RES JUDICATA IN DIVORCE

I. GENERAL STATEMENT OF THE PROBLEM.

After a final decree has been made in divorce—assuming that there has been no appeal or the appeal court has affirmed the decree —can it be impeached? If so, on what grounds? By whom? And by what means? And will lapse of time or a change in the circumstances of one or both of the parties be a material factor?

Again, assuming the right of appeal is still extant, are there any restrictions on the right of appeal or on re-opening the litigation on a new trial where the other party has remarried in accordance with the permissive provisions of the law? Is there a possibility of any criminal liability attaching to a party who contracts a fresh marriage after the final decree?

The dissolution or annulment of a marriage may bring in its train questions of grave social importance. Where no problem of conflict of law arises the municipal law should supply the answers; but, as often happens, the matter is complicated by conflict rules where the effect of the dissolution or annulment has to be considered in relation to the law of another political entity. In Australia problems may arise as to the validity and effect of a decree as between the State in whose court it was made and another State of the Commonwealth in which it may be called into question either directly or in some dispute concerning a collateral matter.

A final pronouncement dissolving a marriage or declaring a marriage a nullity has been described as a judgment *in rem*—which is customarily and loosely defined as a judgment "binding on all the world." How far such a judgment is truly binding has not been settled satisfactorily by judicial pronouncement.

The acceptance of divorce by most modern states, the varying grounds, the tempo of modern life, and the greater facilities for transport, mean an increased number of perplexing problems.

The statutory law of divorce is not one hundred years old and is largely the result of conflict between church and state, the church standing for the preservation of the spiritual tie while the state pursues the sociological aspect. The resulting law is more often than not a compromise which provides for relief but puts some difficulties in the way of getting it. The lies and deceit practised to surmount these difficulties are well known to judges and lawyers. Parties may select the forum dispensing law most favourable to their needs, or

manufacture a case designed to obtain the desired relief. Perhaps this is a sign that the law is out of step with the social conscience, but nevertheless the courts should not lend themselves to the machinations of the parties. The law should protect the innocent and not aid the guilty. A spouse whose marriage has been judicially dissolved or annulled by fraud of the other party is put in a position where the courts should help to repair or mitigate the wrong. Again, a person who has *bona fide* married the fraudulent party should have a claim at any rate to consideration as against that party. The matter may be further complicated where there are children of both marriages.

As often happens, the legislature gave expression to the essential features of the new law and left the judges to work out the various incidental problems in the light of precedent. That process is a slow one and ill adapted to a subject such as divorce. Judges are often slow to accept new situations, and only gradually has a change of thought made itself felt in the interpretation of the law.[1]

As is well known, the original enactment in England made no provision for a decree nisi—a testing period during which intervention may take place on certain specified grounds, which, if established, may result in the rescission of the decree. In England to-day, as in most jurisdictions in the British Commonwealth, the nisi period is part of the law, although in Scotland the decree is granted outright. In most of the States of the American Union there is a nisi period, but in a few instances the decree takes immediate effect. In practice the law providing a period of intervention has not proved entirely effective. It has been suggested that the provision of such a period, and the absence of intervention during that period, render the final decree unimpeachable, but it seems illogical to argue that, because the legislature has enacted this precautionary provision, it must necessarily have intended to give greater efficacy to the final decree.

Lack of jurisdiction is a well known ground on which intervention may be made, and the law which holds such a decree void is too firmly established to permit of the argument that, because no objection was taken to the jurisdiction either at the hearing or during the nisi period, such a decree could by any stretch of imagination be held good.

The important question of the validity of final decrees is one on which most legislation is silent. The need for legislative provision has been felt and discussed in America, but in a limited setting.[2] The fitting of divorce judgments into the pattern of the general law

[1] For example, the changed outlook with regard to the petitioner's own adultery, and the recognition of the right of a foreign court to grant dissolution of an English marriage where the matrimonial domicil is in the state of the foreign forum.

[2] See *The Enforcement by Estoppel of Divorces without Domicil: Toward a Uniform Divorce Recognition Act,* 61 Harv. L.R. 326.

relating to the validity and effect of judgments is the question to be discussed.

In Scotland, a final decree of divorce may be rescinded ("reduced") within a period of forty years on the grounds of the petitioner's perjury, his subornation of perjury, lack of jurisdiction, and collusion.[3] That does seem to leave the decree impeachable on the majority of grounds of abuse that arise in practice.

In 1948 the legislature of Western Australia passed the *Matrimonial Causes and Personal Status Code*,[4] which will be referred to in this article as the Code. Part VII contains the first legislative attempt in this State to deal with the problem now under discussion. It should be noted, however, both from the heading of Part VII and from the wording, that it is not designed to deal with cases which may arise in the conflict of laws but purely with domestic judgments. It is not uncommon for statutes to let the "conflicts" position look after itself, but when the Code comes up for review in five years' time consideration may well be given to enunciating a set of rules to deal with that phase of the question.

II. AS TO JURISDICTION.

It is not my intention to discuss the principles for determining the proper forum to pronounce dissolution or nullity of marriage. It is assumed here that the decree was not granted by the proper court. Our law is inflexible that a decree not pronounced by the proper forum is void.[5] The rule is the same whether the decree is pronounced by a domestic court or by a foreign court. Unless the court is jurisdictionally competent, the courts of this State will disregard the judgment, and this is so whether it comes directly in question—as, for example, in proceedings for dissolution based on the cohabitation of the parties in a second and pseudo marriage[6]—or in collateral proceedings such as proceedings by a wife for maintenance under the *Married Women's Protection Act 1922-1926*.[7] The parties cannot by resorting to a forum create jurisdiction by consent.[8] However, where the courts of the domicil of a marriage recognise the jurisdictional competence of another forum to dissolve

[3] Lord Salvesen in his evidence before the English Royal Commission of 1910 advocated that a final judgment in divorce should be unimpeachable after the expiration of one year, but his recommendation excluded cases where there was no jurisdiction (see *House of Commons Papers*, vol. 18, p. 253 — Questions 6181-6187). The Report of the Commissioners recommended that a final judgment in divorce should be unimpeachable after the expiration of five years (*ibid.*, p. 125, sec. 290); but nothing was done in the subsequent legislation.

[4] No. 73 of 1948; for the full text of the Code see pp. 236-254, *supra*.

[5] *Le Mesurier v. Le Mesurier*, [1895] A.C. 517.

[6] See section 56 of the Code.

[7] See *Reprinted Acts of the Parliament of Western Australia*, Vol. 1.

[8] *Armitage v. Attorney-General*; *Gillig v. Gillig*, [1906] P. 135.

the marriage, the courts of this State will treat the dissolution as valid.[9]

It remains to be seen whether the courts of the various States of the Commonwealth of Australia will in time adopt the principles now followed in some of the States of the Union in America, whereby a party to a dissolved marriage may be estopped from denying jurisdiction.[10] In some cases in America the courts have given a duality of effect to a decree; for example, holding it effective to extinguish the marriage bond, but ineffective to extinguish the right of the other spouse to claim under an order for separation and maintenance which would otherwise have been extinguished.[11] We have laws which to some extent achieve the same results but not on the same principle; for example, the provision for maintenance of a spouse and the children of a void marriage.

Before concluding this phase of the subject mention should be made of the case of *Harris v. Harris*[12]:—

> This was an undefended case where a husband petitioned in Victoria for a decree on the ground of his wife's adultery. From the particulars furnished in the petition it appeared that he had been previously married in New South Wales but that a New South Wales court had dissolved that marriage. During the hearing of the petition in Victoria it appeared that he had never had a domicil in New South Wales and that the proper forum to dissolve the first marriage would have been Victoria; so that, the New South Wales court having no jurisdiction, its decree dissolving the first marriage would, under the general conflict rules, be of no effect. Under the New South Wales legislation the divorce court there is expressly required to make a finding of domicil, which is to be recited in the decree. On the assumption that a decree in New South Wales, based on a wrong finding of domicil there, would nevertheless be regarded as valid in New South Wales, the Victorian court held that it was obliged to recognise the validity of the New South Wales decree under the "full faith and credit" clause of the Commonwealth Constitution and the legislation passed thereunder.[13]

This decision is doubtful and is not in line with decisions in the United States of America.[14] The reasoning in the judgment by which the court distinguished *Harris's Case* is not convincing. Under section 51 (xxv) of the Commonwealth Constitution and the *State and Territorial Laws and Records Recognition Act* there does not seem to be any reason why a decree containing a recital of the

[9] See note 8.

[10] See *Restatement*: *Conflict of Laws,* sec. 112; 61 Harv. L.R. 326 (note 2, *supra*).

