Divorce Ex Parte Style

For more than one hundred years American courts have struggled with the evolution of the ex parte divorce.[1] Prior to *Simons v. Miami Beach First National Bank*[2] the apparently settled doctrine as expressed by the Supreme Court was that, while a divorce court could terminate the marital status of the interested parties, its ex parte decree could not affect any other valuable rights resulting from the marital relationship. In *Simons* the Court held that an ex parte divorce in Florida extinguished the dower right in a Florida estate of an absent spouse who was not personally served, entered no appearance, and had no contact whatsoever with the State of Florida. Inasmuch as dower appears to constitute a valuable right, the seeming inconsistency of this holding suggests a need for reappraisal of the doctrine of ex parte divorce.

I. Development of the Doctrine of Divisible Divorce

The Supreme Court first dealt with ex parte divorce in *Atherton v. Atherton*[3] and *Haddock v. Haddock*.[4] In these cases the Court held that a divorce decree is entitled to full faith and credit only when entered by a court of the state of matrimonial domicile or by a court exercising personal jurisdiction over both parties. Thus an ex parte divorce decree had effect outside the rendering state only if that state

1 The term "ex parte divorce" will be used to describe a proceeding in which the divorce court is unable to exercise personal jurisdiction over the absent spouse. The possibility of an ex parte divorce arose concurrently with the right of a married woman to establish a domicile separate from that of her husband, see Williamson v. Osenton, 232 U.S. 619, 626 (1914); Atherton v. Atherton, 181 U.S. 155, 166 (1901); Barber v. Barber, 62 U.S. (21 How.) 582 (1858); Ditson v. Ditson, 4 R.I. 87 (1856), thus creating the possibility that either of two states could exercise jurisdiction over at least one of the parties to the marital relationship.

At that time the authority of either state to grant a divorce to its own domiciliary was found in Pennoyer v. Neff, 95 U.S. 714, 734-35 (1877), where the Court said: "[A] State may . . . authorize proceedings to determine the *status* of one of its citizens toward a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident . . . . The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."

2 381 U.S. 81 (1965).

3 181 U.S. 155 (1900).

4 201 U.S. 562 (1906).

contained the marital "res"; otherwise the decree was viewed as valid only in the rendering state.

This doctrine remained unaltered for nearly forty years. Then, in *Williams v. North Carolina*,[5] the Supreme Court held that any ex parte divorce, if valid in the granting state, was henceforth entitled to full faith and credit. Recognizing that the previous doctrine, by contemplating divorces as valid in one state but not elsewhere, had resulted in polygamous marriages and a cloudy legal status for later offspring, the Court said that it was bowing to "intensely practical considerations" and was protecting the national interest in avoiding these results.[6] The Court adopted its new policy of national uniformity of marital status without explicitly deciding whether terminating the marital status of an absent spouse might deprive her of a valuable right. As Mr. Justice Jackson charged in dissent: "Settled family relationships may [now] be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill."[7] Nevertheless, the Court had implicitly answered Mr. Justice Jackson by concluding, in effect, that the need to bring national uniformity to questions of marital status[8] outweighed the possible harm to the absent spouse—if the suing spouse established domicile where he sued and if notice was given to the defendant spouse.

While *Williams* entitled the ex parte divorce to an extraterritorial effect it had not previously enjoyed, the Court limited its holding to the issue of marital status. It explicitly reserved judgment regarding the extraterritorial effect of the divorce on property interests.[9] It was not until *Estin v. Estin*[10] that the Court dealt with this problem. The question presented in *Estin* was whether there were any circumstances in which Nevada could adjudicate the absent wife's claim to alimony under a prior New York separation judgment when she neither was personally served nor appeared in the proceedings.

In resolving this problem, the Court adopted the doctrine of divisible divorce and held in favor of the absent wife. It said that *Williams*

5 317 U.S. 287 (1942).

6 *Id.* at 303.

7 *Id.* at 316.

8 By accepting the doctrine of Pennoyer v. Neff, 95 U.S. 714 (1877), that a state may determine the status of its own domiciliaries, the Court foreclosed the possible conclusion that national uniformity might be achieved by limiting the divorcing power to the marital domicile. The Court similarly precluded the possible conclusion that only the law of the state of marital domicile may be applied by the divorce court by stating: "It is difficult to perceive how North Carolina [the marital domicile] could be said to have an interest in Nevada's domiciliaries superior to the interest of Nevada." 317 U.S. at 296.

