able to satisfy. The new procedure appears to be ideal for the settlement of existing disputes which the parties desire to be settled according to the rules of substantive law and with the right of appeal. Whether it will be incorporated in contracts as a means for the settlement of future disputes is questionable. The obstacle of overcoming human inertia and resistance to change imposes an immediate burden upon the Simplified Procedure. Much remains to be seen. If the procedure receives sufficient publicity and trial by the business community, it may be a reform of great significance. Its success or failure will, in large measure, depend upon the cooperation of judges and attorneys in accomplishing its announced aim, that is, "a simplified method of litigation which combines the chief advantages of arbitration . . . with the chief advantages of traditional common law trials—the adherence to recognized principles of substantive law, the right to trial by jury if desired, and the right to appeal. . . ."  

THE EFFECT OF ESTOPPEL ON THE RECOGNITION OF SISTER STATE DIVORCE DECREES IN NEW YORK

In general, estoppel may be defined as a prohibition against the knowledgeable assumption of an obviously inconsistent position in relation to previous acts. Within the context of a marital controversy, its immediate effect is to prohibit a party from asserting the invalidity of a decree of divorce. This note will discuss the circumstances under which, and the parties against whom, the estoppel may be generally applied.

In order to properly appraise the law of estoppel in cases where a decree of divorce is attacked on jurisdictional grounds, it is first

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107 1960 LEG. Doc. No. 98, at 103.
2 See McClintock, Equity 79 (2d ed. 1948). For a treatment of the origin of estoppel see 3 Pomeroy, Equity Jurisprudence § 802 (5th ed. 1941).
2 In Krause v. Krause, 282 N.Y. 355, 26 N.E.2d 290 (1940), this judicial impediment was treated as a quasi-estoppel because the court said it was not a true estoppel although its effect was the same. See Borenstein v. Borenstein, 151 Misc. 160, 270 N.Y. Supp. 688 (Sup. Ct. 1934), aff'd, 242 App. Div. 761, 274 N.Y. Supp. 1011 (1st Dep't), aff'd, 272 N.Y. 407, 3 N.E.2d 844 (1936), wherein the court stated that this was not an estoppel and that no one has defined what it is. For convenience it shall be hereinafter referred to as "estoppel."
necessary to properly delimit its application within the ambit of other inhibitions against such attack.

**Background**

In New York State, adultery is the only ground sufficient to justify the granting of an absolute divorce. However, a domiciliary is not prohibited from abandoning his present domicile to avoid this limited availability of a divorce. He is at liberty to take up domicile within a jurisdiction where there are liberal grounds for

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3 N.Y. CIV. PRAC. ACt § 1147. Historically, only the ecclesiastical courts had jurisdiction of a matrimonial action. They could dissolve a marriage only in limited situations. After Henry VIII invalidated the papal authority in England, Parliament assumed exclusive jurisdiction to grant an absolute divorce. It was not until the passage of the Matrimonial Causes Act, 20 & 21 Vict. c. 85 (1857), that the common-law courts were vested with authority to decree an absolute divorce. In the colonies, divorce power was either in the governor and his council or the colonial legislature. This power was seldom exercised. See Burtis v. Burtis, 1 Hopk. Ch. 557 (N.Y. 1825). After the Revolution, the power to grant divorces was vested in the courts by legislative acts. See Maynard v. Hill, 125 U.S. 190 (1888); Erkenbrach v. Erkenbrach, 96 N.Y. 456 (1884).

4 In all state courts the law which determines the existence of grounds for divorce is not the law of the situs in which the alleged acts occurred, but the law of the forum. The rule, which is apparently contrary to the concept of choice of law obtaining in other fields, is defended on the ground that the policy of the forum should govern. RESTATEMENT, CONFLICT OF LAWS § 135(a) (1934); 2 BISHOP, MARRIAGE, DIVORCE AND SEPARATION § 164 (1931). “If one of the parties to a marriage leaves the state of matrimonial domicile to seek a divorce elsewhere, a defendant might well answer—if obliged to answer at all—that such forum must give full faith and credit to the statutes of the state of actual domicile.” Ibid. Jackson, Full Faith and Credit—The Lawyer’s Clause of the Constitution, 45 COLUM. L. REV. 1, 14 (1945), citing COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 463-64 (1942). Similarly, the operation of the doctrine of estoppel is determined by the law of the forum where the decree is being attacked and not the law of the jurisdiction which granted the divorce. Senor v. Senor, 272 App. Div. 306, 311, 70 N.Y.S.2d 909, 913 (1st Dep’t 1947), aff’d mem., 297 N.Y. 800, 78 N.E.2d 20 (1948).

5 Domicile is a traditional notion common to the English-speaking courts. Williams v. North Carolina, 325 U.S. 226, 234 (1945). Since 1789 no court has questioned domicile as a jurisdictional prerequisite of judicial power to grant a divorce. Id. at 229. See Story, Commentaries on the Conflict of Laws §§ 200, 218, 219 (1st ed. 1834), where the theory may have originated. For the acquisition of domicile there must be an absence of any present intention of not residing there permanently or indefinitely. Gilbert v. David, 235 U.S. 561, 569 (1915). For example, the intent cannot be to reside in the new locality as a matter of temporary expediency such as solely to acquire a divorce. Williamson v. Osenton, 232 U.S. 619, 624 (1914). See 2 Bishop, Marriage, Divorce and Separation § 111 (1891).

