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*June 16, 19, 20, 21
*Nov 20

BERTHA MAYNARD (*Plaintiff*) .....APPELLANT;

AND

CECIL MAYNARD (*Defendant*) .....RESPONDENT,

AND

RUTH LILLIAN MARTIN .....DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Divorce—Alimony and Maintenance—Consent judgment to lump sum payment—Subsequent application to vary not within jurisdiction of Court to grant—Res judicata—Estoppel—The Matrimonial Causes Act, R.S.O. 1937, c. 208, ss. 1, 2.

A wife suing for divorce authorized her solicitor to accept a lump sum in full of all claims for alimony and maintenance. The trial judge queried the prudence of such an arrangement and being assured by her counsel, granted a decree *nisi* and endorsed on the record that on consent of the parties judgment was granted in the sum agreed upon. In the formal judgment the Court ordered payment of the sum as and for alimony and maintenance and the words "or until this Court doth otherwise order" were added. Subsequently the wife alleging, that the agreement as to the lump sum payment had been made without her consent and had been obtained by fraud on the part of her husband, brought an action in damages or in the alternative, for an order to set aside that part of the judgment and permit her to apply in the divorce action for an award of such alimony and maintenance as she should receive. This action (tried by Mackay J.) was dismissed, it being held that there was no fraud proven and that the wife had authorized acceptance. On appeal that decision was affirmed.

Before the judgment of Mackay J. was rendered a motion was made in the pending divorce suit to rescind or vary the Order as to maintenance and alimony and for an order directing the husband to secure to the wife such gross or annual sum of money, or in addition thereto, or in substitution therefor, to pay such monthly or weekly sum as deemed reasonable by the Court and for an inquiry as to the respective assets of the parties. The trial of an issue having been ordered and an appeal from that Order taken, the Court of Appeal held that there was no jurisdiction in the Court to award a lump sum payment except by consent of the parties but that having been given, it had power to make the award but not to vary the amount thereafter.

Held: The real issue before Mackay J. was whether, notwithstanding the agreement under attack and the paragraph of the judgment which carried the effect of it into the judgment *nisi*, there still remained a right to claim maintenance upon the making of the final decree. That question having been conclusively determined against the

*PRESENT: Kerwin, Taschereau, Rand, Kellock, Estey, Locke and Cartwright JJ.

plaintiff, she could not relitigate the matter. *Green* v. *Weatherill* [1929] 2 Ch. 213 at 221, 222. *Hoystead* v. *Commissioner of Taxation* [1926] A.C. 155 at 165.

Held: also, that the proposition that a judgment cannot take effect as *res judicata* or an estoppel unless it was given before the proceedings in which it is relied upon were commenced must be rejected. *Law* v. *Hansen* 25 Can. S.C.R. 69 at 76, applied.

Per: Rand and Kellock JJ.:—It is open to the parties to agree, as part of the adjudication of divorce, to waive the claim for alimony and maintenance in consideration of a lump sum allowance. The impugned provision in the order *nisi* constitutes evidence of the agreement and may be set aside only on grounds applicable to any agreement or judgment, or as defective as made without power or jurisdiction. If not set aside and not defective, it would be an answer to an application on the decree absolute for relief of either kind. Such an agreement is not within the ban pronounced in *Hyman* v. *Hyman* [1929] A.C. 601, and *Mills* v. *Mills* [1940], 2 All E.R. 254, would not apply because the final decree had not yet been pronounced. (Decision of the Court of Appeal [1950] O.R. 44 affirmed.)

APPEAL by special leave of the Court of Appeal for Ontario from the judgment of that court (1) allowing an appeal from the Order of Wells J. and dismissing the appellant's motion for an Order rescinding or varying the Order of Schroeder J.

Lewis Duncan K.C. and *W. B. Williston* for the appellant.

George Walsh K.C. and *Margaret E. Perney K.C.* for the respondent.

C. R. Magone K.C. for the Attorney General of Ontario.

The judgment of Kerwin, Taschereau, Estey, Locke and Cartwright JJ. was delivered by

CARTWRIGHT J.:—This is an appeal by special leave of the Court of Appeal for Ontario from the judgment of that Court of the 15th of December 1949 (1), allowing an appeal from the Order of Wells J. of the 14th of April 1949 and dismissing the appellant's motion for an Order rescinding or varying paragraph 3 of the Order of Schroeder J. made in the action on the 21st of February 1946 and for other relief to be mentioned hereafter.

The appeal raises questions of general importance and, in order to understand what these questions are, it is necessary to give a short statement of the facts in chronological order.

(1) [1950] O.R. 44; 1950 2 D.L.R. 121.