[11] *Estin v. Estin,* (1948) 334 U.S. 541, 92 Law Ed. 1561; discussed in 61 Harv. L.R. 1454.

[12] [1947] V.L.R. 44.

[13] *Constitution,* section 51: The Parliament shall . . . have power to make laws . . . with respect to — (xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States. See also *State and Territorial Laws and Records Recognition Act* 1901-1928 (Federal.)

[14] *Williams v. North Carolina,* (1944) 325 U.S. 226, 89 Law. Ed. 1577.

domiciliary competence of the forum should be taken as conclusive any more than a decree which is silent on the point.

III. FRAUD.

This part of the subject is more difficult and lacking in judicial authority.

In addition to the ground of want of jurisdiction, judgments in general are impeachable on a number of grounds; amongst others,

That the judgment was obtained by fraud.

That the judgment is contrary to "natural justice"; for example, that the defendant did not have, or was refused, an opportunity of defending his rights.

How do these general principles fit into the pattern of divorce? The question of what is meant by "fraud" will be considered later.

It has already been stated that a judgment in divorce has been likened to a judgment *in rem*. For some reason, not easy to follow, some writers maintain that a foreign judgment *in rem* is not impeachable for fraud. If this is so, a final judgment in divorce, being by analogy a judgment *in rem*, would not be so impeachable. Martin Wolff[15] states—

> "Fraud can invalidate only a judgment *in personam*. If a foreign court of competent jurisdiction has pronounced a divorce, the recognition of the divorce decree itself cannot be refused on the ground of a fraudulent act of one of the parties against the other, or of their fraudulent collusion to mislead the court. The divorce decree stands in spite of fraud committed so that the parties may conclude new marriages. This does not, however, exclude the right of that one of the parties who has been deceived by the other to plead the fraud by which the decree was obtained in a personal action for damages, for maintenance, and the like."

This appears to be the author's own opinion. He quotes no authority for his proposition.

Halsbury's Laws of England[16] cites two cases[17] as authority for the proposition that a foreign judgment *in rem* is not impeachable for fraud unless it has been set aside by the foreign court which gave it. Why there should be this distinction between foreign judgments *in rem* on the one hand and judgments *in rem* in the domestic forum on the other it is difficult to understand. It is also puzzling why a judgment *in personam* in a foreign court should be examinable for fraud but not a judgment *in rem*. If there is any such distinction between foreign judgments *in rem* and domestic judgments *in rem* obtained by fraud, Cheshire[18] does not appear to notice it; the con-

[15] *Private International Law, 272.*
[16] Second (Hailsham) edition: (*Conflict of Laws*), Vol. VI., 310.
[17] *Castrique v. Behrens,* (1861) 3 El. & El. 709, 121 E.R. 608; and *Bater v. Bater,* [1906] P. 209.
[18] *Private International Law* (3rd edition).

flict rules which he propounds relating to the impeachment of judgments are of general application. In Foote[19] it is stated—

> "That the principle which allows a foreign judgment to be impeached for fraud applies to judgments *in rem* with the same certainty as to judgments *in personam* is of course indisputable; but in the absence of fraud, the only requisite necessary to the validity and conclusiveness of a foreign judgment *in rem* is that it should have been pronounced by a competent Court having actual jurisdiction over the subject-matter."

In support of the proposition that a foreign judgment *in rem* is impeachable for fraud the learned author cites *Shand v. Du Buisson,*[20] and *Messina v. Petrococchino.*[21]

> The latter case concerned the validity of a judgment *in rem* obtained in the British Consular Court at Constantinople arising out of the enforcement of a bottomry bond and an hypothecation of the freight carried in the ship. Later the decrees of the Consular Court were questioned in the Court of Commerce at Malta and the Maltese Court rendered judgments setting aside the decrees of the Consular Court on the ground that they had been misconceived by a wrong application of the law of the forum at Constantinople. It was held on appeal to the Privy Council from the Maltese Court that such a judgment was not impeachable on this ground. Lord Phillimore, in giving judgment, said *obiter*[22] that the only grounds on which a foreign judgment *in rem* was impeachable in the courts of another country were lack of jurisdiction, that it carried on the face of it a manifest error, that it was shown to be obtained by fraud, or was wanting in the conditions of natural justice.

Shand v. Du Buisson[23] was an illustration of the impeachment of a domestic judgment *in rem* obtained by fraud.

> A judgment creditor by fraudulent misrepresentation and collusion had got a garnishee order in priority to another garnishee order. On the matter being brought before the Court of Chancery by way of proceedings to remove the record of the court (the Mayor's Court in London), it was held that a court of equity had power to disregard the garnishee order obtained by fraud and to give effect to the second order which had been regularly obtained.

Read[24] does not notice any distinction between the impeachment of domestic judgments *in rem* and foreign judgments *in rem* on the ground of fraud; he says—

> "Principle appears also to sanction disregarding a foreign judgment because the foreign court was misled as to the merits if the misleading acts or facts were extrinsic to the record. Matters not of record form no part of the adjudication in the foreign action.[25] . . . It is plain that impeachment of a foreign judgment on the ground either of fraud going to the jurisdiction or of fraud extrinsic to the record in no way violates either the conclusiveness or the *res judicata* doctrine."

[19] *Private International Law* (1925 edition), 623.
[20] (1874) L.R. 18 Eq: 283.
[21] (1872) L.R. 4 P.C. 144.
[22] At 157.
[23] Note 20, *supra.*
[24] *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth,* (1938) 274.
[25] *Larnach v. Alleyne,* (1862) 1 Wyatt & Webb (Victoria) 342 (Eq.).

Larnach v. Alleyne, the case which he cites, was one in which the court gave relief in respect of a foreign judgment *in rem* obtained by fraud.

In the United States of America, Story[26] stated the proposition that a foreign judgment *in rem* was impeachable for fraud and, in particular, with special reference to decrees in divorce, that—

> "A sentence of divorce pronounced between parties actually domiciled in the country, whether natives or foreigners, by a competent tribunal having jurisdiction over the case, is valid and ought to be held everywhere a complete dissolution of the marriage in whatever country it may have been originally celebrated. *Of course we are to understand that the sentence is obtained bona fide and without fraud*;[27] for fraud in this case, as in other cases, will vitiate any judgment however well founded in point of jurisdiction."

The learned commentator cites Starkie on Evidence and the *Duchess of Kingston's Case.*[28] It must be remembered that at this time *Castrique v. Behrens*[29] had been decided in England, and although Story cites it on numerous occasions for the general proposition as to the binding effect of judgments *in rem* it is not relied on for so wide a proposition as that stated in Halsbury;[30] nor, from the authorities which have been cited, is such a proposition warranted. The principles stated by Story appear to be the law in the United States to-day.[31]

Latey[32] states that "a decree absolute dissolving a marriage is a judgment *in rem* binding *inter partes* and against the whole world so far as the English jurisdiction is concerned." He goes on to say that this proposition would seem to follow as of course, by reason of the fact that, in the words of the statute—

> "As soon as any decree for divorce is made absolute, either of the parties to the marriage may, if there is no right of appeal against the decree absolute, marry again as if the prior marriage had been dissolved by death[33] . . ."

This enabling provision would seem to have as its concept a negation of any penal liability for remarrying after a valid decree rather than the assertion of the principle that no matter how obtained a decree in divorce which had become final was not open to challenge in any way. It is well known that where the decree is impeachable for want of jurisdiction the criminal law exhibits no tenderness towards a party who contracts a fresh marriage.[34] Furthermore,

[26] *Conflict of Laws* (1883), 820-821.
[27] Writer's italics.
[28] (1776) 20 Howell St. Tr. 355.
[29] Note 17, *supra.*
[30] Note 16, *supra.*
[31] *Restatement: Conflict of Laws,* sec. 110 (c).
[32] *Divorce* (13th edn.), 303.
[33] *Supreme Court of Judicature (Consolidation) Act* 1925 (15 & 16 Geo. 5, c. 49), sec. 184 (1). Cf. sec. 58 of the Code.
[34] *R. v. Earl Russell,* [1901] A.C. 446; *R. v. Wheat and Stocks,* [1921] 2 K.B. 119, per Avory, J., at 127.

Latey is careful to point out that his remarks are confined to decrees made in England.

As there is some diversity of opinion on this point it is proposed to examine in detail some of the case law.

