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SECOND-HAND JUDGMENTS:

RECIPROCAL USE OF JUDGMENTS IN CIVIL AND CRIMINAL MATRIMONIAL CASES†

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I. ECONOMY, STARE DECISIS AND POLICY

Our title indicates, we hope, that we wish to discuss and to evaluate the law governing the proof of disputed facts in a matrimonial case of civil or criminal nature which facts have already been judicially determined and reduced to judgment in a previous matrimonial case of the opposite nature. For example: D has been convicted of adultery. Can Mrs. D utilize the judgment of D's conviction in her divorce suit against D, as a short-cut way of proving D's adultery? The order of proceedings may be in the reverse.

An important question confronts us at the outset. Why should an existing judgment be used again in a subsequent litigation? Why not? Let us leave aside, for the moment, the technical considerations on which theories of bar, res judicata and evidence rest, matters about which we propose to talk in detail below. Let us first view the matter of the re-use of judgments in the light of economy. Is it not a matter of simple arithmetic that we will save the taxpayer (in the one case)

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†We have written this paper for two groups of lawyers: (1) counsel now or later in need of a ready precedent and analysis lacking in the standard texts, and (2) the lawyer who is interested in the proper and utilitarian effectuation of a proper societal purpose by a proper legal means. The latter addressee should read the whole of this essay. Note: The term reciprocal is not, as commonly, employed with a sequential but with an alternative denotation.

We are pleased to note that a Case Comment, by Mr. Gavin K. Letts, Evidence—Prior Criminal Conviction as Evidence of Guilt in Subsequent Civil Action, 14 Wash. & Lee L. Rev. 259 (1957), has preceded the publication of this article in the same law review. The topic, it would seem, is an acute and timely one. The instant essay is not meant to be either cumulative to, or corrective of, the cited comment. Indeed, we find the conclusions reached in Mr. Lett's excellent comment to be largely confirmed by our own research. But our essay attempts not only to view the wider problem of prior adjudication on the other side of the court, but also to examine these evidence rules functionally and policy-wise, for one specific sphere, that of the matrimonial offense.

and the parties (in the other) a lot of effort, thus money, if we satisfy ourselves with one thorough judicial determination of the crucial facts in issue, instead of litigating the same questions over again in a subsequent proceeding with now worn-out witnesses whose patience may have been overtaxed and whose memories are undergoing a gradual transformation? The second-hand car and casebook, refrigerator and washing machine, serve a useful purpose in our society. Why not the second-hand judgment, especially if it stays in the same family, so to speak? The second-hand appliance may be as good as new, but the second-hand judgment does not wear out at all; it stays new. Of course, it really stands for the accuracy and veracity of the issues determined and it bears the good-housekeeping seal of judicial approval, a warranty, we surmise, which exceeds that of the dealer's reputation. Thus, on principles of economy one should endorse the widespread use of civil judgments for evidentiary purposes in subsequent criminal proceedings, or of criminal judgments in subsequent civil proceedings. This stand, especially in the latter case, has enormous implications. Suppose we come to the conclusion that the judgment of conviction of adultery, without more, will suffice to support a divorce decree. Will not the statistical curves for adultery prosecution soar as high as satellites? As a result divorce costs would go down considerably, since it is now the public prosecutor who, on complaint of the aggrieved spouse, has the costly task of proving the adultery, or other marital offense, of the erring spouse, while the divorce plaintiff reaps the fruits of the public effort.

Will it not result from such a proposal that the atmosphere surrounding marriage breakdown will become more and more vicious? Where parties now resort to a discreet and stereotyped proceeding which involves the husband's having been seen in a hotel room with an unknown blonde in a black and lacy nightgown, or the wife's taking a socially acceptable and enjoyable trip to Nevada, will there not be an incentive, especially on the part of the aggrieved spouse, to file a complaint with the public prosecutor, whether founded or not, in the hope of securing a conviction that will then serve as a divorce ground? Vice versa, will not prosecutors be tempted to follow up every divorce with a criminal prosecution? Will not such a scheme reverse the present trend of divorce law, which is "away from the fault principle," and accentuate fault, mens rea, or criminal guilt in matrimonial discord, contrary to all modern evidence which tends to prove that the attribution of guilt to any one party to an unstabilized marriage is erroneous?

According to our investigations there have been no such consequences where the reciprocal use of judgments is in vogue.[1] This may be due to the fact that the possibility of the reciprocal use of judgments is very little known. Perhaps we are doing the public a disservice by publicizing this mode of proceeding. But we do not think so.

First of all, the reciprocal use of judgments is necessarily restricted to cases where fault or no-fault is in issue—i.e., where the law still deems it wise and utilitarian to operate with the fault principle. Thus, it does not interfere with any trend away from the fault principle. If divorce were to be based entirely on the non-fault principle (*Zerruettungsprinzip—faillite*—breakdown principle) necessarily there could not then be any re-use of an existing judgment, and we should not be sorry about such a development. But the fact is that our laws, for the most part, are still clinging to the fault principle, and even where the non-fault principle has been introduced, it has not replaced the institution of divorce for fault entirely. In addition, matrimonial offenses, as we define them, include matters of nonsupport, desertion, cruelty to children, etc.—i.e., all offenses which tend to disrupt family harmony and stability, whether grounds for divorce or not, so that the problem of the reciprocal use of judgments will, in the foreseeable future, at least, stay with us no matter what happens on the divorce front.

In the second place, we do not think that the possibility of proving divorce grounds through public prosecutions will make for greater viciousness of dealings between estranged spouses. Again, evidence of such a development is lacking. The more commonly known reverse of the situation, of course, cannot serve us as an example. The public prosecutor stays his hand, as evidenced by the great disparity between the innumerable adultery divorces and the ridiculously few adultery prosecutions, not only because adultery prosecutions are commonly frowned upon, but also because the prosecuting attorney lacks an incentive which the aggrieved spouse may well have, namely, an urge for relief from personal suffering or a retaliatory attitude. Thus, the aggrieved spouse may disregard society's disapproval of adultery prose-

[1]In this connection it is interesting to note that the French Code of Criminal Procedure *(Code d'Instruction Criminelle)* permits aggrieved parties to join the criminal prosecution as civil complainants. After conviction the court may impose appropriate damage awards. After an acquittal the award of damages is still possible if the evidence satisfies the civil preponderance requirement. The difference in the quantum of required proof under French law is similar to that known to us in Anglo-American law. For detailed discussion see Freed, Aspects of French Criminal Procedure, 17 La. L. Rev. 730, 734-735 (1957). See also Hammelman, The Evidence of the Prisoner at his Trial: A Comparative Analysis, 27 Can. B. Rev. 652 (1949).

cutions and institute criminal proceedings against the erring spouse. As long as our law regards certain marital wrongs as crimes we frankly do not blame an aggrieved spouse for employing the strong arm of the law as an *ultima ratio* in her defense. But in this class of offenses, as in all others, it is the public prosecutor's function to guard against a misuse of proceedings where private passion and a retaliatory mood have led to an overzeal which is out of step with the community attitude. But, in any event, it might well be said that the possibility of instituting or following a divorce proceeding by public prosecution can serve as an additional deterrent against the erring spouse, although we realize that a sad marriage it is indeed, and hardly worth saving, which needs deterrence for continued existence.

Should adultery cease to be a criminal offense entirely and in fact, or even in law, as in a number of countries, there still would remain an abundance of matrimonial offenses where public prosecutions are both frequent and desirable. In such cases why should the civil plaintiff not be permitted to use the judgment of the defendant's criminal conviction to support his or her civil claim? Conversely, why should the civil defendant not be permitted to use the criminal acquittal as some evidence against the civil claim? The same should be true if the relation of proceedings is in the reverse order. But further policy speculation cannot proceed without a close alignment of our discussion with the rules of law, for it was in law, not public policy—more particularly in our courses on Criminal Law and Procedure, Domestic Relations and Evidence—that we have encountered this bothersome problem.

We were bound to be troubled by the logic and common sense, as a matter of legal reasoning, which seemed to have escaped a good many pleaders, judges and writers. Evidence rules are legal rules of policy, compromising between the values of fairness and expediency, aimed at uncovering a relative and relevant truth. Evidence rules, like other rules of the common law, have been developed through stare decisis. They are subject to the limitations of all precedents and serve useful purposes only when applied according to the fundamentals of legal reasoning. Again and again we find trial courts ruling that for the reason of the difference in the quantum of required proof between civil and criminal cases—and for various other reasons, of course—a reciprocal use of judgments to prove, or throw light on, controversial factual issues established thereby is quite out of the question. As we shall indicate below, appellate decisions and text books abound with such generalities. A defendant layman who is unaware of any differing standards of proof is tempted to classify the successful invocation of the above

exclusionary rule by his attorney as a typical lawyer's trick-out-of-the-bag, although it will appear quite silly to him that there can be any dispute about what has already been established in some other, or even the same, courtroom, and his pocketbook may already have been subjected to the effects of the earlier determination.