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The appellant is the wife of the respondent, Cecil E. Maynard. By writ dated the 20th of December 1944 the appellant commenced the action in which the motion now in appeal was launched. The action was against the respondent and his co-defendant, Ruth Lillian Martin. The claim endorsed on the writ of summons was as follows:

> The Plaintiff's claim is for the dissolution of the marriage between the Plaintiff and the Defendant Cecil E. Maynard. That the Plaintiff may be awarded such gross sum of money or annual sum of money as may be reasonable for her support, pursuant to the provisions of the statute in that behalf. Or in the alternative a declaration that the Plaintiff is entitled to alimony from the Defendant Cecil E. Maynard and also inter-alimony (*sic.*) and the costs to which she is entitled by the practice in that behalf and that for the purpose all necessary directions may be given and accounts taken.
>
> Her costs of the action, her interim disbursements.

The prayer for relief in the statement of claim is in the same terms as the endorsement on the writ with the addition of a prayer for such further and other relief as to the Court may seem meet.

Prior to the commencement of this action the appellant and the respondent had separated and were living apart from each other pursuant to the terms of a separation agreement under which the respondent was liable to pay the appellant the sum of $15 a week. The payments under the separation agreement were kept up until the trial of the action. Up to that time the appellant was employed and no application for interim alimony was made prior to the trial.

The action came on for trial before Schroeder J. without a jury at Toronto on the 21st of February 1946. The appellant was represented by the late Mr. H. B. Proudlove, and the respondent was represented by Mr. C. E. Kitchen. The defendant Martin did not appear and was not represented. At the opening of the trial Mr. Kitchen informed the Court that he was appearing only with respect to alimony and that while the parties had been unable to agree on the question of alimony they had now, subject to His Lordship's approval, reached an agreement on that matter.

Following the above statement the trial proceeded and it is obvious from the endorsement made on the record that Schroeder J. was satisfied that a case was made out

entitling the plaintiff to judgment *nisi*. The evidence taken before Schroeder J. is not in the case which is before us, but the case contains a transcript of what passed between counsel and the learned judge at the end of the trial. This may be summarized as follows. Mr. Proudlove informed the Court that he and Mr. Kitchen had agreed that there should be judgment for $700 payable by the end of February 1946 and $500 payable on the 30th of September 1946. Schroeder J. asked whether this was in addition to the payments under the Separation Agreement mentioned above. Mr. Proudlove replied: "No. That completes the payment for alimony". Schroeder J. was obviously surprised at the proposal and questioned counsel in regard to it, suggesting that it was an imprudent arrangement for the Plaintiff to make. Both counsel having assured him that the agreement was made and understood, he finally said: "You have made your own agreement among yourselves anyway." To this, Mr. Proudlove replied: "Oh, yes; she is quite competent to, my Lord." Schroeder J. then had the terms repeated to him as to amounts and dates and said "That is for alimony and maintenance of the plaintiff and the infant child until he attains the age of 16?" Mr. Proudlove replied in the affirmative and Schroeder J. then endorsed the record as follows:

Judgment

(*a*) for decree *nisi* dissolving the marriage between the plaintiff and the defendant spouse.

(*b*) for custody of the infant to the plaintiff with reasonable right of access to the defendant spouse, provided that the infant is not permitted to visit the home of the defendant spouse whilst the defendants reside there in adulterous circumstances.

(*c*) on consent of the parties, judgment in favour of plaintiff against defendant spouse for $500 payable September 30, 1946, and $700 payable February 28, 1946, as and for alimony and maintenance of the plaintiff and the infant until the latter attains the age of sixteen years.

(*d*) costs of the action against the defendant, Maynard.

Following this, a formal judgment was signed and entered. Paragraph 1 directs judgment *nisi* in the usual terms. Paragraph 2 deals with custody. Paragraph 4 deals with costs. Paragraph 3 reads as follows:

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant Cecil E. Maynard, do pay to the plaintiff the sum of seven hundred dollars on the twenty-eighth day of February 1946,

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and the sum of Five hundred dollars on the thirtieth day of September 1946, as and for alimony and maintenance of herself, and for maintenance of the infant son of the plaintiff and the defendant Cecil E. Maynard, which infant son is Cecil Maurice Maynard, until the said infant attains the age of sixteen years of age; or until this Court doth otherwise order.

There is nothing in the record to show at whose instance or under what circumstances the final words "or until this Court doth otherwise order" were added to paragraph 3 of the formal judgment, but neither party has taken any steps seeking to have the formal judgment amended by the deletion of these words.

Shortly after the pronouncement of judgment *nisi*, Mr. Proudlove died suddenly, and for a time the appellant was without a solicitor. It appears that Mr. Kitchen had sent a cheque to Mr. Proudlove for the $700 payable on 28th February 1946 but that this cheque could not be found. The appellant got in touch with Mr. Kitchen who furnished her with a cheque for $700 which she deposited or cashed. Before the payment of the $500 payable on 30th September 1946 fell due, the appellant consulted her present solicitors. Mr. Duncan wrote to Mr. Kitchen asking that the $500 should not be forwarded. A cheque was, however, forwarded, but was not cashed.