In *Bater v. Bater, otherwise Lowe*,[35] the court had to consider the effect of non-disclosure of a material fact in foreign divorce proceedings, and how far that non-disclosure vitiated the judgment. The facts were that a husband who had been married to an English wife in England took proceedings against her for adultery but failed on proof of his cruelty towards her. After these proceedings the husband left for New York, where he lived in adultery and acquired a domicil in New York State. The wife and her paramour continued to live in adultery in England; later the wife proceeded to New York and obtained a divorce there, relying on her husband's domicil as well as on a claim that she had also acquired a New York domicil under American law. She did not disclose her own adultery, whereas according to the law of the State of New York it should have been disclosed, and if it had been disclosed the court, under the law of the forum, would have had no power to grant relief. There was no collusion between husband and wife to conceal her adultery.

After the New York divorce the wife went through a ceremony of marriage with her paramour in New York. Some years later the second husband presented a petition in England for a declaration of nullity of the New York marriage on the ground that the decree obtained by the wife in New York was pronounced without jurisdiction and further that it was obtained by the fraud of the wife.

The court in England resolved the question of jurisdiction by holding that the New York court had power to grant the decree, and on the question of fraud held that the judgment was binding notwithstanding the fact that the wife had not disclosed her own adultery. The President dealt with the question of fraud somewhat guardedly, but inclined to the view that as there was no procedure for intervention by the law of the State of New York the English court accepted the foreign divorce decree as valid and binding if no step was taken to have it set aside in the forum where it was granted. He referred to a fraud as practised on the court "where it went to the root of the matter" (for example, a false statement of facts for founding jurisdiction as to domicil) in contradistinction to a fabrication or withholding of evidence concerning the issues. He said—

"Mr. Duke argued that in many of the judgments it has been said that the court will not recognise the decree of a foreign tribunal where it has been obtained by the collusion or fraud of the parties. But I think when those cases are examined that the collusion or fraud which was being referred to was in every case, so far as I have had time to examine the matter, collusion or fraud relating to that which went to the root of the matter, namely, the jurisdiction of the court. In other words, as an illustration, cases where the parties have gone to the foreign country and were not truly domiciled there, and represented that they were domiciled there, and so had induced the court to grant a decree. The collusion or fraud in those cases goes to the root of the jurisdiction. There is no jurisdiction if there is no domicil, and therefore collusion and fraud entered into many of those cases in a way that went to fortify the view that where there is no domicil there is no jurisdiction. But supposing that what was kept back was something that would have made the court come to a different conclusion than it would otherwise

[35] [1906] P. 209.

have done, I can see no valid reason in the judgments in cases affecting status for treating the decree as a nullity, unless it is set aside. In this court there are many cases where facts are kept back. In some, of course, the King's Proctor successfully intervenes, but I have no doubt that in many others the facts escape attention; but it has never yet been argued that a decree made and become absolute is not binding, though if it had been interfered with before it became absolute it could have been set aside. The one form always is to set aside a decree, and not treat it as a nullity because somebody has withheld something. I think these cases differ in their results from cases where there is a decree inter partes simply, and upon an action brought on a foreign judgment fraud can be pleaded to that judgment, and if successfully pleaded, then there is a defence and that is because the court will not enforce that foreign judgment. Nothing is done to set it aside, but it is not enforced. That I do not think is applicable to cases like this. There is some sort of authority, namely, in the case of decrees *in rem.*"[36]

It will be noticed that in discussing the legal position the President has passed from the examination of conflict rules to the rules applicable in the domestic forum, as if those rules had some bearing on the determination of the problem before him. To say that it has never been argued that a decree which has been made absolute is not binding may be true merely because the point has not yet been raised! *The Duchess of Kingston's Case* is authority for the proposition, at any rate in the domestic courts, that a decree (in that case a decree of jactitation of marriage and one affecting status) could be treated as a nullity when impeached in collateral proceedings. There is no reason why the principle of the case should be given a narrow application, and judges and textbook writers seem to have agreed universally in the past that it was authority for the proposition that a judgment obtained by fraud could be treated as a nullity. The President then goes on to draw an analogy between a decree in divorce and a judgment *in rem,* and he cites the case of *Castrique v. Behrens.*[37]

This concerned the obtaining of an order for the sale of a ship by a French subject in a French court on a representation that he was the holder in due course of a bill of exchange drawn on the owners for necessary repairs, and that the bill had been dishonoured. In subsequent proceedings in England it was alleged that the French subject was not the holder for value, and if that was so French law would not have accorded the right to have the ship seized and sold.

The plaintiff held a duly registered mortgage over the ship under English law and claimed that the defendants, who were British subjects, had taken the bill without consideration and had transferred it, also without consideration, to the French subject in order that he might proceed against the ship—as he did—when it reached the French port of Le Havre. The declaration goes on to say that in pursuance of a conspiracy between the defendants and the French subject the latter represented to the French court that he was the holder for value and accordingly obtained an order for the sale of the ship, thus depriving the plaintiff of the benefit of his mortgage. On this declaration the plaintiff founded a claim for £6,000 damages.

It was held that while the judgment *in rem* obtained in the foreign court remained unreversed there was no cause of action.

[36] [1906] P. 209, at 218.
[37] (1861) 3 El. & El. 709, 121 E.R. 608.

Castrique v. Behrens is no authority for the general proposition that a foreign judgment *in rem* is not impeachable for fraud. When the case is examined carefully it will be seen that the decision depended upon a question of procedure as well as on the point that Behrens, whom it was sought to sue in damages, was not a party to the judgment of the foreign court and that while the decision of the foreign court remained unimpeached no action would lie against him. During argument the case was likened to an action for damages for malicious prosecution, or a false adjudication in bankruptcy, where the plaintiff is obliged to show that the proceedings finally terminated in his favour—an analogy which the court appeared to accept. The case of *Vanderbergh v. Blake*[38] was relied on by the defendant; this was an action for falsely and maliciously procuring a sentence of forfeiture of the plaintiffs' goods as being the goods of aliens, whereas the defendant knew the plaintiffs to be the owners of the goods and to be denizens. This decision seems to have rested on the somewhat doubtfully just ground that the proceedings for forfeiture were public and that the plaintiffs could have appeared and established their right.

A quotation from the judgment of Crompton, J., who delivered the judgment of the court in *Castrique v. Behrens,* will show that as an authority the case had not the universal force ascribed to it:—

> "A judgment *in rem* is, as a general rule, conclusive everywhere and on everyone; and we do not think that the averments in the declaration show that this judgment *in rem* was obtained under such circumstances as to be impeachable by the present plaintiff. It is averred, and we must on the demurrer assume it is truly averred, that by the law of France the judgment *in rem* can only be obtained if the holder of a bill of exchange be a French subject, and *bona fide* holds for value; and we must take it as admitted on the demurrer that Troteaux, the French holder of the bill of exchange by the fraudulent procurement of the defendants falsely represented to the French Court that he was the holder for value, when he was not. It is not necessary to say what would be the effect if it were stated that, by the contrivance of the defendants, the proceedings were such that the plaintiff had no opportunity to appear in the French Court and dispute the allegations. In the present case it is quite consistent with the averments in the declaration that the plaintiff had notice of the proceedings in France and purposely allowed judgment to go by default, or even that he appeared in the French Court, intervened, and was heard, and that the very question whether Troteaux was a holder for value was there decided against him. We think, on the principle laid down in *Bank of Australasia v. Nias,*[39] that the plaintiff cannot impeach the judgment here on such grounds, and that whilst it stands unreversed this action cannot be maintained."

There is a suggestion in the latter part of the judgment that fraud intrinsic to the proceedings was a question for the foreign forum—a proposition which the English courts have since denied in *Abouloff v. Oppenheimer*[40] and *Vadala v. Lawes.*[41]

[38] (1663) Hardres 194, 145 E.R. 447.
[39] (1851) 16 Q.B. 717, 117 E.R. 1055.
[40] (1883) 10 Q.B.D. 295.
[41] (1890) 25 Q.B.D. 310.

In dealing with *Castrique v. Behrens* and applying it to *Bater v. Bater*,[42] the learned President said—

> "In the case of *Castrique v. Behrens* the matter was one which has a *certain amount of bearing* on the question, as will be seen by the short statement of facts in the headnote . . . That is analogous to what I have been endeavouring to indicate, and I think (*though I do not think it is strictly necessary to lay this down absolutely in this case*) that the foreign decree remaining unreversed is binding. I say that, because *I am not going to lay down that there are no circumstances outside the question of jurisdiction which would render decrees of this character not properly recognisable in this Court. But where a person endeavouring to complain in a case is the person who is a party to what has been done, I do not think it right to help him, and that he should be allowed to come forward and quarrel with what has been done and then endeavour to set aside a decree which he has recognised, taken advantage of, and acted upon for years, and then seek to invalidate it upon exceedingly technical and refined grounds.*"[43]

The decision in *Bater v. Bater* would appear to be doubtfully grounded on a proposition that the decree of the New York court. being a judgment *in rem*, was unimpeachable, even though obtained by fraud, unless it was set aside. A more tenable ground for the decision would appear to be that the decree was a valid decree according to the *lex domicilii* and that Bater (the second husband) stood by, knowing the position, and allowed the wife to obtain the decree; then on the faith of the decree he married her. The American courts have become accustomed to use the word "equity" or "equities" in relation to the rights of the parties in these circumstances, and while the term sounds odd to the English lawyer it nevertheless does convey the idea that the actions of the parties, or of one of the parties, in first approbating the decree which it is later sought to impeach will have a bearing on their rights.