The logician may argue that if A is larger than B and covers all of B, then B is necessarily inherent in A, though the reverse is not at all true. This simply means that the larger burden of proof (beyond a reasonable doubt) in criminal cases necessarily covers the smaller burden of proof (preponderance of evidence or clear, cogent, and convincing evidence) in civil cases of the same fact complex, though the opposite is not at all true. Does it not follow that, *provided there is no other obstacle,* a judgment of conviction of adultery should be conclusive evidence in a subsequent divorce proceeding, and that only in the reverse order of proceedings should the proof of adultery through a prior (civil) judgment be treated cautiously and with some suspicion? Yet, courts will have no difficulty justifying by precedent that any reciprocal use of judgments is completely out of the question.

Does the failure of some courts to grasp the (always!) policy-affirming rules of logic indicate that rigid adherence to precedent may well lead to ridiculous results, or rather does it indicate that when a rigid (or apparently so!) norm conformity produces ridiculous and unsound results, something must be wrong with application of precedents?

Some time ago Professor Oliphant gave us a clear demonstration of the disturbing decline of stare decisis in modern times, and this demonstration was viewed with alarm. There stretches up and away from every precedent, Oliphant explained, at least one gradation of widening generalizations. Consider this example:

> "A's father induces her not to marry B as she promised to do. On a holding that the father is not liable to B for so doing, a gradation of widening propositions can be built, a very few of which are:
>
> "1. Fathers are privileged to induce daughters to break promises to marry.
>
> "2. Parents are so privileged.
>
> "3. Parents are so privileged as to both daughters and sons.
>
> "4. All persons are so privileged as to promises to marry.
>
> "5. Parents are so privileged as to all promises made by their children.
>
> "6. All persons are so privileged as to all promises made by anyone."[2]

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[2]Oliphant, A Return to Stare Decisis, 14 A.B.A.J. 71, 72-73 (1928). This was Professor Oliphant's inaugural address as president of the Association of American Law Schools, made at Chicago, Ill., on December 29, 1927.

Or consider the following example: In an action in trover between the owner of a horse and its impounder, the judgment was for the defendant impounder. This civil action was followed by a suit to recover a statutory forfeiture, in the nature of a criminal action and subject to rules of criminal evidence, between the same parties. Plaintiff impounder, a public official, sought to introduce the prior judgment in his favor as conclusive evidence of defendant horse owner's guilt. Affiirming the rule below, the supreme court held that a prior civil judgment cannot be thus introduced into evidence to show the defendant's criminal guilt, because the difference in the quantum of required proof would truly prejudice the defendant.[3]

The following propositions of widening generalization may be rested on this decision:

(1) In proceedings to recover a forfeiture a prior judgment in trover against the present defendant may not be used as conclusive evidence of the defendant's guilt.[4]

(2) In all cases of the sequence civil proceeding-criminal prosecution (thus also in matrimonial cases dealing with wives and not horses) a prior judgment against D may not be used as conclusive evidence of his guilt in the subsequent criminal prosecution.[5]

(3) In all cases of the sequence civil proceeding-criminal prosecution the prior civil judgment against D may not be admitted at all as evidence in the subsequent criminal prosecution.[6]

(4) In all case combinations, civil and criminal, whatever the sequence, the prior adjudication against D may not be used as any evidence of D's guilt in the subsequent proceeding.[7]

(5) In all case combinations, civil and criminal, whatever the sequence, any prior adjudication, whether for or against D, may not be used as any evidence of D's guilt or innocence in the subsequent proceeding.[8]

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[3]Riker v. Hooper, 35 Vt. 457 (1862), citing no authority other than sound policy and common sense.

[4]We do not hesitate to support this first proposition by a direct reference to Riker v. Hooper, supra note 3.

[5]McCormick, Evidence § 295 (1954), with exceptions presently not relevant. In State v. Bradneck, 69 Conn. 212, 215, 37 Atl. 492, 493 (1897), the court stated the holding of Riker v. Hooper, supra note 3, in these terms.

[6]In State v. Bradneck, supra note 5, the Connecticut court cited, properly, the case of Britton v. State, 77 Ala. 202 (1884), for this proposition and then proceeded to attach the case of Riker v. Hooper, supra note 3, with a "so, in."

[7]Holding and dicta of State v. Bradneck, supra note 5.

[8]In this form the rule has finally found a resting place in the practitioners' texts. See, e.g., 2 Wharton, Criminal Evidence § 639 in conjunction with § 640 (12th ed. 1955). State v. Bradneck, supra note 5, is cited in both sections; Riker v. Hooper,

A court may pick up the rule at any one of these stages of generalization. Suppose a court seizes upon the rule at stage five in a case involving a prior conviction on a plea of not guilty and holds this conviction inadmissible as evidence. Widening generalizations may now be built on this proposition—e.g.,

(a) always so when D pleaded not guilty and was convicted,
(b) always so when D pleaded not guilty, whether convicted or not,
(c) always so when D was convicted, whatever the plea,
(d) always so whatever the plea and disposition.

Policies tend to be lost sight of in the course of legal development by stare decisis. Thus, should we ask publicly, as we do at stage 5(d) above, which appears to represent a textbook rule, whether the policy reasons behind the rule still serve the original purpose of our first precedent, or whether indeed a new policy may not have been developed which may be inconsistent with the old policy, we may well get angry responses: Keep public policy out of the law. Stare decisis is the best policy of the law, since it rests on the principle of precedent by which every new case must be decided in accordance with the principles of an already existing case. Has that not been done in the case of our evidence example? Or in the case of Oliphant's frustrated suitor?

Courts and writers have been guilty of building up gradations of widening generalizations from originally narrow propositions to dizzy and lofty heights, so high indeed that logic can no longer breathe. The policy considerations underlying the original and narrow propositions quite clearly are no longer being served by the broadened principles. Societal need and functional realism have been sacrificed on the altar of abstraction. The concepts of policy and logic, so much discredited in the law of today, must be restored to their empty pedestals if we want to return from the uncommon law to the common law, from misleading cases to leading cases, from stare dictis to stare decisis. Policy and logic are of equal importance for legal reasoning; in fact, policy considerations can hardly proceed without logic.

The two types of cases, civil and criminal, here discussed, have a lot in common, and we mean more than the moral (and legal) hangover after an immoral (and illegal) frolic and detour. In different spheres of normativity both are concerned with breaches of legal-

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supra note 3, in one. It should be noted that the sequence of broadening generalization could have been presented in a different order.

ethical[9] norms followable, to be followed or actually followed by official counteraction of a corrective nature. At one time these counteractions emanated from the same source, the ecclesiastical courts.[10] Thus, at such a time both civil and criminal actions existed within the same sphere of normativity. No distinctions, evidentiary or otherwise, could be found. It was a matter of pure chance, or, if you wish, a lack of desire to disturb the developing symmetry of a legal system distinguishing between civil and criminal, which eventually resulted in the split personality, differently result-oriented (though not purpose-oriented, to be quite sure), of the matrimonial action. This split penetrated deeply. It operated on all levels, most of all on the evidentiary, since from now on the criminal matrimonial action was subject to the emerging evidentiary rules governing all criminal actions, and, similarly, the civil matrimonial action was subject to those governing all civil actions. The policy of all matrimonial actions, civil and criminal, we venture to surmise, cannot be said to have changed. Yet the results achieved by application of rules of evidence which have been carried to lofty abstractions of immensely widened generalization must, we fear, be regarded as disturbing. The use of the exclusionary rules of which we speak is not policy-oriented.

Need it be so? The answer is obvious for those who follow a policy-oriented approach to law.[11] What is our ultimate aim? It is, of course, the preservation of the social health and integrity of the family and, through this, of society and all its individual members. This the law proposes to achieve within a framework of basic rules providing for (1) the persuading of the persuasible, (2) the scaring of the scarable into familial fidelity, duty, service, obedience and stick-to-itiveness, and (3) by compensating the obviously aggrieved victim of society's frustrated efforts to reach the aim through (1) and (2), so that neither these victims nor society itself need suffer unduly, nor that the absconding scoundrel may obtain a windfall of personal and financial satisfaction contra to the standards which he flouted. Which of these objects is or should be of a criminal, and which of a civil nature? And at what level and to what extent does the criminal consequence

[9]Although not all criminal offenses are ethical violations, we are not aware of any matrimonial offense, in the widest possible sense, which is not commonly regarded as unethical.

[10]1 Bishop, Criminal Law 20-21 (9th ed. 1923); 1 Bishop, Marriage and Divorce 36 (5th ed. 1878); and see Foster, Dependent Children and the Law, 18 U. Pitt. L. Rev. 579, 579-81 (1957).

[11]For a recent exposition see McDougal, Law as a Process of Decision, a Policy-Oriented Approach to Legal Study, 1 Nat'l L. For. 53 (1956), and citations therein.

effectuate the policy better than the civil? Who would be bold enough to contest that those aims and objectives, as well as the means for their accomplishment, are interdependent and indissoluble?

