THE EFFECT OF PRIOR JUDGMENTS IN MATRIMONIAL CAUSES: ANOMALIES IN THE LAW

Henry A. Hubbard *

The author examines the extent to which proof of matrimonial misconduct and proof of marital status are affected by the doctrine of res judicata and the rule that he who invokes the jurisdiction of a court cannot be heard to impugn it. He submits that the law in that regard has not been fully developed, and that there are anomalous decisions that may lead to undesirable consequences in its development. He suggests several possible directions in which the impetus of existing, conflicting decisions may impel the law, and states his view of what the law ought to be. Although his main concern is the position in Ontario, what he says applies to all the common-law provinces.

I. INTRODUCTION

The effect of a prior judgment may be to preclude a party to a present action from establishing the truth in respect of an allegation, either because of the application of the doctrine of res judicata, or because of his conduct in obtaining the earlier judgment. Whether he is thus to be precluded depends on a number of considerations which do not appear to have been adequately dealt with by the courts in actions requiring proof of marital status or proof of some matrimonial misconduct for which the judgment sought is an available remedy. This paper examines the effect prior judgments have been held to have in Ontario with respect to the proof of such facts in subsequent actions, with a view to pointing out anomalies and gaps in that law. It is not a part of this undertaking to present a thorough analysis of the scope of the general doctrine of res judicata in order to apply to matrimonial causes the intricate distinctions found in that doctrine. The view here presented is largely confined to a study of the cases dealing with matrimonial causes and certain related matters. [1]

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* B.A., 1952, University of Ottawa. Member of the Ontario Bar; Associate Professor of Law, Faculty of Law (Common Law Section), University of Ottawa.

[1] There is no jurisdiction in the Supreme Court of Ontario with respect to judicial separation, restitution of conjugal rights, and jactitation of marriage. See POWER, DIVORCE 223-26 (2d ed. 1964). This paper, then, is concerned primarily with annulment and divorce, CAN. REV. STAT. c. 85 (1952), and the separate remedy called an alimony action, ONT. REV. STAT. c. 51, § 34 (1960), as preserved by the Judicature Act, ONT. REV. STAT. c. 197, § 2 (1960). When considered appropriate, reference will be made to other matters involving marital status or matrimonial offences, such as succession and applications under deserted wives' maintenance statutes.

II. Res Judicata and Matrimonial Misconduct

Under the normal application of res judicata, a finding in a prior judgment that an offence had or had not been committed would raise an estoppel *per rem judicatam* with respect to the denial or allegation of that offence in a subsequent action between the parties. The general rule, then, appears to be that the *guilt or innocence* of matrimonial misconduct may be res judicata in a present action *of whatever* kind because of a finding in a prior adjudication between the parties. As this rule is the foundation of much that is to follow, it is appropriate to reproduce the following passage from the judgment of Vice-Chancellor Wigram in *Henderson v. Henderson* : [2]

> I believe I state the rule of the court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. [3]

Immediately after quoting this passage, Lord Justice Bucknill in *Winnan v. Winnan,* [4] a decision of the Court of Appeal of England, made the following observation, the significance of which will be seen presently : "It will be seen that no distinction is drawn here between decisions of acquittal and decisions of conviction." [5]

Mr. Justice Diplock, in *Thoday v. Thoday,* [6] has introduced terminology that should prove helpful, not only concerning charges of misconduct, but in matrimonial causes generally. He distinguishes between two species of estoppel *per rem judicatam* : "cause of action estoppel" and "issue estoppel." If a cause of action has been determined not to exist, the unsuccessful plaintiff is estopped from afterwards asserting that it does. But there may be

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[2] 67 Eng. Rep. 313 (1843).

[3] *Id.* at 319. This passage was adopted by the Judicial Committee of the Privy Council in Hoystead v. Taxation Commissioner, [1926] A.C. 155. It was also quoted with approval by the Ontario Court of Appeal in Upper v. Upper, [1933] Ont. 1. See also Maynard v. Maynard, [1951] 1 D.L.R. 242 (Sup. Ct.), a quite involved decision of the Supreme Court of Canada dealing neither with a marital offence nor the validity of marriage. The *Hoystead* and the *Henderson* cases are cited with approval, and on close analysis the decision seems to be authority for the general rule and its application in the peculiar circumstances of the *Maynard* case.

[4] [1948] 2 All E.R. 862 (C.A.). Lord Morton of Henryton and Asquith, L.J., concurred.

[5] *Id.* at 866.

[6] [1964] 2 Weekly L.R. 371 (C.A.).

several conditions the plaintiff must fulfil in order to establish his cause of action. Each such condition constitutes a separate issue between the parties, and an identical issue may be common to two distinct causes of action. Thus, a final determination of an issue in one cause of action will be conclusive of that identical issue in another cause of action, and "issue estoppel" will preclude either party from advancing a contrary assertion in subsequent litigation.

Thus, in spite of the broad terms in which the general rule has been laid down, it seems evident that res judicata applies only to "charges" made in the prior proceeding. Diplock shows clearly that the "cause of action" consists of the matrimonial *offence* charged; that is, not the actual conduct put forward, but the kind, or legally significant class, of offence to which that conduct is alleged to amount. "Cause of action estoppel," he says, could be called "matrimonial offence estoppel" in the present context. It is apparent that in his view cruelty and adultery are separate causes of action, even though the same remedy might be sought, and even though they would commonly be joined if the existence of both were known to the plaintiff. But if they are pursued *seriatim*, a determination that one does not exist would not normally preclude the subsequent assertion of the other.

Indeed, in the leading Ontario case of *Upper v. Upper*,[7] the Court of Appeal went no further than to say that an unsuccessful charge of adultery with a named co-respondent, alleged by way of defence to an alimony action, precluded a renewed allegation of adultery with that person during the period in question. The implication is that estoppel would not have prevented proof of adultery with some other person during that period. Charges of adultery with different persons are as distinct from each other as they are from charges of cruelty or desertion; and a number of English cases besides *Thoday v. Thoday* indicate that a dismissal of one charge does not preclude the making of another.[8] Thus, if an alimony action based on cruelty is dismissed, the wife is not precluded from bringing another alimony action on a charge of adultery committed before the earlier proceeding.

A more difficult question as to the scope of res judicata is whether the conduct which had been alleged to amount to the dismissed charge can be put forward again to establish a different charge. This problem has arisen repeatedly in England in connection with the distinction between

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[7] Note 3 *supra*.

[8] Pike v. Pike, [1953] 1 All E.R. 232 (C.A.); Foster v. Foster, [1953] 2 All E.R. 518 (P.D. & A.). *But see* Warren v. Warren, [1962] 3 All E.R. 1031, where Scarman, J., said: "It is also clear that the doctrine applies as much to matters which could have been raised in the previous proceedings, but were not raised, as to matters which in fact were raised." *Id.* at 1032. In the light of a line of cases of which the *Warren* case is one, see note 9 *infra*, the "matters" referred to may be taken to be evidence going to establish the charge, and not other charges that might have been made. This entire line of cases supports the point made in the text. See also Hopkinson v. Hopkinson, [1932] 1 West. Weekly R. 623 (Sask.); TOLSTOY, THE LAW AND PRACTICE OF DIVORCE 367 (5th ed. 1963).

cruelty and constructive desertion. Conduct which does not amount to cruelty (which requires actual or apprehended injury to the health) may nevertheless drive a spouse away and amount to constructive desertion.

The English authorities are not altogether clear, but their combined effect seems to be that the same conduct can be re-litigated if upon analysis of the prior proceeding it appears that there was no finding in respect of that conduct inconsistent with its amounting to the new charge.[9] "Fact-estoppel" is a species of estoppel *in pais,* and it is to be distinguished from estoppel *per rem judicatam,* although it may prove difficult in practice "to draw the line between facts which give rise to 'issue estoppel' and those which do not."[10] As Mr. Justice Scarman said in *Warren v. Warren*: "Only a detailed analysis of the issue sought to be raised, of the issue raised previously whose judicial determination is the res judicata relied on, of the pleadings under challenge, and of the judgment of the court which is the basis of the challenge, can reveal in any given case whether an estoppel arises or not."[11]

Conduct that had been put forward to support an issue upon which a definite determination was then made cannot be put forward again to support essentially the same issue arising in a different cause of action. For instance, serious ill-treatment is an issue common to cruelty and constructive desertion. If in a prior action based on cruelty a definite finding was made that the conduct put forward to support that issue did not amount to serious ill-treatment, then that same conduct cannot be alleged to constitute serious ill-treatment in a subsequent action based on constructive desertion. The *Thoday* case also suggested that the plaintiff would be estopped from supporting that same issue in a subsequent action by proving other similar conduct which could have been relied on, but was not alleged, in the earlier action. *Upper v. Upper* seems to support this view.

Since cruelty and desertion are not grounds for divorce in Ontario, this particular question would arise here most importantly in an alimony action, and in such an action essentially the same problem could present itself in other ways too. Alimony can be awarded in a separate action in Ontario where the petitioner, had she been living in England in 1896, could have obtained either a decree of judicial separation or one for the restitution of conjugal rights.[12] Thus, both desertion for two years or upwards and

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[9] Cooper v. Cooper, [1954] 3 All E.R. 358 (P.D. & A.); Dixon v. Dixon, [1953] P. 103; Foster v. Foster, note 8 *supra.* The *Warren* case, note 8 *supra,* gives the impression that the same acts which were unsuccessfully pleaded as cruelty cannot be brought forward again. A close reading of the judgment indicates that they would not be excluded if capable of amounting to the new charge. See also *Hopkinson,* note 8 *supra*; Hill v. Hill, [1954] P. 291. It is submitted that the *Maynard* case, note 3 *supra,* is not on point.

[10] Note 6 *supra* at 385.

[11] Note 8 *supra* at 1033.