9 *Id.* at 293.

10 334 U.S. 541 (1948).

had involved the "regularity and integrity of the marriage relationship"[11] and consequently the protection of legitimate offspring and the prevention of bigamous marriage. All of these, the Court said, are vital concerns of the divorcing state and can only be protected by allowing that state to exercise jurisdiction over the absent spouse through constructive service. But, the Court continued, constructive service would not necessarily support a decree "that changed every legal incidence of the marriage relationship."[12] The Court held that some incidents of the marital relationship can be affected only when a court exercises personal jurisdiction over the absent spouse. One of these incidents was the judgment for alimony on which Mrs. Estin relied. In the Court's view the *Estin* situation was different from *Williams* because of the significant interest of the absent wife's state of domicile in protecting her from becoming "impoverished and perhaps . . . a public charge,"[13] and because the alimony judgment awarded by New York to protect this interest had vested a property right in the wife.

In *May v. Anderson*[14] the Court included child custody as one of the incidents that may be affected only when a court exercises personal jurisdiction over the absent spouse, suggesting that the test was whether the threatened incident constituted a "precious" personal right in the absent spouse. In *Vanderbilt v. Vanderbilt*,[15] the final pre-*Simons* decision concerning divisible divorce, the Court further expanded the doctrine by holding that it was immaterial in *Estin* that the support claim had been reduced to judgment; even absent that circumstance an ex parte divorce could not extinguish any support rights possessed by the absent spouse.

Before considering *Simons* and its relationship to the earlier cases on divisible divorce, two issues never adequately resolved by the Court in any of the cases demand attention. First, the Court has never offered an adequate rationale for its rulings that the absent wife's interest in her marital status, unlike her interests in support and child custody, may be extinguished by a court which is unable to exercise personal jurisdiction over her. The answer given by the Court in *Williams*, that the practical consequences of not allowing jurisdiction dictated this result, has never provided the sole basis for jurisdiction in any

11 *Id.* at 546.
12 *Ibid.*
13 *Id.* at 547.
14 345 U.S. 528 (1953).
15 354 U.S. 416 (1957). See Armstrong v. Armstrong, 350 U.S. 568, 575-81 (1956) (Black, J., concurring).

other context. As held in *Hansen v. Denckla*:[16] "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him."[17]

If necessity alone could support jurisdiction, surely the *May* case should have been decided differently; the state in which the children were domiciled should have been permitted to determine their custody despite the absence of their mother. But the Court held otherwise on the ground that, regardless of the need to resolve the issue of child custody, a "precious" right may not be affected by a court that is unable to exercise jurisdiction over the possessor of that "right."

Although never suggested by the Court, a viable rationale for the differing rights of the absent wife to procedural due process in cases involving support or child custody and those involving marital status alone would be that termination of her marital status does not deprive her of a valuable "right" in the sense of "worsening" her position. If only termination of marital status is involved, her position is not worsened because the marital status itself is not legally enforceable: in no state can husband and wife be forced to live together or to extend to one another the affection and companionship which constitute the value of marital status apart from its economic incidents. Given the need for uniform marital status throughout the country, constructive service can therefore be said to meet all due process requirements when the issue is only that of termination of marital status.[18]

The second question not expressly answered in the cases is whether an ex parte decree relating to matters other than the marital status can be granted full recognition by another state. The clear implication of the Court's opinions in both *May* and *Vanderbilt,* notwithstanding Mr. Justice Frankfurter's opinion in *May*,[19] is that recognition by

16 357 U.S. 235, 251 (1957).

17 *Ibid.* The Court added: "[I]t is a mistake to assume that this trend [away from the rigid rules of personal jurisdiction suggested in *Pennoyer v. Neff*] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts . . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states." *Ibid.*

18 Especially since the husband is usually the more mobile spouse, notions of due process would seem to require that the absent wife who has not been personally served not be deprived of a valuable right in an inconvenient forum. But as the right becomes less valuable, the demands of due process become correspondingly less stringent.