It is not backwardness which caused our forebears to wash all of the family's soiled (not to say dirty) laundry in the same brook. It was sheer common sense. Fortunately, all indications are to the effect that we are returning to common sense in the disposition of matrimonial cases. The Foster Plan,[12] to mention only one of the best among many recent proposals, envisages a single family court with jurisdiction over status adjustment, property settlement, child custody and support, etc. The "preventive medicine" to be dispensed by such a court would include criminal sanctions for offenses hostile to family stability—e.g., adultery, assault and battery, etc. Such a court would also take charge over the erring minor family member. The whole juridical complex of the unstabilized family would be dealt with by the family judge. Such a family judge bears a close resemblance to the old-fashioned family doctor who once treated all medical ills of all members of the family. (But unlike the old-fashioned family doctor, the new family court judge would be assisted by a staff of highly trained specialists of the relevant sciences.) If carried to its logical perfection, the Foster Plan would rigidly provide that one and the same judge (not just the same court) must handle all problems of the same family. Quite aside from the informality inherent in and necessary and proposed for such family court proceedings, problems arising out of the lawyer's orderly and sober habit of evidentiary norm compliance will then quite naturally become reduced to a minimum, as it once was in the ecclesiastical court. Would it not then be rather odd, to say the least, for Judge X to disregard that he just sentenced Mr. D for adultery when he now has to decide whether or not Mrs. D is entitled to a divorce for Mr. D's adultery? As a matter of fact, is our behavior not rather odd today, especially in the typical American county where the same judge handles all cases anyway and more often than not sits without a jury in the case of petty offenses of a matrimonial nature?

We shall be happy if we should succeed in showing at least that for the present, and perhaps until the true family court will alleviate our problems, bench and bar may be well counseled to approach problems of the reciprocal use of judgments in civil and criminal matrimonial cases with the objective of such actions in mind. Moreover, those who

[12]See Note, The Family in the Courts, 17 U. Pitt. L. Rev. 206 (1956), q.v. for other proposals.

realize the logical and functional position of the judgment type in each of our various case types cannot be misled by unprecedents in which judges failed to grasp these differences. If none of the texts states the rules quite as here expressed, and if even the Model Code of Evidence does not correspond fully to our analysis and wishes, we humbly suggest that they may need an editorial re-examination. Not even the often repeated nonsense can properly claim to truly represent the common law, especially if cases are still at hand to show us the true rule. Perhaps it is unfortunate that even the true rule as fully supported by properly reasoned cases does not correspond entirely to our policy-oriented demands. This is due to the eternal lag of the law behind newly developing policies or views about policies. There is, of course, nothing which would prevent those charged with the development of the law from initiating necessary changes.

II. Evidentiary and Conclusive Effect of a Judgment

Any technical consideration of the reciprocal use of judgments must necessarily begin with observations on the two quite distinct theories for the employment of prior judgments to prove disputed facts common to both. One is the res judicata or conclusive effect of a judgment; the other is its effect as evidence only. As to the first, a distinction must be made between the use of a prior judgment as an absolute bar to a later action and the use of a judgment as a conclusive adjudication of some issue which is material to the later cause of action.[13] Thus, while as a general proposition no one would assert that a prior civil judgment would bar a later criminal action, or vice versa, the question still arises whether the prior judgment is—or should be—conclusive of, or tending to prove, the facts or issues common to both actions and necessarily adjudicated in the first action.[14]

Differing parties, differing burdens of proof and differing rights to trial by jury, among others, may make it unjust always to treat a prior judgment as conclusive of the fact or issue in a later proceeding.[15] Where such considerations govern validly, the question still remains whether or not a prior judgment should nevertheless be received in evidence and considered by the trier of fact, together with other evidence, to determine the truth or falsity of the fact in issue. Analytically, judgments are hearsay opinions when used as evidence of the fact in dispute.[16] Even so, their admissibility would be fully justified

[13]2 Freeman, Judgments §§ 676-77 (5th ed. 1925).
[14]Id. at § 677.
[15]Id. at § 654.
[16]5 Wigmore, Evidence § 1671a (3d ed. 1940).

by the exception to the hearsay rule governing official written statements.[17] Therefore, we are squarely faced with the essential distinction between a judgment as conclusive and a judgment as evidence of the facts found in the prior civil or criminal action. This is a distinction which the courts have not ordinarily made when dealing with the reciprocal use of judgments in civil and criminal cases and they have ordinarily denied admissibility solely on the basis of the principles governing the res judicata or conclusive effect of such judgments.[18] But, as Wigmore says:

> "[M]ay not a judgment in a prior cause be at least *admissible* as evidence when the issue there investigated was substantially the same as the present one?
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> "The analogies of other rules would seem to justify this, on principle. Many kinds of returns, reports, and certificates, made by an official who has investigated in the course of duty, are receivable, both at common law and by statutes. . . . Is not the finding of a judge, or the verdict of a jury, based on at least as thorough an inquiry as those other reports and certificates? Has it not some value as evidence, even though not conclusive?"[19]

Is it not odd that Wigmore must ask this question which on policy grounds should clearly have an affirmative answer (or more) in the law?

III. Use in Criminal Matrimonial Proceedings of Judgments Rendered in Prior Civil Matrimonial Proceedings

A. *In General.*

The general rule has developed that civil judgments may not be received in criminal prosecutions to prove any disputed fact on which the judgment was rendered in the civil proceeding.[20] This rule has been applied with equal force in related civil and criminal matrimonial cases and has been grounded on the principle of res judicata.[21] The nature of the principles of res judicata explains the courts' preference over the official-written-statements exception to the hearsay rule, thus retaining uniformity as to all instances of the civil-criminal se-

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[17]4 Wigmore, op. cit. supra note 16, at § 1346a; McCormick, op. cit. supra note 5, at § 295.

[18]McCormick, op. cit. supra note 5, at § 295.

[19]4 Wigmore, op. cit. supra note 16, at § 1364a.

[20]2 Wharton, op. cit. supra note 8, at § 639; McCormick, op. cit. supra note 5, at § 295; 5 Wigmore, op cit. supra note 16, at § 1671a; see also Annot., 87 A.L.R. 1258 (1933).

[21]McCormick, op. cit. supra note 5, at § 295.

quence, although a policy-oriented choice might have been otherwise, thus retaining consistency as to all matrimonial case combinations, whatever the sequence.

We must direct our analysis, in the first instance, toward the courts' rationale of the exclusionary rule on a basis of the principles of res judicata, namely, that a civil matrimonial judgment cannot be received as proof of a disputed fact in a criminal prosecution because of a difference in the parties[22] and the quantum of proof.[23] Usually the courts go no further than merely to recite one, or the other, or both of these reasons to support their adherence to the general rule. Occasionally they assign other and less important reasons in addition. The courts' unquestioned reliance on these reasons for the rule results in its application in many cases in which, it is submitted, the rule ought not to have any application. The indiscreet application of the rule confounds the distinction between the use of a judgment as *conclusive* and as *evidence,* and often obscures, it would seem, the permissible limits of the exclusionary rule.

Turning now to a consideration of the use of divorce judgments as conclusive evidence, the first question that arises is whether the parties do differ. Has the state, as a party in the criminal proceeding, been represented in the civil action? It is said that:

> "An action for divorce is something more than a private controversy. It has been repeatedly declared [by the courts] that the state is a third party to every divorce proceeding. This is usually only figuratively true, though in some states the public is actually represented by a friend of the court or divorce counsel, who must be served with the complaint or petition, examine into the merits of the case and see that there is no collusion, report to the court, and approve various papers."[24]

Therefore, in states like West Virginia, where by statute an attorney may be appointed a "divorce commissioner" with the duty to investigate all divorce suits, to appear at the trials and to examine witnesses to prevent fraud and collusion in divorce cases and thereby to defend the interests of the state,[25] the state itself is a third party to the

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[22]E.g., State v. Rogers, 198 S.C. 273, 17 S.E.2d 563 (1941); State v. Downing, 54 R.I. 455, 175 Atl. 248 (1935).

[23]E.g., State v. Snyder, 157 Ohio St. 15, 104 N.E.2d 169 (1952); State v. Rogers, supra note 22; State v. Downing, supra note 22.

[24]1 Nelson, Divorce and Annulment § 1.07 (2d ed. 1945). See also Keezer, Marriage and Divorce § 243 (3d ed. 1946).

[25]The West Virginia statute provides: "The circuit court of each county, or the judge thereof in vacation, may in his discretion, appoint a competent attorney in each county as a commissioner in chancery, to investigate divorce cases, who

divorce proceedings in a very real sense and must be so considered for purposes of res judicata—i.e., on the subsequent consideration whether a judgment in a divorce action is admissible to prove a disputed fact in a related criminal prosecution.[26]

Similarly, some jurisdictions in which the appointment or appearance of a divorce commissioner or proctor is not provided for, or not mandatory, adhere to the rule that the court is the representative of the state to protect the state's interest in the divorce proceeding. Here too the state has the status of a party in the civil action and should be so considered for purposes of res judicata in the subsequent criminal prosecution. Thus in the Indiana case of *Yeager v. Yeager* the court said:

> "The state is a third party to all suits for divorce.... '[T]he obligations imposed [by the marriage relation] ... are somewhat different from those resting upon parties in a mere contract for the purchase of a mule or a hog.' ... The interests of the state in a divorce case are in keeping of the court. Whenever in the course of the trial it appears that the action is collusive or barred, it is the duty of the court, regardless of the pleadings of the married parties, to fully inquire of its own motion, as the representative of the state, into such facts or circumstances, and to act in accordance with the facts thus developed."[27]

Similar expressions can be found in the case authorities from other jurisdictions.[28] If the rule as expressed in the *Yeager* case is only

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shall be designated as 'divorce commissioner.' He shall be a man of good moral character, of standing in his profession, and a resident of the county for which he is appointed, and shall, before assuming the duties of such commissioner, take the oath required of other commissioners in chancery; such commissioner shall discharge his duties and hold his office at the pleasure of the court, and may be removed at any time by the court. It shall be the duty of the divorce commissioner to investigate all divorce suits; to appear at all trials and examine witnesses when necessary, and defend the interests of the state; to bring before the court, at the trial, all witnesses necessary to develop the true facts, and generally take all steps to prevent fraud and collusion in divorce cases." W. Va. Code Ann. § 4724 (1955). See Harbert v. Harbert, 122 W. Va. 603, 11 S.E.2d 748 (1940).

