

## Maurer School of Law: Indiana University Digital Repository @ Maurer Law

---

Articles by Maurer Faculty

Faculty Scholarship

---

1931

# Effect of Foreign Divorce Upon Dower and Similar Property Interests

Fowler Vincent Harper  
*Indiana University School of Law*

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [Conflict of Laws Commons](#), and the [Family Law Commons](#)

---

### Recommended Citation

Harper, Fowler Vincent, "Effect of Foreign Divorce Upon Dower and Similar Property Interests" (1931). *Articles by Maurer Faculty*. Paper 2006.  
<http://www.repository.law.indiana.edu/facpub/2006>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).

# EFFECT OF FOREIGN DIVORCE UPON DOWER AND SIMILAR PROPERTY INTERESTS

BY FOWLER V. HARPER\*

## THE COMMON LAW

Before inquiring as to the effect upon dower rights of a foreign divorce, it is necessary to consider the effect of a local decree. At the common law the general rule was that a divorce a vinculo terminated all dower rights of the wife in any and all property of the husband, whether acquired prior to or after the decree.<sup>1</sup> The same rule prevailed as to the husband's estate by curtesy.<sup>2</sup> As to such interests, the parties were in exactly the same position that they had been prior to the marriage. It was otherwise, however, with respect to a divorce a mensa et thoro,<sup>3</sup> unless the decree contained express provisions affecting or altering such interests.<sup>4</sup>

The result was inevitable from a consideration of the nature of dower<sup>5</sup> and from its purposes. It was not regarded as a vested property interest,<sup>6</sup> but inchoate only until the death of the husband, at which time, if coverture continued, it became consummate and vested.<sup>7</sup> It was a mere incident of the marital relation and depended entirely upon coverture.<sup>8</sup> Since the theory was that the husband during his life was chargeable with his wife's maintenance and support, his lands were properly chargeable therewith after his death.<sup>9</sup> Accordingly if for any reason the marriage was not "subsisting" at the time of his death, there was no duty to support her and hence no endowment.<sup>10</sup> "It would be a strange thing," says

---

\*Professor of Law, Indiana University.

1. *Coke on Littleton*, 32a; *Billan v. Hercklebrath*, (1864) 23 Ind. 71; *Gleeson v. Emerson* (1871) 51 N. H. 405.

2. *Wheeler v. Hotchkiss* (1834) 10 Conn. 225; *Doe v. Brown* (1840) 5 Blackf. (Ind.) 309.

3. *Clark v. Clark* (1843) 6 Watts & S. (Pa.) 85; *Hokarys v. Hagaban* (1872) 36 Md. 511.

4. *Holmes v. Holmes* (1848) 4 Barb. (N. Y.) 297.

5. *Schouler* "Marriage, Divorce, Separation and Domestic Relations" (6th), sec. 1375.

6. *Barbour v. Barbour* (1858) 46 Me. 9.

7. *Bishop* "Married Women" sec. 239.

8. 2 *Bishop* "Marriage, Divorce and Separation" sec. 1634.

9. *Ibid.*, sec. 1632.

10. If such a duty is to be recognized, provision will be found in the decree. See *Frampton v. Stephens* (1882) L. R. 21 Ch. Div. 164.

Bishop, "for the law to cast on the lands of the husband, after his decease, an obligation which did not rest on his person while living. Therefore it has become established doctrine that in the absence of a contrary direction from a statute, no woman can have dower unless she was the wife of the man when he died."<sup>11</sup>

Some few courts have held that where the wife obtains the divorce for the husband's fault, especially if it be for adultery, she is not barred from dower in his lands even in the absence of any statute preserving dower. The theory seems to be that such a divorce does not affect the marriage relationship so far as the wife's incidental property rights are concerned, and that the wife under some circumstances may still be regarded as the "widow" of the husband within the meaning of the law of dower,<sup>12</sup> unless she remarries afterwards and before the death of her first husband.<sup>13</sup> A more specious rationalization, although equally unsound, may be based upon the old notion that marriage is a contract. The "contract" affords the wife certain dower rights which will be enforced unless she, by her own wrong, forfeits them. By procuring a divorce for her husband's fault, she does not forfeit them and hence is not barred from her dower.<sup>14</sup> These cases are, however, distinctly in the minority and the overwhelming weight of authority made dower a mere incident of coverture, and, the status destroyed, the incident passed with it.

The common law Conflict of Laws rule was entirely orthodox and applied the general principle that the *lex rei sitae* controlled the question of dower.<sup>15</sup> But when the common law with respect to the effect of divorce upon dower prevailed, there was no conflict and the general result would always follow that the divorce barred dower. No problem of any complexity was presented in the Conflict of Laws under such circumstances. Of course if the foreign divorce were void and not entitled to recognition in the state of the situs, there would be no interference with dower,<sup>16</sup> but this was because the status of the parties had not been disturbed so far as the law of the situs was concerned. Under such circumstances a woman

11. *Bishop*, op. cit., supra, note 8, sec. 1633.

12. See *Mansfield v. McIntyre* (1857) 10 Ohio 27, 31. See *McGill v. Deming* (1887) 44 Ohio St. 645, 652, 11 N. E. 113.

13. See *Rice v. Lumley* (1840) 10 Ohio St. 596.

14. See *Wait v. Wait* (1850) 4 N. Y. 95, 108. A distinction is sometimes made between a divorce which operates upon the marriage ab initio and one which operates in futuro. In the former case, which is more properly an annulment, the decree terminates all dower rights, but in the latter case it does not. See *Gum v. Gum* (1917) 122 Va. 32, 94 S. E. 177.

15. *Minor* "Conflict of Laws" p. 174.

16. *Goodrich* "Conflict of Laws" p. 307.

might find her dower barred in one state (where the divorce was procured) but not barred in the other because she was not regarded as a "widow" in the first state, but was so regarded in the second. While such a process of reasoning would be clearly unsound under modern notions of jurisdiction for divorce purposes,<sup>17</sup> since if jurisdiction existed the decree is valid everywhere and if wanting it is valid nowhere, including the state which rendered the decree,<sup>18</sup> such a result would still be possible. The full faith and credit clause of the Constitution does not require the state of the situs to accord the same effect upon dower rights to a foreign divorce as it accords to a local decree. But in the absence of a statute affecting the matter of dower after divorce, the common law Conflict of Laws rule would clearly require such uniform effect.