19 It was Mr. Justice Frankfurter's contention that the Court's opinion did not reach the due process question, inasmuch as it held only that the Ohio court had incorrectly felt bound to grant full faith and credit to the Wisconsin decree, and that upon proper

another state of a decree unsupported by personal jurisdiction would constitute a denial of due process. As stated by the Supreme Court, the divorcing court is "powerless to cut off . . . a spouse's right to financial support . . . . [or] a mother's right to custody of her children,"[20] and, as noted in a subsequent case: "Therefore . . . [a] decree, to the extent it purport[s] to affect the wife's right to support . . . [is] void . . . ."[21] Surely the recognition of a void decree as a basis for depriving a citizen of something of value would constitute a denial of due process in any forum, including the one in which the original decree was issued.

II. Simons v. Miami Beach First National Bank[22]

In *Simons,* the specific question was whether a Florida ex parte divorce could extinguish an absent spouse's dower interest in Florida property under Florida law. Petitioner and Mr. Simons were married and domiciled continually in New York until 1946, when she was granted a permanent separation with alimony. In 1951 Mr. Simons moved to Florida and the following year obtained a divorce in an action in which Mrs. Simons was neither personally served nor entered an appearance. During the remainder of his life, Mr. Simons fully complied with his obligations under the separation decree. Upon his death in 1960, and after the respondent, the executor of his estate, had entered his will in probate, Mrs. Simons appeared and filed an election to take dower under Florida law. The executor challenged Mrs. Simons' claim, and the challenge was sustained by the Florida District Court of Appeals.[23]

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reconsideration the Ohio court might still recognize the Wisconsin decree. May v. Anderson, 345 U.S. 528, 535 (1953).

However, it does not appear that the Ohio court felt bound by the full faith and credit clause. Rather, the court seems to have determined that under Ohio law the Wisconsin court had the requisite jurisdiction to decide the question. May v. Anderson, 91 Ohio St. 557, 107 N.E.2d 358 (1952). Nor is Mr. Justice Frankfurter's conclusion that Ohio might still grant full faith and credit to the Wisconsin decree supported by the Supreme Court's own language, which frames the issue strictly in terms of whether a state may cut off a mother's right to custody in an ex parte proceeding, and concludes that it may not. Furthermore, if Mr. Justice Frankfurter's interpretation is correct, the Supeme Court should have vacated and remanded rather than reversed.

Mr. Justice Jackson maintained in dissent that the majority opinion could only be interpreted as holding that a grant of full faith and credit to the Wisconsin decree would have denied the wife due process. 345 U.S. at 536-37.

20 *Id.* at 533-34.

21 Vanderbilt v. Vanderbilt, 354 U.S. 416, 419 (1957).

22 381 U.S. 81 (1965).

23 Simons v. Miami Beach First National Bank, 157 So. 2d 199 (Fla. Ct. App. 1963), *cert. denied,* 166 So. 2d 151 (Fla. Sup. Ct. 1964).

Below, Mrs. Simons challenged the validity of the Florida divorce by (1) questioning

In the United States Supreme Court Mrs. Simons contended, first, that under the *Estin* doctrine it was incumbent on the Florida Court to grant full faith and credit to the New York separation decree, "inherent in which is a preservation of her dower right,"[24] and second, that, on the authority of the *Vanderbilt* case, she could not be deprived of her dower rights under Florida law since she was not subject to the jurisdiction of the Florida divorce court. The Supreme Court summarily disposed of both contentions. In response to the claim that full faith and credit was owing to the New York decree, the Court held that "there is nothing in the New York decree itself that can be construed as creating or preserving any interest in the nature of or in lieu of dower."[25] As to the central issue of whether an ex parte divorce, wherein the absent wife was served by publication, could constitutionally extinguish her dower right in the husband's Florida estate, the Court said only that "under Florida law no dower right survived the decree . . . . [and] dower rights in Florida property, being inchoate, are extinguished by a divorce decree predicated upon substituted or constructive service."[26]

Mr. Justice Harlan concurred on the ground that the Court's opinion constituted a partial retreat from *Vanderbilt*.[27] The language of the Court, he contended, compelled the conclusion that one of the rules emerging from *Vanderbilt*—that "an ex parte divorce can have no effect on property rights"—now "slips unobtrusively into oblivion . . . for Florida is allowed to turn property rights on its ex parte decree."[28]