Shedden v. Patrick[44] is an authority for the proposition that when a judgment has been obtained by fraud, and more particularly by the collusion of the parties, the judgment, although it has been the subject of appeal and has been affirmed by the highest court, may be treated as invalid even in an inferior court, provided that the allegations of fraud and collusion are specifically made, are material, and are amply proved.

> In *Shedden v. Patrick* a claimant to heritable property in Scotland, born prior to the marriage of his parents, claimed to be legitimate according to Scots law (which he maintained governed his status) and sought to recover an estate which had been the subject of proceedings in Scotland forty years before, finally going on appeal to the House of Lords, which upheld the court of original jurisdiction, adjudging that the claimant was illegitimate and not entitled to succeed. In the original proceedings the claimant, who was then under age, had been represented by a guardian for the purpose thereof, and in his later action he contended that the guardian had colluded with a cousin of the claimant and had failed to disclose certain facts which would have established that the

[42] [1906] P. 209, at 219.
[43] The italics in this quotation are the author's.
[44] (1854) 1 Macq. H.L. 535; for a much shorter report see 17 Dunlop S.C. 18.

claimant was legitimate for the purpose of succession to the property, that the whole of the original proceedings were a fraud and a sham and should be disregarded. The court affirmed the doctrine that relief could have been granted if the facts had been established by evidence.

Lord Brougham[45] said— " . . . a judgment, though obtained here in the last resort, if proved to the satisfaction of this House . . . that there has not been a real suit instituted and appealed, but that there was collusion and fraud between the parties; that there was no real plaintiff and real defendant in real conflict together, upon whose case the Court below and this House had adjudicated; if it appear that there was no real trial, no real proceeding, and consequently no real judgment, but that the Court was imposed upon by the fraud of the parties; that the Court was led to believe that there was a contest when there was none, and that there was an opposition of parties when they were really in concert and leagued for the purpose of deceiving the Court to serve their own ends . . . . I am prepared to go the full length of holding, that, in this House, as in any other Court, a proceeding so instituted, so carried on, and so consummated in a judgment thus fraudulently and collusively obtained, in a word, a fictitious judgment, may be treated as a nullity as would be, *ex concessis,* on all hands, the judgment so obtained of any inferior tribunal."

Later[46] he goes on to say — "The authority of *The Duchess of Kingston's Case* upon the subject is, in my opinion, not to be got over, and not to be resisted — for what had we there? This House was sitting as a High Court of Justice in full Parliament as the Lord Steward's court, to try a Peeress for felony. There was produced before the Court a sentence of another Court of competent jurisdiction to deal with the subject-matter of that sentence — the Consistorial Court — not only competent, but exclusively competent, to deal with questions of marriage and divorce; . . . . A proceeding had been instituted in that Court of exclusive jurisdiction; and a sentence of nullity had been obtained. To all intents and purposes, therefore, there was an end of the prior marriage, standing that sentence. But it was satisfactorily proved . . . here . . . that the whole proceeding there was fraudulent and collusive. Therefore, the House disregarded that sentence . . ."

If, as is the case, a judgment *in rem* pronounced by the domestic forum and a judgment *in personam* pronounced by a foreign court are examinable for fraud,[47] there seems to be no reason why a foreign judgment *in rem* obtained by fraud should be sacrosanct. Since 1882 in England the courts have laid down that not only will they allow the impeachment of a foreign judgment for fraud *dehors* the proceedings, but that they will also allow impeachment when the fraud was in issue in the foreign court and was resolved against the party seeking to impeach.[48]

If the English courts go out of their way to allow reventilation of an issue of fraud which was raised in the foreign court, or which was not even raised although the facts were known to the party

[45] 1 Macq. H.L. 535, at 619.
[46] *ibid.,* at 620.
[47] *Duchess of Kingston's Case; Birch v. Birch,* [1902] P. 130; *Shedden v. Patrick; Shand v. Du Buisson; Lanarch v. Alleyne; Messina v. Petrococchino.*
[48] *Abouloff v. Oppenheimer,* (1883) 10 Q.B.D. 295; *Vadala v. Lowes,* (1890) 25 Q.B.D. 310.

concerned and could have been raised,[49] and allow foreign judgments to be impeached on the ground that they were given contrary to the principles of natural justice, then a foreign judgment *in rem* should be examinable for fraud, and it is submitted that this is the law.

IV. WHAT IS THE NATURE OF "FRAUD" WHICH WILL RENDER A JUDGMENT LIABLE TO IMPEACHMENT?

Such fraud may be broadly classified as follows:—

(1) The fabrication of a document[50] acceptance of which is the foundation of the whole proceeding (for example, a will in probate proceedings); or the fabrication of a document which leads to a judgment in the absence of the other party (for example, a false affidavit).[51]
(2) Deception practised by one party on the other so that the other is induced not to appear in the proceedings, with consequent judgment in his absence.[52]
(3) The obtaining of a judgment "behind the other party's back."[53]
(4) The suppression of a document which, had it been produced, would have been conclusive as to the issue.[54]
(5) Bias or dishonest dealing by the tribunal.[55]

Mere perjury as such is not sufficient to impeach a judgment.[56] But there seems to be no reason why, if it could be conclusively established that a case was a fabrication from beginning to end, the judgment could not be impeached in the same way as a judgment which is founded on a false document. The only difficulty is that which usually arises in opposing a fresh lot of oral evidence to that given in the first proceedings. Such cases seldom arise in practice as the parties are often in collusion or willing to let the matter pass in order to get the relief that each desires. It is only when disputes occur over such matters as property or claims to custody of children that the truth comes out, and even then it is seldom that a new set of facts in opposition to the previous evidence will be so weighty and conclusive as entirely to demolish the former case.[57]

Some of the remarks which fell *obiter* from Atkin, L.J., in *Jacobson v. Frachon*[58] are hard to follow. For instance, he says:—

> ". . . It would not be a defence to a foreign judgment to prove that the court proceeded on the evidence of one of the parties and that the

[49] *Syal v. Heyward and Another,* [1948] 2 All E.R. 576.
[50] *Birch v. Birch,* [1902] P. 130.
[51] *Loyd v. Mansell,* (1722) 2 P. Wms. 73, 24 E.R. 645.
[52] *Ochsenbein v. Papelier,* (1873) L.R. 8 Ch. App. 695.
[53] *Rudd v. Rudd,* [1924] P. 72.
[54] *Brooke v. Mostyn,* (1864) 33 Beav. 457, 55 E.R. 445.
[55] *Price v. Dewhurst,* (1837) 8 Sim. 279, 59 E.R. 111.
[56] *Jacobson v. Frachon,* (1928) 138 L.T. 386, 44 T.L.R. 103.
[57] For a good illustration of the practical difficulties which may crop up in what looks on the surface to be a case of easy proof, see *Austin v. Austin,* (1931) 33 N.Z. Gazette L.R. 640, and *Birch v. Birch* (*supra*).
[58] (1928) 138 L.T. 386, at 394.

evidence could subsequently be shown to have been perjured evidence, that would be attacking the decision on its merits. In the same way it appears to me to show one of the witnesses was a biased witness, or was interested in the case, is only an attack on the merits of the decision and is not an attack on the procedure. It would be different to my mind if it could be shown that the plaintiff had himself procured a witness whom he knew to be a biased witness, and who would be likely to mislead the court. That, to my mind, would be a fraud on the part of the plaintiff. It matters not, I think, whether he procured a perjured witness or a biased witness. In both circumstances I am inclined to think the true answer would be: This is a judgment obtained by fraud of one of the parties who cannot now set it up."

Reference has already been made to the question of jurisdiction. If the court is not jurisdictionally competent in the international sense, then, whether the invocation of jurisdiction is fraudulent or not, the judgment is void.