[12] For the basis of an alimony action see note 1 *supra.* Besides these offences and adultery, a wife may have a cause of action on the ground of rape, sodomy, or bestiality.

desertion for a lesser period are grounds for the action. But the charges are distinct to this extent: in the former, the petitioner need not have a bona fide desire to re-cohabit; in the latter, that desire must be present, and it constitutes an additional condition or issue which distinguishes the causes of action. It follows that a dismissal of an action based on desertion for less than two years does not necessarily preclude a later action based on desertion for a period of more than two years commencing prior to the earlier proceeding. It would depend upon whether there had been a determination against the plaintiff upon the issue which is common to both, namely, the legal condition of being in desertion. [13]

An important exception to the general rule of res judicata can be found in a number of English cases that have held that the ground for divorce cannot be established through estoppel. [14] Res judicata is a doctrine of public policy; but it seems that the public interest that litigation should come to an end is outweighed by the public interest that the court shall perform its duty of inquiring into the validity of charges made in divorce proceedings. [15] It is the court's duty in a divorce action to inquire and satisfy itself that the offence has been proved. " 'Proved' here means proved as a fact, and not merely *inter partes*. Hence no estoppels binding on the parties are sufficient to entitle a party to such relief." [16] Undoubtedly, these English decisions would be followed in Ontario since the source of the court's duty to satisfy itself is a statutory provision in force in Ontario. [17]

There is a widespread opinion that divorce should be made to depend on whether the marriage has irreparably broken down, rather than on a finding of "guilt" in connection with enumerated offences. Thus whether this limitation of the doctrine of res judicata is in the public interest is open to doubt. While it may be said that "the public interest, no doubt, does intervene to see that relief is not improperly obtained by a petitioner merely through some technical rule," [18] it can hardly be doubted that it is in the public interest that the dissolution of a defunct marriage be not impeded by a mere technicality. Yet it has been held that res judicata prevents the divorce court from pressing its inquiry into the truth of an

[13] Ginter v. Ginter, [1953] Ont. 688, does not really hold to the contrary. In that case a second alimony action was dismissed because the facts found against the plaintiff in the first action were res judicata and constituted a defence to the second action as well.

[14] Harriman v. Harriman, [1909] P. 133 (C.A.); Pratt v. Pratt, 96 L.J.P. (n.s.) 123 (1927); Winnan v. Winnan, note 4 *supra*; Hudson v. Hudson, [1948] 1 All E.R. 773 (Leeds Assizes); Dixon v. Dixon, [1953] P. 103; Cooper v. Cooper, [1954] 3 All E.R. 358 (P.D. & A.); Thompson v. Thompson, [1957] 1 All E.R. 161 (C.A.); Fisher v. Fisher, [1959] 3 All E.R. 131 (C.A.); Holland v. Holland, [1961] 1 All E.R. 226 (C.A.); see also the English decisions cited in note 8 *supra*. There is also authority that this exception does not apply when the present action is other than for divorce: Skibinsky v. Skibinsky, 4 D.L.R.2d 290 (Sask. 1956).

[15] See particularly Holland v. Holland, note 14 *supra*.

[16] Harriman v. Harriman, note 14 *supra*.

[17] *Harriman* held that the duty is derived from the Divorce and Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85, § 31. This statute has been adopted in Ontario. See CAN. REV. STAT. c. 85 (1952).

[18] Bright v. Bright, [1954] P. 270, at 284 (Wilmer, J.).

alleged offence where the earlier finding was one of innocence. "In such circumstances... no interest of the public is infringed by saying that the petitioner is estopped *per rem judicatam* from repeating allegations that have previously been the subject of judicial determination." [19] Hence, a hopeless union that might otherwise be dissolved because of now abundant proof of an offence is to be maintained "merely through some technical rule" — and marriages that are sought to be dissolved are almost invariably hopeless.

Apparently this conclusion rests on the astonishing assumption that the public interest in maintaining broken unions far exceeds the public interest in dissolving them. That this is also the law in Ontario seems to follow from the decision of the Ontario Court of Appeal in *Upper v. Upper.* [20] However, in that case there was no discussion of the rule that res judicata does not apply in a divorce action in relation to the ground of divorce, or of the question whether within this exception there is a distinction to be made between a prior finding of guilt and one of innocence.

Whereas no doubt exists that estoppel does not apply in the divorce court in respect of a prior finding of guilt, that it does apply to a finding of innocence is not completely free from doubt. In *Winnan v. Winnan,* [21] Lord Justice Bucknill refers to the general rule of res judicata, noting that no distinction is made between a prior decision of acquittal and one of conviction, but he maintains that the doctrine does not apply to a charge made in the divorce court. He takes the view that the exception to res judicata is complete, and that a distinction between an acquittal and a conviction does not preserve the application of the doctrine in respect of the former. That this is his view where the previous proceeding was in an inferior court is unmistakable. [22] Lord Justice Denning expresses the same opinion in *Thompson v. Thompson,* [23] and goes on to say that where the prior adjudication dismissing the charge was "before the magistrates... the rules of estoppel would seem to apply: but the Divorce Court, which is bound by no estoppel, almost invariably investigates the charge afresh." [24] The view expressed by Bucknill in *Winnan* is far from clear; like that of Lord Denning in the *Thompson* case, it might be regarded as obiter, since in both those cases the essential subject of litigation in the previous proceedings was not the same as in the subsequent proceedings. [25]

The broad proposition that a previous dismissal of the charge does not estop the divorce court is not compatible with *Upper v. Upper.* But that

[19] *Ibid.* See also Stokes v. Stokes, [1911] P. 195; Finney v. Finney, L.R. 1 P. & D. 483, at 484 (1868); BOWER, RES JUDICATA 32 (1924).
[20] Note 3 *supra.*
[21] Note 4 *supra.*
[22] *Id.* at 868.
[23] Note 14 *supra.*
[24] *Id.* at 166.
[25] This was the reasoning of Hodson and Morris, L. JJ., in the *Thompson* case, note 14 *supra.*

case does not stand in the way of a narrower rule restricted to the effect of prior decisions of *inferior* courts, because the earlier proceeding there in question had also been in the Supreme Court. This narrower proposition finds strong support in the *Winnan* and *Thompson* cases. *Hayward v. Hayward*[26] held that the divorce court cannot be bound by the doctrine of res judicata where the prior judgment in question is that of an inferior court. The fact in issue was the validity of marriage, but the principle would seem applicable by analogy. However, in British Columbia, in *Harrap v. Harrap,*[27] it was held that a magistrate's dismissal of a charge of adultery made in defence of an application under the Deserted Wives' Maintenance Act estopped the husband from putting forward the same charge in a divorce action. If there is any substance to the earlier observation that the dissolution of marriage should not be prevented by a technical rule, it is to be hoped that that decision will not be followed in Ontario.[28]

In sum, then, where the present action is for dissolution, a finding in an earlier action that the alleged offence was committed cannot bind the court, but a finding that the offence was not committed appears to be binding. Where the present action is not for divorce, the doctrine of res judicata appears to apply with full force, whether the earlier finding was one of guilt or innocence.[29]

III. Res Judicata and the Validity of Marriage

It has been observed that "the question of estoppel in matrimonial cases is one of difficulty";[30] in the present context this observation is an understatement. It may be trite to say that marriage is not an ordinary contract, and that the status and relationships to which it gives rise are matters of the gravest public concern; yet in the process of applying rules the courts often seem to overlook this plain truth. That general rules that are obviously inappropriate to particular kinds of issues must nevertheless be applied is rather incongruous in itself; but it becomes paradoxical when that which makes the rule inappropriate is a public interest that clearly ought to prevail. The incongruity of applying estoppel in the proof of marriage has led all too seldom to attempts to balance the public interests involved : the interest that litigation should come to an end, and the interest in marital status. In the result, the law in this regard is in some respects absurd, in many respects inconsistent, and in most respects confused.

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[26] [1961] 1 All E.R. 236 (P.D. & A.).

[27] [1935] 2 D.L.R. 816 (B.C. Sup. Ct.); see also Ostapchuk v. Ostapchuk, 19 D.L.R.2d 746 (Sask. Q.B. 1959).

[28] Section 1(5) of the Deserted Wives' and Children's Maintenance Act reads as follows : "A finding by the magistrate that adultery has been proved shall not be evidence of adultery in any other proceeding." ONT. REV. STAT. c. 105 (1960). This provision is plainly not necessary where the other proceeding is a divorce action, and it is submitted that very little can be made of it in arguing for or against the existence in Ontario of the rule applied in *Harrop*.

[29] This is subject, of course, to the statutory exception set out in note 28 *supra*.

[30] James v. James, [1948] 1 All E.R. 214, at 217 (P.D. & A.) (per Lord Merriman).

Whether the issue of marital status in a present action can or should be resolved by the doctrine of res judicata depends principally upon the relation between the prior judgment and the remedy now sought. The proceedings in which the validity of marriage is in issue fall into three categories : actions for a declaration of marital status, actions for dissolution of marriage, and actions that depend on marital status, such as those concerned with alimony, maintenance, succession, loss of consortium, and so forth. The applicability of res judicata to the issue of marital status may depend not only upon which of these categories the prior proceeding falls into, and whether or not that proceeding was successful, but also upon the classification of the present action. Many of the possible combinations have not been dealt with by the courts; and not only are there decisions that are anomalous in relation to their own facts, but some of them contain general statements and reasoning productive of bizarre consequences when applied to apparently unforeseen combinations. For these reasons the matters with which this part is concerned are dealt with under sub-headings relating to the different categories of cases in which the validity of marriage is in issue.

A. *Where the Prior Judgment Was a Declaration of Nullity*

In a nullity action a declaration that a marriage is void is a judgment in rem and the invalidity of that marriage is res judicata in *any* subsequent proceeding between *any* parties.[31] Thus, for instance, a woman whose "marriage" has been declared void cannot maintain an alimony action against her putative husband, nor can she recover damages against a third party under the Fatal Accidents Act for negligently causing the death of the putative husband. Of course, if her marriage were void ipso jure, she could not succeed in such actions anyway, but the issue would have to be litigated. The point is that the declaration precludes re-litigation of the issue.

In general, it makes no difference in the later proceeding whether the marriage that was declared void ab initio was void ipso jure or had been merely voidable, nor do the grounds upon which the decree was based have any bearing on the subsequent litigation. For example, suppose *T* leaves property to *H* for life, remainder to the widow of *H* or, if he leaves no widow, to *X*. If the marriage of *H* and *W* is void ipso jure, *W* cannot be *H*'s widow, and no decree is necessary in order for *X* to establish his right to the remainder. But if the marriage of *H* and *W* is voidable and *H* dies without the marriage having been challenged, *W* is his widow. In either case, had the marriage been declared void, that judgment would bind everyone; *X* would be entitled to the remainder, and *W* could not re-litigate the question in order to defeat *X*'s claim.[32]

[31] Salveson v. Austrian Property Adm'r, [1927] A.C. 641.
[32] The illustration is borrowed from BROMLEY, FAMILY LAW 57 (3d ed. 1966).

However, considerable care must be taken in examining the earlier proceedings in relation to the present subject of litigation. For instance, if the present issue is the legitimacy of the natural child of persons whose marriage has been declared void, then had the marriage been voidable the child would be legitimate; had it been void for bigamy the child would be legitimate provided one of a number of circumstances existed; and in any other case the child would be illegitimate, and the prior decree would make the invalidity of the marriage res judicata. [33]

The effect of a dismissal of a nullity action, of the making of a declaration that a marriage is valid, and of a dismissal of an action for a declaration of the validity of a marriage, is considered at the end of this part because of the relevance of the intervening material to that discussion.