Justices Black and Douglas also concurred but rejected the contention that the Court intended any retreat. It was their view that the case was distinguishable from *Vanderbilt* since the dower right "simply never came into existence."[29]

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the validity of Mr. Simons' Florida domicile, and (2) arguing that the New York separation decree, by specifically denying the identical claims subsequently made by Mr. Simons in Florida and rejecting his suit for separation, constituted res judicata. The Florida District Court of Appeals rejected these arguments, holding that "any affirmative defense the prior suit may have afforded should have been presented in the divorce suit," and that by failing to appear, Mrs. Simons waived any defense. 157 So. 2d at 200.

Although the Florida courts did not consider whether a valid divorce might destroy her dower rights, the Supreme Court assumed that "since Florida law allows dower only to decedent's wife . . . we interpret the Florida Courts' decisions sustaining the validity of the divorce as also holding that the divorce extinguished petitioner's dower rights." 381 U.S. at 83-84 n.4.

24 *Id.* at 84.

25 *Id.* at 84-85.

26 *Id.* at 85.

27 *Id.* at 86.

28 *Id.* at 87.

29 *Id.* at 88.

III. Simons and the Doctrine of Divisible Divorce

The fact that the case provoked two concurring opinions based on contrary interpretations of the Court's language demonstrates the ambiguity of the Court's opinion. This ambiguity makes the future of the doctrine of divisible divorce unclear, for it is impossible to determine from the language whether the Court intended *Simons* to be a partial retreat from *Vanderbilt* or a distinguishable problem.

If the Court was not retreating from *Vanderbilt,* there would seem to be two possible bases on which the opinion could be explained: (1) dower is somehow different from the other kinds of property interests that the Court has protected in the past (as Justices Black and Douglas contended); or (2) that a result different from *Vanderbilt* somehow follows from the fact that Mrs. Simons sought to assert a property right which arose under the law of the same state that rendered the divorce decree and sought to assert that right in the courts of that state. Although this second theory was not mentioned in any of the opinions in *Simons,* it also merits examination.

Is Dower Somehow Different from the Previously Protected Incidents of the Marriage Relationship?

The majority opinion in *Simons* seems to depend heavily on the word "inchoate." The Court said that a dower right existed under Florida law prior to the divorce,[30] but added that "dower rights in Florida property, *being inchoate,* are extinguished by a divorce decree predicated upon substituted or constructive service."[31]

Although no further analysis of the nature of the dower right appears in the Court's opinion, there was presented in a footnote an extensive quotation from a Florida case, *Pawley v. Pawley,*[32] evidently

30 "[W]e interpret the Florida Courts' decisions sustaining the validity of the divorce as also holding that the divorce extinguished petitioner's dower rights." *Id.* at 83-84 n.4.

31 *Id.* at 85. (Emphasis added.)

32 46 So. 2d 464 (Fla. Sup. Ct. 1950). "In this, if not in every jurisdiction, right of dower can never be made the subject of a wholly independent issue in any divorce suit. It stands or falls as a result of the decree which denies or grants divorce. It arises upon marriage as an institution of any law . . . . It is not a right which is originated by or is derived from the husband; nor is it a personal obligation to be met or fulfilled by him, but it is a creature of the law, is born at the marriage altar, cradled in the bosom of the marital status as an integral and component part thereof, survives during the life of the wife as such and finds its sepulcher in divorce. Alimony, too, is an institution of the law but it is a personal obligation of the husband which is based upon the duty imposed upon him by the common law to support his wife and gives rise to a personal right of the wife to insist upon, if she be entitled to, it. It has none of the incidents of, and is in no sense a lien upon or interest in, property. Consequently, the right of the wife to be heard on the question of alimony should not, indeed lawfully it cannot, be destroyed by a divorce decree sought and secured by the husband in an

for the purpose of demonstrating that the nature of the dower right under Florida law is such that an ex parte divorce decree can extinguish it. Six different characteristics which distinguish dower from alimony under Florida law can be inferred from the *Pawley* quotation. The Florida court suggests that dower, unlike alimony: (1) represents an inchoate interest; (2) stands or falls solely as a result of the decree granting or denying the divorce; (3) can never be made a wholly independent issue in any divorce suit; (4) does not create a personal obligation of the husband based on the common law duty to support his wife; (5) does not give rise to a personal right in the wife to insist upon it; and (6) constitutes an interest in, or lien upon, property.