In all cases where it is sought to impeach the judgment of a domestic forum for fraud, the rule is that the issues will never be re-examined on the merits but only where the fraud is apparent from some circumstances extrinsic to the proceedings, and the relevant evidence was not and could not reasonably have been discovered before the judgment was rendered.[59]

But, as previously pointed out, the courts in England have anomalously laid down a different rule in the case of foreign judgments, in that they have permitted the examination of a foreign judgment on the ground of fraud intrinsic as well as extrinsic to the proceedings, and even in a case where the very fraud alleged was raised and decided against in the foreign proceedings.[60] This distinction has been criticised and has not been followed in Canada.[61] Quite recently the Court of Appeal in England [62] enunciated what would appear to be a new doctrine based on a notional distinction between a fraud on the court and a fraud on a party. All frauds on a party are frauds on the court, although not all frauds on the court are frauds on the other party.

The case was *Syal v. Heyward and Another*,[63] in which a plaintiff obtained judgment in India for Rs. 20,000 (money alleged to have been lent), not disclosing to the Court certain circumstances relating to the loan. In fact the loan was for Rs. 18,000 only, the balance being for interest and commission payable in advance. By making it appear that the loan was for the larger sum the plaintiff concealed from the court the possibility of a defence under Indian law as to part of the sum claimed. The plaintiff registered the judgment in England under the *Foreign Judgments (Reciprocal Enforcement)* Act 1933;[64] the defendants moved to set aside the registration, under section 4 of the Act, on the ground that the judgment was "obtained by fraud." The defendants had let judgment go by default in India although of course they were

[59] *Birch v. Birch* (notes 50 and 57, *supra*).
[60] See note 48, *supra*.
[61] Read, op. cit., 275 et seq.
[62] See note 49, *supra*.
[63] [1948] 2 All E.R. 576.
[64] 23 Geo. 5, c. 13.

well aware of the circumstances. It could not be said that they were misled, but the court in England ordered an issue to be tried on the question of fraud, holding that "fraud" as used in the Act means fraud on the court.

The decision is based on *Abouloff v. Oppenheimer* and *Vadala v. Lawes,*[65] but emphasises a new feature of the impeachability of a foreign judgment as distinct from a domestic judgment. Now it appears that a defendant, knowing full well that he has a defence, may let matters slide in the foreign court and raise the question of fraud later when the plaintiff seeks to get the fruits of his judgment by suing in an English court. While the judgment in *Syal v. Heyward* relates primarily to the meaning of "fraud" in section 4 of the *Foreign Judgments (Reciprocal Enforcement) Act,* there is no reason why it should not be extended further to cover any case where a party seeks to resist a judgment obtained abroad by fraud of which the defendant was aware and which he took no steps to refute.

The conclusion reached is that a judgment (foreign or domestic) dissolving a marriage or declaring a marriage a nullity has always been examinable and impeachable on the ground of fraud in the courts of this State, just as it is open to impeachment on the ground of want of jurisdiction or disregard of the fundamental conceptions of natural justice. The position in this State, as regards local judgments in divorce, is now set out in section 56 of the Code, which states *inter alia*—

> "Subject as hereinafter provided a final order for dissolution of marriage or nullity of marriage shall be deemed to be an order in rem and absolutely binding on the parties and on all persons claiming under them, save that any such order may be called in question in any court in which the validity of such order may become an issue on the ground that the court making the order had no jurisdiction in the matter and that the order of the court would not be deemed to be valid by the laws of this State, or on the ground that the order had been obtained by fraud, collusion or suppression of material facts by any party.
>
> Provided that (a) a party guilty of fraud or collusion or suppression of material evidence, or a party who with knowledge of any such fraud, collusion or suppression of material evidence neglects to defend the original action or neglects to intervene in such action shall not be heard to impeach the validity of any such order obtained in consequence; . . ."

It will be noticed that the Code contains no definition of "fraud," but there is no doubt that the courts would construe the term in the light of the meaning formerly attributed to it. Since the decision in *Syal v. Heyward* the courts of this State would probably hold that failure to disclose a material fact to a foreign court, which in that court would be a bar to a decree if disclosed, would render the decree impeachable in this State.

[65] Note 48, *supra.*

V. COLLUSION.

"Collusion" as discussed here is collusion in the intrinsic sense, not collusion which goes to the jurisdiction. In the divorce sense it is a species of fraud, but it is a fraud on the court as distinct from a fraud on the parties, who knew the facts and combined to mislead the court.

Latey[66] leaves it as a moot point whether a court will suffer a foreign decree to be impeached on the ground that it has been obtained by collusion. Case law does not furnish an answer. The author states, however, that—

> "Taking into account how seldom the Divorce Court finds collusion nowadays one can hazard the opinion that in no case would the English courts reject the decree of a competent foreign tribunal merely on the ground of collusion as it is understood in English law. Moreover, most of the cases in which foreign judgments have been successfully impeached for fraud are not concerned with the divorce jurisdiction and do not offer sound guidance where the marriage status is in issue"—

an expression of opinion which gives little comfort to the inquiring mind. The courts have not been slow to allow foreign decrees to be impeached on other grounds available in general for the impeachment of foreign judgments,[67] and on this line of reasoning there seems to be the same justification for the argument that a foreign judgment in divorce would be examinable on this ground.

As to the spouses themselves who were parties to the collusion, it would appear that much would depend on the rules of the foreign forum. Assuming that the court had jurisdiction and that the decree were regarded as valid there, notwithstanding the collusion, it would seem that the decree would be accorded recognition in the courts of this State. The question of how far it would be binding on a third party who married one of the former spouses, or on children of the previous or of the subsequent marriage, is best left for later consideration.

VI. WHO MAY CHALLENGE A JUDGMENT OBTAINED BY FRAUD? BY WHAT PROCEDURE? IN WHAT CIRCUMSTANCES?

Having arrived at the conclusion that a judgment dissolving or annulling a marriage is open to question on the ground of fraud, the next point to consider is what persons are entitled to impeach its validity, by what means, and in what circumstances.

Where a party to a marriage which has been dissolved or declared a nullity desires to assert the invalidity of the judgment, he may take some proceeding based on the assumed continuance of the marriage and leave the other party to raise the judgment by way of

[66] 13th edition, 404.
[67] *Rudd v. Rudd,* note 53 *supra.*

estoppel. A third party who has married one of the former spouses and who desires to question the validity of his own marriage may raise the question, as in *Bater v. Bater,*[68] by proceedings for nullity.

One spouse may assert the decree against the other who is proceeding to attempt to establish some claim to a right based on the continuance of the marriage; for example, a woman who is proceeding for maintenance in a married women's petty sessional court may be confronted with a decree of divorce or an assertion that a prior decree on which her later marriage depended is invalid. This position will also be discussed in detail later.

A spouse may desire to take up an affirmative attitude and obtain a judgment of a declaratory nature establishing the validity of a prior divorce and the consequent lawfulness of a subsequent marriage. For this purpose resort has been had in England, in an appropriate case, to the *Legitimacy Declaration Act* 1858.[69]

A child of the prior union or of the subsequent union may raise the question of the legitimacy of the issue of the second union; this too will be discussed later.

But there may be cases where there is no complicating factor of a subsequent marriage; the spouse who asserts fraud simply desires to impeach the judgment with a view to preserving the prior matrimonial status. The courts of equity gave a remedy by bill in which the specific allegations of fraud had to be set out and conclusively proved; in such a case the court would grant an injunction to restrain a party from enforcing a judgment in his favour. It should be noted that once a final judgment has been rendered there is no way of vacating it by motion on the ground of fraud. Where fraud is alleged, the proper way to proceed is by independent action against the person claiming to hold the judgment, asking for a declaration of its invalidity on the ground of fraud. This procedure by action seems to have been well established in English law.[70]

Beside a party to the marriage, a co-respondent, who is not interested in the status of the parties but who is concerned to protect his own reputation or to avert enforcement of damages and costs, may desire to impeach the decree. In this connection it is interesting to note the decision in *Kemp-Welch v. Kemp-Welch and Chrymes.*[71]

> The co-respondent alleged a conspiracy on the part of the petitioner and the respondent whereby the petitioner agreed to take the respondent back if she would make a confession of adultery implicating the co-respondent. The co-respondent appeared and unsuccessfully fought the proceedings, but the respondent did not do so. Later a decree absolute was granted; the petitioner and respondent thereafter resumed cohabitation and went to Canada. The co-respondent

[68] Note 35 *supra.*
[69] 21 & 22 Vict., c. 93.
[70] *Jonesco v. Beard* [1930] A.C. 298; *Birch v. Birch* [1902] P. 130.
[71] [1912] P. 82.

desired to have the whole matter re-opened and lodged a motion to rescind the decree absolute. It was urged on his behalf that any judgment obtained by fraud can be set aside by the court from which it was obtained and treated as a nullity. It was argued that *Shedden v. Patrick*[72] supported that contention. In opposing the co-respondent's motion to re-open, the petitioner's counsel urged that *Shedden v. Patrick* was not applicable because that case had proceeded on the ground that there were no real parties and no real judgment—a point which does not seem to have any substance and which was not noticed in the judgment of the President (Sir Samuel Evans) before whom the motion was heard. In delivering his reasons for dismissing the motion the President said, "This motion is misconceived. I am clearly of opinion that I have no jurisdiction to disturb the decree absolute which followed upon the verdict of the jury and the judgment which passed against the co-respondent. If there is any method of getting rid of the decree after it has been made absolute it is not by motion in this court. Lest it may be said elsewhere that I am wrong in my views on the question of jurisdiction, I will now proceed to pronounce my opinion of the motion on its merits as if I had jurisdiction to entertain it."[73]

The learned President proceeded to find that there was no fraud or collusion — which did not leave much opportunity for it to be said whether he was right or wrong.