However, there is a possibility that a state may not be under a legal duty to abide by the time-honored doctrine that “divorce jurisdiction” must be founded on domicile. It is possible that the state may adopt instead, as Mr. Justice Rutledge has suggested, “some minimal establishment of more than
the dissolution of the marital status.\(^6\)

The United States Supreme Court has held that when there is domicile of the plaintiff-spouse within the divorce-rendering state, that state may exercise its powers over the marital relationship.\(^7\) Consequently, when an ex parte divorce is decreed, the full faith and credit clause of the federal constitution requires all other states to respect that decree.\(^8\) This ex parte dissolution of a marriage will be given full recognition even though it is contrary to the public policy of the state in which the marriage formerly existed and in which the "stay-at-home" spouse still resides.\(^9\)

The jurisdictional validity of an ex parte divorce is bottomed on the fiction that a divorce action is an action in rem, the res casual or transitory relations in the new community, giving the newcomer something of objective substance identifying him with its life . . . with the subjective [domicile] removed . . . ." Williams v. North Carolina, 325 U.S. 226, 259-60 (1945) (dissenting opinion). In Alton v. Alton, 207 F.2d 667 (3d Cir. 1953), it was held that a statute of the Virgin Islands providing for personal appearance of both spouses as presumptive evidence of domicile violates due process. The Supreme Court granted certiorari but the question was dismissed as moot when one spouse procured a second divorce in another jurisdiction. 347 U.S. 610 (1954). See also Granville-Smith v. Granville-Smith, 349 U.S. 1 (1954), wherein it was held that the Virgin Islands statute was invalid because it exceeded the power granted the Island Legislature by Congress. In New York, by virtue of N.Y. CIV. PRAC. ACT § 1147(4), the court has jurisdiction of a divorce action when the parties are married within the state notwithstanding the fact that both are domiciled without the state. See David-Zieseniss v. Zieseniss, 205 Misc. 836, 129 N.Y.S.2d 649 (Sup. Ct. 1954).

\(^6\) The contract of marriage "is something more than an ordinary contract. It is a contract resulting in a status to which certain unalterable rights and obligations are attached . . . ." Anonymous v. Anonymous, 49 N.Y.S.2d 314, 318 (Sup. Ct. 1944). The rules and principles of the law of contracts have very little bearing upon the marriage relation. Ditson v. Ditson, 4 R.I. 87 (1856). See Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 629 (1819), wherein it is stated that marriage is not a contract within the meaning of article I, section 10 of the Constitution which precludes the states from impairing contract obligations. Such a relationship is denominated a status. See RESTATEMENT, CONFLICT OF LAWS § 119 (1934). "It is an institution, in the maintenance of which in its purity the public is deeply interested. . . ." Maynard v. Hill, 125 U.S. 190, 211 (1888). See also Williams v. North Carolina, 325 U.S. 226, 232 (1945).


\(^8\) Ibid. However, a previous judicial establishment of "right to support" is not affected by a subsequent foreign ex parte divorce which terminates the status of the parties. See Estin v. Estin, 334 U.S. 541 (1948); Morris, Divisible Divorce 64 HARV. L. REV. 1287 (1951). However, if the foreign court has in personam jurisdiction of the defendant, it has the power to determine the terms of the divorce although the wife had previously obtained rights in a separation action in New York. Lynn v. Lynn, 302 N.Y. 193, 97 N.E.2d 748, cert. denied, 342 U.S. 849 (1951).

\(^9\) Williams v. North Carolina, supra note 5; see Bell v. Bell, 181 U.S. 175, 178 (1901).
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being the marital status. As an action in rem, it must be brought where the res is located, and that is the domicile of either spouse.

However, in an ex parte proceeding there cannot be a conclusive finding of the fact of domicile. The plaintiff must be in fact domiciled within the jurisdiction of the court in order for a decree of divorce to be valid. Therefore, upon suit brought by an interested party, a sister state may always validly review the evidence of domicile. It may redetermine whether there was such domicile in fact as to empower the court to render an ex parte divorce. If there was not, then the decree is invalid for lack of jurisdiction of the subject matter. As a result it is not entitled to the protection of the full faith and credit clause.

Thus, it may be seen that estoppel is to be considered only after the res judicata—full faith and credit issues as to a party's standing to attack the former divorce are resolved in favor of the

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10 "To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable." Williams v. North Carolina, 325 U.S. 226, 232 (1945). When a court re-litigates the question of domicile, it is at liberty to consider facts unknown to the court which rendered the divorce. The fact that the plaintiff, in an ex parte action for divorce, left immediately after the award of the decree reflects on his original intent and may negative the finding of domicile in the sister state. See Schneider v. Schneider, 281 App. Div. 250, 119 N.Y.S.2d 337 (1st Dep't 1953) (per curiam).

11 "Full Faith and Credit shall be given in each State to the... judicial Proceedings of every other State." U.S. Consr. art. IV, § 1; 28 U.S.C. § 1738 (1958) (statutory implementation). However, a final judgment of a court without having had jurisdiction of the subject matter of the action is void in the state of rendition and is therefore not entitled to the protection of the Constitution. Pennoyer v. Neff, 95 U.S. 714 (1877); Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873).

