing of the nullity of a bigamous marriage, *i.e.*, it results in the recognition, though for a limited purpose, of a polygamous or polyandrous marriage. Moreover, in these cases the second marriage of the divorcee is as dead as his first, as well as invalid. Therefore, social realism, the sociological approach, also would permit an adjudication that it is void.

1. Typical Separation Actions Between Divorcees

A wife has been estopped to question her void Nevada divorce in her later separation action against the same husband when the purpose of the separation action is to obtain an award of alimony greater than that awarded by the foreign divorce court.[81] The showing of the nullity of

79. N.Y. Dom. Rel. Law § 6 (Supp. 1968).

80. See cases cited note 77 supra.

81. Senor v. Senor, 272 App. Div. 306, 70 N.Y.S.2d 909 (1947), aff'd mem., 297 N.Y. 800, 78 N.E.2d 20 (1948); accord, Sommer v. Sommer, 31 Misc. 2d 826, 221 N.Y.S.2d 707 (Sup. Ct. 1961), aff'd per curiam, 16 App. Div. 2d 629, 226 N.Y.S.2d 730 (1st Dep't 1962).

the divorce having been precluded, it appeared the parties were no longer married; this necessitated the dismissal of the separation action since the action presupposes an existing marriage between the parties;[82] and this, in turn, deprived the court of jurisdiction to award the wife alimony,[83] which is precisely what the court desired.

The court decried the vagaries of those who would play fast and loose with marriage, swearing to a residence in one state for the purpose of obtaining a divorce and, at some later time, willing and anxious to impeach their oath for personal gain. The court was, of course, correct to decry the wife's conduct. But today, the court could deny the wife alimony because justice and the circumstances of the case do not entitle her to it[84] even while permitting her to show the Nevada divorce void for the purpose of maintaining the separation action, and, in that action, correctly adjudicating the marital status of the parties.

Since, in New York at least, equity in the matter of alimony no longer requires an estoppel, what purpose does an estoppel serve? The dismissal of the action, in a case like the one above, implies that the parties have no duty of cohabitation. This is as it should be, at least from the sociological view, because the marriage has failed. But it also implies that the parties are not married and, ergo, that they may remarry though, in fact, it would be criminal[85] for them to do so. But should the attack on the divorce be permitted and a separation granted, the plaintiff in that case also would have the right to live apart from the defendant. In addition, there would be no ambiguity concerning the parties' marital status and their incapacity for remarriage. Whether or not there is an estoppel, the defendant will have no right of cohabitation with the plaintiff. Thus, an estoppel works no inequity in this regard. But if there is no estoppel, their marital status will be clearly established. Presumptively, most people would not then attempt a second marriage which would clearly be void until the first had been dissolved. If a separation were granted, a dissolution could be obtained in due course by either party by converting the separation into a divorce.[86] Then each could validly remarry and avoid bigamy.

In another case,[87] a wife brought a separation action against her husband and was awarded temporary alimony which the husband never paid. While the separation action was pending the husband procured a

82. Fischer v. Fischer, 254 N.Y. 463, 173 N.E. 680 (1930).

83. Fein v. Fein, 261 N.Y. 441, 185 N.E. 693 (1933); Ceva v. Ceva, 271 App. Div. 449, 65 N.Y.S.2d 767 (1946), aff'd per curiam, 297 N.Y. 484, 74 N.E.2d 187 (1947).

84. N.Y. Dom. Rel. Law § 236 (Supp. 1968).

85. N.Y. Penal Law § 255.15.

86. N.Y. Dom. Rel. Law § 170(5) (Supp. 1968).

87. Carbulon v. Carbulon, 293 N.Y. 375, 57 N.E.2d 59 (1944).

void Connecticut divorce. Following the divorce, and while her separation action was still pending, the wife remarried. Then, in the separation action, the wife sought a judgment for the arrears in temporary alimony up to the time she remarried. The court held the wife estopped to attack the Connecticut divorce and, therefore, dismissed the separation action. Consequently, the wife lost her right to enforce the temporary alimony decree which, again, was precisely what the court wished to accomplish.