On the 27th of November 1946 the appellant commenced a separate action in the Supreme Court of Ontario against the respondent. The statement of claim in that action alleges the marriage of the parties in 1918, the expulsion of the appellant from their matrimonial home and her desertion by the respondent in June of 1942, the entering into a Separation Agreement in the same month under which the respondent agreed to pay the plaintiff during her life and as long as she should remain chaste the sum of $15 each week and to convey certain property to her, the bringing of the action for divorce and the judgment rendered by Schroeder J., that the agreement embodied in paragraph 3 of that judgment was induced by fraudulent misrepresentations as to the respondent's financial position, that by reason of such misrepresentations no inquiry was made at the trial and no evidence given as to the financial position of the appellant or as to the ability of the respondent to pay alimony or maintenance

or as to the conduct of the parties. There are also allegations of a successful plan to defraud the plaintiff in connection with the property which was conveyed to her pursuant to the Separation Agreement.

The Statement of Claim concludes with the following Prayer for relief:

THE PLAINTIFF THEREFORE CLAIMS by reason of the fact (*sic.*) hereinbefore pleaded, and in particular—

(1) by reason of the facts pleaded in paragraphs 1 to 10 inclusive hereof—$25,000 damages;

(2) In the alternative, by reason of the facts pleaded in paragraphs 1 to 10 inclusive hereof, an order setting aside paragraph 3 of the formal judgment bearing date the 21st day of February 1946, in the action in this Court of *Maynard* v. *Maynard and Martin,* and for an order setting aside paragraph (*c*) of the judgment in the said action as endorsed on the Record at the trial of the said action, and permitting the plaintiff to apply in the said action for an award of such alimony and maintenance as she should receive, having regard to her financial position and the ability of her husband, and the conduct of the parties;

(3) by reason of the facts pleaded in paragraphs 1, 2, 3 and 11 hereof the sum of $600 being the total of 40 payments payable under the Separation Agreement bearing date the 9th day of June 1942, at $15 a week from the 26th day of February 1946 to the 27th day of November 1946, and $15 a week in the said Separation Agreement from the 27th day of November 1946, to Judgment, and interest on the said sums at 5 per cent until Judgment, or in the alternative for alimony by order of the Court;

(4) by reason of the facts pleaded in paragraphs 1, 2, 3, 4, 5, 6, 9, 10 and 11 hereof, interim alimony of $25 per week or such sum as the Court may determine until the trial of this action; and interim disbursements;

(5) by reason of the facts pleaded in paragraphs 1 to 4 inclusive, and 13 and 14 hereof, $1,000 damages;

(6) such further and other relief as the merits of the case may require;

(7) her costs of this action.

A lengthy statement of defence was delivered denying all the allegations of fraud, pleading that the settlement for $1,200 carried into paragraph 3 of the judgment of Schroeder J. was voluntarily made and fully understood and asking that the action be dismissed with costs.

The action came on for trial in due course before Mackay J. The trial occupied 14 days. Judgment was reserved and was given on the 7th of September 1948 dismissing the action without costs. In his reasons for judgment, Mackay J. found against the allegations of fraud and misrepresentation. The reasons state in part:

I further find as a fact that the plaintiff authorized her solicitor, the late H. B. Proudlove, to accept a lump sum of $1,200 payable in amounts of $500 and $700 on specific dates, which lump sum was and was under-

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stood to be, by all parties, in full and final settlement of all claims for alimony and maintenance, such lump sum settlement to supersede and abrogate all payments under the separation agreement, Exhibit 1.

I further find that the plaintiff's solicitor, the late H. B. Proudlove, acting for and on behalf of the plaintiff and with her knowledge, approval and consent, and in her presence informed the trial Judge, Schroeder J. in open Court, that the parties had agreed upon a lump sum settlement of $1,200, the terms of which he announced to the Court. I further find as a fact that the plaintiff fully understood the terms of the lump sum settlement as explained to the Court by her solicitor, and that she consented to it and that the judgment recorded on the record by the trial Judge referable to a lump sum payment for alimony and maintenance was with the full authority and consent of both parties.

I further find that the parties, by themselves and through their solicitors were *ad idem* and that there was no mistake as to the question of a lump sum payment, i.e. $1,200 in full and complete settlement.

The appellant appealed to the Court of Appeal for Ontario from the judgment of Mackay J., and on the 6th of December 1948 the appeal was dismissed without costs. No further appeal was taken in that action.

In the meantime, on the 17th of August 1948, before the judgment of Mackay J. was delivered, the Motion which forms the subject matter of this appeal was launched in the original divorce action. The relief sought and the grounds relied upon are set out in the notice of motion as follows:

(*a*) for an Order rescinding or varying paragraph 3 of the Order of the Hon. Mr. Justice Schroeder of the 21st of February, 1946; and

(*b*) for an Order directing the Defendant Cecil E. Maynard to secure to the plaintiff such gross or annual sum of money or in addition thereto or in substitution therefor to pay such monthly or weekly sum as may be deemed reasonable by this Honourable Court and for an inquiry as to respective assets and incomes of the plaintiff and of the defendant Cecil E. Maynard; and

(*c*) for an Order restraining the defendant from alienating, encumbering or otherwise dealing with his property until the further order of this Honourable Court; and

(*d*) in the alternative, for an Order determining what portion of the sum of $1,200, referred to in the said Order of the 21st day of February, 1946, is for alimony for the plaintiff; and what for maintenance for the infant; and what for maintenance for the wife after judgment absolute; and for an Order

(*e*) granting to the plaintiff the sum of $25 per week for interim alimony pending the final judgment of this motion; and

(*f*) such other relief as the merits on the case may require.