12 In determining the scope of the protection afforded the decree by the full faith and credit clause, an important distinction must be made between an ex parte divorce and those wherein the defendant has made an appearance. In the former, the reviewing state's scope of inquiry into the jurisdictional basis for the divorce is complete, and may be invoked by any person whom the reviewing state sees fit to give standing to so invoke. However, in the latter, the Supreme Court, in Davis v. Davis, 305 U.S. 32 (1938), stated that where the parties to a divorce proceeding litigate the jurisdiction of the court making the award, the question is foreclosed from collateral attack by the parties to the action in a subsequent proceeding. Accord, Schneider v. Schneider, 232 App. Div. 71, 73, 249 N.Y. Supp. 131, 133 (2d Dep't 1931); Tiedemann v. Tiedemann, 172 App. Div. 819, 851 (1st Dep't 1931), aff'd mem., 225 N.Y. 709, 122 N.E. 892 (1919), appeal dismissed, 251 U.S. 536 (1919). In Sherrer v. Sherrer, 334 U.S. 343 (1948), the Court applied the principle of res judicata against the parties in respect to jurisdictional authority, even though jurisdiction was not a contested question, provided both parties had made a personal appearance and there had been an opportunity to question the jurisdiction of the court. Accord, Coe v. Coe, 334 U.S. 378 (1948); Frost v. Frost, 260 App. Div. 694, 696, 23 N.Y.S.2d 754, 756 (1st Dep't 1940). In this event, the sister state court, where the decree is being collaterally attacked, must construe the law of the divorcing state to determine whether that state's
party. In short, even if one is otherwise able to attack the validity of a prior divorce, his conduct may yet estop him from doing so.

**Estoppel Against the Procurer of the Divorce**

An early illustration of the concept of estoppel is the New York case of *Starbuck v. Starbuck*. There, the plaintiff sought the enforcement of her dower right against the estate of her alleged husband. To succeed, it was necessary for her to prove the invalidity of a divorce decree she had obtained in a sister state. She alleged that the former forum was without jurisdiction to dissolve the marital relationship because she had not been a domiciliary of that state at the time the ex parte decree was rendered. Subsequent to the divorce the alleged husband had remarried and there were minor dependents of that union. The Court of Appeals estopped the plaintiff from attacking the validity of the decree, reasoning that a party who has procured an invalid decree of divorce by submitting himself to the jurisdiction of another state cannot thereafter be heard in this state to question that jurisdiction. Notwithstanding the fact that plaintiff was truly the widow of the deceased, she was estopped from proving it in the action.


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13 173 N.Y. 503, 66 N.E. 193 (1903).
14 Cf. Borenstein v. Borenstein, 151 Misc. 160, 270 N.Y. Supp. 688 (Sup. Ct. 1934), aff'd, 272 N.Y. 407, 3 N.E.2d, 844 (1936), in which the parties were divorced in Mexico, but the wife subsequently procured a divorce in California, in which the husband appeared voluntarily. The wife instituted the instant suit to reduce the California money award to judgment in New York. One of the defenses that the husband interposed was that the Mexican divorce was valid in all respects and therefore there existed no marital res over which the California court could acquire jurisdiction. The court held that the husband by voluntarily submitting himself to the jurisdiction of the California court was estopped from collaterally attacking that court's determination.

A wife who obtained an invalid sister state divorce was estopped from asserting its invalidity in a separation action instituted against the same husband. Hyman v. Hyman, 65 N.Y.S.2d 408 (Sup. Ct. 1940), aff'd mem., 263 App. Div. 814, 32 N.Y.S.2d 106 (1st Dep't 1941). A wife who obtained an invalid decree of divorce in a sister state was estopped from collaterally attacking that decree in an action to annul her second marriage. See Rosenberg v. Perles, 182 Misc. 727, 50 N.Y.S.2d 24 (Sup. Ct. 1944). Where a husband had procured an invalid decree of divorce, he was estopped from collaterally attacking that decree when the wife instituted suit to enforce the alimony
A logical projection of the Starbuck principle should preclude one who procured an invalid decree from thereafter maintaining an action for separation or divorce against the non-appearing spouse. In such actions it is necessary to plead and prove the existence of a marriage.\textsuperscript{16} The plaintiff, in order to prove a subsisting marriage would be compelled to collaterally attack the previous decree of divorce. However, in Stevens v. Stevens,\textsuperscript{17} an action by a wife for separation in which the husband counterclaimed for divorce, the court distinguished the principle of the Starbuck case. In Stevens, the wife contended that the husband, who had procured a prior invalid decree of divorce, should be estopped from obtaining a divorce on his counterclaim because he could not collaterally attack his previous decree which purported to dissolve the marriage. Neither party to the marriage had remarried. The Court of Appeals, in refusing to estop the husband, reasoned that in the case before it, unlike the Starbuck case, it was pronouncing judgment directly upon the marital status.\textsuperscript{18} This was a relationship which the prior conduct of the parties could not alter. The court was not concerned with an attempt to assert a private claim arising out of the marriage as it had been in Starbuck, and distinguished the cases on those grounds. The court itself limited its decision to the precise facts before it, and did not inquire into what the result would be in some future event that had not happened.\textsuperscript{19} The Stevens remedy provides a means to settle matrimonial confusion.\textsuperscript{20} The rationale of the decision is that since the parties are without the power to alter their marital status by themselves, the state may declare in a proper situation, exactly what effect an invalid decree of divorce has on the marriage.\textsuperscript{21}

\textsuperscript{16} In every action for separation or divorce the primary fact to be proved is an existing marriage between the parties. Statter v. Statter, 2 N.Y.2d 668, 143 N.E.2d 10, 163 N.Y.S.2d 13 (1957); Fischer v. Fischer, 254 N.Y. 463, 173 N.E. 680 (1930). See N.Y. Civ. Prac. Act §§ 1147, 1161.

\textsuperscript{17} 273 N.Y. 157, 7 N.E.2d 26 (1937).