B. *Where the Prior Action Was Other Than for a Declaration as to Marital Status*

There are considerations that might justify and require different conclusions as to the applicability of res judicata in the three classes of cases in which the validity of marriage is in issue. For this reason it is advisable to treat separately the situations where the present action is for a declaration as to marital status, for dissolution of marriage, or for some other remedy.

1. There are two opposing lines of authorities where the present action is a nullity action, and the prior proceeding was neither for dissolution nor for a declaration as to marital status. The first of these consists of *Wilkins v. Wilkins*, [34] and *Woodland v. Woodland*, [35] and those cases which, though not directly on point, refer to them with approval. [36]

In the *Wilkins* case the petitioner sought a declaration of nullity on the ground that his marriage was bigamous, the respondent's husband by a prior and subsisting marriage having turned up very much alive some few months after a jury had found as a fact that he was dead. In consequence of this finding the petitioner's charge of bigamy, raised as a defence to the respondent's earlier action for judicial separation, had been rejected. The action was adjourned to enable the petitioner to apply to the Court of Appeal for a new trial of the original suit for judicial separation. A new trial was allowed on the terms that the petitioner should in any event continue to pay alimony to the respondent. In the *Woodland* case a declaration of nullity was sought on the ground that the respondent's previous

[33] See the Legitimacy Act, Ont. Stat. 1961-62 c. 71. Another illustration of this problem is whether, since a voidable marriage is valid until declared void, a man can sue his former "wife" for a tort committed prior to the decree of nullity.

[34] [1896] P. 108.

[35] [1928] P. 169.

[36] Upper v. Upper, note 5 *supra*; Thompson v. Crawford, [1932] 2 D.L.R. 446 (Ont. Sup. Ct.); Crosby v. Constable, 10 D.L.R.2d 220 (B.C. Sup. Ct. 1957); Bullock v. Bullock, [1960] 2 All E.R. 307 (P.).

marriage had not been validly dissolved. The *Wilkins* case was referred to, and the action was dismissed on the basis that the respondent's prior decree for restitution of conjugal rights in an undefended action estopped the petitioner from questioning the validity of the marriage.

The scope of the *Wilkins-Woodland* view appears to be this :

(1) The prior judgment, not being a decree of nullity, only makes the validity of the marriage res judicata *inter partes*. This would follow from the fact that the prior judgments were in personam, but there is express authority that these cases apply only between the parties and their privies. [37] Thus, if *W* obtains an alimony order and *H* subsequently petitions for a decree of nullity, res judicata applies. But suppose *W* obtains an invalid divorce, following which *H* marries *X* who obtains an alimony order against *H*. *W* dies and *H* marries *Y* who subsequently seeks a declaration of nullity on the ground that *H* is married to *X*. Res judicata does not apply. *X*'s alimony order cannot give rise to estoppel *per rem judicatam* in the action between *H* and *Y*.

(2) The rule applies *inter partes* so as to constitute a complete estoppel, and this is so whether or not the validity of the marriage had been challenged and contested in the earlier proceeding, and no matter what had been put forward as the basis of any challenge to its validity in that earlier action. For example, the jurisdiction of the Supreme Court of Ontario in an alimony action depends on the plaintiff being the lawful wife of the defendant; thus, the validity of their marriage is in issue. The defendant might not challenge the validity of the marriage — indeed, he may have no reason then to believe that it is invalid; or he might challenge it, alleging, for instance, that it is bigamous. Whether he challenged it or not, if the alimony order is made, the order constitutes a complete estoppel *inter partes*. If he had not challenged it at all, he cannot now get a declaration that it is void as being bigamous. If he had challenged it as being bigamous, he cannot now challenge it on that ground, or on any other, *e.g.*, that it is within the prohibited degrees of relationship.

As discussed earlier this very broad application of res judicata is inconsistent with the scope of this doctrine in cases charging misconduct; but it seems to follow from *Woodland*, where the earlier proceeding was undefended. If res judicata applies no matter what ground the husband now alleges when he had previously alleged none, a fortiori it applies no matter what ground he alleges when his previous allegation was held to be unfounded. In the Ontario case of *Thompson v. Crawford*, [38] which, it is submitted, can be distinguished, the *Wilkins-Woodland* rule was approved,

[37] Crosby v. Constable, *supra* note 36; Foggo v. Foggo, [1952] 2 D.L.R. 701 (B.C.); *Re* Rogers v. Rogers, 39 D.L.R.2d 141 (B.C. 1963).

[38] Note 36 *supra*.

and in that case the validity of the marriage went uncontested in the earlier proceedings.

The line of cases opposed to the *Wilkins-Woodland* view consists of *Miles v. Chilton,*[39] *Andrews v. Ross,*[40] and *Hayward v. Hayward,*[41] together with those decisions which refer to them with approval.[42] The *Hayward* case is of such fundamental importance to many of my submissions that I consider it necessary to discuss it in detail. The parties went through a form of marriage while aware that the petitioner's wife was probably still living, and that their marriage was therefore in all probability bigamous and void. The defendant later obtained a maintenance order on the petitioner's admission of desertion. The petitioner discovered that his lawful wife was alive, and he applied to have the maintenance order revoked. His application was dismissed on the ground that he was estopped by his admission of desertion. He then made the present petition for a declaration of nullity. The defendant pleaded that the petitioner was estopped by his admission of desertion and the making of the maintenance order, and prayed in the alternative for a declaration of nullity. It was held that the petitioner was not estopped, and decrees of nullity were granted to both parties.

Reviewing the *Wilkins* case, Mr. Justice Phillimore expressed the opinion that the Court of Appeal had not committed itself to the view that estoppel applied, but had simply acted in a practical way to avoid the problem. He simply disagreed with the *Woodland* case, as he was entitled to do. He cited the familiar definition of void marriage laid down in *De Reneville v. De Reneville,*[43] and went on in convincing fashion to hold that there can be no estoppel in respect of marital status.

The judgment gave additional reasons why the petitioner could not be estopped: a decision of a magistrate cannot give rise to res judicata in the high court; the admission of desertion does not effect an estoppel *in pais* because both parties had equal knowledge of their positions throughout.[44] The additional reasons do not forfeit the principal point of the judgment. Taken at its narrowest, the scope of the decision is this: estoppel, whether

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[39] 163 Eng. Rep. 1178 (London Consistory Ct. 1849).

[40] 14 P.D. 15 (1885).

[41] Note 26 *supra.*

[42] Postnikoff v. Popoff, 46 D.L.R.2d 403 (B.C. Sup. Ct. 1964); Fife v. Fife, 49 D.L.R.2d 648 (Sask. Q.B. 1965). It is possible that Miles v. Chilton and Andrews v. Ross, *supra* note 40 could be distinguished on their facts as being inapplicable to the present question. However, they lay down a principle in relation to their facts which is broad enough to encompass the present question. They hold that *no* estoppel, *per rem judicatam* or otherwise, can preclude the making of a declaration of nullity.

[43] [1948] 1 All E.R. 56, at 59 (C.A.); a void marriage is "one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties without the necessity of any decree annulling it."

[44] See Square v. Square, [1935] All E.R. Rep. 786, at 787 (P.).

per rem judicatam or otherwise, cannot preclude a party to a marriage void ipso jure from obtaining a declaration of its nullity. [45]

Judicial support can be found for a third and middle position that can be reconciled with the facts of some but not all of the cases in the two opposing views. It would seem to be the ratio decidendi of *Postnikoff v. Popoff* [46] that the prior judgment creates an estoppel *inter partes per rem judicatam* as to the validity of marriage only if that issue had been contested in the prior proceeding. [47] This middle position could be enlarged by holding that if the ground upon which the validity of the marriage was unsuccessfully impugned in the earlier proceeding is not the same ground put forward in the present proceeding, then the validity of the marriage is not res judicata because the new allegation had not been contested.

In terms of the general doctrine, could it not be said that res judicata does not apply because the subject of litigation in the two cases is not the same? *Ex hypothesi,* the validity of the marriage was established prima facie in the original action, and if its validity was unsuccessfully attacked on the basis of one out of a multitude of possible allegations, surely the scope of the decision is not that the marriage is valid (indeed, the particular court may have no jurisdiction so to declare), but only that the prima facie case made out for its validity has not been rebutted.

The earlier discussion on allegations of misconduct seems pertinent to this question. If a man has been guilty of adultery and cruelty, and his wife, not knowing of the adultery, is unsuccessful in an alimony action based on cruelty, she is not thereby estopped from obtaining a divorce on the ground of adultery. Can it then be said that a man's unsuccessful defence of bigamy in an alimony action brought by a woman who, unknown to him, is his sister will estop him from obtaining a declaration on the ground of the prohibited relationship? The absurdity of the contrast and the authority of the cases dealing with matrimonial offences lend strong support to such an enlargement of the middle view. The facts of the *Hayward* and *Wilkins* cases can be fitted into this position, but the *Woodward* case went much beyond the *Wilkins* case on which it relied, because in the *Woodward* case the earlier proceeding went undefended.

Despite the decision of Mr. Justice Orde of the Ontario Supreme Court in *Thompson v. Crawford,* [48] the courts of Ontario would appear to be free to adopt any of the above views. The action in that case was framed as an application to set aside an alimony order on the ground that it was a

[45] Estoppel applies in an action to annul a voidable marriage because the marriage is in fact and law valid at that point of time and until declared void; it is subject to the doctrine of approbation. That which amounts to estoppel amounts to approbation.

[46] Note 42 *supra.*

[47] *But see* Thompson v. Crawford, note 36 *supra.*

[48] *Ibid.*

consent judgment given without knowledge that the marriage was void. The consent judgment was set aside for mistake, and no question of res judicata was required to be answered. The view that the *Wilkins-Woodland* rule would have applied had the prior judgment not been a consent judgment is clearly an obiter dictum of a high court judge whose opinion would not constitute a binding precedent in any event.

The decision of the Court of Appeal in *Upper v. Upper* is not conclusive either. The action there was for divorce, and the issue involved was the commission of adultery and not the validity of marriage. The *Wilkins* case, though not relied on, was referred to with apparent approval; but not only was that approval obiter, it was given without any consideration of the present problem. The courts cannot be confined by such unconsidered opinions, and this must be particularly so when the public interest is involved. Thus, it is appropriate to consider what the law of Ontario ought to be in this regard.