Today there would be no need to dismiss the separation action and, hence, no need of the estoppel in order to deny enforcement of the temporary alimony award. The court could permit a showing of the nullity of the Connecticut divorce, truly determine the marital status of the parties and the plaintiff's right to a separation, but, on motion of the husband, vacate the alimony award on the ground that in the circumstances she is not entitled to it. "Upon the application of . . . the husband . . . the court may annul . . . any such direction [for alimony], whether made by order or by final judgment . . . ."[88]

Were the wife permitted to show the invalidity of the Connecticut divorce in a case like the one above, it would follow that the parties remained husband and wife. Consequently, the court could grant the wife a separation if she had grounds and the husband offered no affirmative defense.[89] Neither the granting nor the denial of a separation[90] would permit the wife to immediately validate her second marriage or the husband to remarry. However, if the proposed rule rejecting estoppel in matrimonial actions was adopted, so as to make it possible for the wife to secure a separation, a decree, if granted, could eventually be converted into a divorce by either spouse.[91] Alternatively, the husband could, if he desired, counterclaim for a divorce because of the wife's adultery with her second, putative husband. In each case, both spouses would sooner or later be free to remarry. But the present law prevents this eventuality: the wife cannot obtain a separation and the husband will not be granted a divorce because each is estopped to question the void Connecticut decree in a matrimonial action against the other.

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88. N.Y. Dom. Rel. Law § 236 (Supp. 1968).

89. The husband would have the defense of recrimination, N.Y. Dom. Rel. Law § 202, since the wife's relation with her second husband was adulterous.

90. In either event justice would be done today as regards permanent alimony; it would be denied. When a woman marries a second time, even though the second marriage is void, she must look solely to her second husband for support. Gaines v. Jacobsen, 308 N.Y. 218, 124 N.E.2d 290 (1954); Johnson v. Johnson, 54 Misc. 2d 1005, 284 N.Y.S.2d 33 (Sup. Ct. 1967); cf. Denberg v. Frischman, 24 App. Div. 2d 100, 264 N.Y.S.2d 114 (1965), aff'd mem., 17 N.Y.2d 778, 217 N.E.2d 675, 270 N.Y.S.2d 627 (1966).

91. N.Y. Dom. Rel. Law § 170(5) (Supp. 1968).

2. Typical Divorce Actions Between Divorcees

A husband has been estopped to show the nullity of his wife's ex parte Pennsylvania divorce in his subsequent action for divorce against the wife when the husband, as well as the wife, had remarried following the divorce.[92]

Had the court permitted the husband to show the nullity of the Pennsylvania decree, it would have appeared that the parties' relations with their second spouses were adulterous; that, while the husband had grounds for divorce, the wife had the defense of recrimination;[93] and that, therefore, a divorce should be denied. The court's actual disposition, the raising of an estoppel, had the effect of denying the husband a divorce. And, if a divorce is denied, for whatever reason, there can be no validation of the second marriages.

Had the parties known in advance that their status could not be affected by a void, foreign divorce, and that their status as fixed by New York law would be uncompromisingly enforced, a void divorce notwithstanding, there is every reason to believe they would have acted more circumspectively. But even though persons do sometimes act irresponsibly, such behavior cannot determine the rule of estoppel to be adopted. Whether the plaintiff is estopped to question the defendant's divorce or not, in a case like the one under discussion an impasse is reached should the defendant assert the defense of recrimination, which no rule of estoppel can resolve.

However, in the situation where both divorcees have remarried and one sues the other for divorce, it is possible that today the defense of recrimination would not be asserted. Since a valid divorce would permit the defendant to validate his second marriage, one might suppose that the defendant would often be as anxious for a divorce as the plaintiff and would not raise the defense.

This reason for not contesting the divorce did not exist at the time the principal case arose. At that time a defendant divorced for his adultery was prohibited from remarrying for at least three years and then only upon a showing of good behavior since the divorce.[94] Therefore, a defendant divorced for his adultery could not look forward to an early validation of his second marriage.[95] But since September 1,

92. Kelsey v. Kelsey, 204 App. Div. 116, 107 N.Y.S. 371 (1922), aff'd per curiam, 237 N.Y. 520, 143 N.E. 726 (1923).

93. N.Y. Dom. Rel. Law § 171(4).

94. Ch. 265, § 8, [1919] N.Y. Sess. Laws 875, as amended N.Y. Dom. Rel. Law § 8 (Supp. 1968) so as to permit a divorce defendant to remarry.