It will be noticed that the judgment really goes off on a point of procedure, but that it does raise incidentally the question whether a decree obtained by fraud can be challenged at all, the President appearing to incline to the view that it cannot. However, the Court of Appeal in New Zealand has re-affirmed the principle that in the divorce jurisdiction an independent action will lie.[74] It must be mentioned that the New Zealand case was one of a decree nisi, but to all intents and purposes the findings stood as against the co-respondent who sought to challenge the decree and were otherwise unassailable by him.

The question of procedure is not so important as the substantive law which affords the right. There is an instance where the Privy Council, for reasons of convenience, permitted such a matter to be decided on motion, although this procedure is not likely to be repeated.[75]

The practice of accepting affidavits and hearsay statements in affidavits filed in support of motions renders procedure by motion unsatisfactory; hence the general rule that the judgment should be impeached by independent action. In any such action it is clearly laid down that the elements of the fraud alleged must be distinctly stated and substantially proved, and if there is any defect on the pleadings the court will stay the action, acting on the principle that courts will not re-open a judgment without the clearest proof that it was obtained by fraud.[76].

[72] Note 44, *supra.*
[73] [1912] P. 82, at 85.
[74] *Austin v. Austin,* note 57 *supra.*
[75] *Hip Foong Hong v. Neotia & Co.,* [1918] A.C. 888.
[76] See note 70, *supra.*

In practice the validity of final judgments in divorce is generally raised in some proceeding whereby a spouse seeks to escape liability (e.g., for maintenance) or seeks to assert a claim to a share (as on intestacy) in the estate of a former spouse. In such circumstances the party moving is actuated by motives of self-interest. There may be a difference in procedure between a case where one party to a proceeding seeks actively to impeach, in that proceeding, the validity of a prior judgment of dissolution or nullity, and a case where the party questioning the prior judgment does so by way of defence or shield in collateral or independent proceedings in which the question arises incidentally. In the latter case there is some authority for the proposition that the validity of the subsequent marriage, if brought into question in some collateral proceeding (e.g., in maintenance proceedings taken by a wife in a petty sessional court) would have to be determined by a court with definite jurisdiction to pronounce on the validity or continuance of the marriage.[77]

This circuity of procedure seems undesirable. Section 22 of the Code provides that any court may determine any matter within its jurisdiction in which any question may arise incidentally for determination which might be made the subject of an application for a declaration as to personal status, but with the safeguarding provision that the determination of any such question should have effect only for the purpose of the particular proceedings, and with a general provision (in the nature of *certiorari*) for the removal of the proceedings into the Supreme Court so that the matter can be amply dealt with and a final determination made. Section 57 of the Code has much the same provision for determining a question which arises incidentally in proceedings as to the validity of any dissolution or annulment of marriage.

A third party who marries a spouse who has obtained a foreign decree by fraud (if *Bater v. Bater* is good law) has no right to challenge the decree "until it is set aside." This qualification sounds paradoxical. If the decree were set aside in the jurisdiction which granted it, the type of challenge in the domestic court which was made in *Bater v. Bater* could hardly have happened at all, and if the rules of the foreign forum are such that it will not allow the decree to be set aside even for fraud the only redress left may be to question it in a forum to which the third party can properly resort when some matter arises in which the validity of the former decree comes into question. The writer expresses no opinion as to whether the courts of this State would allow the impeachment of a foreign decree in divorce, obtained by fraud, by a person (not privy to the fraud) who marries one of the former spouses.

As already pointed out, a domestic court will not uphold any plea of estoppel in subsequent proceedings where it is shown that

[77] *Goldstone v. Smith, otherwise Goldstone,* (1921) 38 T.L.R. 403; see Duke, P., at 404, 405.

the prior divorce proceedings were without domiciliary jurisdiction or were without jurisdiction in the international sense. Thus it is possible for a party who has by the grossest fraud procured a decree from a foreign forum, which had no jurisdiction, to raise the question of the jurisdiction of the court, even though that party has contracted a fresh marriage and the other spouse has also remarried on the faith of the decree being good. In the same way our law will permit the other spouse, who has accepted the decree, to blow hot and cold and repudiate it. Of course there are circumstances in which the court may decline to use its ancillary powers in favour of a spouse who has taken advantage of a decree and then seeks to impeach it. For example, where a wife has collusively resorted to a forum not jurisdictionally competent and her husband has remarried following the decree, a court would probably hesitate to grant her any provision for maintenance where the circumstances of the parties have changed and she makes a belated application for maintenance in subsequent divorce proceedings based on her husband's adultery with the pseudo-spouse. Her previous conduct might be sufficient to debar her from obtaining an order for maintenance.

When it comes to considering cases of fraud not involving jurisdiction, the question of how far the parties may be estopped by conduct becomes more difficult. Phipson[78] states, referring to domestic judgments,

> "A plea of fraud, however, can in general only be taken advantage of by a stranger to the judgment who is in no way privy to the fraud, and not by a party, since, if the latter were innocent he might have applied to vacate the judgment, and if guilty he cannot escape the consequences of his own wrong; so, as to collusion — for example, where the parties, even without fraud, were not really in contest.[79] The rule that fraud can only be proved by an innocent party does not apply, however, to probate cases[80] or to divorce."[81]

But the affirmative portion of the text is not supported by authority, and the exception that even a guilty party may impeach a decree in divorce obtained by fraud is based on a case where there was a collusive resort to the jurisdiction. In a former edition of his work[82] Phipson supported the general statement by a reference to Taylor on Evidence.[83] Taylor cites *Prudham v. Phillips*[84] as authority for the proposition that a party to a judgment cannot plead his own fraud for the purpose of impeaching the judgment. It seems apparent, then, that even apart from any statutory provision the courts would not assist a party privy to a fraudulent decree to repudiate it on the ground of that fraud if it is unrelated to jurisdic-

[78] *Evidence* (8th edition), 400.
[79] *Bandon v. Becher,* (1835) 3 Cl. & Fin. 479, 6 E.R. 1517; *Girdlestone v. Brighton Aquarium Co.,* (1879) L.R. 4 Ex. D. 107.
[80] *Birch v. Birch,* [1902] P. 130.
[81] *Bonaparte v. Bonaparte,* [1892] P. 402.
[82] *Evidence* (6th edition), 406.
[83] (12th edition), 1082; see also *Stephen on Evidence,* art. 46.
[84] (1738) 1 Ambl. 763, 27 E.R. 490.

tion but connected with intrinsic details (for example, the evidentiary structure) of the case. Furthermore, while it is true that in the majority of cases which arise the party seeking to impeach a prior decree will be doing so by means of nullity proceedings in relation to a subsequent marriage, there will be some cases where, those proceedings not being available to the particular class of litigant (for example, to a co-respondent, as in *Austin v. Austin*[85]), the proceedings will be by way of action and, being equitable in form, the usual limitations will be imposed by the court on a person who seeks relief, and the court would not be likely to accord relief to a person seeking equitable relief if that person had been guilty of questionable conduct in relation to the decree complained of. These considerations furnish the background of paragraph (a) of the proviso to section 56 of the Code.[86]

But what of the rights of the children of the prior marriage, who may desire to challenge the subsequent marriage of a parent after a decree which is open to challenge on the ground of fraud? They were not parties to the suit but they have a direct interest in claiming under their parents and for this reason are considered as privy to the judgment. If the second marriage could be impeached, then the right of the children to share in the estate of their natural parent (i.e., their lawful mother or lawful father, partner to the first marriage) may be seriously affected according to whether the spouse placed *in loco parentis* by the second marriage is or is not entitled to rely on the decree which preceded it. At common law their position is not clear. If all the dicta in *Bater v. Bater* are good law, they would appear to have no right at all to challenge the decree, which would be good as against them "until set aside."