[26]See further 1 Nelson, op. cit. supra note 24, at § 1.07; 2 id. at § 22.08; Annot., 22 A.L.R. 1112 (1923).

[27]Yeager v. Yeager, 43 Ind. App. 313, 315, 87 N.E. 144, 145-46 (1909). See Mendenhall v. Mendenhall, 116 Ind. App. 545, 552, 64 N.E.2d 806, 809 (1946).

[28]These include: Gage v. Gage, 89 F. Supp. 987 (D. D.C. 1950); Cannon v. Cannon, 80 F. Supp. 79 (Sup. Ct. D.C. 1936); Ollman v. Ollman, 336 Ill. 176, 71 N.E.2d 50 (1947); Hopping v. Hopping, 233 Iowa 993, 10 N.W.2d 87 (1943); Lickle v. Boone, 187 Md. 579, 51 A.2d 162 (1957); Cahaley v. Cahaley, 216 Minn. 175, 12 N.W.2d 182 (1943); State ex rel. Couplin v. Hostetter, 344 Mo. 770, 129 S.W.2d 1 (1939); Duerner v. Duerner, 142 N.J. Eq. 759, 61 A.2d 307 (1948); Pashko v. Pashko, 63 Ohio L. Abs. 82, 45 Ohio Op. 498, 101 N.E.2d 804 (C.P. Cuyahoga County 1951); Cortese v. Cortese, 163 Pa. Super. 553, 63 A.2d 420 (1949); Puhacz v. Puhacz, 55 R.I.

"figuratively true," then the courts do not mean what they say.[29] In other words, if the interest of the public *qua* state in a divorce proceeding is distinct from its interest in having every case rightly decided,[30] then the view that the state is a party through representation by the court is more real than apparent. Under those circumstances, the courts cannot refuse to admit a divorce judgment in a criminal prosecution to prove a disputed fact in issue for the reason that the state was not a party to the divorce action, as was done in the Rhode Island case of *State v. Downing*.[31] Conversely, in Ohio, where the rule obtains that the state is a party to every divorce proceeding and is represented by the court,[32] the Supreme Court, in *State v. Snyder*,[33] while refusing on other grounds to admit a divorce judgment in evidence in a prosecution for nonsupport, does not appear to have committed the error of supporting its ruling on the ground that the parties differed.

Therefore, in those jurisdictions where the state is a party, either by a statutory representative or through the court's protecting the interests of the state, the refusal to admit a prior judgment in a divorce action in a criminal prosecution because the state was not a party to the civil action seems unwarranted. Of course, where the state is not a party to the divorce proceedings, it has been held properly that the civil judgment is inadmissible to prove the criminal guilt. Thus, in *Coleman v. State*[34] the court held, in a prosecution for abandonment after seduction and marriage, that there was no error in refusing to admit a prior divorce decree in defendant's favor since the state was not a party to the divorce proceeding and could not thus be bound by that decree.

Second, has the defendant, as a party in the criminal proceeding, been a party to the civil action? If the husband or wife is the defen-

306, 180 Atl. 377 (1935), but see Smith v. Smith, 69 R.I. 403, 34 A.2d 726 (1943), where the court said the "state is virtually a party," but otherwise cited Puhacz v. Puhacz, supra, with approval; Bennett v. Bennett, 137 W. Va. 179, 70 S.E.2d 894 (1952); Smith v. Smith, 116 W. Va. 271, 180 S.E. 185 (1935); Wass v. Wass, 41 W. Va. 126, 23 S.E. 537 (1895). See 1 Nelson, op. cit. supra note 24, at § 1.07.

[29]1 Nelson, op. cit. supra note 24, at § 1.07.

[30]See Armour v. Armour, 138 N.J. Eq. 145, 158, 46 A.2d 826, 834 (1946).

[31]54 R.I. 455, 457, 175 Atl. 248, 249 (1935). At the time this case was decided, the rule that the state is a party seems to have been more articulate than it is now. See Puhacz v. Puhacz, supra note 28. Thus, what effect, if any, the dictum of the court in Smith v. Smith, supra note 28, will have on future decisions, is a matter of conjecture.

[32]Pashko v. Pashko, supra note 28.

[33]157 Ohio St. 15, 104 N.E.2d 169 (1952).

[34]77 Tex. Crim. 600, 179 S.W. 1172 (1915).

dant in the criminal action, the answer is clearly in the affirmative. The question is not so easily answered if a co-respondent is the defendant in the criminal proceeding. In the absence of statute, a co-respondent has no right to intervene in a divorce action to protect his reputation.[35] In some states, however, statutes authorize a co-respondent to appear in the divorce action and to defend insofar as the issues may affect him.[36] For example, the West Virginia statute provides that:

> "Any one charged as a particeps criminis shall be made a party to a divorce suit, upon his or her application to the court, subject to such terms and conditions as the court may prescribe."[37]

If, pursuant to such a statute, a co-respondent is made a party to the divorce proceeding, the refusal to admit the judgment in a criminal proceeding against him on the ground that he was not party to the civil action would likewise be unwarranted.[38]

To conclude, if, under applicable state law, both the state and the defendant are parties to the civil matrimonial action, the rule of non-admissibility in a later criminal action cannot be defended on the ground that the parties are different. If this particular reason for the rule is to be defended, it can only be done with clear statutory or case support in the law of the state of the forum.

Assuming that both the state and defendant were parties to the civil action, we must next consider the second principal reason given by the courts for excluding divorce judgments in criminal prosecutions as conclusive proof of facts in dispute in the divorce action. Does the quantum of proof differ? Yes, of course. In divorce cases clear, cogent and convincing proof is required,[39] while in criminal cases, proof beyond a reasonable doubt must be established. But the application of the general rule should be subject to qualification depending upon whether the judgment in the divorce action is rendered against or for the defendant.

The general rule, it would seem, is correctly applied insofar as it prohibits the introduction in evidence in a criminal prosecution of a divorce judgment which has been rendered against the defendant as

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[35]1 Nelson, op. cit. supra note 24, at § 5.06; 2 id. at § 22.07.

[36]Ibid.

[37]W. Va. Code Ann. § 4712 (1955). See also 1 Nelson, op. cit. supra note 24, at § 5.07.

[38]Cf. 1 Nelson, op. cit. supra note 24, at § 5.06, especially the discussion of the res judicata effect of a divorce judgment as to a co-respondent in a subsequent suit for alienation of affections or criminal conversation.

[39]3 Nelson, op. cit. supra note 24, at § 26.20.

conclusive proof of any fact upon which the divorce decree was rendered. Any other rule would be unfair to the defendant under present standards, since it would deprive him of the benefit of the more stringent burden of proof required in criminal cases. Several cases have so held,[40] the most recent of which is the Ohio case of *State v. Snyder*.[41] Here, the husband-defendant was prosecuted for nonsupport pursuant to statute. The trial court, over the objection of the accused, admitted the record of judgment in a prior divorce action which determined that two children were born as issue of the marriage and ordered the defendant to pay for their support. In addition, the trial court rejected evidence offered by the defendant tending to show that he was not the father of the children, and held that the state had established beyond a reasonable doubt by introducing the prior divorce judgment in evidence that the defendant was the father of the children. In reversing an affirmance of the judgment of the trial court by the Court of Appeals, the Supreme Court held that it was error for the trial court to admit the divorce judgment and to refuse to permit defendant to offer evidence to prove he was not the father of the children. It held that the judgment was not admissible since, in a criminal prosecution, the state must prove its case beyond a reasonable doubt and that the proof on which the judgment in the divorce proceeding rested did not have to satisfy this requirement.

One may profitably conjecture about the question whether the result on appeal would have been the same if the trial court had merely admitted the judgment as evidence of paternity and, at the same time, had allowed the defendant to offer evidence tending to prove he was not the father. In other words, even in these classes of cases where the judgment in the divorce proceeding is against the defendant, must we still not draw a distinction between the use of the judgment as conclusive of the fact in dispute and its use as evidence of that fact and admit it for the latter purpose?

It may be, as Wigmore puts it, that "the discrimination between using [judgments] as conclusive and using them as merely admissible, is not commonly emphasized nor readily grasped."[42] To be sure, only one case involving a related divorce proceeding has been found in

[40]State v. Snyder, 157 Ohio St. 15, 104 N.E.2d 169 (1952); Kilpatrick v. People, 64 Colo. 209, 170 Pac. 956 (1917); State v. Sharkey, 73 N.J.L. 491, 63 Atl. 866 (1906); State v. Bradneck, 69 Conn. 212, 37 Atl. 492 (1897); see Dunagain v. State, 38 Tex. Crim. 614, 44 S.W. 148 (1898).