95. However, a divorce defendant could contract a marriage outside of New York in a jurisdiction where the divorce was no impediment and New York would recognize the marriage though it was contracted abroad by New York citizens to evade the New York statute. See note 46 supra.

1967 either party to a marriage dissolved by divorce may immediately marry again.[96]

Nor would the question of alimony cause a defendant to contest a divorce action when he otherwise would not do so. Since 1940, the first husband's obligation to support the wife is extinguished when she remarries, even though the second marriage be void.[97] So far as alimony is concerned, neither the husband nor the wife has anything to gain or lose by a decree dissolving their marriage when the wife has attempted to remarry.

Therefore, in cases where one divorcee sues the other for divorce and one or both have attempted a second marriage, a valid dissolution will be desirable so that the second marriage can be legitimatized. A rule against estoppel in matrimonial actions will help to make a valid dissolution possible; but a rule permitting estoppel would tend to prevent a valid divorce and, hence, the regularization of the bigamous, second marriages.

3. Typical Matrimonial Actions Between a Divorcee and His Second Spouse

A case which has largely contributed to the confusion as to the law of estoppel but which was just in its result is *Krause v. Krause*.[98] In that case it was held that a husband who had procured a void Nevada divorce from his first wife could not show the nullity of the Nevada decree for the purpose of defeating his second wife's separation action when the showing would also defeat the second wife's right to the support and alimony to which the court thought her entitled. If it appears that the parties to a separation action are not validly married, the action must be dismissed.[99] At the time that the *Krause* case was decided, a dismissal of the second wife's separation action would have deprived the court of jurisdiction to award her alimony.[100] But since the present law provides that alimony may be awarded "notwithstanding that the court refuses to grant the relief requested by the wife . . . by reason of a failure of proof of the grounds of the wife's action of counterclaim,"[101] were a case like

96. N.Y. Dom. Rel. Law § 8 (Supp. 1968).

97. Gaines v. Jacobsen, 308 N.Y. 218, 124 N.E.2d 290 (1954); Johnson v. Johnson, 284 N.Y.S.2d 33 (Sup. Ct. 1967); cf. Denberg v. Frischman, 24 App. Div. 2d 100, 264 N.Y.S.2d 114 (1965), aff'd mem., 17 N.Y.2d 778, 217 N.E.2d 675, 270 N.Y.S.2d 627 (1966).

98. 282 N.Y. 355, 26 N.E.2d 290 (1940).

99. Fischer v. Fischer, 254 N.Y. 463, 173 N.E. 680 (1930).

100. See Fein v. Fein, 261 N.Y. 441, 185 N.E. 693 (1933); Ceva v. Ceva, 271 App. Div. 449, 65 N.Y.S.2d 767 (1st Dep't 1946), aff'd per curiam, 297 N.Y. 484, 74 N.E.2d 187 (1947).

101. N.Y. Dom. Rel. Law § 236 (Supp. 1968).

Krause v. Krause to arise today, the second wife could be awarded alimony in her separation action although, because the parties are not validly married, she is unable to prove a ground for separation.[102] The wide discretion[103] given the court would enable it to award the alimony, but at the same time, the husband could be allowed to show the nullity of the dissolution of his first marriage so as to have a true disposition of the question of status and a consequent dismissal of the separation action.[104]

Of course, the proper action to be brought by one who has attempted a void marriage is not a separation or divorce action, but one for a declaration of the nullity of the marriage. In such an action alimony can now be recovered by the wife when justice and the circumstances of the case show that she is entitled to it.[105] The wife did not follow that course in the *Krause* case because, at that time, a court could not award alimony