UPON THE FOLLOWING GROUNDS:

(1) That the said Order of 21st of February, 1946, is subject to the further order of the Court;

(2) That the financial position of the plaintiff has altered since the making of the said Order;

(3) That in so far as paragraph 3 of the said Order purports to award a lump sum for alimony and maintenance of the plaintiff and the infant, it was made without jurisdiction and contrary to the provisions of *The Matrimonial Causes Act*, R.S.O. 1937, c. 208; alternatively, that it was made on the wrong principle and contrary to public policy;

(4) That it is just and equitable that the said Order be rescinded or varied;

(5) On such other grounds as may appear;

When this motion first came before the Court it was adjourned until after Mackay J. should have given his judgment, and it was later further adjourned until the Court of Appeal should have given its judgment on the appeal from the judgment of Mackay J. After such appeal had been disposed of, the Motion finally came on to be heard before Wells J. in January 1949 and that learned judge gave judgment on the 14th of April 1949 directing the trial of an issue at the Toronto non-jury sittings, and enlarging the Motion before the judge presiding at the trial of the issue. The Order provided in part:

1. THIS COURT DOTH ORDER AND DIRECT that Bertha Maynard and Cecil E. Maynard do proceed to the trial of an issue upon oral evidence before the Judge presiding at the Non-Jury Sittings of this Court and that the said Motion bearing date the 17th of August, 1948, be enlarged before the said Judge at the trial of the said issue, and that in the said issue, the said Bertha Maynard shall be the plaintiff and the said Cecil E. Maynard shall be the defendant.

2. AND THIS COURT DOTH FURTHER ORDER that the issue to be tried shall be whether there is power to rescind or vary paragraph 3 of the Order of The Honourable Mr. Justice Schroeder of the 21st of February, 1946, or to make any alteration in the provisions for alimony and maintenance provided by the said Order and if so what provision for alimony and maintenance should be made for the said Bertha Maynard.

An appeal was taken from this order and the Court of Appeal was of opinion that the motion raised a question of law which should have been determined by Wells J. before directing any issue, that the proper course under the circumstances would be to refer the matter back to Wells J. but that both counsel having asked the Court to dispose of the point of law this was a convenient course which should be followed. The question of law was stated to be whether or not the Court had power to vary paragraph 3 of the judgment of Schroeder J. in view of the fact that the same was a consensual judgment for a lump sum settlement in full of alimony and maintenance. The Court

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of Appeal decided that the question should be answered in the negative, allowed the appeal and ordered that the motion be dismissed, without costs.

In view of the findings of fact made by Mackay J., counsel for the appellant conceded before us that he must deal with the appeal on the basis that the agreement set out in paragraph 3 of the judgment of Schroeder J. had been entered into voluntarily by the appellant, that it was untainted with fraud and that the parties were *ad idem.* He contended however that even so the plaintiff was entitled to the relief claimed in the notice of motion heard by Wells J. In support of this contention the following points were argued with great force and ability:

(i) that on a proper construction of the agreement embodied in paragraph 3 of the Order of Schroeder J., particularly having regard to the concluding words "or until this Court doth otherwise order", the plaintiff is at liberty to apply to the Court for, and the Court has reserved to itself power to grant, further alimony and maintenance;

(ii) that if paragraph 3 of the judgment of Schroeder J., properly construed, has the effect of declaring that, on payment by the respondent of the sums totalling $1,200 therein referred to, the appellant should never thereafter have any further right to claim for alimony or maintenance, then, if the matter is regarded as a judgment of the Court, Schroeder J. had no jurisdiction to pronounce it so as to effectively tie the hands of the Court in the future, and particularly on the granting of judgment absolute; and if, on the other hand, it is regarded as a judgment confirming an agreement between the parties, such agreement is unenforceable under the principles laid down in the decision of the House of Lords in *Hyman* v. *Hyman* (1).

(iii) in support of the submission first mentioned in (ii) it is argued that the Judge pronouncing judgment *nisi* has no jurisdiction to deal with maintenance and that, even if this contention is rejected, it is clear that neither under the Imperial Statutes (1857), 20-21 Victoria c. 85 s. 32 and (1866) 29-30 Victoria c. 32 s. 1, nor under the Ontario legislation, R.S.O. 1937, c. 208 ss. 1 and 2 has the Court power to order payment to the wife out and out of a

(1) [1929] A.C. 601.

lump sum, that such jurisdiction cannot be conferred by consent and that if and insofar as the case of *Mills* v. *Mills* (1), appears to hold the contrary, it is distinguishable or ought not to be followed.

(iv) in support of the submission last mentioned in (ii) it is argued that a contract otherwise invalid is not given validity merely by being incorporated in a consent judgment, citing *Great West Central Railway* v. *Charlebois* (2), and *Huddersfield* v. *Lister* (3).