\textsuperscript{18} See Querze v. Querze, 290 N.Y. 13, 47 N.E.2d 423 (1943), wherein the court stated that one who procures a foreign decree is estopped from collaterally attacking it in an action to enforce private rights, but he may have a full adjudication of his marital status. “[I]t is now established that a foreign decree has no effect upon the right of either party [to the valid marriage] to a full adjudication in a marital action of their marital status. . . .” Mintz v. Mintz, 34 N.Y.S.2d 242, 243 (Sup. Ct. 1942). (Emphasis added.) See Krause v. Krause, 282 N.Y. 355, 26 N.E.2d 290 (1940) (dissenting opinion).

\textsuperscript{19} Stevens v. Stevens, supra note 17, at 159, 7 N.E.2d at 27.

\textsuperscript{20} Ibid. But see Astor v. Astor, 6 Misc. 2d 967, 160 N.Y.S.2d 103 (Sup. Ct.), motion for reargument granted and original determination adhered to, 162 N.Y.S.2d 87 (Sup. Ct. 1957).

judgment directly upon the marital status in *Senor v. Senor*. The wife, who had procured a prior invalid decree, instituted suit for a declaratory judgment that the sister state decree of divorce was invalid. If this were all that appeared, then according to the *Stevens* holding, there would be no estoppel applied against the procurer. However, the wife also sought a separation decree with large alimony payments. The court realized that the wife desired the judicial re-establishment of the marital relationship only as a means of obtaining alimony payments. The court estopped the wife from asserting the invalidity of the prior decree and declared that the state has no intention of being subservient to the vagaries of those who play "fast and loose" with the institution of marriage. The public policy of a state cannot be disregarded and then subsequently resurrected whenever it suits a party’s convenience to retract the wrongful conduct.

A different situation was present in the celebrated case of *Krause v. Krause*. The principle there formulated is that a husband who has obtained an invalid decree of divorce in a sister state, and who thereafter remarries, shall be estopped from asserting its invalidity in a separation action brought by the *wife* of the second marriage. As stated previously, an existing valid marriage is a necessary prerequisite to an action for separation. The husband, in the *Krause* case, had not been validly divorced from his wife. Therefore, he could not validly enter into a subsequent marriage while she was living. This defendant, however, had attempted to do so. Although unable to hold the second marriage valid, the court, in estopping the husband from collaterally attacking the validity of the decree which purported to dissolve the former marriage, was able to hold that the procurer was estopped because the present separation action was inconsistent with the decree he procured in the sister state.


"Where persons having no complicity in the divorce proceedings have legitimate interests in a determination of the validity of the divorce, they may arouse the State’s interest and institute an inquiry, which our courts will entertain, to ascertain the validity of a divorce decree, by a foreign State as to persons alleged to have been at the time residents of this State." *See In the Matter of Lindgren’s Estate*, 293 N.Y. 18, 55 N.E.2d 849 (1944); *Urquhart v. Urquhart*, 272 App. Div. 60, 69 N.Y.S.2d 57 (1st Dep’t 1947).

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(1st Dep’t 1947), *aff’d mem.*, 297 N.Y. 800, 78 N.E.2d 20 (1948). Accord, *Hyman v. Hyman*, supra note 15. *In Mintz v. Mintz*, 34 N.Y.S.2d 242 (Sup. Ct. 1942), it was held that although the sister state decree had no effect upon the right of either party to a full adjudication of their matrimonial status, the procurer was estopped because the present separation action was inconsistent with the decree he procured in the sister state.


to confer upon the second wife all the incidents of a true wife for the purposes of the separation action. The Krause case is a good example of the judicial scorn for those who flagrantly disregard the statutory divorce laws, and then seek to avoid the consequences of their acts. It is distinguishable from the rule of the Stevens case in that, there, the objective of the husband’s counter-claim for divorce was not inconsistent with his prior objective even though the previous decree was invalid. The court, in the Stevens case, could properly pronounce judgment on the status of the parties because both parties to the true marriage were before the court and they had not remarried. In the Krause case, the husband was not asking the court to pronounce judgment upon the marital status between himself and the true wife but instead was seeking to avoid the consequences of his attempted marriage to the plaintiff.

It should be noted that although the court, through the application of the estoppel, is permitting limited extraterritorial effect to the invalid decree, it is in no wise validating it. It is only the procurer, in this instance, who is being estopped from asserting its invalidity. The principle of the cases may be interpreted as the imposition of a judicial impediment resulting from an act which is regarded as the successful perpetration of a fraud on the foreign court, and an attack upon the marital philosophy of this state. New York, through its legislature, has declared the method through which, and the grounds for which, the dissolution of a marriage may be decreed within its jurisdiction. When a domiciliary has disregarded the legislative attitude toward divorce and has fraudulently procured an invalid decree of divorce in a more liberal jurisdiction, he has violated the policy of this state. He will not be allowed to recant when the probability is that he is motivated solely by a desire to secure some immediate benefit dependent upon the pre-decree status. This may be a means of deterring similar conduct by other domiciliaries of the state.