102. N.Y. Dom. Rel. Law § 236, quoted in the text accompanying note 101 supra, was enacted to, inter alia, minimize litigation concerning the obligation of a husband to support his wife. With the parties before it, the court can determine the wife's right to support, even though it denies her a divorce or separation, rather than remit her to further litigation in the family court to procure the needed support. Brownstein v. Brownstein, 25 App. Div. 2d 205, 268 N.Y.S.2d 115 (1st Dep't 1966). When the parties are validly married, the court may award the wife alimony though she is denied a divorce or separation because her evidence is insufficient to establish adultery, cruelty, etc. Brownstein v. Brownstein, supra; Insetta v. Insetta, 20 App. Div. 2d 544, 245 N.Y.S.2d 133 (2d Dep't 1963). When the parties are validly married, the court may decree alimony although her complaint for separation on the ground of nonsupport is dismissed for failure of proof because the wife is refusing to cohabit with the husband who is, therefore, relieved of the duty of support to the extent that a failure to support is not a ground for separation. Eylman v. Eylman, 23 App. Div. 2d 495, 256 N.Y.S.2d 264 (2d Dep't 1965). But, just like a man who is validly married, a man who is invalidly married has an obligation to support his "wife." Johnson v. Johnson, 295 N.Y. 477, 68 N.E.2d 499 (1946). Thus, it would be appropriate to construe the quoted portion of § 236 as authorizing an award of alimony to the wife even when the court denied her a separation or divorce because the parties are not validly married, rather than remit her to further litigation in another action to procure the needed support. However, it seems that prior to the enactment of the quoted portion of § 236, a wife could not be awarded alimony when her complaint for separation or divorce was dismissed because the parties were invalidly married, not even after 1940 when alimony could have been awarded in an action to declare the nullity of the parties' marriage. See Marum v. Marum, 8 App. Div. 2d 975, 190 N.Y.S.2d 812 (2d Dep't 1959); Ceva v. Ceva, 271 App. Div. 449, 65 N.Y.S.2d 767 (1946), aff'd per curiam, 297 N.Y. 484, 74 N.E.2d 187 (1947).

103. McMains v. McMains, 15 N.Y.2d 283, 289, 206 N.E.2d 185, 189, 258 N.Y.S.2d 93, 99 (1965). The Matrimonial and Family Laws Committee which framed N.Y. Dom. Rel. Law § 236 stated that the section "broadens the discretion of the court [to award alimony] in all classes of matrimonial actions." Report of Joint Legislative Comm. on Matrimonial And Family Laws, N.Y. Leg. Doc. No. 34, 185th Sess. 309 (1962).

104. The courts were given their broad discretion so that "more flexibility and better results can be provided by the courts in dealing with these vexations (sic) collateral domestic problems." N.Y. Leg. Doc. No. 34, 185th Sess. 310 (1962).

105. N.Y. Dom. Rel. Law § 236 (Supp. 1968).

when it decreed the nullity of a void marriage.[106] The law was changed in this respect, precisely for the purpose of alleviating the plight of a wife married to a bigamist husband.[107] Since 1940, in an action to declare the nullity of a marriage, brought during the lifetime of both parties to the marriage, the court may award alimony as justice requires.[108] Thus a woman in the position of the second Mrs. Krause, desiring support from her husband of a void marriage, could today, rather than sue for a separation or divorce, bring an action to declare the nullity of her marriage because the husband's dissolution of his first marriage was invalid and also be awarded the alimony to which she is entitled.[109] But whether she sued for separation, divorce or a declaration of nullity, the wife would have justice. At the same time the void divorce decree need not affect the court's decision concerning the parties' status. The court could unambiguously hold the marriage void. It would then be clear that a wife in Mrs. Krause's position is free to marry. Since the alimony question can be resolved equitably there is no reason to permit the wife to obtain a separation as was done in the *Krause* case. Today the only effect of a separation decree would be to imply that the wife was not free to marry.

Likewise, a husband could be granted a declaration of the nullity of his marriage to a bigamous wife after showing the nullity of the wife's dissolution of her prior marriage, while the wife could be awarded such alimony as she deserves.[110] It had been held in such a case,[111] at a time when the court had no jurisdiction to grant alimony when it declared a marriage void, that the husband was estopped to question the wife's divorce and the validity of their marriage because he should not be able

106. Johnson v. Johnson, 295 N.Y. 477, 68 N.E.2d 499 (1946).

107. Id.

108. N.Y. Dom. Rel. Law § 236 (Supp. 1968), incorporating the substance of N.Y. Civ. Prac. Act § 1140-a, which was enacted in 1940.