An apparent exception to the above rule is to be found where the wife procured the void foreign divorce or consented thereto, or where she accepts the fruits of such a "divorce" by remarrying afterwards, in which case she would not be permitted to attack the jurisdiction of the court which rendered the decree and would thus be barred from asserting her claim to dower by a sort of quasi-estoppel.<sup>19</sup>

#### STATUTORY CHANGES IN LOCAL DOWER LAW

Several different types of statutes, each type with numerous variations, exist in most of the states which in many instances change the common law rule as to the effect of divorce upon dower rights.

In a number of states dower has been abolished and a statutory share in the realty owned by the husband at his death is substituted therefor. This is true in California,<sup>20</sup> Colorado,<sup>21</sup> Idaho,<sup>22</sup> Iowa,<sup>23</sup> New Mexico,<sup>24</sup> New York,<sup>25</sup> Oklahoma,<sup>26</sup> South Dakota,<sup>27</sup> Utah,<sup>28</sup>

---

17. See Restatement of the Conflict of Laws, American Law Institute (hereafter cited "Restatement") sec. 118.

18. *Ibid.*, sec. 44.

19. See *Harper* "Validity of Void Divorces" (1930) 79 Pa. L. Rev. 158. There is a statute on the point in South Carolina. Code of Laws of South Carolina, 1922, sec. 5243.

20. Civil Code of California, 1923, sec. 173.

21. Courtright's Mill's Ann. Stat., 1927, sec. 7838.

22. Revised Stat., 1919, sec. 4668.

23. Iowa Code, 1927, sec. 11990.

24. New Mexico Stat., Ann., 1929, sec. 68-308.

25. Cahill's Consolidated Laws of New York, ch. 51, secs. 189, 190.

26. Compiled Laws of Oklahoma, 1909, sec. 8986.

27. South Dakota Revised Code, 1919, sec. 702.

28. Utah Compiled Laws Ann., 1907, sec. 2832.

Washington,<sup>29</sup> Indiana,<sup>30</sup> and Wyoming.<sup>31</sup> Under a statutory abolition of dower the wife is in the position of a "forced heir" and her interest in her husband's lands is entirely dependent upon the status of the parties at the husband's death. A divorce terminating the marriage entirely cuts off such spouse's interest under such a statute. It obviously would make no difference if the divorce were rendered in a foreign state.<sup>31a</sup> The only question that could be raised would be as to the validity of the divorce. If it were rendered by a court of competent jurisdiction, it would be recognized and all statutory rights dependent upon the marital status would be terminated.

In some states statutory provisions make divorce an absolute bar to dower rights. Thus the Alabama statute provides that "a divorce from the bonds of matrimony bars the wife of her dower and of any distributive share in the personal estate of her husband."<sup>32</sup> The Kentucky statute provides that "a divorce from the bonds of matrimony shall bar all claim of either husband or wife to the property, real or personal, of the other after his or her decease."<sup>33</sup> A somewhat similar statute exists in Nebraska,<sup>34</sup> in North Carolina,<sup>35</sup> and Wisconsin.<sup>36</sup> These statutes, of course, do no more than re-enact the common law rule. They terminate all interests of either spouse regardless of the one who was at fault. It is usually held here also that the effect of a foreign divorce decree would be identical with that of a domestic decree,<sup>37</sup> although the result would be the same without the statute.

A substantial number of states have modified the common law rule by preserving the interests of one or both spouses after divorce under certain circumstances. The statutes vary considerably in detail and in form. In Ohio the statutes are rather specific. The statute providing for alimony has the further provision that at the death of the husband the wife is entitled to dower in his lands "not allowed to her as alimony."<sup>38</sup> When the divorce is granted because

29. Remington's Compiled Stat. of Washington, 1922, sec. 6897.

30. Burns' Indiana Ann. Stat., 1926, sec. 3377.

31. Wyoming Compiled Stat., 1920, sec. 7002.

31a. *Boyles v. Latham* (1883) 61 Iowa 174, 16 N. W. 68; *Merwin v. Merwin* (1882) 54 Iowa 699, 13 N. W. 851.

32. Ala. Code, 1928, sec. 7431.

33. Carroll's Kentucky Stat., 1922, sec. 2144.

34. Compiled Statutes of Nebraska, 1922, sec. 1536.

35. North Carolina Code, 1927, sec. 2522.

36. Wisconsin Stat., 1929, sec. 247.36.

37. See *Arrington v. Arrington* (1889) 102 N. C. 491, 9 S. E. 200; *Hawkins v. Ragsdale* (1882) 80 Ky. 353, 44 Am. Rep. 483.

38. Throckmorton's Ann. Code of Ohio, 1929, sec. 11991.

of the husband's aggression the husband is barred of all right of dower in her lands<sup>39</sup> but if the divorce is granted for the wife's aggression her right to dower is ended.<sup>40</sup> Under these provisions the wife has been held entitled to dower in her first husband's lands even though she had remarried.<sup>41</sup> Her claim is valid as against a purchaser from him<sup>42</sup> unless her alimony allowance had been made in lieu of dower.<sup>43</sup> In Massachusetts the statute provides that there shall be no dower after divorce unless the wife procured the divorce for adultery or confinement of the husband at hard labor in which cases she is endowed.<sup>44</sup> The Michigan statute preserves dower to the wife when she obtains the divorce for adultery, imprisonment for life or for a term of three years or more, or for his habitual drunkenness, "in the same manner as if he were dead."<sup>45</sup> In all other cases she is not entitled to dower. The Maine statute also provides that upon a divorce decreed to the wife for any cause except impotence, she shall be entitled to one-third of his real estate, except wild lands, "which shall descend to her as if he were dead."<sup>46</sup> There is a similar provision in favor of the husband with the addendum that "in all cases the right title and interest of the libelee in the real estate of the libelant shall be barred by the decree."<sup>47</sup>

The statute in Missouri provides that "if any woman be divorced from her husband for the fault or misconduct of said husband, she shall not thereby lose her dower; but if the husband be divorced for her fault or misconduct she shall not be endowed."<sup>48</sup> There is a similar statute in Illinois.<sup>49</sup> A Rhode Island statute declares that "whenever a divorce is granted for fault on the part of the husband, the wife shall have dower as if the husband were dead; but such dower shall be claimed on proceedings begun within six months after the absolute decree. . . ."<sup>50</sup> Another statute provides that "whenever a divorce is granted for fault on the part of the wife the husband, if he be entitled to curtesy initiate, shall have a life estate in all the lands of the wife as if the wife were

---

39. *Ibid.*, sec. 11990.

40. *Ibid.*, sec. 11993.

41. *McGill v. Deming* (1887) 44 Ohio St. 645, 11 N. E. 118.