[41]157 Ohio St. 15, 104 N.E.2d 169 (1952).

[42]5 Wigmore, op. cit. supra note 16, at § 1671a.

which the question was squarely put to a court of record. In *State v. Bradneck*[43] the defendant was prosecuted for nonsupport of his wife. In his defense he sought to prove through testimony that his wife had been guilty of adultery. The state, in rebuttal, offered and the trial court received in evidence the judgment in a divorce action brought by the defendant against his wife on grounds of adultery in which he sought and failed to prove the acts of adultery with which he had charged his wife in the criminal proceeding. The trial court, in its charge, told the jury that while such judgment was not to be considered conclusive evidence in the case, it ought to be given serious consideration. In holding that the trial court committed prejudicial error in admitting the judgment, the Supreme Court said that the error was not relieved by the court's instruction to the jury to the effect that the evidence was not conclusive; that a judgment is either conclusive or it is nothing, otherwise there would be no means by which the court could measure and determine its effect. But such a view ignores the plain distinction which can and ought to be made between the conclusive effect of a judgment and its admissibility in evidence as a fact to be considered in light of the other evidence offered to determine the disputed issue. Certainly, one could not say, for example, if the trial court in the *Snyder* case had admitted the divorce judgment in evidence, and permitted the defendant to offer rebuttal evidence of nonpaternity, that the judgment was being given a conclusive effect. At most, it would have been prima facie evidence of the fact of paternity which would have had the effect of requiring the defendant to produce evidence showing his innocence thereof.

What should be the rule where there is a finding in favor of the defendant in the divorce proceeding? If, on account of the difference in proof, it is proper and fair to exclude a divorce against the defendant as conclusive of the disputed issue in the criminal prosecution, must it not follow, providing the parties are the same, that a finding of defendant's innocence in a divorce proceeding should be admissible in the defendant's behalf as conclusive of the disputed face since, if he cannot be found guilty by clear and satisfactory evidence, how can he possibly be found guilty of the criminal offense beyond a reasonable doubt? In the few cases found where this element has been present the courts have not even considered this question and have consistently adhered to the rule that civil judgments are inadmissible in criminal prosecutions. Of these, three have expressly cited, as among

[43]69 Conn. 212, 37 Atl. 492, 43 L.R.A. 620 (1897).

their reasons, that the quantum of proof differs.[44] The others have merely refused to admit the prior judgments, although the result can possibly be sustained on other grounds.[45]

What clearer example could be adduced to demonstrate the misuse of precedent, or the use of an unprecedent? A rule stemming from a narrow precedent—i.e., restricted to a finding of the divorce ground, was stated too broadly. It was phrased in terms of a higher abstraction and thus misled the courts to use it for another narrow case category not identical with the rule-creating precedent, but encompassed by the broadened abstraction. Such errors could not occur if judges would examine whether the abstraction expressed by the rule of a precedent is functionally consonant with the policy which the abstraction-creating precedent sought to achieve. Here, quite clearly this had not been done.

The most recent case is *State v. Rogers,*[46] decided in South Carolina in 1941. It is of particular interest because the majority of the court went to considerable length in considering the admissibility of civil divorce judgments in criminal prosecutions, even though the point was not necessary for a determination of the case. The defendant was prosecuted for nonsupport and the trial court admitted a divorce decree determining defendant's non-liability for support. He was acquitted and the Supreme Court affirmed, holding that the state had no right to appeal from a judgment of acquittal. The court went on, however, to say that the trial court had erred in admitting the divorce judgment since the parties in the two different actions were not the same and the burden of proof differed. For the reasons already given, it is submitted that the court erred in relying upon the difference in proof as a valid reason for concluding that the divorce decree was inadmissible as conclusive proof of his innocence to the charge of nonsupport,[47] since the burden of proof in criminal prosecutions is greater than in civil actions. In *State v. Rogers,* however, the court was actually confronted with "preponderance" evidence, sufficient to overcome certain presumptions in criminal cases—i.e., in this case the burdens of proof were actually identical in both the civil and the

[44]State v. Rogers, 198 S.C. 273, 17 S.E.2d 563 (1941); State v. Downing, 54 R.I. 455, 175 Atl. 248 (1935); Coleman v. State, 77 Tex. Crim. 600, 179 S.W. 1172 (1915).

[45]See Commonwealth v. Simmons, 165 Mass. 356, 43 N.E. 110 (1896); Bell v. State, 65 Fla. 505, 62 So. 654 (1913).

[46]198 S.C. 273, 17 S.E.2d 563 (1941).

[47]The concurring judge thought the case presented an exception to the general rule of non-admissibility. 198 S.C. at 278-79, 17 S.E.2d at 565. He did not elaborate on the nature of the exception, though it seems that he was alluding to the exception which permits the use of a judgment to prove status.

criminal proceeding.[48] No statutory or case authority has been found covering the status of the state as a party to divorce actions in South Carolina. If, as intimated in the opinion of the court, the state was not a party to the divorce action, then the view of the majority of the court seems correct, so far as the conclusive effect of the divorce judgment is concerned, for the reason that the parties differed. But the divorce judgment should nevertheless have been admissible as evidence of the criminal offense charged. This distinction was recognized by the majority of the court, but not applied, since it concluded that in either case the principles controlling res judicata or conclusive effect of the judgment prevented its use in the criminal prosecution.

B. *Exceptions to the General Rule.*

There are certain well defined exceptions to the over-generalized rule that prior civil judgments are not admissible in criminal prosecutions and these exceptions have been applied in the domestic relations area. In the first place, a judgment is always admissible as conclusive of the fact of its existence and rendition.[49]

Second, in order to establish status, when that is material, the judgment of a civil domestic relations suit may be introduced in a criminal prosecution. For example, in prosecutions for bigamy, the state may introduce a decree divorcing the accused from his former wife, rendered after the alleged bigamous marriage took place, to prove that the wife was living and married to the defendant at the time of the alleged bigamous marriage.[50] Conversely, the defendant may also introduce a divorce decree to show his single status prior to an alleged bigamous marriage.[51] But, even with this exception, at least one court has confused the application of the exclusionary rule and prohibited the introduction into evidence of a civil domestic relations judgment.[52] According to Freeman, divorce judgments constitute conclusive proof

[48]Note the opinion of the concurring judge on this point: "... the measure of proof is the same, since in this criminal prosecution, the respondent had to establish 'just cause or excuse' by the preponderance or greater weight of the testimony, as he did in the civil actions." 198 S.C. at 297, 17 S.E.2d at 656.

[49]State v. Goodrich, 14 W. Va. 834, 848-49 (1878). See also 2 Freeman, op. cit. supra note 13, at § 655.

[50]State v. Ashley, 37 Ark. 403 (1881). For similar cases see State v. McClelland, 152 Iowa 704, 133 N.W. 111 (1911); Oliver v. State, 7 Ga. App. 695, 67 S.E. 886 (1910); Pontier v. State, 107 Md. 384, 68 Atl. 1059 (1908); cf. Adkisson v. State, 34 Tex. Crim. 296, 30 S.W. 357 (1895).

[51]Commonwealth v. Lucas, 158 Mass. 81, 32 N.E. 1033 (1893). See Halbrook v. State, 34 Ark. 511 (1879); State v. Goodrich, 14 W. Va. 834 (1878).

[52]Martin v. State, 19 Ala. App. 251, 96 So. 734 (1923).

of the question of status.[53] However, the decisions do not appear to support any such categorical conclusion. One court has held that such judgments constitute prima facie evidence of status,[54] while other courts, though holding them admissible, are silent on the weight such judgments should receive.[55] Since a decree of divorce, as affecting the status of the parties, is regarded as a judgment in rem, the better view is that it should be given a res judicata or conclusive effect in the criminal prosecution.[56]

Third, purely collateral questions which do not bear upon the guilt or innocence of the defendant in the criminal prosecution may be proved by a civil domestic relations judgment. For example, such judgments may be offered to establish the competency of a witness to testify against the defendant,[57] to establish the identity of persons,[58] and other collateral matters.[59] Here, however, the judgments should not be used as conclusive of the facts in dispute unless the usual requirements of a judgment as an estoppel are met, that is, identity in parties and proof.

IV. Use in Civil Matrimonial Proceedings of Judgments Rendered in Criminal Matrimonial Proceedings

A. *In General.*

We are not concerned with judgments in criminal prosecutions which are, in themselves, grounds for divorce. Thus, in forty-five American jurisdictions conviction and imprisonment for a felony is a ground for divorce.[60] In such a case, the judgment would necessar-

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[53]2 Freeman, op. cit. supra note 13, at § 658.

[54]State v. Ashley, 37 Ark. 403 (1881).

[55]See cases cited at notes 50 and 51 supra.

[56]2 Freeman, op. cit. supra note 13, at § 906.

[57]State v. Dixson, 80 Mont. 181, 260 Pac. 138 (1927).

[58]State v. Herren, 173 N.C. 801, 92 S.E. 596 (1917).

[59]Divorce decree admissible in evidence in Coy v. State, 75 Tex. Crim. 85, 171 S.W. 221 (1914), to show lack of diligence of defendant in ascertaining the fact of divorce from previous wife; in State v. Hendrix, 87 Mo. App. 17, 25 (1901), to show "the intention of the defendant to get rid of his wife entirely instead of to support her as he swears he always meant to do"; and in Commonwealth v. Ham, 156 Mass. 485, 31 N.E. 639 (1892), to rebut the husband's evidence of his wife's misconduct, used as a defense in the prosecution of the husband for non-support.