109. Whittleton v. Whittleton, 3 Misc. 2d 542, 152 N.Y.S.2d 117 (Sup. Ct. 1956) where in H-2's action to declare the nullity of his marriage to W, held: H-2 permitted to prove the nullity of W's divorce of H-1 and the declaration of nullity granted; but W entitled to alimony because H-2 should not be permitted to entirely escape the consequences of his improvident conduct; cf. Heusner v. Heusner, 181 Misc. 1015, 42 N.Y.S.2d 850 (Sup. Ct. 1943) where in H-2's counterclaim to declare the nullity of his marriage to W, held: H-2 permitted to prove the nullity of W's divorce from H-1 and the declaration granted. Recently enacted statutes save the legitimacy of the child of the void marriage and give the court jurisdiction to decree support of the child against H-2; hence, it is unnecessary to estop H-2 in order to accomplish these things.

110. Johnson v. Johnson, 295 N.Y. 477, 68 N.E.2d 499 (1946). Alimony may also be awarded the wife when the husband's action for a declaration of the nullity of their marriage is unsuccessful. Rosenstiel v. Rosenstiel, 20 N.Y.2d 925, 233 N.E.2d 292, 286 N.Y.S.2d 277 (1967) (mem.), aff'g 28 App. Div. 2d 651, 280 N.Y.S.2d 624 (1st Dep't); Virgil v. Virgil, 55 Misc. 2d 64, 284 N.Y.S.2d 568 (Sup. Ct. 1967).

111. Kaufman v. Kaufman, 177 App. Div. 162, 163 N.Y.S. 566 (1st Dep't 1917).

to escape all responsibility to the wife, *i.e.*, the duty of support, since he financed her divorce, married her following it and cohabited with her for a number of years. Today the void marriage could be unambiguously declared void but alimony awarded.[112]

In a recent case[113] a wife, who had divorced her first husband and remarried, sued her second husband for a separation. The court expressly adopted the sociological rule permitting estoppel in matrimonial actions and held the defendant estopped to question the wife's divorce because he had induced and aided the wife to procure the void divorce, married her and cohabited with her for eight years. Both the defendant's motion to dismiss the wife's action and his counterclaim for a declaration of nullity were denied. Thus, the wife could be awarded a separation. But to what purpose? Even if the court had granted the defendant's counterclaim for a declaration of nullity, the wife could have been awarded alimony.[114] Therefore, the only purpose of a separation decree is to relieve the plaintiff of a duty of cohabitation which never existed for an alleged marital fault, *e.g.*, abandonment, which is no fault at all since the cohabitation of the parties was adulterous and bigamous. Furthermore, a separation decree not only implies that the parties are validly married and that the second spouse is incapable of contracting a valid marriage, but it makes the former question res judicata as between them.[115] But, in fact, the marriage is void and remains so, the separation decree notwithstanding,[116] and the husband is capable of a valid marriage.

Had the defendant been permitted to prove the nullity of the divorce and his subsequent marriage to the plaintiff, a separation would have been denied. In this event, too, the court would have determined that the plaintiff had no duty to cohabit with the defendant, but it would have done so for the correct reason and without the ambiguity concerning the marital status of the parties. Moreover, the second marriage has, in fact, failed, so why pretend that it legally exists when the proper disposition of the wife's request for alimony no longer requires the pretense?

In the cases analyzed above and in others an estoppel has been raised and a divorce, separation or decree of nullity granted or withheld accordingly because the court was concerned about the collateral matter of

112. Whittleton v. Whittleton, 3 Misc. 2d 542, 152 N.Y.S.2d 117 (Sup. Ct. 1956).

113. Merino v. Merino, 56 Misc. 2d 854, 290 N.Y.S.2d 462 (Sup. Ct. 1968).

114. Johnson v. Johnson, 295 N.Y. 477, 68 N.E.2d 499 (1946).

115. Statter v. Statter, 2 N.Y.2d 668, 143 N.E.2d 10, 163 N.Y.S.2d 13 (1957); Psaroudis v. Psaroudis, 30 App. Div. 2d 841, 293 N.Y.S.2d 24 (2d Dep't 1968); Presbrey v. Presbrey, 6 App. Div. 2d 477, 179 N.Y.S.2d 788 (1958), aff'd mem., 8 N.Y.2d 797, 168 N.E.2d 135, 201 N.Y.S.2d 807 (1960).