Without saying why, Professor Bromley submits that the *Wilkins-Woodland* rule is to be preferred; but he says that:

> It cannot be denied, however, that the rule is likely to work hardship, as no one but the parties will be estopped by the record. Thus if H has married W and then X and is estopped as against X from denying the validity of his marriage to her, we are forced to the conclusion that he could be charged by X with adultery with his true wife, W, although apparently X could not, for example, maintain a claim under the Fatal Accidents Act in respect of H's death as no estoppel could be raised against the tortfeasor.[49]

What he says seems to amount to a bald statement that there is no justification for a different view, followed by an illustration that would lead many of his readers to disagree with him. The assertion that *H* would be estopped as against *X* from denying that his sexual relations with *W* were adulterous is rather sweeping. But the logical extension of his illustration reveals even stranger consequences. Although *H* might be estopped from denying that he committed adultery with *W*, *W* cannot be so estopped and *X*'s allegation might be slanderous. On the other hand *X*'s sexual relations with *H* are adulterous, and *W* cannot be estopped from saying so. It is interesting to speculate about the outcome should both *X* and *W* sue *H* for divorce, naming each other as co-respondents.

This position, whether it is law in Ontario or not, is anomalous, and Bromley's approval of it seems astonishing. We are dealing here with a marriage that is void ipso jure, a marriage that cannot by any form of estoppel be turned into a valid marriage. No declaration is required in order for the parties to treat it as void. They can remarry without a decree, and the prior judgment cannot affect this in the least. However, in some

[49] BROMLEY *op. cit. supra* note 32, at 64.

circumstances it is wise to get a decree;[50] but the prior judgment, according to this view, will prevent the court from declaring the true status of the parties even when the only relief sought is that declaration.

The anomaly is clearly demonstrated by this illustration: Suppose *H* goes to Nevada where he divorces *W* and marries *X*. He returns to Ontario where *X* subsequently obtains an alimony order. *W* then dies and *H* wishes to marry *Y*. He consults a solicitor and receives this advice: If you were domiciled in Ontario when you divorced *W* in Nevada, then your marriage to *X* is void ipso jure in Ontario, and you are free to marry *Y*. However, you should seek a declaration that your marriage to *X* is a nullity, because the question of your domicile is uncertain, and if you had been domiciled in Nevada at the time of your divorce, your marriage to *X* is valid. But because *X* obtained an alimony order (and it matters not that you made no defence to that action) you are now precluded from obtaining a nullity decree. Should you go ahead and marry *Y*, your status, and that of *X* as well as of *Y*, and perhaps of your children by either of them, will be in doubt and may be challenged by interested parties in the future. You must also be warned that a charge of bigamy may be laid against you to which you may or may not have a defence.

What is so ludicrous about this position — and that it is contrary to the public interest can hardly be doubted — is that the prior judgment that constitutes the estoppel *in no way affects the validity of the marriage in the eyes of the law*. If it were void ipso jure, that judgment would not make it valid. All that is now wanted is a declaration of fact as to status. The petitioner is not seeking to escape any personal liability. Should it be objected that a declaration of nullity will allow a man to escape some real or supposed moral obligation of financial support owed to his putative wife, the answer is that she is protected in Ontario by the court's power to award alimony or maintenance in a nullity action.[51]

It is submitted that the *Hayward* case represents the only sensible rule when the present action is one for a declaration of nullity. Neither of the other two views is acceptable. Since there is no binding authority in Ontario on this matter, the following statement by Professor Jackson is all the more apt:

> The *ratio decidendi* of the *Woodland* and *Wilkins* cases permits a party to be validly married to two persons at once.... On the other hand, there

[50] It may even be necessary to obtain a decree in order to get a marriage licence. Marriage Act, ONT. REV. STAT. c. 228, § 12 (1960). But if the licence is refused on that ground, then likely certiorari would lie to require its issuance, *Re* Schepull, [1954] Ont. 67 (High Ct.), and estoppel, being *inter partes* would not apply because the parties would not be the same. If the licence were secured without disclosing the facts, the resulting marriage would nevertheless be good, Clause v. Clause, 5 D.L.R.2d 286 (Ont. Sup. Ct. 1956).

[51] The Matrimonial Causes Act, ONT. REV. STAT. c. 232, §§ 1, 3 (1960). See Sealey v. Bridge, [1966] 2 Ont. 639 (High Ct.).

> is something to be said for the hardship of [some] cases... but to give weight to hardship in these circumstances would amount to the conversion of void into voidable marriages, a most far reaching metamorphosis.... From this point of view, *Miles v. Chilton* and *Andrews v. Ross* must be preferred to *Woodland v. Woodland* and *Wilkins v. Wilkins.*[52]

The same or similar arguments can be marshalled in support of the view that, if the prior judgment contained a finding that the marriage was not proved, or was void, that finding cannot be res judicata in a nullity action. The prior judgment has not determined the status of the parties, and to preclude either of them from seeking that determination would be unreasonable and contrary to the public interest.

2. Where the present action is neither a nullity action nor an action for dissolution, and the prior proceeding was neither for dissolution nor for a declaration as to marital status, any of the three views discussed above might be applied; but their relative authority and merits are not the same.[53] Again, the law of Ontario appears to be free from binding authority on this particular combination of antecedent and subsequent actions. *Thompson v. Crawford* is somewhat more to the point in this connection than when the present action is for a declaration of nullity, since it involved an application to set aside an alimony order. However, the observations it contains as to the application of res judicata remain obiter.

If the *Wilkins-Woodland* rule is accepted without qualification, then it would clearly apply to the circumstances envisaged here. Obviously, if res judicata applies in a present nullity action, it will apply when the present action is not a nullity action. For reasons already expressed, it is submitted that the *Wilkins-Woodland* rule should be rejected.

If the *Hayward* case is given the broad interpretation implied by the references in it to *Miles v. Chilton, Andrews v. Ross* and the *De Reneville* definition of a void marriage as one which *every court in any action* will recognize as being void, then res judicata can never apply to preclude anyone from contesting the validity of a marriage in any kind of action.

However, it does not follow that the *Hayward* rule should be espoused where the present action is not for a declaration of marital status. The middle view would apply res judicata only in respect of a ground of invalidity previously contested, and that view might well be preferable in the present context. Perhaps the courts should take the position that in such circumstances they will not allow the validity of a marriage to be questioned

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[52] JACKSON, THE FORMATION AND ANNULMENT OF MARRIAGE 84 (1951 ed.).

[53] Attention should be drawn to Crosby v. Constable, note 36 *supra*. Res judicata with respect to the validity of marriage was applied in an action against an estate for arrears under an alimony order. The case was explained and distinguished by the Court of Appeal of British Columbia in *Re* Rogers v. Rogers, note 37 *supra*. Whether res judicata would apply in a nullity action was not decided. *But see* Blackham's Case, 90 Eng. Rep. 1265, 91 Eng. Rep. 257 (Nisi Prius, Holt, C.J.).

inter partes in order to avoid personal liability or to obtain some personal advantage; and this should be so whether the earlier judgment involved a finding that the marriage was valid, or a finding either that it was void or not established. This would not — to use Professor Jackson's words — convert void into voidable marriages, since a nullity action could be subsequently brought. Nor would the possibility of a subsequent nullity action render such a disposition of the matter ineffectual, since the nullity decree could be made upon terms (as was the practical effect of what occurred in the *Wilkins* case).

The earlier discussion of matrimonial offences lends support to this view, and enables it to be put on a more analytical basis. Suppose, paraphrasing Diplock, we speak of "marital status estoppel," should not the following parallel hold true? By "matrimonial offence estoppel" is meant "cause of action estoppel" in relation to questions of matrimonial offences. "Marital status estoppel," then, can be taken to mean "cause of action estoppel" in relation to questions concerning the validity of marriage. Just as the cause of action in the former is a specific offence alleged, such as cruelty, so too the cause of action in the latter is a specific ground of invalidity alleged, such as bigamy. If in an alimony action the cause of action is cruelty, and it is determined that that cause of action does not exist, clearly that determination does not preclude a subsequent alimony action in which the cause of action is adultery. Similarly an unsuccessful nullity action based on bigamy should not preclude a subsequent nullity action based on relationship within prohibited degrees, although the same marriage is being contested.

It can also be said that if, in "matrimonial offence estoppel," adultery with *A* is not the same cause of action as adultery with *B*, then, in "marital status estoppel," bigamy with *A* is not the same cause of action as bigamy with *B*, and a determination that the former does not exist should not preclude a later assertion that the latter does. [54]

It is necessary to carry the analogy further, because the question presently under consideration is the effect of a prior judgment in a subsequent action when the object of neither proceeding is to declare or alter marital status. In actions other than to declare it, the cause of action is not marital status; status is simply one of the issues. The only form of estoppel *per rem judicatam* to which such actions can give rise with respect to marital status is "issue estoppel." For instance, suppose the prior proceeding was an alimony action brought for relief from a husband's alleged cruelty. The cause of action was matrimonial cruelty, and the issues were: (1) serious

[54] For the sake of convenience, since frequent reference is made to it, a prior marriage to *A* or *B*, making the marriage of *H* and *W* bigamous, is described elliptically as "bigamy with *A*" and "bigamy with *B*."

ill-treatment; (2) injurious affect on health; (3) wife-husband relationship. It has been seen that if there was no definite determination of issue (1), then "issue estoppel" does not apply to prevent that issue from being litigated in a subsequent and different cause of action (namely, constructive desertion). It follows that if issue (3) had not been definitely determined, then there should be no preclusion from litigating it in a subsequent and different cause of action.

Now, for reasons set forth in section C of this Part, it is submitted that *a marriage cannot definitely be determined to be valid.* It is only where the issue is traversed, and an alleged specific ground of invalidity is determined either to exist or not to exist, that "issue estoppel" *can* arise in respect of marital status. Thus, unless the husband in the prior alimony action had alleged a specific ground of invalidity, such as bigamy with *A*, and bigamy was definitely determined either to exist or not to exist, then neither party could subsequently be estopped from denying or asserting the validity of the marriage.

While a marriage which is not void for bigamy with *A* may nevertheless be void for some other reason, if it is void for bigamy with *A* (or for any other reason) it cannot possibly be valid. Thus, had it been found that there was bigamy with *A*, neither party can assert the validity of the marriage in a later proceeding (other than for nullity, as has been seen, or for divorce, which is about to be seen). However, had it been found that there was no bigamy with *A*, then "issue estoppel" would preclude the parties from asserting that the marriage was void for bigamy with *A*. But either of them could assert that it was void for bigamy with *B*, or because they were related within the prohibited degrees; for to hold otherwise would be to lend to "issue estoppel" a more preclusive effect than has "cause of action estoppel." The very cause of action in a nullity proceeding is a specific allegation of invalidity; and the question of marital status in some other proceeding cannot be any broader nor can its determination be more conclusive, than in a nullity action.