[60]Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Vir-

ily be admissible in the divorce action to establish the divorce ground. Rather, we are here concerned with the use of criminal judgments in matrimonial proceedings to prove disputed facts on which the judgment was rendered in the criminal proceeding.

The general rule is stated by Wharton as follows:

> "A judgment rendered in a criminal action, when offered in a civil action to establish the facts upon which it was rendered, is not admissible as evidence of such facts."[61]

Conversely, the Model Code of Evidence rule 521, provides:

> "Evidence of a subsisting judgment adjudging a person guilty of a crime or a misdemeanor is admissible as tending to prove the facts recited therein and every fact essential to sustain the judgment."[62]

So far as matrimonial cases are concerned, neither source can be said to reflect the existing law. However, the proposed Model Code rule, while bold and contrary to the weight of authority, seems generally correct in principle.

B. *Admissibility Based on Nature of Plea and Disposition.*

An analysis of this phase of our subject requires us to distinguish between four major case types of pleas and dispositions—i.e., where the defendant, in the criminal action, pleads: (1) nolo contendere with leave of court; (2) guilty and is convicted; (3) not guilty and is convicted; and (4) not guilty and is acquitted.

(1) *Pleas of Nolo Contendere.* Since it is a significant characteristic of such a plea that it admits guilt for purposes of this criminal proceeding only and that therefore it cannot be used against the defendant as an admission in a subsequent civil litigation involving the same issues,[63] the admission of a judgment based upon such a plea as conclusive proof of, for example, a ground of divorce, would destroy any effect that such a plea would otherwise have. In the North Carolina case of *Briggs v. Briggs*[64] the court held that a criminal judg-

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ginia, Wisconsin, Wyoming, Alaska, District of Columbia, Hawaii, Puerto Rico, Virgin Islands. Mackay, Marriage and Divorce 69 (2d ed. 1955).

[61]2 Wharton, op. cit. supra note 8, at § 640.

[62]Model Code of Evidence rule 521 (1942). Compare, however, rule 63 (20) of the Uniform Rules of Evidence which limits admissibility to judgments of conviction for felony. Handbook, Nat'l Conf. of Comm. on Uniform State Laws 206 (1953).

[63]Abbot, Criminal Trial Practice 153 (4th ed. 1939); Puttkammer, Administration of Criminal Law 172 (1953).

[64]215 N.C. 78, 1 S.E.2d 118 (1939).

ment in a nonsupport action based on a plea of nolo contendere was not res judicata—or conclusive—of the defendant's right to support pending the litigation in a subsequent divorce action. On the other hand, there is one decision from which it may be inferred that a criminal judgment based on such a plea was not to be regarded as evidence at all in the matrimonial proceedings.[65] If the court in this case meant that such a judgment has no evidentiary value whatsoever, then the decision seems clearly wrong. Even a judgment based upon a plea of nolo contendere should have some value as evidence, because it is quite clear that this plea has always been understood as merely preventing its use as an admission in subsequent proceedings. Nothing has ever been said to extend this restriction to other rules of admissibility—i.e., the admissibility of the judgment under the official-written-statements exception to the hearsay rule.[66] This is the view taken in the comments to Model Code rule 521 and it seems sound in principle.[67] In such a case, the defendant is not foreclosed, in the divorce proceeding, from disputing any evidential value which the criminal judgment based upon his plea of nolo contendere might have.

(2) *Convictions Based on Pleas of Guilty.* The record in a criminal case showing a plea of guilty may be introduced in a civil proceeding growing out of the same offense, but the record in such cases is ordinarily not admitted as a judgment establishing the fact.[68] Rather, it is admitted as a confession or admission of the defendant in the criminal prosecution.[69] Wharton correctly treats this as an ex-

[65]See Wright v. Wright, 98 N.J. Eq. 528, 131 Atl. 94 (1925). In this case the judgment was inadmissible for the additional reason that the offenses were not identical—i.e., keeping a disorderly house; adultery. See also Johnson v. Johnson, 78 N.J. Eq. 507, 80 Atl. 119 (1911), but non vult plea held admissible to discredit defendant.

[66]It might be argued that when the plea of nolo contendere was developed, with a certain policy in mind, one thought of total prohibition of its use in a subsequent civil proceeding. The mention of "as an admission" merely indicated the fact that any other basis of possible admissibility was not recognized. This may well be so. A long overdue reform of the plea will have to address itself to the problem on policy grounds.

[67]See Model Code of Evidence rule 521 (1942), and comments thereto.

[68]2 Wharton, op. cit. supra note 8, at § 636.

[69]See cases cited at 2 Wharton, op. cit. supra note 8, at § 636. For divorce cases see Ralston v. Ralston, 6 Terry (45 Del.) 305, 72 A.2d 441 (1950); Stewart v. Stewart, 93 N.J. Eq. 1, 114 Atl. 851 (1921); Burgess v. Burgess, 47 N.H. 395 (1867). Note: Wharton uses the phrase "admission against interest." Admissions must be clearly distinguished from declarations against interest. It is beyond the scope of this paper to consider the distinctions between these two exceptions to the hearsay rule, but it should be emphasized that here we are concerned with admissions, and not declarations against interest. For discussion of the differences see McCormick, op. cit. supra note 5, at § 240. Also, for the distinction between confessions and admissions see id. at § 113.

ception to the general rule. Likewise, he finds support in a majority of the cases—including divorce cases—for his explanation of the evidentiary character of such a judgment. It is to be observed, however, that the admissibility of the record might more understandably be sustained on the ground that the criminal judgment establishes the fact admitted by the accused and hence, that it is admissible as an adjudication thereof, rather than as an admission. This point was plainly stated in the New Jersey case of *Tucker v. Tucker* as follows:

> "The evidential value of a verdict of guilty after trial and one on a plea of guilty differs only in degree of persuasiveness. It is the record of the conviction, which attests the fact of the commission of the crime, that is of probative force and influence."[70]

This theory of admissibility is not suggested as a mere quibble; rather, it is believed that a more uniformly harmonious application of the reciprocal use of judgments in criminal and civil matrimonial cases would result. It is true that it is primarily the plea and admission of the accused which establishes his guilt. But it is the judgment of the court on the defendant's plea which constitutes the adjudication of the fact of guilt, and it should be given that status for purposes of proving such facts when called in question in subsequent matrimonial proceedings.[71]

In any event, in divorce actions based on such grounds as assault,[72] adultery,[73] and the like, records of criminal proceedings containing judgments of conviction based on pleas of guilty are admissible in evidence to prove the ground of divorce by the admission through plea of the defendant's guilt. Similarly, the record showing a plea of guilty to the criminal charge of adultery is admissible in a subsequent civil action against the defendant for criminal conversation.[74]

What evidentiary value do such records or judgments have? In an early Maine case, the court held that a record showing a plea of guilty to an information for assault and battery was admissible only as evidence in a libel for divorce by the wife against the husband.[75] Later decisions support this holding.[76] Such evidence is not treated

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[70]101 N.J. Eq. 72, 73, 137 Atl. 404, 405 (1927).

[71]Compare Model Code of Evidence rule 521 (1942).

[72]Bradley v. Bradley, 11 Me. 367 (1834).

[73]Burgess v. Burgess, 47 N.H. 395 (1867); Stewart v. Stewart, 93 N.J. Eq. 1, 114 Atl. 851 (1921); Ralston v. Ralston, 6 Terry (45 Del.) 305, 72 A.2d 441 (1950).

[74]Jones v. Cooper, 97 Iowa 735, 65 N.W. 1000 (1896).

[75]Bradley v. Bradley, 11 Me. 367 (1834).

[76]See cases cited at notes 73-74 supra.

as conclusive. It can be argued that the conclusive effect of such evidence should be avoided for fear of misuse of the guilty plea by one of the spouses to obtain a collusive divorce, inconsistent with the state's interest in the preservation of the marriage tie.[77] For this reason, some courts have required corroborating evidence of the fact admitted by the guilty plea.[78] This argument seems rather weak, at best. Actually it constitutes a supposition entirely inconsistent with our knowledge of human behavior. In the words of one court:

> "The plea of guilty to an indictment for a crime must be regarded as much less open to the suspicion of collusion or insincerity than ordinary confessions, inasmuch as it must be followed by punishment."[79]

Indeed, in at least two cases, the record of a criminal conviction based on a plea of guilty, while not given a conclusive effect, was accorded great weight. Thus, while the court in *Stewart v. Stewart,*[80] a New Jersey case, called it "substantive evidence," it concluded that the prior plea of guilty to an adultery charge was sufficient to prove the fact in the divorce suit and therefore supported the decree of divorce. The court said:

> "While it is an inflexible rule in this state that a divorce will not be granted upon the uncorroborated testimony or admission of a party to the suit, yet the admission in a plea of guilty, made on arraignment for adultery in a criminal court, is made under the sanction of the law and the protection of the judge. It cannot be presumed to be procured by the husband's coercion, . . . nor can it be presumed to have been made through collusion with the other spouse; and this is the more apparent when we know that by interposing such a plea the defendant at once puts himself in the situation of being liable to a sentence of fine or imprisonment or both. And in the case before me the woman was actually sentenced and served a term of imprisonment.
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> "Collusion in the law of divorce includes any agreement between the parties as a result of which no defense shall be made to the dissolution of the marriage tie which would not otherwise be dissolved. I conclude, therefore, that the admission of adultery in the plea of guilty in the criminal court was not the result of coercion or collusion, and it is not an admission or confession having no evidential effect, but, on the contrary, is one

[77]See Burgess v. Burgess, 47 N.H. 395 (1867).
[78]Ibid.
[79]Ibid.
[80]93 N.J. Eq. 1, 114 Atl. 851 (1921).

which is substantially evidential against the defendant who made it."[81]

Should the fact determined in the criminal prosecution have a conclusive effect? Take first the prevailing rationale that the record of conviction is received, not as a judgment establishing the fact of guilt, but rather as an admission by the defendant of the facts confessed by his plea. Since a defendant may give evidence explaining his reasons for a plea of guilty where the record is introduced as an admission in other types of subsequent proceedings,[82] such an admission might likewise be viewed as not estopping the defendant in a subsequent civil matrimonial proceeding from showing that, notwithstanding such confession and conviction, he was not guilty of the facts alleged.[83]

Or, consider the suggested rationale that it is the judgment, not the plea, which is of probative force in the matrimonial proceeding. Again, it seems such evidence could not be regarded as conclusive proof, since in this case—as well as in the three other situations involving the use of criminal judgments in civil matrimonial actions—the parties are not identical. While the defendant in a divorce suit and the state (if a party to the divorce proceeding under the particular state law) would be parties to the criminal proceeding, the plaintiff would not.[84] Therefore, the judgment would not be conclusive proof of the disputed fact in the divorce proceeding since it could not be used against a party to the criminal action in favor of one who would not be bound by that judgment.[85]

While this is a sound legalistic conclusion, it does, of course, not correspond to patterns of human behavior. One may ask which is the more important consideration in the identity-of-parties requirement of res judicata, against whom the defendant suffered a certain defeat, or that he suffered a certain defeat? (And so it is in the case of victory.) While we do not propose a change in this respect at this time, it is proper to keep this consideration in mind, especially when the identity-of-the-parties requirement is carried to the opposite extreme of excluding evidence of conviction where the party seek-

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[81]93 N.J. Eq. at 4, 114 Atl. at 852; see also Ralston v. Ralston, 6 Terry (45 Del.) 305, 72 A.2d 441 (1950).

[82]McCormick, op. cit. supra note 5, at § 242, note 32. This is obviously not easy for the defendant and such cases are highly exceptional.

[83]2 Freeman, op. cit. supra note 13, at § 655.

[84]For discussion of the state's party role in divorce actions see text at note 24 supra.

[85]1 Freeman, op. cit. supra note 13, at § 407; Annot., 31 A.L.R. 261, 269 (1924).

ing admission of the judgment was the principal witness, subject to cross-examination by defendant, in the prior criminal proceeding.[86] The law is here confronted with a clash of competing policies which it has been unable to properly resolve so far.

(3) *Convictions Based on Pleas of Not Guilty.* Although a majority of jurisdictions are still on record as adhering to the rule excluding criminal convictions as evidence in civil cases, the trend is in favor of the admissibility of such convictions and indicates that many of our courts, when called upon to do so, would today rule in favor of admissibility.[87] In the matrimonial field, cases unqualifiedly in favor of admissibility, decided either by case law[88] or by statute,[89] are still rare. In some jurisdictions the courts have endeavored to qualify the admissibility of prior convictions in either of two ways: the record of a party's conviction will be received after his default in the divorce proceeding;[90] or the prior conviction is not admissible where

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[86]See note 91 infra.

[87]Annot., 18 A.L.R.2d 1287, 1299 (1951).

[88]The rule seems to have been applied first in Maine. Anderson v. Anderson, 4 Greenl. (Me.) 100 (1826), though subsequently it was modified by the Maine court; see notes 90 and 91 infra. The Ohio and Pennsylvania courts likewise have adhered to this practice since early times. See Wilson v. Wilson, Wright (Ohio) 128 (1832); Carey v. Carey, 25 Pa. Super. 223 (1904). Other courts have adopted the rule more recently—e.g., Wald v. Wald, 161 Md. 493, 159 Atl. 97 (1932), where H's conviction of desertion and nonsupport, also ordering him to make payments to W, was held convincing evidence in a subsequent divorce action for desertion.

A considerable liberality may be observed in English cases: In O'Toole v. O'Toole, 42 T.L.R. 245 (1926), H's perjury conviction for swearing that he never had had intercourse with respondent was held admissible in a subsequent divorce proceeding as prima facie evidence, justifying the divorce decree. In Virgo v. Virgo, 69 L.T.R. (N.S.) 460 (1893), a conviction for attempting to carnally know a daughter, rendered on an indictment for rape, was held admissible in a subsequent divorce action to prove incestuous adultery as a divorce ground. That goes a little too far! The conviction was for a crime not requiring penetration, an essential of adultery.

The rule of admissibility has been recognized in quasi-criminal cases—e.g., where H in a quasi-criminal proceeding was ordered to post a peace bond, the judgment was admitted in a later divorce proceeding as tending to prove cruelty, as a divorce ground, committed against W. White v. White, 106 W. Va. 680, 146 S.E. 720 (1929); Rice v. Rice, 88 W. Va. 54, 106 S.E. 237 (1921). A similar judgment was even held to be a bar in Vanleer v. Vanleer, 13 Pa. 211 (1850); cf. McDaniel v. McDaniel, 175 Va. 402, 9 S.E.2d 360 (1940). By the same token, judgments in quasi-criminal proceedings, ordering H to pay W's maintenance, or to post bond, have been held admissible in W's defense to H's divorce action, Bauder's Appeal, 115 Pa. 480, 10 Atl. 41 (1887); or in defense of W's heirs to surviving H's action, claiming an estate by the curtesy in land of which W died seised, Bealor v. Hahn, 132 Pa. 242, 19 Atl. 74 (1890); see Bealor v. Hahn, 117 Pa. 169, 11 Atl. 776 (1887).

[89]As to which see text at note 101 infra.

[90]Randall v. Randall, 4 Greenl. (Me.) 326 (1826); Tucker v. Tucker, 101 N.J. Eq. 72, 137 Atl. 404 (1927).

the conviction was obtained upon the testimony of the person in whose favor the judgment of conviction is offered in the divorce case.[91] Qualifications such as these, while perhaps affecting the weight to be accorded the judgment as evidence, should not affect its admissibility.

So far as we have been able to ascertain, there is only one case which flatly holds that a prior criminal conviction is not admissible in a divorce proceeding. This is the Massachusetts decision of *Silva v. Silva*.[92] Here, the husband sued his wife for a divorce on the ground of desertion. The wife, in defense, offered in evidence a criminal conviction of the husband for nonsupport. In holding that the judgment was not admissible, the court said:

> "We think that the 'traditional rule' by which 'a defendant convicted of crime is entitled to re-try the question whether he actually committed the crime, when that issue arises in a civil proceeding to which the Commonwealth is not a party' . . . must be deemed to be law in this jurisdiction. . . . 'The judgment is effectual only between those upon whom its operation is mutual, and therefore he against whom it can in no respect be enforced is not permitted to use it for his own benefit or to the prejudice and disadvantage of his adversary.' "[93]

The court failed to distinguish between the evidentiary and the conclusive effect of a judgment. Had it done so, it would have been unnecessary to consider the admissibility of the judgment based on the principles of res judicata or estoppel. Admittedly, the judgment could not be used as conclusive proof since, quite aside from any supposed difference in the degree of proof, the defendant-wife was not a party to the criminal action and hence, not being bound by the judgment in that action, could not take advantage of it.[94] But this has nothing whatsoever to do with the admissibility of the judgment as evidence of the fact sought to be proved in the divorce proceeding.