42. See *Arnold v. Donaldson* (1888) 46 Ohio St. 73, 18 N. E. 540.

43. *McKean v. Ferguson* (1894) 51 Ohio St. 207, 42 N. E. 254.

44. Gen. Laws of Massachusetts, 1921, ch. 208, sec. 27.

45. Compiled Laws of Michigan, 1915, sec. 11415.

46. Revised Stat. of Maine, 1916, ch. 65, sec. 9.

47. *Ibid.*, ch. 65, sec. 10.

48. Revised Stat. of Missouri, 1919, sec. 327.

49. Smith-Hurd Ill. Revised Stat., 1927, ch. 41, sec. 14.

50. Gen. Laws of Rhode Island, 1923, sec. 4216.

dead . . . ."<sup>51</sup> Neither spouse has any right or claim in the realty of the other except as provided in the foregoing statutes.<sup>52</sup>

Statutes of the type set out above seem fairly clear and free from ambiguity. They recognize the rule that at common law a divorce was a complete bar to a claim for dower or curtesy by either spouse. The effect of the statute is to extend the right where it were otherwise terminated and in states like Michigan and Maine to have the further effect of making the dower right consummate upon divorce "in the same manner as if the husband were dead."

But there are other statutes which at first glance are not so clear. In Arkansas a provision makes a divorce for the wife's misconduct a bar to any subsequent claim for dower.<sup>53</sup> In Hawaii a woman divorced for her misconduct "shall not be endowed."<sup>54</sup> In Oklahoma the act declares "a divorce granted at the instance of one party . . . shall be a bar to any claim of the party for whose fault it was granted, in or to the property of the other except in cases where actual fraud shall have been committed by or in behalf of the successful party."<sup>55</sup> The Tennessee statute provides that "if the bonds of matrimony be dissolved at the suit of the husband the defendant shall not be entitled to dower in the complainant's real estate. . . ."<sup>56</sup> Two New York statutes provide that "in case of a divorce dissolving the marriage contract for the misconduct of the wife she shall not be endowed,"<sup>57</sup> and that "in case of a dissolution of the marriage because of the absence of the wife for five successive years . . . she shall not be endowed."<sup>58</sup>

The obvious inference from these statutory enactments would seem to be that, in case of a divorce other than those described in the statutes, dower would not be barred. This, of course, was not true at common law. Where there are statutory provisions purporting to create dower, it might be possible to construe the statute as giving to the wife a vested interest in all lands whereof her husband was seized at any time during the marriage. This seems to be the way the New York courts work it out. The word "widow" in such statutes is regarded as a description "comprehensively employed" by the legislature to designate the person entitled to dow-

---

51. *Ibid.*, sec. 4217.

52. *Ibid.*, sec. 4218.

53. Crawford and Moses' Stat. of Arkansas, 1921, sec. 3521.

54. Hawaii Revised Laws, 1925, sec. 3025.

55. Compiled Laws of Oklahoma, 1909, sec. 6180.

56. Shanon's Code of Tennessee, 1909, sec. 4226.

57. Cahill's Consolidated Laws of New York, 1930, ch. 51, sec. 196.

58. *Ibid.*, ch. 51, sec. 196a.

er;<sup>59</sup> but a woman need not be the wife of the deceased at the time of his death.<sup>60</sup> If the statute declaring that "a widow shall be endowed with the third part of all lands," etc.,<sup>61</sup> were construed alone, such an interpretation would obviously be absurd. Such a statute in view of the common law would make dower identical with that which existed before the statute. However, such a statute, when read in connection with a provision that "in case of a divorce dissolving the marriage contract for the misconduct of the wife she shall not be endowed," may very plausibly receive the construction of the New York courts. It is the only way in which the latter statute can have any meaning whatever. Thus taken together such enactments may be regarded as preserving to the wife her dower in every case not covered by the statute which bars such rights.<sup>62</sup> Some courts, however, have refused to follow this reasoning<sup>63</sup> and apply the common law rule to all cases of divorce. The statute is thus an anomaly.<sup>64</sup>

59. See *Wait v. Wait* (1850) 4 N. Y. 95.

60. See *People v. Faber* (1883) 92 N. Y. 146, 44 Am. Rep. 357.

61. Cahill's Consolidated Laws of New York, ch. 51, sec. 190, prior to 1929 when the statute was amended to abolish dower and curtesy.

62. *Van Blaricum v. Larson* (1912) 205 N. Y. 355, 98 N. E. 488.

63. *Buckley v. Mosarret* (1899) 12 Hawaii 265; *Wood v. Wood* (1894) 59 Ark. 441, 29 L. R. A. 151.

64. See *Reynolds v. Reynolds* (1840) 24 Wend. (N. Y.) 193, in which the legislative history of this provision is detailed: "By the statute, Westm. II. (13 Edw. I. c. 34), it was enacted that 'if a wife willingly leave her husband, and go away, and continue with her advouter, she shall be barred forever of action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon, except that her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him, in which case she shall be restored to her action.' 2 Co. Inst. 433. This statute was, in substance, re-enacted in this state in 1787 (1 Greenl. St. 294, sec. 7), and it remained in force down to the revision of the laws in 1830. . . . In 1830 the act of 1787 was repealed, and, after declaring that a widow shall be entitled to dower, a new provision was made in the following words: 'In case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed.' 1 Rev. St. 741, sec. 8. Under this statute the adultery is not enough. It must be followed by a divorce dissolving the marriage contract. This has brought us back to the common law as it stood before the statute of 13 Edw. I., for, as we have already seen, adultery did not work a forfeiture at the common law. And as to a divorce a vinculo, that always put an end to the claim of dower: for, although it was not necessary that the seisin of the husband should continue during the coverture, it was necessary that the marriage should continue until the death of the husband. Co. Litt. 32a; 2 Bl. Comm. 130; 2 Kent, Comm. p. 52c, and Id. p. 54. The statute bar for the mere act of adultery, which had existed for more than five centuries and a half, was blotted out by the repeal of the act of 1787, the British statutes not being in force in this state; and the eighth section of the act of 1830 has added nothing to the law as it would have stood had the legislature stopped with a simple repeal of the act of 1787."

See also for an explanation of the provision, *Kendall v. Crenshaw* (1915) 116 Ark. 427, 173 S. W. 393; *Grober v. Clements* (1903) 71 Ark. 565, 76 S. W. 555; and *Wood v. Wood* (1894) 59 Ark. 441, 27 S. W. 641.