(v) that if it is sought to distinguish the case at bar from *Hyman* v. *Hyman* by reason of the difference between the wording of s. 32 of *The Matrimonial Causes Act* (1857) 20-21 Victoria (Imp.) c. 85, and that of s. 1 of the *Matrimonial Causes Act,* R.S.O. 1937 c. 208, then the latter section is ultra vires of the Provincial Legislature insofar as it is in conflict with the former, which, it is contended, became part of the law of Ontario by virtue of the Dominion Act, *"The Divorce Act* (Ontario)" 1930, S. of C. c. 14. It should be pointed out that the important difference between the two sections is that the Imperial Act gives the Court jurisdiction to award maintenance (as distinguished from alimony) "on any such (i.e. final) decree", while the Ontario Act gives jurisdiction to make such award "in any action for divorce".

(vi) that giving effect to the above arguments the Court should declare that there remains in the Court in the pending divorce action power on the granting of decree absolute (or by order made prior to, but not to become effective until, the granting of such decree) to award the relief asked for in paragraph (*b*) of the notice of motion quoted above; and that the payment of the $1,200 made pursuant to paragraph 3 of the judgment of Schroeder J. (and which the appellant brought into Court in the action tried by Mackay J.) should be regarded only as one of the matters to be considered in fixing the quantum of maintenance to be ordered.

To all the above it was answered that the decision of the Court of Appeal was right upon the merits but that whether so or not the appellant is estopped by the judgment of Mackay J.

(1) [1940] 2 All E.R. 254.
(2) [1899] A.C. 114.
(3) [1895] 2 Ch. 273 at 276.

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If the respondent's contention as to estoppel is sound, it is sufficient to dispose of the appeal and I think that it should be first considered.

The main arguments against such estoppel were as follows: First, it was said that when the pleadings and the reasons for judgment of Mackay J. are examined it appears that that learned judge was not asked to deal and did not deal with the questions argued before us but only with the question whether the agreement between the parties embodied in paragraph 3 of the judgment of Schroeder J. should be set aside by reason of fraud or lack of consent; and that, while the appellant can no longer question the existence of the agreement on such grounds, it is still open to her to contend that, although existing as an agreement *inter partes*, it is no more effective to deprive the Court of its power to order maintenance as a condition of finally dissolving the marriage than was the agreement considered in *Hyman* v. *Hyman* (*supra*).

Secondly—although perhaps this is only putting the ground just stated in other words—it is said that there is no identity of issue, and that the relief sought in the proceedings before us could not have been obtained in the action disposed of by Mackay J.

Thirdly, it is argued that even if otherwise an estoppel would have existed none can exist because the judgment of Mackay J. was not delivered until after the commencement of the present proceedings.

It was not questioned that the pleadings should be examined in order to ascertain what was in issue between the parties in the earlier proceedings and I think that the judgment of this Court in *Hogg* v. *Toronto General Trusts Corporation* (1), and that of the Court of Appeal in England in *Marginson* v. *Blackburn Borough Council* (2) make it clear that the reasons for judgment may also be considered.

On comparing clauses (*a*) and (*b*) in the notice of motion in the present proceedings with paragraph 2 of the statement of claim in the former action, it appears to me that, although not expressed in identical words, they ask for the very same relief. In the former action the appellant sought

(1) [1934] S.C.R. 1. (2) [1939] 2 K.B. 426 at 437.

to set aside paragraph 3 of the judgment of Schroeder J. and, upon that having been done, to have it adjudged that she was entitled to apply in the divorce action for an award of such alimony and maintenance as, but for the existence of such paragraph, she would have been entitled to under the applicable legislation. Her claim was dismissed, the dismissal was affirmed by the Court of Appeal and that action is at an end. In the present proceeding the appellant again asks to "rescind or vary" paragraph 3 of the Order of Schroeder J. and applies for an award of maintenance.

It is argued that the appellant is not estopped from seeking to vary or rescind paragraph 3 of the Order of Schroeder J. on the grounds that it was made without jurisdiction and is unauthorized by any valid legislation as these grounds were not put forward before, or considered by, Mackay J. It is further contended that, even if the appellant is estopped from seeking to vary or rescind such paragraph, it is nonetheless open to her to claim that, notwithstanding its existence, she is entitled to claim maintenance on the ground that the paragraph in question is ineffective in law to deprive the Court of power to award maintenance to her.

Putting the matter in a different form, it was argued that all that has become *res judicata* by reason of the judgment of Mackay J. is the valid existence of an agreement *inter partes* in the terms set out in paragraph 3 of the judgment of Schroeder J. and that the appellant is not precluded, by having unsuccessfully questioned the valid existence of that agreement, from claiming any relief to which she may be by law entitled notwithstanding the agreement.