The first distinction, which is the only one mentioned by the Supreme Court in the text of its opinion, appears to be irrelevant. Whether a right is inchoate or vested seems to have little bearing on whether the right is valuable and therefore should be protected against deprivation without due process of law. Dower is a valuable right. The fact that it may not be claimed at the time of the divorce proceeding does not support the conclusion that it is not "property" under the fourteenth amendment and is not entitled to the due process protection afforded rights which are subject to claim at that time.[33]

Both Florida and New York, Mrs. Simons' domiciliary state, have recognized that dower constitutes a valuable property interest of the wife. One New York court has gone so far as to characterize dower as "the most highly and widely cherished property right resulting from the marriage and one which the courts have been alert to protect."[34] New York has also recognized that survivorship rights, although "inchoate," are valuable before they ripen. In an action for partition of property held by the entirety,[35] in which the plaintiff's former wife relied on a Florida ex parte divorce decree, a New York court held that a spouse's "right of survivorship . . . is a property right with

action wherein only constructive service of process was effected." *Id.* at 472-73 n.2, quoted in 381 U.S. at 85-86 n.6.

33 See Baker's Ex'rs v. Kilger, 145 U.S. 487, 491 (1892), in which the Court held: "[Although] the relation of husband and wife is . . . formed subject to the power of the state to control and regulate both that relation and the property rights directly connected with it," that regulation can be accomplished only "by such legislation as does not violate those fundamental principles which have been established for the protection of private and personal rights . . . ."

34 Byrnes v. Owen, 243 N.Y. 211, 216, 153 N.E. 51, 52 (1926). See also *In re* Schmidt's Estate, 168 Misc. 534, 541, 6 N.Y.S.2d 213, 219 (Surr. Ct. 1938).

35 Like dower, a tenancy by the entirety constitutes a right of survivorship dependent upon the continuance of the marital relationship. Huber v. Huber, 26 Misc. 2d 539, 209 N.Y.S.2d 637 (Sup. Ct. 1960).

which only a court having jurisdiction of the property or of defendant's person could deal."[36] In answer to plaintiff's contention that the valid Florida decree "destroyed the status which is essential . . . to the continuation of the property right,"[37] the court stated that "federal constitutional law proscribes giving the Florida decree the effect . . . claimed for it."[38]

Florida, too, has recognized that dower, at the time of the divorce proceeding, constitutes a valuable property right. While reaffirming "the general rule that [in Florida] an appeal in a divorce proceeding cannot be prosecuted after the death of one of the parties, except where the decree of divorce affects the property rights of the parties," the Supreme Court of Florida, in *Busch v. Busch*,[39] upheld a surviving "wife's" right to pursue her appeal from a divorce decree because of the dower interest involved. Quoting with approval from a Nevada case, *First National Bank v. Wolff*,[40] the Florida court concluded that "rights granted by operation of law and based upon the marital relationship, such as dower . . . , are held to be 'property rights.' "[41] Thus, there seems to be strong support for the argument that the dower right —inchoate or not—is a valuable right and may not be extinguished without the full protection guaranteed by the due process clause.[42]

The second distinction implied by the Court's quotation from *Pawley*, that dower stands or falls solely on the granting or denying of a divorce, may be the law in Florida, but it does not follow that the granting of an ex parte divorce should be allowed as a matter of constitutional law to cut off dower automatically. The *Pawley* opinion implies that dower has no meaning once the marital status is terminated. However, there is no inherent reason why dower cannot stand independently of the marital status. It does in many states, including New York.[43] As to the constitutional issue, the *Pawley* opinion only repre-

36 *Id.* at 541, 209 N.Y.S.2d at 641.

37 *Id.* at 542, 209 N.Y.S.2d at 641.

38 *Ibid.*

39 62 So. 2d 68, 69 (Fla. Sup. Ct. 1952).

40 66 Nev. 51, 57, 202 P.2d 878, 881 (1949).