3. It remains to say a few words about the peculiar position where either the prior judgment was a divorce decree or the present action is for dissolution.

A decree of divorce is a judgment in rem, or as some have described it, quasi in rem. It alters the status of the parties *inter se*, and is to that extent binding on third parties. However, in *Foggo v. Foggo* [55] it was said that where a divorce is granted, the finding (whether express or implied) that there was a valid marriage to dissolve is not part of the *res*, but is only collateral, and therefore does not affect third parties. The effect of

[55] Note 37 *supra.*

the divorce decree is to make the antecedent validity of the erstwhile marriage res judicata *inter partes*. Thus, suppose that *H* now discovers that *W* was a bigamist and sues her for damages in negligence for an injury suffered between the celebration of their "marriage" and the decree purporting to dissolve that "marriage." That they were validly married at the time of the injury is res judicata and *H* might not, therefore, succeed, depending on which view of the main problem is adopted. But a third party cannot plead res judicata on the strength of someone else's divorce, as was attempted to be done in the *Foggo* case. In sum, then, a divorce judgment, whether of dissolution or dismissal, would support a plea of res judicata to the same extent as, and no more than, would a judgment in any other action in which the validity of marriage is in issue, save a nullity action.

When the present action is for dissolution, and the prior action was not for a declaration of marital status, once again there is no binding authority as to the application of res judicata in respect of the validity of marriage, and any of the three views discussed could yet be adopted in Ontario. That the *Wilkins-Woodland* rule is unacceptable can be demonstrated by carrying it through to its logical conclusion. Suppose that the marriage of *H* and *W* is bigamous, but *W* has nevertheless obtained an alimony order. *H* subsequently sues *W* for divorce and claims damages against *X*, the co-respondent. Clearly, *X* cannot be estopped from raising the invalidity of the marriage as a defence. All that is left of the matter is the question of status. There does not appear to be any reason remaining for *H* to prefer a divorce decree to a nullity decree. Why should *W* be estopped from showing that there is no marriage to dissolve? Even if she is estopped, the divorce cannot prevent a third party from raising the invalidity of the marriage "while it lasted." In effect the court would be saying that the marriage is void and, therefore, *X* did not commit adultery; but as between *H* and *W* the marriage is valid, and *W* committed adultery with *X*. The court would then solemnly dissolve a union that it had just declared never to have existed.

This *reductio ad absurdum* shows the utter inappropriateness of the *Wilkins-Woodland* rule and makes it obvious that the *Hayward* rule offers the only reasonable solution, at least where the present action is for nullity or divorce. In view of the cases of hardship that might be thought to follow from the *Hayward* rule, it bears repetition that the court has the power to award alimony and maintenance in a nullity action.

It is equally clear that there can be no estoppel *per rem judicatam* in a divorce action by reason of a prior finding that a marriage is invalid, except where the prior action was for a declaration of marital status. Since, in relation to the validity of the marriage, such judgments are in personam only, the status of the parties is left uncertain and can be litigated in actions involving third parties. For instance, if in an alimony action *W* failed to

prove that she was the wife of *H*, this would not preclude *X* from asserting that *W* was *H*'s wife for the purpose of recovering from *H* the price of necessaries sold to *W*. Nor would it prevent *W* from claiming a legacy left by *Y* to "the wife of *H*." The examples could be multiplied.

It is plainly necessary that it be open to the parties to have their status established in a proper action brought for that purpose; and if in such an action they were declared to be man and wife, that judgment would render nugatory the earlier finding to the contrary. Neither party could then be estopped in a divorce action.

In respect of a prior finding that a marriage is valid, the position in the divorce court may not really be free from authority. That res judicata cannot apply in a divorce action so as to preclude the court from inquiring and satisfying itself that the offence was committed has been seen. No one would quarrel with the definition of adultery as sexual intercourse between two persons, one of whom is married to another. There has been considerable controversy over the meaning of "sexual intercourse" in the context of the concept "adultery," but no one has yet suggested that it can occur between two unmarried persons. Thus, it can be contended that the existence of a lawful marriage between plaintiff and defendant is an integral part of the offence. If *H* and *W* are not married, then *H* cannot be said to have committed adultery with *X*, and the divorce court cannot be precluded from saying so.

Of course, the answer may be made that the cause of action in a petition for divorce is the matrimonial offence of adultery, and that there are two distinct issues : (1) husband-wife relationship between plaintiff and defendant, and (2) sexual intercourse between defendant and co-defendant. It could then be said that, while the court cannot be precluded from satisfying itself that the co-defendants indulged in sexual relations, it can be precluded from denying that that intercourse was adulterous. Whereas adultery is the only ground for divorce presently available to Ontario husbands, their wives have at their disposal the additional grounds of rape, sodomy and bestiality. Since marriage to a third party is not even part of the definition of these offences, this argument carries additional weight in respect of them. As it is inevitable that the grounds of divorce will be extended to include cruelty and desertion, this question can be posed in connection with those offences as well. [56]

However, even if that answer is not specious, it is suggested that the rule in respect of marital offences extends, or should extend, in principle

[56] In Sealey v. Bridge, note 51 *supra*, the suggestion is made that a putative wife can be deserted on the basis that there was a de facto marriage. But this case involved a petition for nullity and alimony. It does not raise the question of the court's peculiar duty in a divorce case to satisfy itself that the offence was committed.

to the whole action, and that the court can no more be precluded from finding out whether there is a marriage to dissolve than it can be precluded from finding out whether there is a ground upon which to dissolve it.

C. *Where the Prior Judgment is a Declaration of Validity, or a Dismissal of an Action for a Declaration of Nullity or of Validity*

That a declaration of nullity made by a competent court is a judgment in rem is beyond dispute. So long as it stands, it determines conclusively that the parties were never man and wife.[57] Neither the parties nor anyone else can successfully assert a claim to the contrary. However, whether a judgment declaring the validity of a marriage, or dismissing an action for a declaration either of validity or of nullity, is a judgment in rem, is not easily ascertained.

No one would question the correctness of the following proposition: the assertion that intelligent life is confined to the planet earth can be refuted by finding such life on a given planet, but it cannot be established by the failure to do so. It is submitted that it is as unquestionably true to say that *a marriage can be proved to be void, but it cannot be proved to be valid.* Of course, there is a way to prove that there are no other intelligent beings in the universe, and that is to determine in respect of every planet in creation that such life does not exist upon it. Similarly, the only way to prove that a marriage is valid is to determine in respect of every impediment created by law that it does not exist in connection with that marriage. If it be thought that the practical impossibility of exploring the universe destroys the analogy, let it be remembered that the marriage of *H* and *W* is not void because of bigamy in the abstract, but because of a prior subsisting marriage between either *H* or *W* and *A* or *B* or *C* or any of millions of yet unidentified persons. To prove that such a relationship does not exist between *H* and *A* does not preclude the possibility of such a relationship between either *H* or *W* and someone else; and when all the possible bigamous relationships have been accounted for, there remain the other grounds of nullity to be considered.

There is seldom certainty about the facts to which the law is applied, and the requirements of legal proof are such that many assumptions must be made and acted upon in legal proceedings. Whether an assumption of fact thus made and acted upon becomes in law incontrovertible is a matter of policy governed in general by the doctrine of res judicata; and when that doctrine is applied for or against third parties, the conversion of an assumption into an absolute legal certainty is complete. It has been repeatedly

[57] This is referable to the status of marriage between the parties. It is usually, but not always, so with respect to all other possible effects of the marriage. See: Cohn, *The Nullity of Marriage*, 64 L.Q.R. 324, 533 (1948).

held that estoppels cannot override the law of the land, and, unless the accepted definition of void marriage is now to be rejected, the assumption that a marriage is valid can never become (even in law) an absolute certainty.

Thus, it is clear that the dismissal of a nullity action can mean only that an assumption that the marriage is valid has not been rebutted by the particular allegations made. Not only may impediments other than those alleged exist, but (as in the *Wilkins* case) the impediment originally alleged may actually exist; and if that is so, then without doubt that marriage is void ipso jure. This conclusion stands in complete contradiction of any assertion that the dismissal of a nullity action is a judgment in rem, because a marriage cannot be void ipso jure and at the same time be held to be unchallengeable by anyone at any time in any kind of proceeding.

The chances must be extremely slight that in a nullity action some impediment other than the one alleged actually exists, and the court is not likely to make an erroneous finding on the impediment advanced and contested. [58] Consequently, it is highly unlikely that the validity of such a marriage would be contested in a subsequent proceeding, and no cases have been found involving these circumstances.

The proposition that such a judgment is not in rem seems incontrovertible, and if the arguments advanced in that regard seem to labour the obvious, it is because general statements to the contrary are to be found. For instance, the judgments "of a divorce court of competent jurisdiction dissolving or establishing a marriage, or declaring the nullity of a marriage or affirming its existence" are said by Halsbury to be examples of judgments in rem. [59] It can be observed immediately that this statement is incorrect in so far as it pertains to a judgment in a divorce action. Even where a divorce decree is made, it is a judgment in rem only to the extent of establishing that the parties are *thenceforth* not man and wife; as to whether there was a valid marriage to dissolve in the first place, it is conclusive only between the parties. [60]

The authorities cited by Halsbury do not seem to support the broad proposition laid down in that treatise. In *Salveson v. Austrian Property Administrator,* [61] the House of Lords held that a foreign nullity decree was a judgment in rem and precluded a third party from asserting the validity of an annulled marriage. The opinions in that case do contain some general statements from which it might be inferred that a judgment dismissing a nullity action or declaring the validity of a marriage is a judgment in rem. However, those statements can hardly be taken to be referable to a question

[58] The mistake made in the *Wilkins* case must be rare. The suit in question was for judicial separation and the judgment could at most create an estoppel *inter partes.*

[59] 15 HALSBURY, LAWS OF ENGLAND 179 (3d ed. 1963).

[60] Foggo v. Foggo, note 37 *supra.*

[61] Note 31 *supra.*

far removed from the facts of that case and clearly not within the contemplation of the court. There were two issues before the House of Lords: whether a decree of nullity is a judgment in rem, and whether such a judgment pronounced by a court in a foreign country where the parties are domiciled is a judgment in rem. Both issues were answered in the affirmative. The case decides nothing else.