I do not think that the arguments are entitled to prevail. I do not have to decide what the result would have been if in the action tried by Mackay J. the only claim made had been one to declare void the agreement embodied in paragraph 3 of the judgment of Schroeder J. Two other claims were expressly put forward in the pleadings, (*a*) for an order permitting the appellant to apply in the pending divorce action for an award of such alimony and maintenance as she should receive, and (*b*) for payment

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of the sums due under the separation agreement from the date of the trial before Schroeder J. to the date of judgment in the action tried by Mackay J. To decide whether these claims or either of them should be allowed, it was necessary for Mackay J. to pass not merely upon the continued existence of the agreement carried into paragraph 3 of the judgment of Schroeder J. but also upon its construction and effect including the effect if any to be given to the concluding words of that paragraph "or until this Court doth otherwise order". It may be that counsel assumed that unless and until paragraph 3 of the judgment of Schroeder J. was set aside it constituted an insuperable barrier to any further claim for maintenance in the divorce proceedings and that consequently the view, so fully and ably argued before us, that notwithstanding such paragraph the Court has power to grant maintenance, was not put before Mackay J. at all. It may be that such an assumption, if it were made, was erroneous; as to that I express no opinion. It may be that some of the points of law argued before us were not thought of at that time. All this however would, it seems to me, be *nihil ad rem.* The issue now before us was, I think, expressly raised in the pleadings in the earlier proceeding and was decided by the judgment of Mackay J., dismissing that action. The appellant has submitted the same question as is now before us (although perhaps not the same arguments) to the decision of a Court of competent jurisdiction and cannot now re-litigate the matter.

The following passage from the judgment of Maugham J., as he then was, in *Green* v. *Weatherill* (1), seems to me to state concisely the principles which are applicable:

> the plea of *res judicata* is not a technical doctrine, but a fundamental doctrine based on the view that there must be an end to litigation: see *In re May* (2); *Badar Bee* v. *Habib Merican Noordin* (3). In the latter case it may be observed that Lord Macnaghten in delivering the judgment cites from the Digest and relies on the maxim *"Exceptio rei judicatae obstat quotiens eadem quaestio inter easdem personas revocatur."* In the leading case of *Henderson* v. *Henderson* (4), there is to be found the following statement of the law by Wigram V.C.: "I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward

(1) [1929] 2 Ch. 213 at 221, 222.
(2) 28 Ch. D. 516, 518.
(3) [1909] A.C. 615.
(4) 3 Hare, 100, 114.

their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." This passage has recently been approved by the Privy Council in the case of *Hoystead* v. *Commissioner of Taxation* (1).

In the judgment of the Judicial Committee in *Hoystead* v. *Commissioner of Taxation* (1), at page 165 is the following:

> Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances.
>
> If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.

In my opinion the law is correctly stated in Halsbury's Laws of England (2nd Edition) Volume 13 at page 410, where it is said that the principle of estoppel applies "whether the point involved in the earlier decision, and as to which the parties are estopped is one of fact, or one of law, or one of mixed law and fact".

It remains to consider the third argument of the appellant mentioned above. This is founded on a passage in Halsbury's Laws of England 2nd Edition Volume 13 at page 449:

> It seems that a judgment cannot take effect as a *res judicata,* or an estoppel unless it was given before the proceedings in which it is relied upon were commenced.

It is said that the date of the commencement of the proceedings now before us was 17th August 1948, the date of the notice of motion which eventually came before Wells J., and the judgment of Mackay J. was not pronounced until 7th September 1948.

Three cases are referred to in the footnote to the statement from Halsbury quoted above: *Houston* v. *Marquis of Sligo* (2); *The Delta—The Erminia Foscolo* (3); and *Re Defries; Norton* v. *Levy* (4).

(1) [1926] A.C. 155 170.
(2) (1885) 29 Ch. 448.
(3) (1876) 1 P.D. 393.
(4) (1883) 48 L.T. 703.

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Support for the statement quoted from Halsbury is contained in *The Delta*. The judgment was founded also on other grounds, but no doubt Sir Robert Phillimore gave as the principal reason for his decision the fact that the judgment which it was alleged created an estoppel had not been given until after the action before him was commenced.

In *Houston* v. *Sligo* Pearson J. expressed a doubt as to this ground of decision in *The Delta* and held against the existence of an estoppel on other grounds. On appeal from his judgment the point with which we are concerned was not dealt with, as a consent order was pronounced. The effect of the decision of Pollock B. in *re Defries* is directly contrary to the statement quoted from Halsbury. The action before Pollock B. was commenced on 5th March 1881 and at the trial on 2nd May 1883 that learned judge, after hearing argument on the point, gave effect to an estoppel created by a judgment delivered on 24th July 1882.

I do not think that I have to choose between these apparently conflicting decisions, as the point appears to me to be settled so far as this Court is concerned by the judgment in *Law* v. *Hansen* (1). In that case the ground of decision in *The Delta* with which we are concerned was carefully considered and the reasoning upon which it was founded was, I think, rejected. At page 76 King J. giving the judgment of the Court said:

> No substantial objection therefore can be said to lie against the bringing forward of a defence based upon a judgment recovered after action brought.