Estoppel Against the Non-procuring Spouse

It is only just that the spouse not appearing in the fraudulent divorce proceeding should not be adversely affected by the invalid decree. Whether he may be estopped from collaterally attacking the decree at a future date, however, depends upon his subsequent

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activity. The problem cannot be determined solely from his conduct at the time the decree is obtained. Thus, in the case of Kelsey v. Kelsey, the wife had obtained an invalid decree of divorce in a sister state and had subsequently remarried. The first husband instituted an action for divorce based on the adultery of the wife during her subsequent de facto marriage. Prior to the action, the plaintiff had also remarried. The fact of the husband's remarriage was held to estop him from collaterally attacking the invalid divorce decree. The apparent rationale of the court was that the husband could not take advantage of the decree by marriage, and then after such an overt manifestation of his acquiescence, seek to collaterally attack it in a New York court. The case is distinguishable from the Stevens remedy in that here the parties had remarried. Also, the decision is analogous to the doctrine of recrimination, which would also prohibit the granting of a divorce. If the non-procuring spouse, after a remarriage, sought an annulment of the second marriage and a declaration that the decree his real wife obtained was invalid, there is authority to the effect that such affirmative relief would be denied.

28 It is still unsettled which state law controls the validity of a marriage performed following the procurement of an invalid decree of divorce. Some courts have held that it is the state of the domicile of the parties at the time of the marriage. Cunningham v. Cunningham, 206 N.Y. 341, 99 N.E. 845 (1912); Bell v. Little, 204 App. Div. 235, 197 N.Y. Supp. 674 (4th Dep't 1922), aff'd mem., 237 N.Y. 519, 143 N.E. 726 (1923). Other courts hold that it is the state wherein the marriage is performed. Brown v. Brown, 282 App. Div. 726, 122 N.Y.S.2d 411 (2d Dep't 1953) (memorandum decision), aff'd mem., 306 N.Y. 788, 118 N.E.2d 603 (1954); Apelbaum v. Apelbaum, 7 App. Div. 2d 911, 183 N.Y.S.2d 54 (2d Dep't 1959) (memorandum decision).
30 N.Y. Civ. Prac. Act § 1153(4). If both parties are guilty of adultery a divorce cannot be obtained.
31 A remarriage by the non-procuring spouse would estop him from claiming his distributive share when the true wife died. Matter of Bingham, 265 App. Div. 463, 39 N.Y.S.2d 756 (2d Dep't), motion for leave to appeal denied, 290 N.Y. 929 (1943). Decedent had procured the invalid decree of divorce in the sister state. Nevertheless, the fact that the husband had remarried estopped him from collaterally attacking the invalid decree.
32 Packer v. Packer, 6 App. Div. 2d 464, 179 N.Y.S.2d 801 (1st Dep't 1958); Marrero v. Marrero, 15 Misc. 2d 999, 183 N.Y.S.2d 685 (Sup. Ct. 1959). But see Landsman v. Landsman, 302 N.Y. 45, 96 N.E.2d 81 (1950), where the court held the marriage to be void. This case is distinguishable because there the action to annul the marriage was instituted by the second husband who was not involved in the former marital action. The case is also distinguishable on the ground that the former action had not been fraudulent but the wife had remarried prior to the decree becoming effective. The court
Estoppel Against the Second Spouse of the Procurer

The history of the applicability of estoppel in this area is enigmatic. The uncertainty prevalent in the application is exemplified by the case of *Dover v. Kitchel.* Previous to this action, the plaintiff had been sued for separation. Disappointed with his wife's success, he instituted an action against his former attorneys for their alleged negligence in failing to collaterally attack an invalid decree of divorce that the wife had previously obtained in a sister state against her first husband. The attorneys alleged that the second husband (plaintiff) had instigated, financed and generally sponsored the procurement of the invalid decree and had advised the wife that she was at liberty to contract a valid second marriage. The attorneys contended that these facts, had they been presented in the separation action, would have estopped the second husband from collaterally attacking the wife's invalid decree of divorce. The court denied the motion to strike the attorneys' affirmative defense, stating that after investigation of the case law, the only reasonable view was that the state of the law was unsettled in relation to the doctrine of estoppel. It could not be said with assurance that the presentation of all the facts would or would not give rise to an estoppel.

In *Kaufman v. Kaufman,* the husband sought an annulment, alleging that the marriage was void because the wife had procured an invalid decree of divorce from her first husband. The wife, in her defense, introduced evidence tending to show that the plaintiff husband had induced her to procure the invalid decree and had financed her trip to the jurisdiction where she was granted the divorce. The court held that it would be unconscionable to allow the husband to avoid the responsibility for these acts after he had lived with this woman for only so long as it pleased him. The court did not state that the parties were validly married, but merely refused to grant him affirmative relief from his situation. He was stated that this marriage was void *ab initio* which would prevent any counteraactive estoppel even though conceding that the husband had come into court with unclean hands; the inference being that in other marital actions where an estoppel is applied there is a marriage performed after a prima facie decree of divorce is obtained. See the next section in the text for a general discussion of the latter problem.


34 "It may not be easy to detect in the mass of decisions . . . any special consistency in dealing with the question of estoppel . . . but the confusion is most evident in cases where relief is sought by the second husband." Rosenberg v. Perles, 182 Misc. 727, 731, 50 N.Y.S.2d 24, 27 (Sup. Ct. 1944). A recent case illustrates that this uncertainty is still with us. See Beavers v. Beavers, 11 Misc. 2d 247, 177 N.Y.S.2d 870 (Sup. Ct.), *appeal dismissed,* 6 App. Div. 2d 1041, 281 N.Y.S.2d 758 (1st Dep't 1958).

estopped from attacking the wife’s decree because if affirmative relief were to be granted, it would be tantamount to judicial sanctioning of such conduct.\textsuperscript{36}