In speaking of the jurisdictional validity of decrees the American Law Institute is careful to say that it expresses no opinion as to whether the children of a prior marriage or a third person may be precluded from questioning the validity. As pointed out, this comment relates to a proposition as to the binding effect of decrees in cases where parties have taken advantage of and acted on the decree of a court not jurisdictionally competent;[87] but by parity of reasoning there would seem to be the same doubt in relation to a decree which is sought to be challenged on the ground that it was obtained by fraud or in contravention of the principles of natural justice.

However, while children cannot choose their parents, there are good arguments why, if the administration of the law is to be kept pure, the machinations of their parents should be open to review. The trouble is that if unrestricted scope is allowed to children to challenge subsequent marriages of their parents following on decrees of divorce or nullity, much misery and hardship may result to child-

[85] Note 57, *supra.*
[86] See page 383, *supra.*
[87] *Restatement: Conflict of Laws,* sec. 112.

ren born of the subsequent union. It has already been pointed out that our law wastes no sympathy in these matters where the questioned decree lacked jurisdiction; but that the law is harsh in one direction is no argument for a harsh law in this connection.

These considerations furnish the legal background to paragraph (b) of the proviso to section 56 of the Code—

> "(b) any children born of a marriage after such final order (if the subsequent marriage is not otherwise invalid) shall, subject to any particular context in any instrument of benefaction, be deemed to be legitimate for all purposes of succession under a benefaction made in favour of children as a class or for the purpose of succession to the property of one or other of their parents on intestacy of such parent, or for the purpose of making any application under section 3 of the Testator's Family Maintenance Act (No. 44 of 1939)."

Reference has already been made to paragraph (a) of the proviso, which it is thought states the common law as to the position of parties actively participating in frauds on the court, or knowingly standing by and allowing such frauds to be perpetrated.

But the question still remains unanswered as to whether, and how far, a child of a former marriage is entitled to impeach a subsequent marriage by impeaching a judgment in divorce which preceded it. At common law this question is doubtful, but under the Code, so far as domestic decrees are concerned, it is submitted that children have the right in any collateral proceedings to raise the question of the validity of a decree on which their parents' marriage may depend, and any such question may be raised whether it goes to the point of the jurisdiction of the court in this State or involves the issue of fraud, collusion or the suppression of material facts, remembering that the words of the section are, "save that any such order may be brought into question in any court in which the validity of such order may become an issue on the ground that . . . the order was obtained by fraud, etc." Section 24 (3) (e) of the Code expressly permits a child of a former marriage to take action for a declaration of nullity of a subsequent marriage, and section 21 permits a child of either marriage to take action for a declaration of his or the other's status.

There is no specific limitation as to the persons who may challenge the final judgment in these circumstances, and the exception stated is an exception to the general proposition that it is to be regarded as a judgment *in rem,* so that if any collateral matter should arise (for example, the right of the children of the prior marriage to take the whole of their mother's estate on intestacy to the exclusion of her second husband who married her after the date of the questioned judgment) those children are perfectly competent to litigate the issue, and to do so whether the husband of the second marriage was or was not aware of the tainted origin of the decree which preceded his marriage.

VII. APPEALS.

The statutory provisions relating to appeals in divorce have always allowed an appeal on grounds of fact or of law. Under the law as it was before the passing of the Code there was no ground for appeal against the granting of a decree absolute if the would-be appellant, in the words of the statute, "had time and opportunity to appeal . . . from the decree nisi." This extremely vague provision was interpreted to cover not only cases where the person concerned was unaware of the proceedings or had not sufficient time to appear and contest the case, but also cases where through ignorance or inadvertence he had misconceived his rights.[88]

Section 51 of the Code now provides that there shall be no right of appeal against the final order where a party has failed to appeal against the order nisi "unless such failure was due to such party having had no knowledge that the action had been taken, or if the fact of the action having been taken did come to his knowledge he did not have reasonable opportunity of appearing and defending his rights." Previously the time for appealing was governed by the Rules, three months being the prescribed time, and that time could be extended under the general powers conferred by the Rules. But in place of this provision section 51 of the Code now provides a fixed period of three months. This was done to lead to more speedy ventilation of appealable matters and to give more certainty of effect to judgments in divorce.

In discussing the present English law, which is similar to the law in force in this State prior to the passing of the Code, Latey states that it is conceivable that courts might refuse to extend the time for appeal in cases where parties have remarried and in particular where one of the parties to a subsequent marriage is innocent.[89] No such questions can now arise in this State. On balance it seems far better that final judgments in divorce should not be appealable after the prescribed time has elapsed and that the *mores* of any particular situation should not be left to the discretion of the court when the facts and the law have been considered by the court of first instance.

VIII. NEW TRIALS.

Beside the question of impeachability of a judgment dissolving a marriage on the ground of lack of jurisdiction or fraud, there also arises the problem whether and in what circumstances a new trial should be granted where some cogent and conclusive evidence comes to light which would probably have affected the decision of the court in the former suit and have led to a different conclusion. In this connection the rule is that the courts of the domestic forum which have pronounced a decree will, notwithstanding lapse of time, allow

[88] See *Supreme Court Act* (Western Australia), No. 36 of 1935, sec. 114.
[89] *Divorce* (13th edition), 306.

the matter to be re-opened on an order for a new trial, but in such a case the court may impose terms as a condition of granting a new trial. In *Wilkins v. Wilkins*[90]—

> The wife had been married in 1854 to one George Rickard, who in 1858 left her (and was not heard of again until 1895). In 1865 the wife, believing him to be dead, went through a form of marriage with Wilkins who was aware of the circumstances and knew that there was no positive proof of Rickard's death. There were eight children of that union. The parties separated in 1883, Wilkins covenanting to make the wife a weekly allowance of twelve shillings. In 1892 the wife petitioned for judicial separation on the ground of Wilkins's adultery. The latter disputed the adultery and raised the question of the validity of his union with the petitioner, contending that Rickard was alive at the time of the second union, and asked for a decree of nullity. The issues were determined by a jury, who found the adultery proved and that the first husband was not alive at the time of the second union. In 1895 Rickard re-appeared, undoubted evidence being forthcoming of his identity. In a fresh suit brought by Wilkins in that year the wife raised the plea of *res judicata* and the President, being in doubt as to whether he had any jurisdiction, referred the matter to the Court of Appeal which enlarged the time for appeal and gave leave to Wilkins to serve notice of motion for a new trial but subject to his undertaking to secure payment to the respondent during their joint lives of an increased allowance, viz., £1 per week.

This is a good instance of the court's imposing terms as a condition precedent to enlarging the time for moving for a new trial after the time allowed by the Rules has expired. In the instant case there was no suggestion of fraud on the part of either party.

The right to apply for a new trial in this State is now governed by the Code which, while laying down a definite time for the lodging of appeals, prescribes no time for applications for a new trial. That is left to be prescribed by the Rules, and Rule 135 (3) states that every motion for a new trial or re-hearing is to be made within twenty-one days after the finding of the judge or the verdict of the jury.

Wilkins was a very special case in which the applicant had clear grounds for a new trial but was forced to apply long after the time allowed by the rules had elapsed; thus the court in granting him leave to present the motion was able to impose terms. It is conceived, however, that in a case where the facts were similar to those in *Wilkins* but the applicant applied within the prescribed time, he would be entitled to an order for a new trial notwithstanding any culpable behaviour on his part when he entered into the marriage the validity of which he sought to impeach.

IX. THE IMPACT OF THE CRIMINAL LAW.

Section 339 of the *Criminal Code* 1913 enacts that—

> Any person who—
>
> (1) Being married, goes through the form of marriage with any other person during the life of his or her wife or husband;

[90] [1896] P. 108.

(2) Goes through the form of marriage with any person whom he or she knows to be married;

is guilty of a crime, and is liable to imprisonment with hard labour for seven years.

It is a defence . . . to prove that at the time of committing the alleged offence, the wife or husband of the person already married had been continually absent from him or her for the space of seven years then last past, unless it is shown that the accused person knew that such wife or husband was living within that time.

Unlike its English forerunner[91] the *Criminal Code* does not state the further exception from criminal liability of a person "who is divorced or whose former marriage shall have been declared void by the sentence of a court of competent jurisdiction." It is considered that the words "being married" in paragraph (1) and the words "knows to be married" in paragraph (2) of the *Criminal Code* provision import a valid and subsisting marriage, and that there is really no need to state the exceptions as is done in the English Act.