41 Busch v. Busch, 62 So. 2d 68, 70 (Fla. Sup. Ct. 1952).

42 Mr. Justice Frankfurter argued in his dissent in *Vanderbilt* that dower is entitled to even greater protection than alimony:

> There can be no "right" until the termination of the marriage, and the whole question in the case is which State shall be able to determine the incidents of the dissolution of the marriage status. Nor is analysis furthered by analogizing the "right" to alimony to the dower "right," thence sliding to the conclusion that since New York would not have to recognize a Nevada decree cutting off dower, it does not have to recognize the Nevada decree cutting off alimony. The differences between a "right" to alimony and a dower "right" are so decisive that I need not spell out why an assumed decision with respect to dower does not reach our problem. (345 U.S. at 427.)

43 See Huber v. Huber, 26 Misc. 2d 539, 543, 209 N.Y.S.2d 637, 643 (Sup. Ct. 1960)

sents an unsupported conclusion on the very question at issue: whether a state can constitutionally terminate an absent party's dower right on the basis of an ex parte decree.

The third suggestion is that dower can never be made the subject of an independent issue in a divorce proceeding—that, unlike alimony, there is no dower question to be adjudicated by the divorce court. Thus, because dower is not a right that Mrs. Simons could have raised had she appeared, there is no reason to place her in the more advantageous position of having that right protected merely because she failed to appear.

If this argument is a fair statement of the reasoning underlying *Simons*, then the significance of the case is that it creates a limitation on the *Vanderbilt* doctrine. For this suggests that the *Vanderbilt* doctrine protects only those valuable rights—like alimony and child custody—which could have been preserved, despite the granting of the divorce, by the appearance of the absent spouse in the inconvenient forum. Previously, *Vanderbilt* might have been understood to imply that no valuable right could be cut off by an ex parte divorce.

Were this argument supported by considerations of good policy, it would be a tenable reconciliation of *Simons* with *Vanderbilt*. However, it appears to create a rule which is undesirable for at least two reasons. First, if the distinguishing feature of dower is that the ex parte divorce does not "worsen" the wife's position because, short of successfully contesting the entire divorce, she cannot preserve the dower right by appearing, then the entire *Williams* doctrine is called into question. As suggested above, the only rationale which appeared to support the use of constructive service in *Williams* was that the absent wife's position was not "worsened" by the termination of her marital status because that adjudication deprived her of no valuable right.[44] Now the Court has said in effect that a valuable right, dower, is bound up in the marital status itself, and that the termination of the status extinguishes the right. If this is indeed the rationale of *Simons*, the Court has destroyed what appeared to be the only justification for *Williams*—that no valuable rights were involved in an ex parte divorce—and has thereby clouded the entire ex parte divorce doctrine.[45]

("[D]ower is not dependent upon the continuance of marriage."); *cf.* MADDEN, DOMESTIC RELATIONS §§ 182 (1931). The original divorce, or divorce *a mensa et thoro*, did dissolve the marital status (although neither party was permitted to remarry) while preserving all other incidents of the marital relationship, including dower.

44 See notes 7-12 *supra* and accompanying text.

45 Huber v. Huber, 26 Misc. 2d 539, 209 N.Y.S.2d 637 (Sup. Ct. 1960), which upheld an

Second, there is no justification for a distinction which protects only those rights that could have been preserved despite the granting of the divorce. Mrs. Simons could, in effect, have defended her dower interest by actively resisting the granting of the divorce itself. She would not have been independently pursuing her dower interest as she would her right to alimony, but successful contesting of the divorce would have preserved her dower right. Thus, even though Mrs. Simons could not raise dower as an independent issue, she was in fact disadvantaged by not appearing. A valuable right was cut off, and she might have prevented this had she contested the divorce. Hence there is no reason to modify *Vanderbilt* to protect only those rights which can be independently claimed in the divorce proceeding. The essential consideration, as stated by the Florida court itself in the *Pawley* case, is that any rule should rest on the question of whether "the defendant wife under such circumstances has . . . had her day in court."[46] The Supreme Court's decision in *Simons* does not appear to meet that test.