The Court of Appeals was presented with the converse situation in \textit{Fischer v. Fischer}.\textsuperscript{37} There, the wife, who had procured the invalid decree of divorce from her first husband, sued her alleged second husband for separation. She had succeeded in the lower courts because of the similarity to the \textit{Kaufman} case; in other words, the husband was estopped from collaterally attacking her invalid decree of divorce from her first husband. The court noted that it had not reviewed the \textit{Kaufman} case, and that even if approval of its doctrine were to be assumed, the nature of the action and the facts of the instant case were so distinguishable, that it would prevent application of that rule. In the case before the court, the second husband was not demanding affirmative relief from his situation, whereas the second husband in the \textit{Kaufman} case had demanded affirmative relief. The \textit{Fischer} court allowed the second husband to prove the plaintiff’s first marriage and deny her allegations concerning her marriage to him.\textsuperscript{38} The complaint was dismissed because she failed to prove a valid second marriage as recognized by the laws of New York State.\textsuperscript{39} The composite result of the \textit{Kaufman} and \textit{Fischer} cases evinces a judicial attitude of reluctance to aid either party in securing a decree in New York which would in any manner sanction his or her former conduct. The decisions are distinguishable from the \textit{Krause} case, where the court decreed a separation in favor of the wife when in fact no marriage existed, because, there, the plaintiff-wife had not aided and abetted in the procurement of the invalid divorce. The justice of the rule is apparent. The court will not allow the second husband who has unduly aided the wife to procure an invalid divorce, and who has \textit{married} her, to disclaim that relationship through a demand for affirmative relief. Nor will it allow the wife, who actually has procured the invalid divorce, to enforce any of the rights of a true wife in a marital action. The former is achieved through the application of an

\textsuperscript{36} \textit{Accord}, Bonney v. Bonney, 65 N.Y.S.2d 488 (Sup. Ct. 1946), \textit{aff’d mem.}, 271 App. Div. 1060, 70 N.Y.S.2d 133 (4th Dep’t 1947). See Campbell v. Campbell, 164 Misc. 647, 1 N.Y.S.2d 619 (Dom. Rel. Ct. 1937). In Hubbard v. Hubbard, 228 N.Y. 81, 126 N.E. 508 (1920), the court stated: “The plaintiff, assuredly, is not entitled to protection against the marriage. . . . [H]e instigated the procurement of the divorce. The moral or legal principles adopted by the state will not be weakened or deteriorated by refusal to \textit{declare} unlawful and void the marriage between the parties.” \textit{Id.} at 87, 126 N.E. at 510. (Emphasis added.)

\textsuperscript{37} 254 N.Y. 463, 173 N.E. 680 (1930).


estoppel; the latter, through the inability to prove an existing marriage. It is to be remembered that the Stevens remedy applies only to the parties of the original marriage when they have not remarried. That remedy is more apparent than real.

In *Davis v. Davis*, the second husband, although he did not aid in the procuring of the decree, had full knowledge of it. However, he had obtained legal opinion to the effect that the wife was at liberty to remarry. He had persuaded her to marry him. Subsequently, he instituted an action for the annulment of the marriage. The court held that these facts would be insufficient to raise an estoppel against him, notwithstanding the fact that he was demanding affirmative relief from his situation. The distinguishing fact was that he had entered the marriage in good faith, with the belief that she was able to contract a second marriage. In *Heller v. Heller*, the second husband, although he did not aid in the procurement of the prior invalid divorce of the wife, had full knowledge of its invalidity before he married. After the birth of a child, he informed the wife that the divorce was invalid and therefore they were not validly married. Nevertheless, he continued to cohabit with her. He subsequently commenced an action to annul the marriage. The Appellate Division, Second Department, held that because of his conduct, he was estopped from collaterally attacking the invalid decree. Although affirming the Appellate Division in the denial of affirmative relief, the Court of Appeals expressly reserved the question of estoppel, and held the wife’s decree of divorce entitled to recognition under the “rule of comity.”

Subsequently, in *Maloney v. Maloney*, the supreme court stated that the rule of the *Kaufman* case had been overruled and disapproved in the *Fischer* and *Davis* cases. The decision was af-

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40 279 N.Y. 657, 18 N.E.2d 301 (1938).
41 In *Lefferts v. Lefferts*, 263 N.Y. 131, 188 N.E. 279 (1933), the court held that there would be no estoppel applied against the second husband because he only advised the wife (plaintiff) to go to the sister state to obtain a divorce.
43 See *Brunel v Brunel*, 64 N.Y.S.2d 295 (Sup. Ct. 1946), where the wife ceased living with the husband when she acquired full knowledge of the invalidity of the divorce decree and it was held that in these circumstances there would be no estoppel applied against her.
45 Id. at 344. The court also stated that the *Kaufman* decision was overruled by *Lefferts v. Lefferts*, 263 N.Y. 131, 188 N.E. 279 (1933). However it is to be noted that the court in the *Lefferts* case did not refer to the *Kaufman* decision and the cases may be distinguished by the fact that in the *Lefferts* case the second husband merely advised the wife to go to the sister state to obtain a divorce.
firmed by the appellate courts on other grounds. However, subsequent lower court opinions have similarly interpreted the Fischer and Davis cases. An example of the departure from the principle deduced from the Kaufman and Fischer cases, viz., denial of affirmative relief, is Heusner v. Heusner. There, the second husband advised the divorce, paid the expenses, and even accompanied the wife to the jurisdiction where she began the fraud that resulted in her being granted a divorce (invalid). After their marriage, she subsequently instituted an action for separation. The second husband counter-claimed for annulment of the marriage. The court held that it was no longer able to follow the decision in the Kaufman case. Therefore, since the husband could not be estopped from collaterally attacking the invalid decree of divorce, the court was compelled to grant the husband’s annulment. The court noted that this decision was in accordance with the recent authority of the Davis case. It is difficult to sustain the position of the court in light of the fact that in the Davis case the second husband entered the marriage with the belief that the wife could validly contract the second marriage, whereas in Heusner no such element was present. In Honig v. Honig, the lower court estopped the second husband from collaterally attacking his wife’s previous invalid sister state divorce. The second husband had financed the fraudulent divorce action, and was generally helpful in facilitating her trip to the sister state. Subsequently, the wife commenced an action for separation. The Second Department, in a memorandum decision, reversed the holding of the lower court, stating that the estoppel invoked in the Krause case does not seem to operate against a person who does not procure the invalid decree. It would seem that this court established the