At page 75 the same learned judge put the question:

> Why should a plaintiff in a foreign action, by commencing fresh proceedings in another country on the eve of judgment rendered, become entitled to litigate the matter anew?

In that case the judgment held to create an estoppel in the Courts of Nova Scotia was that of a foreign tribunal. It seems to me that the decision would apply *a fortiori* where the second proceeding is started in the very Court in which the issue is already standing for judgment.

So that it may not appear to have been overlooked, I should mention another argument put forward on behalf

(1) (1895) 25 Can. S.C.R. 69.

of the appellant. It was submitted that, if the argument that paragraph 3 of the judgment of Schroeder J. was made without jurisdiction is sound, then the appellant, as a matter of law, could not be estopped from asserting such lack of jurisdiction; in other words, that jurisdiction can not be acquired by means of estoppel any more than by means of consent. For the sake of argument the last stated proposition may be accepted. It is stated in Spencer Bower on *Estoppel by Representation* (1923) at page 187 as follows:

> Even the most plain and express contract or consent, *a fortiori*, therefore, any mere conduct or inaction or acquiescence, of a party litigant from which a representation may be implied such as to give rise to an estoppel, cannot confer judicial authority on any of His Majesty's subjects not already invested with such authority by the law of the land, or add to the jurisdiction lawfully exercised by any judicial tribunal.

This rule is, I think, concerned with cases of estoppel by representation and not with cases of *res judicata* or estoppel by record. Had the appellant in the action tried by Mackay J. expressly raised for decision the point that paragraph 3 of the judgment of Schroeder J. was invalid on the ground that it was made without jurisdiction and had that point been finally decided adversely to her it could not have been raised again in litigation between the same parties. In my view, while not raised expressly in the pleadings, the question of the validity of the order of Schroeder J. was fundamental to the decision of Mackay J. and the reason that I think the question is not now open for our consideration is not that the appellant is precluded by her consent or conduct or acquiescence in the proceedings before Schroeder J., but because Mackay J. whose judgment was affirmed by the Court of Appeal has decided the point against her.

In my view, the real issue before Mackay J. both in form and in substance was whether, notwithstanding all that had happened, including the making of the agreement under attack and the paragraph of the judgment of Schroeder J. which carried the effect of that agreement into the judgment *nisi*, there still remained in the appellant a right to claim maintenance upon the making of a final decree of dissolution. I think that question has been con-

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clusively determined against the appellant and I do not think that she can ask the Court to pass upon it again merely because she now puts forward an argument. in support of her contention that paragraph 3 of the judgment of Schroeder J. should be disregarded, which was not put forward in the action before Mackay J. I do not think it is necessary to enquire whether the arguments addressed to us as to the lack of jurisdiction of Schroeder J. were addressed either to Mackay J. or to the Court of Appeal on appeal from his judgment. I think that, applying the principles laid down in *Hoystead* v. *Commissioner of Taxation,* cited above, it was a ground which the appellant, if she wished to rely upon it, was bound to bring forward at that time.

One further matter should be mentioned. It is clear that in order for the judgment of Mackay J. to constitute an effective estoppel that learned judge must have had jurisdiction to pronounce it. I did not understand counsel for the appellant to question the jurisdiction of Mackay J. in the action before him to decide the question mentioned above as to whether there remained in the appellant a right to claim maintenance. His argument, as I understand it, was that Mackay J. did not decide the question. It might, however, be suggested that if the appellant's argument, that the question of maintenance (as distinguished from alimony) can be dealt with only on the pronouncing of decree absolute or by order made in contemplation of and only to become effective upon the granting of judgment absolute, is right, then Mackay J. had no more jurisdiction to deprive the appellant of her right to maintenance than did Schroeder J. I think that this difficulty is apparent rather than real. Mackay J. was not asked to award maintenance to the appellant. Schroeder J. was asked to award it and purported to do so. Mackay J. was asked not to fix maintenance but to say by his order that the plaintiff was still entitled to claim it in the action. In my view he had jurisdiction to decide this question in an action brought for the purpose of determining it; although it might be suggested that a more appropriate procedure would have been to move for judgment absolute and to make the claim for maintenance on such motion.

I am of opinion that this appeal fails on the ground that the appellant is estopped by the judgment of Mackay J. from asserting the claim now put forward. Having reached this conclusion, I do not think it desirable to express any opinion on the other questions argued before us. While I respectfully agree with the learned Justices of Appeal who granted leave to appeal that those questions are of great and general importance, it seems to me that once it has been decided that effect must be given to Mr. Walsh's argument based on estoppel any further discussion would be *obiter*.

Under all the circumstances, I am of opinion that the appeal should be dismissed without costs. The appellant's motion to enlarge the case by including therein further material should also be dismissed without costs.

The judgment of Rand and Kellock JJ. was delivered by:

RAND J.:—Accepting Mr. Duncan's contention that the law of England in relation to alimony and maintenance applies in Ontario by force of *The Divorce Act* (Ont.) (1930) S. of C. c. 14, the question reduces itself to this: can a petitioner for divorce, claiming alimony and maintenance, bind herself by an agreement with the respondent at the trial by which, in satisfaction of all rights to alimony, past or future, and to future maintenance, a lump sum is to be paid and accepted, for the payment of which, what purports to be an order, by consent, is included in the decree *nisi*?