116. Krause v. Krause, 282 N.Y. 355, 26 N.E.2d 290 (1940); Packer v. Packer, 6 App. Div. 2d 464, 179 N.Y.S.2d 801 (1st Dep't 1958); Kaufman v. Kaufman, 177 App. Div. 162, 163 N.Y.S. 566 (1st Dep't 1917).

alimony. Sometimes the court has desired to award alimony to a deserving woman, and an estoppel has been raised so as to permit the award;[117] other times, an estoppel has been raised so as to deprive an unworthy woman of alimony.[118]

The proper disposition of the question of alimony no longer necessitates an estoppel to question the validity of a void divorce in a matrimonial action.[119] Nor can an estoppel confer on a married person the capacity to marry or prevent an invalidly married person from marrying. Nor does it validate a void marriage. But it does confuse these matters.

4. *The Difficult Cases*

One can conceive of only two cases in which a collateral attack upon a void divorce might be inequitable.

One case involves a person who in good faith supposes himself married to a divorcee who suddenly finds himself deprived of that status when the divorcee is granted a declaration of nullity because the dissolution of the plaintiff's prior marriage is void. But this is no real inequity. So far as the second marriage is concerned, it is void in any event; estopping the plaintiff and denying the declaration of nullity does not validate the bigamous marriage.[120] Moreover, by the time the divorcee has sued for a declaration of nullity, the marriage is in fact dead. If there is no point in insisting upon the technical, legal continuation of a *valid* marriage which has failed, there is certainly no point in a technical, legal ruling which half-way suggests that the parties are bound in a *void* marriage which has failed, at least where this is unnecessary to accomplish justice as regards collateral matters like alimony.

The other case in which a refusal to estop an attack on a void divorce might result in inequity would arise where one divorcee sues the other and the latter's second spouse for a declaration of the nullity of the de-

117. E.g., Krause v. Krause, 282 N.Y. 355, 26 N.E.2d 290 (1940); Kaufman v. Kaufman, 177 App. Div. 162, 163 N.Y.S. 566 (1st Dep't 1917).

118. E.g., Carbulon v. Carbulon, 293 N.Y. 375, 57 N.E.2d 59 (1944); Senor v. Senor, 272 App. Div. 306, 70 N.Y.S.2d 909 (1947), aff'd mem., 297 N.Y. 800, 78 N.E.2d 20 (1948).

119. This is not contradicted by Feuer v. Feuer, 17 Misc. 2d 318, 186 N.Y.S.2d 194 (Sup. Ct.), aff'd per curiam, 8 App. Div. 2d 805, 187 N.Y.S.2d 933 (1st Dep.t 1959). H moved to modify a judgment of separation granted to W by eliminating the provision for alimony on the ground that following the separation W had obtained an ex parte Florida divorce, which she was estopped to question, and was thereby deprived of any right to alimony. Held: because H had pending an action to declare the nullity of the Florida decree, he was estopped to inconsistently allege its validity in the separation action. Notice that the court's determination and the Florida decree did not affect W's right to live apart from H. The substance of the decision was that in the circumstances of the case W was entitled to continued support from H because he himself acknowledged their continuing marriage. The court's use of estoppel to support this conclusion is confusing and, therefore, unfortunate.

120. Cases cited note 116 supra.

fendants' marriage.[121] If the "marriage" of the defendants is successful, is it right to let the plaintiff attack the divorce and the defendants' marriage when he has done something that might raise an estoppel? It may have been the plaintiff who procured the divorce and thereby led the defendants to believe they could marry. Or the plaintiff may have remarried.

This is a difficult case but it is so whatever rule of estoppel is adopted. Under the present law the plaintiff is estopped to question the divorce unless it was a Mexican decree. The sociological approach would estop the plaintiff even in the case of a Mexican divorce. Thus, the defendants are spared a judicial declaration of the nullity of their marriage. But that is no real benefit since their marriage is in any event void.

The proposed rule, rejecting estoppel in matrimonial actions, would result in an unequivocal declaration of the nullity of the marriage. But this is no real injury to the defendants; their marriage is void regardless. Conceivably the declaration could shock the defendants into regularizing their marriage when that is possible.

The declaration of nullity will again result in no inequity as regards alimony. Where a wife seeks the declaration of nullity against her husband and his second spouse, the court can award her alimony if justice requires the award;[122] and deny alimony when, *e.g.*, the plaintiff has herself remarried. In the latter case the plaintiff's remarriage has terminated the first husband's obligation to support her.[123] Likewise, if it is the husband who seeks a declaration of the nullity of his wife's second marriage, the wife is entitled to no alimony.