47 After a lengthy discussion in which the court attempted to distinguish the decisions where an estoppel had been applied, and noting the recent tendency of the cases away from the application of estoppel, the court added, almost as an afterthought, that it may no longer be necessary "to apply the principle of estoppel to save the plaintiff and the child from becoming public charges. Recent legislation provides ample relief (Civ. Prac. Act, §1140; §1140-a, added by L. 1940, ch. 226). [Providing that the court after granting an annulment may in their discretion award support to the wife.] In any event the child is the legitimate issue of both parties (Civ. Prac. Act, §1135) [court may direct support of issue] and is entitled to be supported by the father, the defendant herein, with custody to the plaintiff." Id. at 1018, 42 N.Y.S.2d at 854.

49 The court also stated that its decision was in accord with Slater v. Kenny, 265 App. Div. 963, 38 N.Y.S.2d 595 (2d Dep’t 1942) (memorandum decision), reversing 176 Misc. 690 (Sup. Ct. 1941); however, in that case there had never been an attempt to dissolve the first marriage; the wife remarried without even an invalid divorce decree.

50 See text accompanying note 25 supra.
general rule that the application of estoppel is to be limited to the actual procurer of the invalid decree. However, a later decision in the same department indicates that when there are strong equitable considerations, the Kaufman rule will still be applied, and the party seeking affirmative relief will be estopped. In Lodati v. Lodati, the plaintiff's second husband financed the procurement of the invalid divorce in the sister state and obtained an attorney to conduct the action. After she was granted the divorce, plaintiff advised her that she was at liberty to marry him. However, the plaintiff's motive for marriage was to achieve a dependency status under the then Selective Service Act. He even adopted a child by the wife's former marriage to retain his deferred status. When the Selective Service regulations were again amended and deferment on these grounds was no longer permissible, he instituted an action to declare the nullity of the marriage. The lower court dismissed the complaint because of "unclean hands." The Second Department affirmed the decision, and cited as its authority the Kaufman, Krause, and Heller cases. The court stated that any case to the contrary is distinguishable on its facts. In the same year as the Lodati decision, a supreme court within the First Department, in effect, followed the Kaufman rule, where the second husband had actually engineered and arranged the specific procedures for the wife's procurement of a divorce in another jurisdiction from the first husband. He thereafter sought an annulment after having lived with the wife for twenty-three years and having raised three children. Here, as in the Lodati case, there were strong equitable considerations. Therefore, an estoppel would be applicable to the second husband.

Thereafter, the First Department, in Jackson v. Jackson, held that counselling and defraying the expenses of the procurement of the invalid decree of divorce by the second husband would not create an estoppel. Although the facts seemed almost identical with those in the Kaufman case, the court stated that the Kaufman case had no application to the facts there presented, and in any event, the Kaufman rule had not met with approval, citing as its authority the Fischer and Davis cases.

The lower courts have been unable to find any consistency in the reasoning of the various appellate opinions, and one court stated that

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53 See text accompanying notes 25, 35, 42 supra.
although it was unconscionable to grant affirmative relief to the second husband, the court was constrained to do so. 56

Recent lower court opinions state that up to the Krause decision, there was an estoppel applied against the second husband, but since then, the application of estoppel has been limited. 57 Seemingly, the Krause decision, when written, was a liberalization of estoppel. However, the court, in Beavers v. Beavers, 58 stated that “there is no public policy of this State so rigid and inflexible as to require a court of equity to ignore the brazen efforts of a person to flout the law on one hand and on the other seek to invoke the same law in his favor.” 59

As stated above, the Kaufman decision has neither been expressly approved nor overruled by the Court of Appeals. The rule of the case may be defended on the ground that it deters unconscionable conduct after a party has greatly aided another in a fraudulent attempt to circumvent the New York divorce law. However, the application of the estoppel is no less difficult than just, because he is not legally a party to the former invalid divorce action. The specific acts required of him, to call forth the application of the estoppel, have necessarily been couched in general terms. Mere suggestion or advisement has not been held to suffice. The decision in Kaufman is categorized as mostly negative in effect. It is denial of the right of the second spouse to have the court declare that no valid marriage exists. However, this is denied to him only when he demands affirmative relief from the de facto marriage that he is responsible for, no less than his de facto spouse. If it is not he, but instead his spouse, the procurer of the invalid decree of divorce, who demands the affirmative relief, for example a separation, he may, as was held in the Fischer case, interpose the invalidity of her decree as a defense. He may, when the procurer of the invalid decree demands affirmative relief from her alleged second marriage, show the inability of the complainant to enter into a valid marriage. Thus, the court is not compelled to sanction the actual procurer’s evasion of the controlling divorce law. It may be said that one of the Kaufman decision’s salutary effects is that, although no marriage exists, the second spouse may not compel the courts to aid him. Although there has been some remedial legislation, 60 the rule of this particular section is of great value to society because of the complexity of the situation.