The most inclusive statement made in the *Salverson* case as to what constitutes a judgment in rem is that of Viscount Dunedin:

> Neither marriage nor the status of marriage is, in the strict sense of the word a "res", as that word is used when we speak of a judgment in rem. A res is a tangible thing within the jurisdiction of the Court, such as a ship or other chattel. A metaphysical idea, which is what the status of marriage is, is not strictly a res, but it, to borrow a phrase, savours of a res, and has all along been treated as such. Now the learned judges make this distinction. They say that in an action for divorce you have to do with a res, to wit, the status of marriage, but that in an action of nullity there is no status of marriage to be dealt with, and therefore no res. Now it seems to us that celibacy is as much a status as marriage.... The judgment in a nullity case decrees either a status of marriage or a status of celibacy. [62]

An analysis of Viscount Dunedin's judgment, particularly in the light of the law with respect to matrimonial causes in general, shows clearly that these words do not have, and could not have been intended to have, the effect that might at first be attributed to them.

The statement that "the judgment in a nullity case decrees either a status of marriage or a status of celibacy" is patently false. Just as a decree of divorce declares that these parties are not henceforth man and wife, a decree of nullity declares merely that they never were man and wife. Just as a decree of divorce is not a judgment in rem precluding third parties from showing that there had never been a marriage to dissolve in the first place, a decree of nullity is not a judgment in rem precluding third parties from asserting that one of the principals is, and has all along been, the spouse of a third party. Indeed, it does not even have this effect *inter partes*. The most obvious illustration of this is a case of bigamy. Clearly a nullity judgment in such a case does not decree a status of celibacy, because it does not purport to annul the first marriage the existence of which is the basis of the decree.

It is submitted that the other branch of the statement is equally fallacious, and just as the one was obviously not thoroughly considered, neither was the other. Surely it cannot be said that if a nullity action brought on the ground of bigamy is dismissed, and it is discovered that the parties are brother and sister, that judgment has decreed a status of marriage and is a judgment in

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[62] *Id.* at 662.

rem. If that were so, then if *H* married *X* without divorcing *W* he would have no defence to a criminal prosecution for bigamy, and if he continued to live with *W* he would not be committing incest, and *X* would be entitled to an annulment even though she is *H*'s lawful wife.

If that illustration is not sufficient to make the point, consider the following: *H* went through successive marriages with *W*, *X*, and *Y*. A nullity action has been brought by *Y*, who has just discovered *H*'s prior marriage to *X*. Suppose that it is learned after the judgment has been made that *W* is alive, that the marriage of *H* and *W* was never dissolved, that *W* was in complete ignorance of the nullity proceedings, and that *H* had remained silent about *W* for reasons known only to himself. If the judgment had declared the marriage of *H* and *Y* to be void on a finding that *H* and *X* were man and wife, clearly it does not preclude *X* from suing *H* for a declaration of nullity, nor preclude *W* from suing him for divorce. Its effect is only that *H* and *Y* were never married. Similarly, if the judgment were dismissed, *W* could not be precluded from obtaining a divorce or any other remedy that might be available to her as a wife. Nor could *X* be precluded from obtaining a declaration of nullity. But such would be the effect of a true judgment in rem. And while the effect of the dismissal of the nullity action may be to make the validity of the marriage of *H* and *Y* res judicata as between them, it would be obviously absurd for the rule to apply in a nullity action brought by *Y* on learning that *W* is *H*'s lawful wife.

It must be perfectly plain that Viscount Dunedin's statement was not intended to apply to anything but a declaration of nullity, and even then it cannot be taken to mean more than that such a judgment is conclusive that the parties were never married to each other. The same may be said of the *Salveson* case as a whole. Indeed, it is submitted that any judicial statement that can be found to support a contrary view is either distinguishable, obiter, or of no authority in Ontario.

For exactly the same reasons, a judgment declaring a marriage to be valid [63] can no more be a judgment in rem than can a judgment dismissing a nullity action. However, a judgment dismissing a petition for a declaration that a marriage is valid may in substance amount to a declaration of nullity, and, like such a declaration, there is no reason why it should not be considered to be a judgment in rem. Finally, although it is possible to have a nullity decree set aside, [64] such a proceeding could have no more effect

[63] Such a declaration can be made in Ontario, Alspector v. Alspector, [1957] Ont. 14 (High Ct.), 454 (C.A.). In substance, all that was decided in that case was that the marriage was not invalid for failure to comply with the Marriage Act of Ontario. Had Mrs. Alspector turned out to be a bigamist, that judgment would not have made the marriage unimpeachably valid.

[64] See for example Simpson v. Montreal Trust Co., [1953] 3 D.L.R. 305 (B.C. Sup. Ct.), in which a decree of nullity was set aside because of perjured testimony, the fraudulent suppression of material facts, and because it had been obtained without proper notice of the proceedings having been given to the defendant.

by way of estoppel *per rem judicatam* than would the dismissal of a nullity action.

Since judgments declaring marriages to be valid and judgments dismissing nullity proceedings are not judgments in rem, it follows that any estoppel *per rem judicatam* to which they may give rise is only *inter partes*. Their effect under the doctrine of res judicata is precisely the same as that of the judgments discussed in the second section of this part.

IV. Estoppel and Foreign Judgments

A judgment of a foreign tribunal of competent jurisdiction creates an estoppel *per rem judicatam* in a proceeding in Ontario to the same extent as a similar judgment of an Ontario court. [65] If, under Ontario law, the foreign tribunal lacked jurisdiction, its judgment is of no effect per se and cannot give rise to res judicata. [66] The question with which this part is concerned is whether a foreign judgment which is not recognized by the law of Ontario can have an effect *per accidens*, as it were. Although such a judgment cannot give rise to res judicata, it may nevertheless have the preclusive effect of an estoppel in some proceedings in Ontario.

The doctrine employed to this end is that he who invokes the jurisdiction of a foreign court cannot later impugn the judgment of that court as having been made without jurisdiction. The typical situation in which this doctrine has been used is where one spouse, who has obtained a decree of divorce or of nullity in a foreign court which (under the law of Ontario) has no jurisdiction in the matter, claims a share as widow or widower in the estate of the other.

Whether the doctrine is law in Ontario is uncertain, for there are opposing views in Canada, and the question is of such a nature that it hardly seems capable of receiving different answers in the various common-law provinces. In *Re Capon v. McLay*, [67] Mr. Justice Schroeder reviewed the conflicting decisions and, speaking for the Court of Appeal of Ontario, made the following statement:

> Unquestionably there is a sharp diversity of judicial opinion as to the soundness of the authorities upon which the respondents rely in support of their alternative submission. Nevertheless, even if I were disposed to consider them wrong or of doubtful validity, since they have been acted upon for a long period of time in legal procedures and in other ways in this Province, I would consider that they should be followed by our Courts until they are overruled by a Court of higher jurisdiction. [68]

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[65] See case cited note 31 *supra*; *Re* Capon v. McLay, [1965] 2 Ont. 83.

[66] *Ibid.* Of course, the same can be said of a dismissal of an action in an Ontario court on the ground that the Ontario court lacked jurisdiction, Manella v. Manella, [1942] 4 D.L.R. 712 (Ont.).

[67] Note 65 *supra*.

[68] *Id.* at 99-100.

These remarks can hardly be said to express a firm conviction as to the soundness of the doctrine; yet, even though the statement is obiter,[69] there can be little doubt that it will be applied in Ontario pending a final resolution of the problem by the Supreme Court of Canada.[70]

The doctrine seems to have been born out of moral indignation and without regard to its ultimate effect on the paramount question of status.[71] This is not to suggest that ethical considerations cannot be sufficient in themselves to provide a sound basis for a legal rule, but the cases in which the doctrine has been applied seem devoid of adequate reflection on its merits. Indeed, in the *Capon* case the Court of Appeal, which was probably free to reject the doctrine, appears to suggest that it is law (at least provisionally) for no other reason than that it has been applied in the past in Ontario, and no binding authority contradicts it. In contrast with this, contrary opinions have stressed the importance of status and have concluded that neither status nor the subsidiary rights which flow from it can be affected by an invalid foreign judgment. But these opinions may suffer from having given too little attention to the question: How far must other important considerations be displaced in order to afford adequate protection to the concept of status?

Whether the doctrine is law or not has been already the subject of much legal writing,[72] and, in view of the decision in the *Capon* case, there is no need to review the cases for that purpose. However, the scope of the doctrine has not been worked out, and there are a number of questions to be considered in that regard. In order to deal with these questions adequately it would seem best to keep them clearly separate.

1. Although the doctrine is "similar to and sometimes referred to as an estoppel," it is clear that the principle against impugning a jurisdiction which one has invoked is not simply an instance of estoppel by conduct.[73] The scope of the former must not be assumed to parallel that of the latter. The doctrine in question does not require that there should have been a detriment suffered in reliance upon a representation made by the person

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[69] In the *Capon* case, a woman claimed to be entitled to share in an estate as the widow of the deceased, notwithstanding a foreign nullity decree which she had obtained. One of the issues was whether the foreign tribunal had had jurisdiction to make the decree. In the circumstances, the decision that the decree was effective in Ontario caused considerable stir in the legal profession. See MacKinnon, Comment, 1 OTTAWA L. REV. 216 (1966). The decision also made it unnecessary to consider what effect that judgment would have had had it not been valid in Ontario.

[70] Actually, the Supreme Court of Canada appears to have approved of the rule in Stevens v. Fisk, Cameron Sup. Ct. Cas. 392 (1885). Perhaps it is because the decision is rather old and has not been followed by all the courts that Schroeder, J. A., suggests that the question is open.

[71] See Sadleir, Comment, 38 CAN. B. REV. 90 (1960).

[72] The cases have been collected and commented upon at different times. See Cowan, Comment, 16 CAN. B. REV. 57 (1938); Sadleir, note 71 *supra*; Castel, Comment, 43 CAN. B REV. 647, 660 (1965).

[73] Fife v. Fife, *supra* note 42, at 653.

against whom the rule is inveighed. Indeed, estoppel by conduct would seem to have no application in respect of marital status. [74]

2. Despite the decision of the Supreme Court of Canada in *Stevens v. Fisk,* [75] which holds to the contrary, the doctrine may well be limited to precluding the plaintiff in the foreign action from denying the jurisdiction of the foreign tribunal. This apparently innocuous distinction is supported by several decisions [76] and thought by some commentators to be necessary. In reference to the possible application of the doctrine against the defendant in the foreign proceedings, it has been observed that:

> To adopt such a rule would be to place him in an unenviable position. If he appears he thereby makes the otherwise invalid decree effective against him at his domicile; if he does not appear it may be said of him that he did not defend the suit because there was no possible defence. If however the defendant in the foreign suit later acts upon the invalid decree it does seem that he should be prevented from setting up its invalidity against a person who has, for example, married him believing the decree to be valid. [77]

The author of this comment admits that if the defendant in the foreign suit had objected to the jurisdiction of the foreign court, "such protest would undoubtedly have the effect, in a Canadian court, of preventing the application of the principle of *Stevens v. Fisk.*" [78] That being so, the distinction seems to lack merit, since a defendant who fails to object appears to be as guilty as the plaintiff of whatever it is that the courts have taken objection to and feel necessitates the doctrine.