On the matter of the difference in the standard of proof we would like to refer to a prime example of a case lacking logic, incidentally not a matrimonial case. In *Interstate Dry Goods Stores v. Williamson*,[95] the court held that the record of a conviction of the defendant for larceny was not competent evidence in a civil suit against him to recover the value of the stolen property. In addition to giving the reason that the parties differed in the two proceedings, the court also

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[91]Woodruff v. Woodruff, 11 Me. 475 (1834); Quinn v. Quinn, 16 Vt. 426 (1844).
[92]197 Mass. 217, 7 N.E.2d 601 (1937).
[93]197 Mass. at 217, 7 N.E.2d at 601.
[94]1 Freeman, op. cit. supra note 13, at § 407.
[95]91 W. Va. 156, 112 S.E. 301, 31 A.L.R. 258 (1922).

relied on the fact that the standard of proof differed as a basis for its ruling that the judgment should be excluded. Of course, the standard of proof does differ. But since the conviction is obtained by beyond-a-reasonable-doubt proof, the defendant is not prejudiced by the introduction of such evidence, for example, in a divorce proceeding, where the standard of proof is only a preponderance of the evidence, or, at most, clear, cogent and convincing evidence. If the fact has once been established beyond a reasonable doubt, the burden of proof in the divorce case is satisfied and the difference in the degree of the proof required in the two different types of controversies becomes unimportant. Then, if the subsequent civil action is between the same parties, such a criminal judgment would be entitled to a conclusive effect.[96]

However, in cases involving the admissibility of judgments of conviction based on pleas of not guilty in subsequent divorce actions, the difference in the parties to the two actions prevents, by present standards, their use as conclusive determinations. But no court should deny the admissibility of the judgment as evidence of the disputed fact in the divorce proceeding. There is no logic in the Massachusetts rule as expressed in the *Silva* case. The correct rule is that a judgment of conviction is admissible as evidence in a divorce proceeding to aid in establishing the divorce ground, providing the offenses in the two proceedings are identical.[97]

(4) *Acquittals Based on Pleas of Not Guilty.* The general exclusionary rule is said to apply to judgments of acquittal. The rule is correct as to criminal judgments sought to be used in divorce proceedings as conclusive proof of the disputed facts. In several divorce cases the courts have held properly that such judgments are not res judicata or conclusive of the facts determined in the criminal action,[98] for the reason that the parties differ and that the difference in the quantum of proof in the two actions would result in prejudicing the rights of the parties to the divorce action. Regarding the difference in the parties, it has already been noted that either the plaintiff or defendant in the divorce action will not, ordinarily, have been a party to the prior

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[96]2 Freeman, op. cit. supra note 13, at § 657.

[97]Wald v. Wald, 161 Md. 493, 159 Atl. 97 (1932); Wilson v. Wilson, Wright (Ohio) 128 (1832).

[98]Knight v. Knight, 24 A.2d 612 (R.I. 1942); Jenkins v. Jenkins, 103 Ore. 208, 204 Pac. 165 (1922); Brower v. Brower, 157 Pa. Super. 426, 43 A.2d 422 (1945); Sanders v. Sanders, 178 Misc. 720, 36 N.Y.S.2d 287 (1942); Breinig v. Breinig, 26 Pa. 161 (1856). But some courts failed to appreciate the difference between conclusive and merely evidentiary effect—e.g., Jenkins v. Jenkins, supra; Brower v. Brower, supra.

criminal proceeding. This would be sufficient to defeat the res judicata effect of the criminal judgment.[99]

But what of the difference in the burdens of proof? In cases involving the use of a judgment of acquittal, it is the divorce respondent who will want to introduce his criminal acquittal in evidence to prove that he is not guilty of the alleged divorce ground. If the exclusionary rule was created, in part, at least, to protect the defendant-respondent, should it then be used to prevent him from using the judgment of acquittal to exonerate himself from the charge made in the divorce proceeding? But the acquittal does not mean that the defendant is innocent of the charge made in the divorce proceeding; rather, it means that there was not enough evidence to satisfy the requirement of proof beyond a reasonable doubt. In consequence, while the evidence may be insufficient to prove the defendant guilty beyond a reasonable doubt, it does not mean that there is not sufficient evidence of a clear, cogent and convincing nature which will satisfy the trier of fact in the divorce proceeding.[100] Whether or not judgments of acquittal ought to be admissible as at least some evidence of the defendant's innocence is a question which can be answered only after due policy considerations. But it may be doubted that Model Code rule 521, providing for their admissibility, is correct on principle. Acquittals have little, if any, probative value to prove the negative fact of noncommission of a civil wrong.

C. *Effect of Statute.*

The admissibility of criminal convictions in divorce proceedings may be governed by statute. The Pennsylvania statute provides:

> "When the respondent in any action of divorce shall have been convicted and sentenced for adultery, the records of the said conviction shall be received in evidence on any application for a divorce by the injured libellant."[101]

This statute, which is restricted to adultery, has been held to cover only cases of conviction after pleas of guilty or not guilty, and to leave untouched the law with respect to acquittals.[102] Any judgment of conviction of adultery,[103] or an offense which necessarily includes

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[99]See note 94 supra.
[100]2 Freeman, op. cit. supra note 13, at § 656.
[101]Pa. Stat. Ann. tit. 23, § 51 (1955). This statute dates back to 1815.
[102]Romano v. Romano, 34 Pa. D.&C. 215, 220 (1939).
[103]Ibid.

adultery, such as prostitution of a married woman,[104] "while not res judicata, is not only *prima facie* evidence, but standing undenied, is conclusive."[105]

Whatever one may say about the legislative and judicial restrictions imposed upon this statute, it constitutes an old affirmance of an old wisdom, that matrimonial cases are to be regarded as in a class sui generis.[106] This is the point we made at the outset in our plea for a greater concentration of matrimonial causes, civil and criminal, subject to a uniform standard of evidence, whatever the rules may be in cases outside the matrimonial sphere. But we hasten to add that although matrimonial cases are subject to policy considerations peculiarly their own and that therefore they should not be set at a par with cases from other legal problem areas as regards matters of evidence and otherwise, nothing suggests itself at this point which would prevent a re-examination of policy considerations on the reciprocal use of judgments across the board. A common denominator can perhaps be found which effects our policies better than present text book rules.

V. Conclusion

A. *Use of Civil Matrimonial Judgments in Criminal Matrimonial Cases.*

Civil judgments, whether or not operating in the defendant's favor, fully or partially, may be received in evidence as conclusive proof of (1) the fact of their existence and rendition; and (2) the status of the parties. They may be received in evidence as tending to prove any collateral matter not bearing upon the guilt or innocence of the parties.

Provided that the state is, by statute or by common law, a party to the civil proceedings, as is the case in many states with respect to divorce proceedings, the identity-of-the-parties requirement of res judicata has been satisfied. A policy-oriented consideration of the

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[104]Provenson v. Provenson, 58 Pa. D.&C. 41, 60 York L. Reg. 105 (1946). Strangely enough, a plea of guilty to an indictment for fornication, without corroborating circumstances, was held to be insufficient evidence for divorce on the ground of adultery. Fornication is subject to fine only, whereas other adultery offenses lead to possible imprisonment. The possibility of fraud on the divorce court was therefore regarded as particularly high in the case of fornication. Chiaretti v. Chiaretti, 24 Pa. D.&C. 679 (1935).

[105]Romano v. Romano, 34 Pa. D.&C. 215, 233 (1939).

[106]Id. at 217, bringing out that in nonmatrimonial cases Pennsylvania law holds the "judgment and record of a criminal case . . . not admissible in evidence on the trial of a civil action involving the same matter," citing authorities.

quantum-of-proof requirement will then lead to the following rule: Civil judgments, operating fully or partially in the defendant's favor, may be received in evidence as conclusive proof of the facts on which they were rendered—e.g., the nonexistence of a divorce ground constituting the criminal charge.

There may well be sufficient policy considerations leading to the application of the official-written-statements exception to the hearsay rule according to which, then, civil judgments operating fully or partially in the plaintiff's favor may be received in evidence against the defendant as tending to prove the facts on which they were rendered—e.g., the existence of a divorce ground.

B. *Use of Criminal Matrimonial Judgments in Civil Matrimonial Cases.*[107]

In cases involving the use of criminal judgments in civil matrimonial proceedings—and contrary to the situation prevailing when it is sought to use civil judgments in criminal proceedings—there will always be a lack of identity of the parties (although the quantum of required proof presents no obstacle) which will prevent the use of the criminal judgment as conclusive of the disputed facts. Nevertheless, clear policy considerations support their use as evidence, to be considered together with other evidence, of the facts in issue, according to the following rules:

In civil matrimonial proceedings, and apart from statute, judgments of conviction of a matrimonial offense (1) on pleas of nolo contendere are not admissible in evidence as an admission to prove the commission of the offense, though the nature of this plea does not prevent the use of the judgment based on the plea as tending to prove the civil matrimonial issue; (2) on pleas of guilty are admissible in evidence as tending to prove the commission of the matrimonial offense, under Model Code rule 521, and by the better reasoned cases, as an admission, and probably also under the official-written-statements exception to the hearsay rule; (3) on pleas of not guilty are admissible in evidence as tending to prove the commission of the offense, under the Model Code rule 521, and by the better reasoned cases, under official-written-statements exception to the hearsay rule. A re-exami-

[107]After completion of this manuscript a valuable student note in a current law review came to our attention: Note, 11 Sw. L.J. 230 (1957). We are in basic agreement with the liberal views there expressed but caution against a hasty adoption of an overly liberal rule not distinguishing between judgment types according to plea and disposition, for reasons stated.

nation of the policy considerations underlying the identity-of-the-parties requirement of res judicata, however, may well lead to a reform which would provide for the conclusive effect to be given judgments of conviction when introduced to prove the identical matter in a subsequent matrimonial proceeding.

Judgments of acquittal of a matrimonial offense, sought to be introduced in behalf of the defendant in a subsequent civil proceeding are of greater emotional than legal significance and have little probative value. It might be queried whether Model Code rule 521 is correct in providing for their admissibility.

C. *Rules in a Family Court.*

If and when a family court can be established with jurisdiction over all causes connected with family breakdown and strife, and empowered with a wide range of civil, quasi-criminal and criminal sanctions and remedies, a policy study should be undertaken to determine whether or not all matters of evidence in such cases, whatever their nature, should be subjected to a uniform and unfettered policy of admissibility providing for the free reciprocal use of judgments.

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