58 Ibid.
59 Id. at 250, 177 N.Y.S.2d at 874.
60 See note 47 supra.
Estoppel Against the Party Who Procures a "Mail-Order" Divorce

In the main, the early lower court cases involved situations where the procurer of the mail-order divorce was seeking the same relief as the decree purported to grant. An estoppel was not applied because the procurer's position was not deemed inconsistent; he was seeking to terminate the marriage in both actions. However, when the problem reached the Court of Appeals, all principles of estoppel were cast aside because of the judicial compulsion to declare the utter worthlessness of such a decree. In *Caldwell v. Caldwell,* it was held that one who obtains a mail-order decree and subsequently remarries is not estopped to plead and prove the invalidity of such decree in a separation action instituted by the second spouse. The court stated that no rights of any kind emanate from this decree. The rationale of the court was that when there is a mail-order decree of divorce, the divorcing court has not the slightest semblance of jurisdiction which is present when a party procures an invalid decree of divorce in a sister state. However, although no rights may emanate from this decree, it may be a foundation for the exclusion of the surviving spouse's distributive share in the estate of the deceased spouse, when the survivor has procured a mail-order divorce.
If either party to the former divorce action without the United States has made some form of personal appearance, color of jurisdiction will be found. The decree of divorce will not be then categorized as a mail-order divorce. Therefore, an estoppel may be applied.65

Conclusion

In the majority of marital actions in which the question of estoppel arises, ostensibly at issue is whether the parties shall be constrained to continue to maintain the relationship of husband and wife toward each other. It is to be noted that notwithstanding the application of the estoppel and its concomitant results, the court can in no wise validate the de facto marriage. There can be no marriage by estoppel. The parties may be prosecuted for bigamy66 and, in the absence of statute, the children would be considered illegitimate.67 The raison d'être of the estoppel has a more immediate purpose. It is to prevent injustice. When an individual domiciled in New York decides to terminate his marriage for a cause other than adultery, he must look to a more liberal jurisdiction. In our system of sovereign states, it is believed that the state has the absolute right to prescribe the various causes for which a marriage may be dissolved. It has that right although there is only one party domiciled within the court's jurisdiction. The spouse must decide whether he will conform to this state's social mores and legal restrictions or evade

65 Caswell v. Caswell, 111 N.Y.S.2d 875 (Sup. Ct.), aff'd mem., 280 App. Div. 969, 117 N.Y.S.2d 326 (1st Dep't 1952) (second spouse estopped when the wife, who had procured the decree, had appeared therein, and her first husband was represented by counsel); Leviton v. Leviton, 6 N.Y.S.2d 535 (Sup. Ct), modified, 254 App. Div. 670, 4 N.Y.S.2d 992 (1st Dep't 1938) (procurer estopped when both spouses had appeared in the former divorce action); Mountain v. Mountain, 109 N.Y.S.2d 828 (Sup. Ct. 1951) (second spouse estopped when the wife who had procured the decree was represented by her counsel and the first husband had appeared personally); In the Matter of Estate of Fleischer, 192 Misc. 777, 80 N.Y.S.2d 543 (Surr. Ct. 1948) (non-procuring spouse estopped when it was found that she had appeared by counsel and the procurer appeared personally); Carbene v. Carbene, 166 Misc. 924, 2 N.Y.S.2d 869 (Dom. Rel. Ct. 1938) (non-procuring spouse who subsequently remarried was estopped when it appeared that he was personally served within the jurisdiction of the court although he did not appear in the action and the procuring spouse did appear). But see Marum v. Marum, 8 App. Div. 2d 975, 190 N.Y.S.2d 812 (2d Dep't 1959) (memorandum decision) (spouse not estopped to assert the invalidity of the divorce decree when he personally appeared because he had stated in the divorce action that he would not relinquish his New York residence). See also Alfaro v. Alfaro, 5 App. Div. 2d 770, 169 N.Y.S.2d 943 (2d Dep't 1958).
them in a brief extra-domiciliary holiday under the approving certificate of a jurisdiction which facilitates the latter conduct. Estoppel is but one answer to the question of invalid divorce. The ex parte action for divorce is the main problem.

To suggest uniform divorce laws would be futile because of the conflict which exists between the traditional and liberal grounds for divorce. An approach no less startling than practical would be in the field of congressional action. Under article 3, section 2 of the federal constitution, Congress controls the jurisdiction of both state and federal courts in controversies between citizens of different states. An ex parte divorce action is a controversy between citizens of different states when one spouse has sought the liberal jurisdiction. In that event the case would be required to be transferred from the state court to the federal court where the defendant is domiciled. The law that would be applied is the law of the last matrimonial domicile. Thus the plaintiff could gain no advantage from his brief residence in the liberal jurisdiction.68

Presently, estoppel is the modus operandi to prevent untoward results. However, its efficacy is too limited to obviate the main problem. Another aspect of the application of the estoppel is that, as some writers have suggested, there is little likelihood of criminal prosecution and therefore it is not probable that the divorce decree will be attacked. They contend that a realistic view of the divorce situation would result in the conclusion that there is no requirement of domicile as a prerequisite for jurisdiction to render a divorce.69 However, the fact remains that the estoppel is generally applied to prevent an individual from gaining an inequitable advantage. The decree of divorce is invalid; and though many times it may remain unquestioned, the fault does not lie with the estoppel but lies in the enforcement of the criminal laws.

68 Mayers, Ex Parte Divorce; A Proposed Federal Remedy, 54 Colum. L. Rev. 54 (1954).