In some instances statutes provide that certain grounds for divorce alone will terminate dower,<sup>65</sup> the most common of which, of course, are adultery or, as in Virginia, abandonment,<sup>66</sup> and in North Carolina statutes provide that upon a divorce a mensa et thoro the party at fault shall lose her dower or his curtesy.<sup>67</sup> A Minnesota statute provides for an action to bar dower against one furnishing grounds for divorce.<sup>68</sup>

Still another type of statute has been held to bar dower as well as any other property claim. Such a provision is found in a Georgia statute to the effect that "after permanent alimony granted upon the death of the husband, the wife is not entitled to any further interest in his estate in her right as wife. . . ."<sup>69</sup> This statute has been held to be a bar to dower.<sup>70</sup> In Iowa the code provides that "when a divorce is decreed the guilty party forfeits all rights acquired by marriage."<sup>71</sup> This statute has been interpreted to cover property rights,<sup>72</sup> although the question of dower could not arise since such estates are abolished in Iowa. It has been held, however, that the statute does not refer to dower or to the statutory substitute, since the implication would be that the innocent party's rights would be preserved. This, it was held, was not the case. The common law prevails and both parties are barred.<sup>73</sup> In Nevada, where the community rule prevails, a statute declares that "all property not otherwise disposed of by the decree is vested in the party who procures the divorce."<sup>74</sup> But in New Mexico, where dower is abolished and the community is in effect, there is a provision that "failure to divide the property on divorce shall not affect the property rights of either husband or wife."<sup>75</sup> Prior to this statute a divorce decree in that state was res judicata as to all rights which might have been adjudicated in the divorce proceedings.<sup>76</sup> A Kansas statute provides that the wife is barred of all rights in the husband's property not disposed of by the decree.<sup>77</sup>

---

65. Public Laws of New Hampshire, 1922, ch. 306, sec. 19.

66. Virginia Code of 1930, sec. 5123.

67. North Carolina Code, 1927, sec. 2523, 2524. See *Joyner v. Joyner* (1909) 151 N. C. 181, 65 S. E. 896.

68. Mason's Minnesota Stat., 1927, sec. 8622.

69. General Code, 1926, sec. 2991.

70. *Harris v. Davis* (1902) 115 Ga. 950, 42 S. E. 266; *Stewart v. Stewart* (1871) 43 Ga. 294.

71. Iowa Code, 1927, sec. 10483.

72. *Holdorf v. Holdorf* (1924) 198 Iowa 158, 197 N. W. 910.

73. *Hanelton v. McNeill* (1911) 150 Iowa 470, 129 N. W. 480.

74. Compiled Laws of Nevada, 1900, sec. 505.

75. New Mexico Stat. Ann., 1929, ch. 8, sec. 509.

76. *Duncan v. Beacon* (1914) 18 N. M. 579, 139 Pac. 140.

77. Kan. Revised Stat., 1923, ch. 60, sec. 1511.

This, it would seem, would effectually bar a claim to dower after a divorce. But another provision declares that "a divorce shall be a bar to any claim of the party for whose fault it was granted in or to the property of the other," except in case of fraud.<sup>78</sup> It would seem that dower after divorce would be effectually barred by such an enactment as that in Louisiana: "the divorce shall forever dissolve the bonds of matrimony between the parties and place them in the same situation with respect to each other as if no marriage had ever been contracted between them."<sup>79</sup> Similarly as to the Porto Rico statute: "A divorce carries with it a complete dissolution of all matrimonial ties and the division of all property and effects between the parties to the marriage."<sup>80</sup> The same result might be expected from a simple statute like the Utah provision that "when a divorce is decreed the guilty party forfeits all rights acquired by marriage,"<sup>81</sup> or the Arizona enactment that "any separate property not disposed of by the decree shall remain separate property free from the claims of the other."<sup>82</sup>

To be sharply distinguished from all the statutes above, which make the divorce decree operative by its own force to affect the dower rights of the spouses, is a totally different type of enactment. This class of statute prescribes a rule of practice for the courts and empowers them to make certain orders and to enter certain provisions in the divorce decree to affect the property rights of the parties. The statutes are purely jurisdictional ones and authorize the provisions named, which the court otherwise would not have power to make by reason of the fact that in divorce matters it acts as a court of special and limited jurisdiction.<sup>83</sup> These statutes appear in a variety of forms in different states. Some of them authorize a disposition of the community,<sup>84</sup> others empower the court to divide the separate property of the husband or the wife or their joint property. Sometimes these statutes prescribe directions of a general nature to guide the court in making its decree. The Delaware statute for example provides that when the wife gets the decree the court *must* restore all her realty and such share of the husband's realty as appears right. But if the husband gets the decree the court *may* restore her separate

---

78. *Ibid.*, ch. 60, Sec. 1512.

79. Wolf's Constitution and Revised Laws of Louisiana, 1904, sec. 1195.

80. Porto Rico compilation of Revised Stat. and Codes, 1913, sec. 3243.

81. Utah 1907 Compiled Laws Ann., sec. 1213.

82. Arizona Revised Code, 1928, sec. 2182.

83. See *Bishop* "Marriage, Divorce and Separation" ch. IX.

84. California Civil Code, sec. 146; Idaho Revised Stat., 1919, sec. 4650.

property to the wife and such share of the husband's property as may be reasonable.<sup>85</sup>

A common type of statute of this general class is that which empowers the court to make such order in relation to the property of the parties as shall be "right,"<sup>86</sup> or as shall be "just,"<sup>87</sup> or as may be "expedient."<sup>88</sup> Sometimes the statutes limit the circumstances under which the court may award such share of the one spouse's property to the other as may be "just."<sup>89</sup> Under these statutes courts are usually regarded as having authority to divest the property rights of one party and create property rights in the other.<sup>90</sup> Sometimes the statute specifically provides that the filing of the decree alone shall effectuate a record binding upon all the world.<sup>91</sup> Again some statutes classed as "alimony" statutes are regarded as authority for the court to adjust the property interests<sup>92</sup> of the parties although other "alimony" statutes permit nothing but a money decree against the defendant.<sup>93</sup>

The statute of the District of Columbia empowers the court expressly to preserve dower in its decree.<sup>94</sup> The Michigan statute makes it the duty of the court to include in the decree a provision in lieu of dower in favor of the wife.<sup>95</sup> In Arkansas a statute provides that a wife is "entitled" as of right to a provision in a decree procured by her for one-third of her husband's lands for life.<sup>96</sup> A similar statute in Oregon entitles the successful party to a divorce decree to an undivided one-third of the realty of the other.<sup>97</sup> Such statutes do not themselves operate automatically to transfer title to land on divorce,<sup>98</sup> but merely authorize the court to make such a

85. Revised Code of Delaware, 1915, sec. 3018.

86. Iowa Code, 1927, sec. 10481.

87. Public Laws of New Hampshire, 1922, ch. 287, sec. 16; General Laws of Vermont, 1917, sec. 3590, 3593; Pierce's Code of Washington, 1905, 4637; Wyoming Compiled Stat., 1920, sec. 5000.