The English law is to be found in 20-21 Vict., c. 85, s. 32 and 29-30 Vict., c. 32, s. 1, and its effect is that the Court has jurisdiction on a decree of divorce to order the husband to *secure* to the wife such gross or annual sum of money as, having regard to certain matters specified, the Court deems reasonable; or to make an order for weekly or monthly sums for maintenance during their joint lives. It is settled that the Court has no power under these provisions to order payment of a lump sum; the latter can only be "secured". As stated by Lord Greene in *Mills* v. *Mills* (1), "such payment can only be consensual."

(1) [1940] P. 124 at 134;
[1940] 2 All E.R. 254 at 261.

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Two authorities bear upon the question raised. In *Mills* v. *Mills, supra,* it was held by the Court of Appeal that after an order for maintenance had been made, the parties could agree upon a lump sum in satisfaction of all rights under it and embody the agreement in a subsequent order which at the same time discharged the original order and petition; and in *Hyman* v. *Hyman* (1), the House of Lords held a provision in a separation agreement that the wife would never assert a claim to maintenance was not a bar to an application following a decree absolute, on the ground that there was a public interest in the duty of the husband to support the wife which would be affected by the divorce, and which could not by such an agreement be defeated.

Is, then, an agreement entered into at the hearing and incorporated in the decree *nisi* within the ban pronounced in *Hyman* v. *Hyman* or is it open to the parties to agree, as part of the adjudication of divorce, to waive the claim for alimony and maintenance in consideration of a lump sum allowance? I do not see that the time of repudiation of such an agreement would affect the matter even though in *Mills* v. *Mills* the application in effect to revive the original order for maintenance was made seven years after the order approving the commutation had issued and was clearly not made "on a decree": that point could not be raised here because the final decree has not yet been granted. So made, the impugned provision in the order *nisi,* constituting the evidence of the agreement and evidencing the abandonment of the claim for alimony and maintenance, is, in my opinion, either definitive, to be set aside only on grounds applicable to any agreement or judgment, or fatally defective as made without power or jurisdiction; and if not set aside and not defective, it would be an answer to an application on the decree absolute for relief of either kind.

Must the Court, as a condition of validity in any adjudication involving the right to alimony and maintenance insist on examining all matters relating to these claims and formally adjudging a gross or annual sum to be secured or periodic payments to be made notwithstanding that the parties do not desire it? I see nothing in the policy under-

(1) [1929] A.C. 601.

lying *Mills* v. *Mills* to require that to be done, particularly as by the rule laid down, as I interpret it, they could the next day bring their agreement into Court and have the order discharged. There would, no doubt, have been placed before the petitioner the amount which the Court considered proper and further time would be gained; but are these sufficient considerations on which to ground such an exceptional requirement? If the Court is not to insist upon the enquiry, will the right of the wife be lost if she refuses, at that time, to assert it? If not, there would result an unprecedented indulgence to her as a litigant which I should say is unwarranted.

The chief and controlling interest is her interest. The legislature has not provided for the representation of the public on the hearing of a divorce action; and to impose an absolute duty upon the Court to proceed upon its own independent enquiry and adjudication in disregard of the desire of the parties would seem to me to be an extravagance in paternalism and a burden on the Court quite beyond the scope of the statute. A refusal to allow a provision in a separation agreement to defeat a jurisdiction founded in part on public policy, is based on considerations very different from those that would permit a party to a suit to repudiate a consensus openly announced in court and made part of the relief adjudged; and such a judgment can be taken to be a nullity only if there has been a failure in a duty placed on the Court itself. If the public interest were of such high concern, we could properly expect to find provision made in the legislation for its assertion by a representative of the public and not by the Court.

The clause in the order *nisi*, "or until this Court doth otherwise order", cannot preserve a jurisdiction which by the judgment has been exhausted; and the observations of the Master of the Rolls in *Mills* v. *Mills*, (*supra*) on similar language in the order in that case are directly pertinent here. The clause adds nothing to the decree and is unavailing to the support of the appeal.

The circumstances here give some colour to what I think is the reality behind the efforts that have been made to set aside the judgment now attacked. It may be that the petitioner was badly advised, or that she herself exercised

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poor judgment, in agreeing to accept the particular sum. But that occasional hardship cannot justify a departure from rules governing the course of courts which are necessary to their proper functioning; and where parties act freely, with full opportunity to ascertain all relevant facts, they must abide by that adjudication of their private quarrel to which they gave their consent.

The appeal, therefore, must be dismissed, but without costs. The motion made at the hearing should likewise be dismissed.

The appeal and the motion to enlarge the case by including therein further material are both dismissed without costs.

Solicitors for the appellant: *Duncan & Bicknell.*

Solicitor for the (Defendant) Maynard, respondent: *Margaret E. Perney.*

Solicitor for the Attorney General for Ontario: *C. R. Magone.*