The rationale of the fourth and fifth distinctions between dower and alimony is that dower is not part of the husband's support obligation and therefore need not be protected from termination by an ex parte divorce. Alimony, this argument suggests, more nearly corresponds to the wife's needs for both herself and her children. Dower, on the other hand, is felt to represent a property interest that is in no way related to the wife's needs. But this is no longer the case: All states but one have abolished common law dower,[47] most either substituting a more general right of election against the husband's will, as in New York,[48] or expanding the dower rights to include a fraction of the husband's personal property, as in Florida.[49] The courts have generally interpreted these new statutory provisions as extending the husband's obligation to support his wife and children beyond his death.[50] If the legis-

absent spouse's interest in a tenancy by the entirety that would have been transmuted into a tenancy in common had the spouse appeared, supports the argument that the mere fact that a party benefits by not appearing does not give any extra force to a decree entered by a court unable to exercise personal jurisdiction over the affected party.

46 Pawley v. Pawley, 46 So. 2d 464, 472 (Fla. Sup. Ct. 1950).

47 Only South Carolina maintains the common law dower. S.C. CODE ANN. § 19-153 (1962).

48 N.Y. DECED. EST. LAW § 18.

49 FLA. STAT. ANN. § 731.34 (1964). See Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 & n.1 (1966).

50 See Adams v. Adams, 147 Fla. 267, 271-72, 2 So. 2d 855, 857 (1941), in which the Florida Supreme Court stated: "Dower is that portion of the deceased husband's estate admeasured to the widow for her support and the support of the children." In response to the allegation that it was unconstitutional to reduce a childless wife's dower, the court said: "Since the basis of it is bread for the widow and children, it cannot be said

latures have enacted these "modern" dower interests in order to provide continuing support for the widow over the period of time during which she survives her husband, there is no discernible distinction between the two "segments" of the husband's support obligation. The wife's domiciliary state has as great an interest in preventing her becoming a ward of the state after her husband's death as before.[51] Thus there is no basis for distinguishing between the absent wife's interest in that segment of her right to support arising after her husband's death and the segment arising prior to his death.

The sixth distinction suggested by the Court's quotation from *Pawley* is that dower, unlike alimony, is a traditional property interest. The premise of this argument is that dower constitutes a standard in rem question and consequently may be determined by a court exercising jurisdiction over the res. However, the use of labels such as in rem, quasi in rem, or in personam is a poor substitute for reasoned analysis.[52] Traditionally, a state's interest in the free alienation of local property—particularly real property—is sufficient to allow its courts to adjudicate questions of title in circumstances where jurisdiction is based only on constructive service. At the same time, however, it is quite clear that alimony or other support obligations may not be dissolved by a court at the husband's request solely because the property necessary to fulfill that obligation is located within the state.[53] The question to be analyzed, therefore, is whether dower in a divorce context is more properly viewed as a traditional property question or as an aspect of the husband's support obligation, and consequently, whether it is fair to force the wife to appear in an inconvenient forum on penalty of forfeiture.

As argued above, "modern" dower is an extension of the husband's support obligation and analogous to alimony. Thus, to the extent

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that the needs of the childless widow are the equivalent of those of the widow on whom there are dependent children." *Id.* at 272, 2 So. 2d at 857. See *In re* Boesenberg's Estate, 179 Misc. 3, 37 N.Y.S.2d 54 (Surr. Ct. 1942) (holding that the purpose of the act was to prevent the husband from avoiding his support obligation); *In re* Jackson's Will, 177 Misc. 480, 31 N.Y.S.2d 54 (Surr. Ct. 1941).

51 See Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Estin v. Estin, 334 U.S. 541 (1948).

52 There is mounting support for ending the traditional in rem-in personam distinction, and substituting a scheme of "particularized jurisdictional rules" based upon considerations of "ease of administration and equity." The result would be to substitute for the traditional labels an interest analysis to be applied to each problem. See, *e.g.*, Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 281-88.

53 In Vanderbilt v. Vanderbilt, 354 U.S. 416, 418 (1957), the Court observed: "It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant."

that a divorce proceeding relates to the wife's dower rights, it is a dispute over the limits of the husband's support obligation, as opposed to a suit to determine title to local realty or personalty. It follows that, as in the case of alimony, it is unfair to compel the wife to appear in an inconvenient forum to defend the valuable support right of dower. Nevertheless, dower, unlike alimony, can constitute an encumbrance on real property under Florida law, and this to some extent conflicts with the state's policy in favor of free alienation. This might tend to support the result reached in the *Simons* case were it not for the fact that Mr. Simons' estate consisted solely of intangibles. To the extent that dower represents a general claim to a percentage of the estate, as in New York, or to a percentage of the personalty, as in Florida, it is analogous to alimony and should be treated accordingly. A court might well decide that where dower creates an encumbrance on real property, its adjudication falls within the traditional in rem jurisdiction of the courts of the state in which the property is located. But that should not preclude a holding that where, as here, there is no encumbrance, the court will protect the right of the absent spouse.