88. Virginia Code, 1930, sec. 5111; West Virginia Code, Ann., 1906, sec. 2927.

89. As to divorce obtained on certain grounds, General Laws of Vermont, sec. 3593 (where husband obtains divorce for wife's adultery, court may award him such share in the wife's realty or, personality as it deems "just").

90. Unless there is a provision to the contrary, as in Texas. Complete Texas Stat., 1928, sec. 4638.

91. Wisconsin Stat., 1929, sec. 247, 26.

92. North Carolina Code, 1927, sec. 1665. See *Davis v. Davis* (1873) 68 N. C. 180; Oklahoma Compiled Laws, 1909, sec. 6179.

93. Burn's Indiana Stat., 1926, sec. 1110. See *Alexander v. Alexander* (1894) 140 Ind. 560, 40 N. E. 55.

94. D. C. 1924 Ann. Code, p. 144, A 71.

95. Compiled Michigan Laws, 1915, sec. 11436.

96. Crawford and Mose's Stat. of Arkansas, sec. 3511.

97. Olson's Oregon Laws, 1920, sec. 511.

98. See *Bamford v. Bamford* (1870) 4 Ore. 30.

decree. The decree, however, operates directly upon the res and divests the title of the one party and vests it in the other.<sup>99</sup>

#### CONFLICT OF LAWS UNDER STATUTORY CHANGES

The starting point for all Conflict of Laws problems is the fundamental proposition that the *lex rei sitae* governs the dower of the wife in a particular piece of land. This is because such state is the only state which has jurisdiction (power) in the international sense to determine what interest will be created by a given act or status in land within its borders. That law determines the effect of divorce on dower regardless of whether divorce is domestic or foreign.

In considering the effect of a foreign divorce under modern statutes, mention should first be made of express Conflict of Laws statutes. Kansas for example, has a statute which provides that a foreign divorce "shall have the same force with regard to persons now or hereafter resident or hereafter to become resident of the state as if said judgment had been rendered by a court of this state and shall as to the status of all persons be treated and considered and given force the same as a judgment of the courts of this state."<sup>100</sup> This statute applies to "persons" and to "status"; it says nothing about property rights. In the absence of a decision on the point, it is to be supposed that it would require the same results of a foreign divorce upon local property rights as if the decree were a domestic one. In South Carolina, where there is no provision whatever for local divorce, a statute expressly provides that one who procures a divorce in any other state shall be barred of dower.<sup>101</sup> The legislative policy against divorce in that state is to be found in another provision which "estops" the wife to claim dower even where the foreign divorce is not recognized as valid in South Carolina.<sup>102</sup> An Indiana statute provides that "a divorce decree in any other state, by a court having jurisdiction thereof, shall have full effect in this state."<sup>103</sup> This statute has been held to prevent a wife, after a foreign divorce, from asserting any claim to the husband's property at his death,<sup>104</sup> although the same result would have been required

99. See *Senkler v. Berry* (1908) 52 Ore. 215, 96 Pac. 1070.

100. Kansas Revised Stat., 1923, ch. 60, sec. 1518.

101. Code of Laws of South Carolina, 1922, sec. 5237. See *Dawson v. Dela Torre* (1921) 116 S. C. 338, 108 S. E. 101; *Shirley v. Parris* (1922) 121 S. C. 260, 113 S. E. 788.

102. *Ibid.*, 5243.

103. Burn's Indiana Stat., 1926, sec. 1121.

104. *Hilbish v. Hattie* (1896) 145 Ind 59, 44 N. E. 20.

without the statute, since the common law rule prevails in Indiana as to a wife's interest in her husband's lands after divorce.<sup>105</sup> The Indiana cases also hold that a local decree of divorce constitutes an adjudication of all property rights between the parties,<sup>106</sup> although such an effect would not necessarily be accorded to foreign divorces.

In the absence of a Conflict of Laws statute at the situs of the land, the application of the general dogma of *lex rei sitae* in connection with the local property law sometimes presents a serious problem. Statutes of the foreign state, where the decree was rendered preserving dower under the circumstances of the decree, are of no effect if there is no statute preserving dower at the situs,<sup>107</sup> or, if the foreign court in its decree includes a provision preserving dower under a local statute authorizing the same, it is of no effect if the statute at the situs bars dower.<sup>108</sup> The principal problem in this type of case is properly to interpret the local statute to determine (1) whether it affects the property interests of the parties *ipso facto* upon the rendition of a divorce decree, and (2) whether it is intended to apply equally to foreign decrees. The latter is the more difficult question and one upon which there is some confusion in the cases. It is always a question for the courts of the state which enacts the statute. "Whether a statute of one state securing or denying the right of dower in case of divorce extends to a divorce in a court of another state having jurisdiction of the cause and of the parties depends very much upon the terms of the statute and upon its interpretation by the courts of the state by the legislature of which it is passed and in which the land is situated."<sup>109</sup>

The principle involved in the interpretation of these statutes seems to be a penetration of the legislative policy which prompted the statute. Starting with the common law proposition that every divorce from the bonds terminates all dower rights, it is clear that the legislature desired to preserve these rights under certain circumstances, these circumstances depending primarily upon moral considerations. The common type of statute preserving dower to the innocent party in all or certain cases requires some attention to what is included as "innocence" in the policy established. From a legal point of view innocence means a failure to afford grounds for divorce; accordingly the spouse who has not afforded grounds for divorce is to be protected as against the spouse who has afforded

105. *Chenowith v. Chenowith* (1859) 14 Ind. 2.

106. *Murray v. Murray* (1899) 153 Ind. 14, 53 N. E. 946.

107. *Block v. P. & G. Realty Co.* (1924) 96 N. J. Eq. 159, 124 Atl. 372.

108. *McLaughlin v. McLaughlin* (1918) 202 Ala. 16, 79 So. 354.

109. *Barrett v. Failing* (1884) 111 U. S. 523, 526, 28 L. Ed. 505.

such grounds. But the legislative policy is further particularized in each state by statutes exclusively prescribing what are "grounds" to support a divorce decree. Consequently it may be plausibly argued that statutes preserving dower against the party at fault are to be interpreted narrowly to include only such fault or grounds as are prescribed by the local legislature and which have been judicially determined in a particular case by the local courts. Under such a construction the statute would apply only to domestic divorces.