If *H* and *W* were resident in a foreign country and *W*, acting on the advice of counsel, obtained a divorce in an action defended by *H*, on the advice of counsel, it is hard to see why one should be considered to have acted in a manner more reprehensible than the other. Suppose they both come to Ontario where they learn they are in law still husband and wife. Should *H* be able to treat *W* as his wife, whereas *W* is precluded from acting

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[74] See cases cited notes 39, 40, 41 *supra*; C. v. C. Ont. L.R. 571 (1917). See also BROMLEY, *op. cit. supra* note 32, at 64; BOWER, THE LAW RELATING TO ESTOPPEL BY REPRESENTATION 138 (2d ed. Turner 1966). As explained in note 45 *supra*, approbation of a voidable marriage is an exception.

[75] Note 70 *supra.*

[76] *Re* Plummer v. Sloan, [1942] 1 D.L.R. 34 (Alta.); *Re* Graham Estate v. Graham, 52 B.C. 411 (Sup. Ct. 1937); *Re* Lavis, [1959] Ont. Weekly N. 291 (High Ct.); Swaizie v. Swaizie, 31 Ont. 324 (1899); *Re* Williams, 14 Ont. L.R. 482 (1907); *Re* Banks, 42 Ont. L.R. 64 (High Ct. 1918); *Re* Jones, 25 D.L.R.2d 595 (B.C. Sup. Ct. 1961).

[77] Cowan, *op. cit. supra* note 72, at 61. The last sentence in this quotation appears to be contradicted by the very case which is the subject of the comment, *viz., Re Graham Estate,* note 76 *supra.* In that case, two "wives" claimed a share in an estate as widow of the deceased. The doctrine was applied against the lawful wife who had procured an invalid foreign divorce. This is the point commented upon. The commentator seems to have overlooked the fact that the putative wife was not allowed to invoke the doctrine against the estate of the deceased who had apparently not only submitted to the foreign jurisdiction, but in "marrying" her had acted upon the invalid decree.

[78] *Ibid.*

as his wife?[79] Should *H* be able to sue *X* for damages for criminal conversation?

On the other hand, if the distinction is valid, why should it be affected by the defendant's subsequent conduct? The principle involved is not estoppel by conduct, but whether submitting to the foreign jurisdiction is equivalent to invoking it. If it is not, then the doctrine simply does not apply. What the exception to the exception implies is that estoppel by conduct can preclude the assertion of true status. If *H* married *Y*, then whether he had objected to the jurisdiction of the foreign court which purported to dissolve his marriage to *W* should be entirely irrelevant in an action by *Y*. If her action is against third parties, they will not be estopped. If her action is against *H*, it must be either for money or for dissolution or nullity. If she wants money, her proper remedy is either an action for damages for breach of promise of marriage or breach of warranty of capacity to marry,[80] or for a declaration of nullity with alimony and maintenance incidental thereto. If she wants a divorce, she is plainly not entitled to it; but she is done no injustice by substituting annulment for dissolution. To allow her any other remedy is to invite the courts to compound the existing confusion by building estoppels on top of estoppels. If *Y* obtains an alimony order because *H* is precluded by this doctrine from asserting the invalidity of their marriage, it might later be urged that the alimony order has made the validity of the marriage res judicata.

These illustrations lend support to the other possible limitations of the doctrine. But, within whatever limits the doctrine is ultimately found to apply, there is no good reason why it should not include the submission without protest to the jurisdiction of the foreign tribunal.

3. Although that which the doctrine precludes from being established is the validity of a marriage, it is clear that this is so only when and to the extent that the marriage is being asserted to obtain or to avoid some personal advantage or disadvantage. When the object of the suit is to declare or to alter marital status, the doctrine can have no application.[81] Indeed, it is possible to regard the doctrine as a rather special exception which applies only where the present proceeding involves a claim to share in an estate. This is apparently the view of one commentator:

> The general rule concerning foreign divorces is as follows: where the foreign court had no jurisdiction, the fact that the plaintiff invoked that

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[79] Should not the rule in Square v. Square, note 44 *supra*, apply here?

[80] Shaw v. Shaw, [1954] 2 All E.R. 638 (C.A.); Baran v. Wilensky, 20 D.L.R.2d 440 (Ont. High Ct. 1959).

[81] McGuigan v. McGuigan, [1954] Ont. 318 (High Ct.), *aff'd* [1954] Ont. Weekly N. 861. See also C. v. C., note 74 *supra*. That case was an action for divorce, and it was said that "the relationship of husband and wife is of such great public importance that the doctrine of estoppel cannot here apply."

> jurisdiction and the defendant submitted to it does not estop anyone, including the parties to the suit, from attacking the decree as it relates to the status of the married pair.
>
> The recent decision of Hughes J. in *re Lavis*, appears to confirm an exception to this rule, namely, that one spouse having sought and obtained an invalid decree of divorce abroad is precluded from attacking the jurisdiction of the court *in order to claim a share in the estate of the other spouse.* [82]

It is difficult to find cases applying the rule for some purpose other than to preclude one spouse from claiming as the widow or widower of the other. One such case was *Swaizie v. Swaizie,* [83] where the plaintiff sought to enforce an alimony order made in conjunction with a divorce decree. The defendant failed to impeach the foreign decree, and the tentative approval of the doctrine, given by the Divisional Court of Ontario with hesitation and misgivings, was obiter. The doctrine was applied in similar circumstances in British Columbia in *Burpee v. Burpee*; [84] but it was rejected in Saskatchewan in *Fife v. Fife,* [85] where it was unsuccessfully invoked in maintenance proceedings in an attempt to preclude the defence that the marriage was void.

It would seem, however, that there is no good reason in principle to so restrict the application of the doctrine. Unless it is altogether meretricious, it should be applied in all "proper cases" where something other than marital status is at stake. The expression "proper cases" is meant to signify cases which are not excluded by other limitations of the doctrine.

4. It is submitted that the doctrine applies *inter partes* only and can be invoked only by the spouses or their privies. None of the cases appears to have applied the principle for the benefit of a third party, [86] and at least one authority supports the view that it cannot be so extended.

In *Fife v. Fife,* the defendant, who married the plaintiff following an invalid divorce obtained by him, was not precluded from raising the invalidity of that decree in a maintenance action. Mr. Justice Lamont in *Burnfield v. Burnfield* [87] refused to apply the doctrine in proceedings brought by a third party. In *Re Graham* provides further indication that the doctrine does not apply for the benefit of third parties, since in that

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[82] Sadleir, *op. cit. supra* note 71. (Emphasis added).

[83] Note 76 *supra.*

[84] [1929] 3 D.L.R. 18 (B.C. Sup. Ct.).

[85] Note 42 *supra.* The fact that the *Fife* case did not involve a claim against an estate might be a point of reconciliation between it and opposing decisions. See note 87 *infra.*

[86] Most of the cases have involved claims by one spouse against the estate of the other.

[87] [1926] 2 D.L.R. 129 (Sask.). Since the *Burnfiel* and *Fife* cases reject the doctrine altogether, it might be said that they cannot be authority for the narrower proposition. However, this is another factor which might be used to distinguish and reconcile the cases, and it might be said that these cases can at most be restricted to the narrower rule. See note 85 *supra.*

case the putative wife of an invalidly divorced man was not allowed to invoke the doctrine against his estate. [88]

When we consider the merits of the question, it is difficult to imagine circumstances in which a third party ought to be able to plead the doctrine. For instance, although it might be thought that an action for damages for criminal conversation is one such case, it may be carrying sympathy too far to make a rule, or even an exception to a rule, in order to protect an adulterer from the consequences of his conduct, especially when the damages would be minimal, if not nominal, in the circumstances.

It might also be thought that an invalidly divorced spouse ought not to be able to maintain an action under the Fatal Accidents Act. [89] But why not? *Ex hypothesi,* we are not dealing with estoppel by conduct; when the tortfeasor killed the other spouse he was not relying on a representation that his victim was not married. The doctrine here in question lacks the moral basis of an estoppel by conduct. Indeed, it does not seem to have any moral foundation except when applied *inter partes;* even then it is obviously controversial. What, precisely, is the moral basis of the rule? Is it somehow reprehensible per se to apply for relief to the wrong court? If the parties come to Ontario and are informed that they are still man and wife, is it really unseemly that they seek to act accordingly?

Surely it is misplaced moralizing to suggest that the doctrine apply in favour of third parties. If a wife who is not entitled to the support of her husband may nevertheless succeed under the Fatal Accidents Act, [90] why not an invalidly divorced wife who is, *inter partes,* entitled to and in receipt of support under an alimony order? In the former case, it is difficult to see how the claimant, whose conduct might have been quite immoral, can be said to have suffered any damage; in the latter case, the claimant, who might be innocent of any misconduct, suffered damage.

5. It is a curious fact that apparently in all of the cases in which it has been applied, the doctrine has been used to prevent one party from establishing that he or she is the spouse of the other. It does not seem ever to have been used to preclude one party from *denying* that he or she is married to the other. If *H* sues for nullity in a foreign court which, under Ontario law, lacks jurisdiction, and that action is dismissed, can *W* in a subsequent alimony action in Ontario assert the doctrine to preclude *H*'s defence that the marriage is void? If there is any cogent reason for that doctrine's existence, it would seem that it ought to extend to invalid foreign judgments that declare or find that the marriage is valid. To the extent that such judgments do not come within the compass of the doctrine it can be said that its reason for existence is not well-founded, and its

[88] See note 77 *supra.*

[89] ONT. REV. STAT. c. 138 (1960).

[90] Home v. Corbeil, [1955] 4 D.L.R. 750 (Ont. High Ct.); Nowakowski v. Martin, [1951] Ont. 67.

assertion specious. Thus, although apparently the question has not been put to the courts, it seems to have been judicially answered by implication; prima facie the doctrine should apply to judgments which annul or dissolve marriages.

It would seem self-evident that invalid foreign judgments cannot be accorded a more encompassing effect than would be theirs were they valid. The doctrine imposes a disability, and that disability can have no greater consequence than to make the judgment unimpeachable in the circumstances. Since the invalid judgment is to be treated as though it were valid, the effect of the doctrine when applicable must be identical with estoppel *per rem judicatam.* [91] Thus, the full scope of the doctrine here in question depends upon which view of the doctrine of res judicata is adopted. The former must follow the latter, *mutatis mutandis,* producing the same results but for different reasons.