The Supreme Court has been reluctant in the past to extend the scope of ex parte divorce. It appears to have adopted the doctrine in *Williams* only for the purpose of alleviating an intolerable situation.[54] Apart from the limited rule of *Williams*, the Court has systematically prevented all other rights arising out of the marital relationship from being extinguished in an ex parte proceeding. Indeed, the Court has consistently prevented the husband from avoiding any obligations arising in the marital domicile by moving out of the state.[55] It would have been more consistent with these objectives if the Court in *Simons* had protected the wife's dower rights, for the Court's holding cannot be justified on the basis of any distinction between the wife's dower right and her rights in the incidents of marriage which the Court has protected.

Is it Significant That Mrs. Simons Sued in Florida under Florida Law for Florida Property?

Mr. Justice Brennan's opinion obviously relies heavily on the fact that Florida law provides that the right to dower is cut off by a divorce granted by the courts of that state. This reliance implies that a court which renders an ex parte divorce has more power to cut off

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54 See note 5 *supra* and accompanying text.

55 Barber v. Barber, 62 U.S. (21 How.) 582 (1858).

support rights arising under its own law than support rights which arise under the law of another state. This would suggest that the *Vanderbilt* case, involving the authority of a Nevada court to cut off support rights which arose under New York law, would have been decided differently had the Nevada court been attempting to cut off a right arising under its own laws.

But surely such a rule would beg the constitutional question. Florida undoubtedly has the legislative power to define dower as totally dependent upon continuance of the marital status. However, it does not necessarily follow that such a rule can constitutionally be applied to a divorce proceeding defendant who has been served only constructively. The essential question is not whether Florida may enact such a statute, but whether Florida may constitutionally apply such a statute to an absent spouse in an ex parte divorce proceeding—whether it may constitutionally cut off the valuable property right of an absent spouse while terminating the marital status. The due process clause would appear to dictate that this question be answered in the negative. The fact that the right to dower arises under the law of the divorcing state, although relevant,[56] is not sufficient justification for the conclusion that such a right can constitutionally be extinguished in an ex parte proceeding.

The Supreme Court dealt with a similar situation in the *May* case, in which a Wisconsin divorce court, exercising jurisdiction over a husband and children who were domiciled in Wisconsin, had applied Wisconsin law to grant the husband an ex parte divorce and custody of the children. The absent wife, who sued in Ohio for custody, lost on the ground that the Wisconsin court had sufficient jurisdiction under its statutes to enter a custody decree. The United States Supreme Court reversed the Ohio court on the theory that a precious right arising out of the marital relationship may not be terminated by an ex parte decree. It was apparently immaterial that the Wisconsin statute authorized the state court to determine the "right" or that Ohio looked to Wisconsin for this determination. The *May* case thus provides support for the contention that all valuable rights arising from the marital relationship must survive an ex parte divorce, regardless of the statutory source of the rights which the divorcing court purports to cut off. Therefore, the fact that Mrs. Simons sued in Florida to vindicate a Florida-created right would not appear to justify the *Simons* result.

[56] It is relevant only to the extent that a state has some interest in enforcing its own laws.

IV. Conclusion

The dower right held extinguishable by an ex parte decree in *Simons* is substantively identical to the alimony right deemed unextinguishable in *Vanderbilt*. Therefore, *Simons* can only be read as a retreat by the Court from its prior holding in *Vanderbilt*. It is contended here that this is an undesirable result. The Florida judgment raised serious due process questions which were overlooked by the Court: dower appears to be a right too valuable to be extinguishable, consistent with due process, in an inconvenient forum whose jurisdiction is based only on constructive service. Although an ex parte divorce is entitled to full faith and credit, it must not become a vehicle by which a husband can avoid his marital obligations; it should affect only the status of the parties involved.