A second possible construction would be to regard the statute as applicable to all divorces, domestic or foreign, granted for "aggression," "fault," or "misconduct" as recognized by local divorce law. This enforces the local notion of the moral grounds which are sufficient to support protection for the "innocent" spouse but does not confine the determination of such grounds in a particular case to local courts.

A third construction is to be found in the view that a judicial determination by the courts of any state of the "fault," "aggression," or "misconduct" of one of the spouses according to the legal definition of those terms by the proper law applicable to the status of the parties at the time is sufficient to satisfy the requirements of the statute. This construction proceeds partly from the view that moral policies of the various common law jurisdictions are not so dissimilar as to justify a difference in the results of divorce decrees from the several jurisdictions, and partly from a recognition of the great social interest involved in certainty and uniformity of the legal consequences ensuing from a valid divorce. While the courts have frequently seized upon other arguments and frequently upon misconceptions of the legal principles involved, including fanciful doctrines of the Conflict of Laws, it seems clear that the correct solution of the question depends upon a choice between the foregoing hypotheses based upon a consideration of the principles of social utility implied therein.

The cases under the Ohio statutes disclose an interesting treatment of the problem. In *McGill v. Deming*<sup>110</sup> the wife had obtained a decree in California where the parties had both been domiciled at the time. It was held that she was entitled to dower in his Ohio lands under the statute preserving dower to the wife if the decree was granted for the "aggression" of the husband. The ratio decidendi seemed somewhat as follows: (1) it was assumed that

---

110. (1887) 44 Ohio St. 645, 11 N. E. 118.

"aggression" in the local statute meant such a cause as would be grounds for divorce in Ohio. This was present in the California divorce; (2) the Ohio statute changing the common law rule that divorce invariably barred dower and preserving dower to the wife where the divorce was granted for the aggression of the husband was found to be applicable to a foreign divorce; (3) there was no violation of the "territorial" principle of the Conflict of Laws involved in such a construction of the local statutes. Said the court:

"While it is a principle of general recognition that real or immovable property ought to be left to be adjudged by the law of the place where the property is situated, as not within the rule of extraterritorial law, it is not inconsistent with this principle to accord to a foreign divorce the same effect upon real property located beyond the forum of the decree that is given to divorce of the same class decreed within the jurisdiction where such property is situated."

After quoting from *Story* on "Conflict of Laws" (sec. 230 e) the court continued,

"and so . . . if a right of dower according to such local law would accrue upon the granting of a divorce by a local tribunal, the like effect would follow a foreign divorce of the same sort decreed by a competent tribunal. The foreign divorce would not be recognized as exerting an extraterritorial force, *propiori vigore*, but would owe its effect rather to its conformity to the law of the place where the real property might be situated."

In *Mansfield v. McIntyre*,<sup>111</sup> where the husband had secured a divorce in Kentucky, the court had occasion to construe differently the statutory provision that if a husband obtained a divorce for the aggression of the wife, her dower was barred. It was held that "aggression" meant grounds for divorce under the Ohio law decreed by Ohio courts. It might have been held that since the Kentucky decree did not disclose the grounds upon which the divorce had been granted, it was not established that the statute operated to bar her rights. There is no presumption, in the absence of proof, that a divorce was for the "fault" of the wife so as to bar dower under a statute.<sup>112</sup> Since the other statutes preserve her dower except where the decree was granted for the wife's aggression, she was entitled to her dower. But these intelligible grounds seem wanting in *Doerr v. Forsythe*,<sup>113</sup> a later case. Here the husband had procured a divorce in Indiana, upon substituted service. The reasoning in the opinion proceeded as follows:

---

111. (1840) 10 Ohio 27.

112. *Murry v. Scully* (1914) 259 Mo. 57, 167 S. W. 1017.

113. (1893) 50 Ohio St. 726, 35 N. E. 1055.

## EFFECT OF FOREIGN DIVORCE ON DOWER

"The decree of divorce granted the husband in the state of Indiana acted only on the marital relation between the parties and did not affect nor purport to affect the property rights of the wife in the state of Ohio. For aught that appears, the divorce may have been granted on some ground not recognized as a ground for divorce by the laws of this state; so that it cannot be said that it was granted for any aggression of hers within the meaning of sec. 5700 Rev. Stat. But if it were otherwise, as she had no opportunity to defend, all that can be claimed for the decree is that it dissolved the marriage relation between the parties, and restored the husband to the status of an unmarried man. This the court could do; but, as it has no jurisdiction of the person of the wife, it was not competent to the Indiana court to affect such rights as she had acquired in the property of the husband under the laws of this state."

This opinion seems to amount to a statement of propositions of law somewhat as follows: (1) the Indiana decree did not purport to affect the wife's dower; (2) the Ohio statutes preserve dower except where a divorce is granted for the wife's aggression; (3) "aggression" means grounds for divorce under the Ohio statute; (4) the Indiana court had no jurisdiction to deprive the wife of any property interest in her husband's lands in Ohio; (5) to deny the wife's claim for dower would be to accord such an effect to the Indiana decree. The second and third propositions are correct and will account for the decision when applied to the facts.<sup>114</sup> The first proposition is no doubt correct in the case in hand, but irrelevant. Proposition four is, of course, likewise sound since the wife was not personally before the court, but irrelevant. The fifth proposition is false. If the foreign court had no jurisdiction to divorce the parties, the decree is, of course, void and the status and property rights incident thereto unchanged in Ohio and everywhere else. If the wife were actually at fault, the husband could acquire a domicile in Indiana or any place else and obtain a valid divorce upon substituted service, entitled to recognition under the Constitution in every state in the Union.<sup>115</sup> The effect of the altered status upon the wife's dower in Ohio is a distinct and different problem. It is a problem of Ohio law for Ohio courts and it involves no question of the jurisdiction of a foreign tribunal to affect directly Ohio land or the wife's interest in the land. It would make no difference whether the wife were before the Indiana court or not, although this seems to be a paramount consideration in the opinion of the

---

114. The grounds for the Indiana divorce were not put in evidence.

115. See Restatement of Conflict of Laws (tentative draft) by the American Law Institute, sec. 118.



case.<sup>116</sup> In either event, the Ohio law could provide certain legal consequences in Ohio; does the Ohio law bar her dower under the circumstances, or does it preserve it? The court answered the question, but it went further and introduced much irrelevant and unsound Conflict of Laws doctrine in addition.