It can be concluded that in these difficult cases no rule of estoppel will give entirely satisfactory results. Consequently, the choice of the rule as to estoppel must be made on the basis of reasoning derived from other sources.

D. *Influence of the Policy Favoring Legitimacy upon Estoppel*

A divorce or separation does not, of course, affect the legitimacy of the children of the parties to the action; born legitimate, they remain legitimate.[124] Neither for that matter does a declaration of the nullity of the parents' marriage since the child of a void marriage is a bastard from birth.[125] Nevertheless, a declaration of the nullity of the parents'

121. E.g., Krieger v. Krieger, 29 App. Div. 2d 43, 285 N.Y.S.2d 811 (1st Dep't 1967); Schneider v. Schneider, 281 App. Div. 250, 119 N.Y.S.2d 337 (1st Dep't 1953); Christensen v. Christensen, 39 Misc. 2d 370, 240 N.Y.S.2d 797 (Sup. Ct. 1963).

122. However, the fact that the husband is obligated to support his second wife will influence the amount of the alimony decreed for the first wife. See, e.g., Brooks v. Brooks, 38 N.Y.S.2d 224 (Sup. Ct. 1942).

123. Gaines v. Jacobsen, 308 N.Y. 218, 124 N.E.2d 290 (1954).

124. N.Y. Dom. Rel. Law § 175.

125. See Matter of Moncrief's Will, 235 N.Y. 390, 139 N.E. 550 (1923).

marriage makes that fact plain. However, this is no reason to withhold a declaration of nullity; quite the contrary. The court has broad powers[126] to legitimatize the child of a marriage declared a nullity.[127] But an action for a declaration of nullity of a bigamous marriage will not be brought, and the child of the marriage will not be legitimized, if the prospective plaintiff knows he will be estopped to show the nullity of the divorce upon which the validity of the marriage depends.

There can be a case in which the court is without authority to legitimatize the child of a bigamous marriage. But estopping an attack on the dissolution of the prior marriage and denying a declaration of the nullity of the second marriage will not aid the child of the second marriage because his illegitimacy can be proved collaterally.[128]

Concern for the legitimacy of children, therefore, would permit the adoption of the rule rejecting estoppel in matrimonial cases because legitimization of the children of a bigamous marriage does not require estoppel.[129]

IV. Conclusion

The advantages of the rule rejecting estoppel in matrimonial cases and permitting it in other actions are several. First, it can be justified on traditional grounds expressed in a number of cases. Consequently, it will not meet the opposition which would be aroused by a rule founded upon a radical departure from old concepts and could be adopted by the courts. The adoption of some rule which can be consistently employed by the courts is sorely needed. Second, the rule avoids uncertainty as to marital status and capacity to marry. It would, therefore, discourage bigamous marriages but at the same time encourage the validation of bigamous marriages that have been attempted. Third, it would permit substantial achievement of the ends desired by the proponents of the sociological rule. In actions concerning property rights such as inheritance, support or social security benefits, an estoppel is proper when equity requires it. In matrimonial actions, also, equity will be done as regards the collateral matters of alimony and legitimacy. Thus, the sociological judges, as well as the traditionalists, could adopt the proposed rule.

126. N.Y. Dom. Rel. Law § 145. When a marriage is declared a nullity because of a prior subsisting marriage, "if it appears, and the judgment determines, that the subsequent marriage was contracted by at least one of the parties thereto in good faith, and with the full belief . . . that the former marriage has been annulled or dissolved, or without any knowledge on the part of the innocent party of such former marriage, a child of such subsequent marriage is deemed the legitimate child of both parties."

127. E.g., Beck v. Beck, 21 Misc. 2d 225, 195 N.Y.S.2d 977 (Sup. Ct. 1959).

128. See Matter of Newins, 12 N.Y.2d 824, 187 N.E.2d 360, 236 N.Y.S.2d 346, aff'g 16 App. Div. 2d 436, 229 N.Y.S.2d 279 (1962).

129. Heusner v. Heusner, 181 Misc. 1015, 42 N.Y.S.2d 850 (Sup. Ct. 1943).