Reference has already been made to section 184 of the *Supreme Court of Judicature (Consolidation) Act* 1925,[92] to which section 85 of the (Western Australian) *Supreme Court Act* 1935 corresponded. As previously mentioned, the writer considers that the purpose of this section (now re-enacted with slight modification in section 58 of the Code) is to make clear when the parties can re-marry without penal consequences. But it does not necessarily follow that, because a decree has been made, *no* penal consequences can be incurred by a party who remarries in reliance on the decree where he has been a party to a fraud on the court, or where the court which pronounced the decree had no jurisdiction to do so in the international sense. It is clear that a party who obtains a decree by fraud will not be heard to maintain it as justification for a subsequent marriage.[93]

There may be instances where a party wilfully fails to disclose some fact which if disclosed would create a discretion in the court to grant relief in his favour. The case law is obscure as to how far this omission may be used to impeach the decree, but the writer holds the view that, so far as a foreign decree is concerned, the omission will not vitiate the decree unless the express terms of the law of the forum so provide. As to decrees obtained in this State, prior to the passing of the Code they were not liable to be impeached in criminal proceedings by reason of the wilful non-disclosure of some collateral but material fact. But under subsection (2) of section 58 of the Code a party can no longer resort to tricks and devices to impose on the court and absolve himself from penal consequences which might have been incurred had the decree not been obtained. A decree which is obtained by fraud or collusion or suppression of material evidence will not absolve the party obtaining it from pro-

[91] *Offences against the Person Act* 1861, 24 & 25 Vict. c. 100, s. 57.
[92] See note 33, *supra.*
[93] *Duchess of Kingston's Case.*

secution for bigamy if he re-marries during the lifetime of the former spouse.

Where resort is knowingly had to a jurisdiction which is not competent to make a decree in the particular case, there is no doubt that the re-marriage of a party obtaining such a decree could in this State be followed by penal consequences.[94]

How far can an honest but mistaken belief that a decree is valid absolve from penal liability a party who re-marries on the faith of a decree granted by a court not jurisdictionally competent? The answer to this question is that a mistaken view concerning jurisdiction will not avail a party as a defence to a prosecution for bigamy. In *R. v. Wheat and Stocks*[95] Avory, J., in delivering the judgment of the Court of Criminal Appeal, emphasised that in *Earl Russell's Case,*[96] where the defendant had obtained a decree of divorce in one of the States of America, and it was not disputed that he honestly believed that the divorce was valid and that he was free to marry again, it was conceded that this was no defence, the divorce being in fact invalid according to English law.

X. SUMMARY OF CONCLUSIONS.

Judgments in Divorce granted without Jurisdiction.

(1) Where jurisdiction is lacking the court will regard the decree as a nullity, no matter how innocent the parties or one of them may have been, and any ensuing complications—for example, the possible bastardization of children or the frustration of claims to property—make no difference at all to the consideration of the question.

(2) It is immaterial that the spouse against whom the judgment is obtained has submitted to, or has not challenged, the court's jurisdiction.

(3) It matters not, in the opinion of the writer, that the questioned decree is one of another State of the Commonwealth which may have widened the grounds of jurisdiction beyond the international concept. Such a widening may be a step in the right direction, but all decrees granted on the basis of such widened jurisdiction must run the risk of impeachment and invalidity outside the jurisdiction where they are granted.

(4) Nor does it matter that the decree contains a recital of domiciliary jurisdiction when in fact none existed. In this respect the opinion is expressed that *Harris v. Harris*[97] would not be followed in this State.

[94] *Lolley's Case,* (1812) 2 Cl. & Fin. 567, 6 E.R. 1268.
[95] [1921] 2 K.B. 119.
[96] [1901] A.C. 446.
[97] [1947] V.L.R. 44; see note 12, *supra.*

Fraud.

(1) The term "fraud" as used in relation to foreign judgments, and as used in the Code relative to final orders of dissolution or orders for nullity granted by the Supreme Court of this State, means the fabrication or suppression of evidence of such vital materiality that if disclosed it must necessarily have led the court to a different conclusion,[98] or some underhand or dishonest conduct by one party which deprives the other of an opportunity to be heard;[99] or some bias of the tribunal.[100]

(2) A foreign or a domestic judgment in divorce may be disregarded or impeached in proceedings in a court of this State if it is demonstrable that it was obtained by fraud.

(3) Where fraud is raised to impeach a domestic judgment in divorce the courts of this State will not re-try the issue but will only allow the question to be brought forward on proof of fraud *dehors* the proceedings and on the ground that the evidence now sought to be adduced was not previously known and could not reasonably have been discovered.

(4) Where fraud is raised in the courts of this State to impeach a foreign judgment in divorce the court may re-try the question of fraud notwithstanding that it has been litigated in the foreign forum, or notwithstanding that the party seeking to impeach knew the facts and took no steps to litigate the matter in the foreign court.

Collusion.

(1) A foreign judgment in divorce which has been obtained by collusion of the parties would probably be regarded as binding on them in the courts of this State if the law of the foreign court which gave the judgment treats it as binding notwithstanding the collusion.

(2) A final order of dissolution or an order of nullity granted by the Supreme Court of this State is impeachable here under section 56 of the Code if the order has been obtained by collusion.

Restrictions on Right of Challenge—and Procedure.

(1) Generally a divorce judgment which has been obtained by fraud may be challenged by a party to the proceedings who has had no complicity in the fraud. However, it is questionable whether a third party who has married one of the spouses, with or without knowledge of the tainted origin of a previous decree, may raise the question in subsequent proceedings in order to challenge the validity of the second marriage, except where the fraud goes to jurisdiction.

[98] *Birch v. Birch,* note 50, *supra; Syal v. Heyward and Another,* note 49 *supra.*
[99] *Rudd v. Rudd,* note 53, *supra.*
[100] *Price v. Dewhurst,* note 55, *supra.*

(2) Where no question of jurisdiction is involved, a party who has been privy to a fraud on the court in order to obtain a decree will not be permitted to raise the question of the fraud in order to impeach the decree, but since the decision in *Syal v. Heyward* it is a moot point whether a party who has stood by and allowed a foreign decree to be granted knowing that the other party is perpetrating a fraud will be permitted in subsequent proceedings in this State to challenge the validity of the foreign decree. But where a decree of a foreign court is granted without jurisdiction it is immaterial that the party or parties seeking to impeach the decree were guilty of fraud on the court; nor does it matter that the jurisdiction of the court whose judgment is now impeached was colourable, or that the parties, or either of them, have contracted fresh marriages.

(3) It is doubtful whether a child of a party to an impeachable foreign decree is entitled to challenge the decree in the courts of this State. In the case of a judgment of dissolution or nullity granted by a court of this State the Code permits a child affected by the judgment to raise the question of the validity or invalidity of a subsequent marriage.

(4) Where a judgment in divorce is challengeable, a party to the judgment who is entitled to impeach it may do so by way of an action for declaration of nullity of a subsequent marriage.

(5) Where a party to a marriage which has been dissolved or declared a nullity by a foreign court or by a domestic court desires to assert the invalidity of the judgment, he may take some proceedings based on the assumed continuance of the marriage and leave the other party to raise the judgment by way of estoppel.

(6) In any case where a third party, who has married one of the parties to an impeachable decree, desires to question the validity of his marriage he may resort to proceedings for nullity.

(7) In some cases the provisions of section 21 of the Code will be available to enable a party seeking to affirm or impeach the validity of a subsequent marriage to obtain a declaration as to status.

(8) A co-respondent or co-defendant who has been the victim of collusion would be obliged, once the proceedings were closed, to resort to an independent action in order to have the divorce judgment declared invalid.

Appeals.

In general a final order for dissolution of marriage will not be appealable unless the party involved had no knowledge of the proceedings or, if he had notice, the notice was insufficient to enable him to appeal against the order nisi. Subject thereto a final order is not appealable unless the appeal is lodged within three months of the date of its issuance.

New Trials and Re-hearing.

A new trial or a re-hearing may be granted in any case where conclusive evidence is discovered after the trial which could not reasonably have been discovered before; in this respect there is a time limit of 21 days under the Rules, but the court may extend the time. In cases where the status of the parties has been altered the court may impose terms.

Criminal Liability.

(1) A person who obtains a judgment of dissolution of marriage in a court not competent to pronounce the judgment may be prosecuted for bigamy in the courts of this State if he goes through the form of marriage with another person during the life of the other spouse. It is immaterial that the person concerned genuinely believed that the dissolution pronounced by the court was valid.

(2) A party who has suppressed material facts or committed a fraud on the court in this State may be prosecuted for bigamy if he marries in this State during the lifetime of the former spouse, and the pleading of the order of dissolution will be no defence.

General conclusion.

It will be seen that the general body of law relating to the validity of judgments, both domestic and foreign, is applicable in divorce—with the one notable exception, that the parties in divorce proceedings cannot by consent confer jurisdiction on a tribunal which is not internationally competent.

A. A. WOLFF.