The Missouri court arrived at a different conclusion in a similar situation where the husband had obtained a foreign divorce.<sup>117</sup> It was recognized that the foreign decree could have no extra-territorial effect but the Missouri statute preserved dower to the wife only when a decree was obtained for the husband's fault. In all other cases the common law rule prevailed. The decree in question, not falling within the statutory exception, was effectual to terminate her property interests in his Missouri lands.

The Missouri case is commonly regarded as in conflict with the Ohio case of *Doerr v. Forsythe*. But under the respective statutes of the two states such is not true. The Ohio statutes are construed as preserving the wife's dower whenever the divorce is not obtained for her "aggression."<sup>118</sup> The Missouri statute preserves her dower only when the divorce is obtained for her husband's misconduct.<sup>119</sup> Thus the common law rule in Ohio is abrogated in all cases save the statutory exception. In Missouri the common law rule is abrogated only in the cases designated by the statute. It is to be noted that the Missouri case turned upon the section of the statute which provided that "if the husband be divorced from the wife for her fault or misconduct she shall not be endowed." The court held that "this section applied to all divorces wherever obtained in this or any other state and whether obtained on personal service or by order of publication." The same result would have followed had the statute not been construed to apply to foreign decrees. With no statute applicable, the common law would have governed the case, thus cutting off the wife's dower. The court seemed to recognize this in the opinion.

In the Kentucky case of *Hawkins v. Ragsdale*<sup>120</sup> the court apparently lost sight of the common law rule. The husband here had obtained a divorce in Indiana upon constructive notice. It was held that the wife's dower in Kentucky lands was barred under the local statute. The court, however, seemed to believe that dower

---

116. See *Gould v. Crow* (1874) 57 Mo. 200. See *Goodrich* "Conflict of Laws" p. 307.

117. *Gould v. Crow*, supra, note 116.

118. See note 38, supra.

119. See note 48, supra.

120. (1882) 80 Ky. 353, 44 Am. Rep. 483.

would be intact were it not for the construction thus put upon the statute.

"Hawkins being a bona fida citizen of Indiana and resident therein at the time of the proceedings in which the divorce was obtained, the decree severing the bonds of matrimony determine the status of the parties, but does not by its own force affect the right to property in this state. Section 14 Article 4, Chapter 52 of the General Statutes . . . provides that a divorce bars all claim to curtesy or dower.

"We are of the opinion that this statute was intended to apply to all valid divorces no matter of what sovereignty granted. In its terms it is general referring to the fact of the severance of the bonds of matrimony, and not to the tribunal by which the dissolution is declared."

It is to be observed that the result should have been the same in this case, without any statute whatever.<sup>121</sup>

The remaining cases which show the general trend of statutory construction may be briefly reviewed. In *Thomas v. King*<sup>122</sup> the wife was barred from her dower in Tennessee lands of her husband who had obtained an Illinois divorce both by the common law and under the local statute. In *Hilbish v. Hattie*<sup>123</sup> the husband divorced the wife in another state and she was thereby barred from any interest in his Indiana lands. Indiana has no dower, but has a statutory substitute therefore and while the court purported to ground its result upon the local Conflict of Laws statute,<sup>124</sup> it is again clear that the only question involved was to determine the validity of the foreign divorce. If it was valid, the wife's interest in Indiana lands is immediately barred without the force of the statute. *Van Blaricum v. Larson*<sup>125</sup> and *Van Cleaf v. Burns*<sup>126</sup> are two leading New York cases in point. In the former, the wife, who had procured a divorce in a foreign state, did not lose her dower in New York by reason of the local statute preserving dower except where a decree is rendered for her fault. In the *Burns* case where the husband had procured the foreign decree, the wife was not barred because the decree had not been granted for the wife's fault within the meaning of the New York statute, adultery only being ground for divorce in that state. A Massachusetts defendant in *Barber v. Root*<sup>127</sup> held title under execution against a husband from whom the wife had

---

121. *Hood v. Hood* (1872) 110 Mass. 463.

122. (1895) 95 Tenn. 60, 31 S. W. 983.

123. (1896) 145 Ind. 59, 44 N. E. 20.

124. See note 103, *supra*.

125. (1912) 205 N. Y. 355, 98 N. E. 488.

126. (1890) 118 N. Y. 549, 23 N. E. 881.

127. (1813) 10 Mass. 260.

obtained a Vermont divorce. It was held that the husband's interest in the wife's property was terminated as a result of the decree. An Ohio divorce obtained by the wife barred her from dower in her husband's Kansas lands in *Chapman v. Chapman*.<sup>128</sup>

The Maine court, in *Harding v. Allen*,<sup>129</sup> construed a local statute to the effect that if a wife obtains a divorce for her husband's adultery, dower in his lands is not barred. The wife had been deserted in Massachusetts where the couple had been domiciled. She thereafter established her separate domicile in Rhode Island and obtained a divorce there for adultery. Later she remarried. It was held that she had not lost dower. "The language [of the statute]<sup>130</sup> is general," argued the court, "and is not limited to divorces within the state." The New York court in *Sullivan v. Sullivan*<sup>131</sup> construed the statute preserving dower after divorce in favor of a woman who had procured a foreign decree although she had twice violated a prohibition upon her remarriage contained in a decree procured by her first husband. The Supreme Court had refused to allow her dower on the clean hands doctrine.<sup>132</sup> The Appellate Division found that this maxim had nothing to do with her property interests in her husband's lands in view of the statute.

In Illinois homestead rights in the lands of a husband who had procured a divorce in Kansas were denied under the local statute.<sup>133</sup> But in an Oklahoma case,<sup>134</sup> where the husband had abandoned his wife in Oklahoma and procured a divorce in Missouri on substituted service, the decree was regarded as having no effect upon the wife's homestead rights in Oklahoma, under a statute somewhat different from the one involved in the Illinois case.<sup>135</sup> The Iowa case of

128. (1892) 48 Kan. 636, 29 Pac. 1071.

129. (1832) 9 Me. 140, 23 Am. Dec. 549.

130. See note 46, *supra*.

131. (1923) 205 N. Y. Supp. 955.

132. *Sullivan v. Sullivan* (1923) 203 N. Y. Supp. 140.

133. *Rendleman v. Rendleman* (1886) 118 Ill. 257, 8 N. E. 773. See also *Gummison v. Johnson* (1921) 149 Minn. 329, 183 N. W. 515 (similar holding as to husband's homestead rights in wife's realty).

134. *Gooch v. Gooch* (1913) 38 Okla. 300, 133 Pac. 242. But the husband had abandoned his family and obtained the foreign divorce. Under such circumstances, the divorce was invalid and the decision could well have rested on these grounds. See Restatement, sec. 118.