It is not suggested that there is a complete parallel between the two doctrines. Attention must be drawn to the words "when applicable" which appear in the preceding paragraph in the statement "the effect of the doctrine *when applicable* must be identical with estoppel *per rem judicatam.*" The possible limitations of the doctrine that have been considered must be taken into account. The doctrine is that one who invokes a jurisdiction cannot impugn it; consequently, when one invokes a foreign jurisdiction, the doctrine should apply, unless the circumstances lie outside these limits. But when it does apply, its effect is the same as if the prior judgment had been valid. Thus, it is submitted, the full scope of the doctrine, from a positive viewpoint, is to be found by looking to the doctrine of res judicata.

It will be recalled that there are three possible views in respect of res judicata, depending upon the relation between the prior and subsequent proceedings. Whichever of these views is adopted should govern the effect, when it is applicable, of the doctrine now being considered. [92] In this way can be found the answers to the following questions: Does the present doctrine apply in respect of a finding in an invalid judgment that a matrimonial offence was or was not committed? Does it apply in respect of invalid judgments of inferior courts? Does it apply in respect of invalid judgments other than annulments and dissolutions? [93] Does it apply in respect of findings and declarations that a marriage is valid?

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[91] Conversely, an argument can be made from this against the soundness of the doctrine. An invalid judgment cannot give rise to res judicata; but to treat such a judgment as though it were valid is in substance to allow it to give rise to res judicata; therefore an invalid judgment cannot be treated as though it were valid. Since an invalid judgment cannot be treated as though it were valid, the doctrine against impugning a self-invoked jurisdiction is not sound.

[92] Of course if the rule in Hayward v. Hayward, note 26 *supra,* is adopted, res judicata cannot apply in respect of status in any action for any purpose. Since an invalid judgment cannot have any greater effect, the "cannot impugn" doctrine would then have to be rejected, as it was in Fife v. Fife, note 42 *supra,* although the present argument was not therein advanced.

[93] There do not appear to have been any cases involving prior invalid judgments other than divorce or nullity decrees.

V. CONCLUSIONS

1. The doctrine of res judicata applies in respect of matrimonial misconduct, but obviously only *inter partes*. Its application in proceedings other than for divorce seems complete, but there are fine distinctions that must be looked out for. Although it ought not to apply at all in the divorce court, it appears to be applicable in proof of innocence of alleged misconduct. It is submitted that, within the framework of existing law, the courts are capable of eliminating this anomaly.

However, even should it be supposed that the doctrine ought not to apply in respect of charges of misconduct in *any* proceedings, it appears that the courts are not free to reject it altogether. Divorce proceedings excepted, the purpose of an accusation of marital misconduct is either to obtain money or to avoid paying it. The underlying assumption of the law in this regard is that a wife's primary right to her husband's financial support is contingent upon her good behaviour, but her secondary right to secure that support is dependent on his bad behaviour, the expressions "good" and "bad" receiving a restricted meaning reflective of outmoded concepts of what a spouse ought (or ought not) to be expected to put up with.

This assumption is so fundamental to the present state of the law that its rejection is beyond the courts; and the application of res judicata in respect of allegations of misconduct in proceedings other than for dissolution appears to be but its necessary corollary. It seems plain that this assumption is completely out of place in modern society, and the right to receive, and the duty to provide, support should be placed upon some other footing. The whole conduct of the parties, not just that which most offended past generations, should be in issue; and even then, it should be but one consideration. It seems inevitable that the grounds for divorce will be extended to include conduct for which a less drastic remedy is now available. In matrimonial disputes of practically every kind, the object of the law should be to provide relief to the parties in the situation in which they find themselves. If the "fault" concept is inadequate in divorce proceedings, it is equally inadequate when the parties happen to prefer some other remedy for the same situation. Hopefully, then, the time may come when res judicata can have no possible application in relation to marital conduct.

2. An unimpeachable judgment declaring the nullity of a marriage is a judgment in rem, precluding any assertion to the contrary by anyone in any circumstances. The effect of any other prior judgment is strictly *inter partes* with respect to the validity of the marriage there in issue; unless a valid distinction can be drawn between the judgments of inferior courts and those of superior courts, whether res judicata can or should apply depends entirely on the nature of the present proceeding. Apart from this,

the scope of the doctrine of res judicata in relation to marital status is uncertain.

Where the present action is for divorce or nullity, an authoritative answer seems wanting, at least in Ontario, and quite probably in the other common-law provinces as well. It is submitted that the doctrine ought not to apply in such proceedings. If there is any likelihood that the courts might rule otherwise, this submission should be included in any recommendations that might be made towards the reform of matrimonial law.

Where the present proceeding is other than for nullity or divorce the courts of Ontario and most, if not all, of the other provinces are free to adopt any of three possible views : (1) the doctrine applies without qualification in such proceedings; (2) the doctrine applies in such proceedings, but only in respect of grounds of invalidity actually put forward and contested in the prior proceeding; (3) marital status can never be established by estoppel *per rem judicatam.*

The first view is clearly objectionable and must be rejected. There are simply too many situations in which it would be as ridiculous as it would be unjust to apply the doctrine. It is not suggested that hard cases should be allowed to make bad law because it is not merely a matter of some concrete case or cases; rather, the question is whether a rule that applies unjustly to several classes of cases can be a good law.

It is difficult to choose between the two remaining views. Since the object of the suit is neither to alter nor to declare marital status, should a party be allowed to assert a subsidiary right or avoid its correlative duty by re-litigating exactly the same set of facts and allegations that have been already judicially determined? Do the rights and liabilities in question really outweigh the interest that litigation should come to an end? In such circumstances, is it specious to insist that status, which cannot be established by estoppel, is the true issue? Thus, much can be said in favour of the middle view.

On the other hand, it is unfortunate, and a rather sad commentary on our legal system, that the resolution of marital problems should necessitate shutting out the truth. There can be no other human relationship in respect of which it could be more injurious to enjoin silence and to act upon pretence. If the courts are really powerless to provide adequate and creative remedies based on the realities of these situations, would they not be wise to reject the doctrine altogether in disputes between spouses and to call upon the legislature to solve the problems? Though rejecting the doctrine might frustrate many just claims in the form in which they have been made, it must be remembered that alternative remedies are often available. For instance, on the strength of an alimony order made after many years of de facto marriage, a woman may well be thought to

be entitled to a share in her deceased partner's estate even though it transpires that he was a bigamist. But it is not necessary to call her his widow in order to give her that share; it is hers in damages for breach of contract. The same remedy is available to her while he is alive, and it would be a suitable alternative to some proceeding that would leave the question of status in doubt. There is, therefore, a great deal to be said for the last view.

3. The doctrine that one who invokes the jurisdiction of a foreign court cannot later impugn it must be taken to include a submission to that jurisdiction without protest. It is further submitted that the doctrine can never be applied for or against third parties.

Since the doctrine, which is quite distinct from an estoppel by representation, can only be applied *inter partes*, its dubiousness is heightened by its apparent lack of any strong moral basis. An invalid judgment should not have any more preclusive effect in subsequent proceedings than it would have had had it been valid; any court which would go as far as to say that the doctrine of res judicata can never be applied in proof of marital status ought also to reject this shadow doctrine.

It follows, too, that the doctrine cannot be applied by a court in any situation in which it would refuse to apply res judicata. Subject to a qualification to be made presently, the doctrine should apply wherever res judicata would apply. Thus, the doctrine can never be applied in a divorce or nullity action in order to establish marital status; nor should it apply for that purpose in any other proceeding unless the self-same allegations had been previously litigated. However, the doctrine should arise not only where there has been a decree of divorce or nullity, but also as a result of a declaration or finding that the marriage is valid.

If the doctrine is really sound in the first place, it would be both logical and desirable to extend it to charges of misconduct, so that it would apply to such charges in the same circumstances as would res judicata. As it has already been suggested that res judicata ought not to apply to questions of matrimonial behaviour, it must also be submitted that such an extension would be regrettable.

It seems paradoxical that this doctrine should have been employed almost exclusively in connection with claims against estates when (it is submitted) it is in respect of such cases that reliance upon the rule is particularly unfortunate. In many instances it may appear to make little practical difference whether the court reached a proper conclusion by treating a marriage as though it did not exist, instead of acknowledging its existence and ascribing its decision to the conduct of the parties. However, treating a marriage as though it does not exist requires a reason, and that reason

can become an inflexible rule. The reason assigned is that the party in question invoked the jurisdiction. The conduct that truly justified the decision is forgotten, and a rule evolves which is to be rigidly applied even when the conduct of the parties cries out for a different result.

The courts have suffered no pangs of conscience over this rule, but that is because they have not yet had to face its full consequences. A wife runs away, gets an invalid divorce, enters into a bigamous union of long duration, and then shows up at her husband's wake to claim his fortune. This is the typical situation, and it lends an aura of righteousness to the rule. But what of the wife whose wealthy husband takes her to a foreign land, brings a mistress into the home, and drives her away. Suppose on the advice of counsel there she gets a divorce and an alimony award on which she is dependent, and shortly thereafter he dies intestate, leaving her penniless. Ought the rule to apply?

It may, indeed, be true to say that hard cases make bad law. But that is no answer here, for it was a hard case that produced the rule in the first place; and a series of hard cases similarly decided does not make it any better. It is apparent that the courts cannot or will not look to the whole conduct of the parties, and it is therefore obvious that legislation directing them to do so in all cases of succession is needed.

4. No one would disagree with Professor Castel's observation that "What Canada really needs is comprehensive legislation dealing with matrimonial causes generally." [94] Indeed, the Ontario Law Reform Commission, in its Family Law Project, presently has the matter under consideration. [95] It is not known to what extent, or even whether, the recommendations eventually to be made will touch upon or affect the problems with which this paper has been concerned. Since it is not unlikely that the substantive law in this regard will be materially altered by the implementation of its recommendations, it is to be hoped that the attention of the committee will be drawn to the questions discussed herein. Indeed, as the adversary system itself seems inappropriate to the resolution of family disputes, considerable thought might be given to replacing it in this area with the inquisitorial system "to which the common law concept of estoppel is alien." [96] But such a radical departure is not required in order to obviate the complexities and eliminate the anomalies inherent in the application of that concept to family-law matters. All that is needed is a simple statutory provision precluding the use of estoppel, or anything that resembles it, in matrimonial causes and related actions between spouses and their privies.

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[94] *Supra* note 72, at 664.

[95] This broad programme will include recommendations with respect to the law of successions.

[96] Thoday v. Thoday, *supra* note 6, at 384.