135. The Illinois statute was as follows: "If any husband or wife is divorced for the fault or misconduct of the other, except where the marriage was void from the beginning, he or she shall not thereby lose dower nor the benefit of any such jointure, but if such divorce shall be for his or her own fault or misconduct, such dower or jointure and any estate granted by the laws of this state in the real or personal estate of the other shall be forfeited." See *Rendleman v. Rendleman* (1886) 118 Ill. 257, 263.

The Oklahoma statute was as follows: "A divorce granted at the instance of one party . . . shall be a bar to any claim of the party for

*Holdorf v. Holdorf*<sup>136</sup> presents a confused order of reasoning on much the same kind of question. The husband had left his wife in Iowa (whether for her fault or not does not seem clear) and procured a Colorado divorce. The wife claimed certain property in Iowa as exempt from his creditors under the statutory grounds of abandonment. The court held that the Iowa statute by which the guilty party to a divorce suit forfeits all claims to the property of the other applied to foreign divorces. It also seemed to hold that the Colorado decree estopped the wife from setting up abandonment by the husband although she had not appeared in the action. Since under the modern view a deserting husband could not acquire such a Colorado domicile as to confer jurisdiction upon the state to divorce him,<sup>137</sup> it would seem that if properly presented to the court, the wife could set up the fact, if it existed, of her abandonment by the husband.

Some of the cases involving the wife's right to dower after a foreign divorce merely turn on the validity of the foreign decree with no local property statute involved in the situation. Here the only problem is to determine whether the foreign state had jurisdiction to render the decree.

In *Colwin v. Reed*<sup>138</sup> a husband acquired an Iowa domicile under circumstances which did not amount to desertion on his part. It was held that his Iowa divorce did not bar the wife's dower in Pennsylvania. There was no local statute but the court thought that since Pennsylvania was the matrimonial domicile of the parties, that state had the "greater" right to regulate the wife's status. The case is not within the decision of *Haddock v. Haddock*<sup>139</sup> and is clearly erroneous. In *Reel v. Elder*<sup>140</sup> where the husband deserted his wife in Pennsylvania, the matrimonial domicile of the parties, and procured a divorce in Tennessee, it was held that the wife was not barred from dower in his Pennsylvania lands as the Tennessee divorce was invalid. This case is correct as Tennessee had no jurisdiction to divorce under the modern view. In *McCreary v. Davis*<sup>141</sup> the wife procured a divorce for her husband's fault, in another

---

whose fault it was granted in or to the property of the other except in cases where actual fraud shall have been committed by or in behalf of the successful party." See Compiled Laws, 1909, sec. 6180. The last clause could account for the decision.

136. (1924) 198 Iowa 158, 197 N. W. 910.

137. Restatement sec. 118.

138. (1867) 55 Pa. St. 375.

139. (1906) 201 U. S. 562, 50 L. Ed. 867.

140. (1869) 62 Pa. St. 308.

141. (1895) 44 S. C. 195, 22 S. E. 178.

state. It was held that her dower in South Carolina was not barred, apparently because the court thought it unnecessary to recognize a foreign divorce, in view of the policy of the state. It is now settled that such a decree, if valid, must be recognized under the Constitution. A different result is now available under the South Carolina Conflict of Laws statute.<sup>142</sup>

#### THE EFFECT OF PROCEDURAL OR DIRECTORY STATUTES

With respect to the type of statute of which a number are set out above, which empower or direct the court to dispose of the property rights of the parties in the decree, or to insert a provision in lieu of dower, etc., it is clear that such statutes are of no effect unless such a provision is included by the proper court in the decree when the divorce is granted. Thus where a wife obtained a divorce in a foreign state, she could not bring an action in Nevada for a division of the community there under a local statute authorizing the "court granting the decree" to make such a division.<sup>143</sup> A similar result was obtained in an Idaho case,<sup>144</sup> although in that case it seemed clear that the wife had deserted her husband and taken up a residence in Oregon where the divorce had been obtained. Under such circumstances, of course, Oregon had no jurisdiction to divorce her. Similarly in *Barrett v. Fielding*<sup>145</sup> an Oregon statute making it the duty for the court to decree to the successful party to a divorce action a one-third interest in the other's property did not affect property rights after a foreign divorce. An Arkansas case resulted in a similar decision under the same type of statute.<sup>146</sup>

On the other hand, where the court granting the decree exercises authority under such a statute, it operates only upon property within the state and does not affect land in a foreign jurisdiction. Accordingly where a wife procured a divorce in Illinois, the court reserving to her dower in her husband's lands, it had no effect as to Alabama property.<sup>147</sup> Conversely where an Oregon decree barred the wife of all rights in the husband's lands in Okla-

142. See notes 101, 102, *supra*.

143. *Keenan v. Keenan* (1917) 40 Nev. 351, 164 Pac. 351.

144. *Bedal v. Sake* (1904) 10 Idaho 270, 77 Pac. 638.

145. (1884) 111 U. S. 523, 28 L. Ed. 505.

146. *Gwyn v. Rush* (1920) 143 Ark. 4, 219 S. W. 339.

147. *McLaughlin v. McLaughlin* (1918) 202 Ala. 16, 79 So. 354. So also in *Pinkley v. Pinkley* (1913) 155 Ky. 203, 159 S. W. 795, where a California decree of division of property was of no effect in Kentucky, where a local statute prescribed a different division. See *Procter v. Procter* (1905) 215 Ill. 275, 74 N. E. 145, 106 Am. St. Rep. 168.

homa, it was of no effect.<sup>148</sup> The court granting the decree of divorce should recognize that a local statute does not, and could not, afford authority to dispose of foreign lands.<sup>149</sup>

A recent South Carolina case (*Scheper v. Scheper*<sup>150</sup>) seems to confuse the above principles in an effort to support a contrary result. A wife had procured a limited divorce in North Carolina where a statute made such a decree in favor of either husband or wife a bar to dower or curtesy of the party at fault.<sup>151</sup> The husband moved to Georgia and there remarried. It was held that he was not entitled to share in his first wife's South Carolina property. The court became hopelessly entangled in attempting to rationalize its decision. It reasoned:

"Reading the express statutory provisions referred to into the judgment of the North Carolina court, we have a clear-cut judicial determination of the forfeiture for cause of the husband's marital rights in his wife's property—a forfeiture subject to be defeated only by the wife's condonation and resumption of cohabitation" [citing a North Carolina case].<sup>151a</sup>

Again, the court said:

"But in so far as that judgment determined and fixed the marital status and rights of the husband with respect to the wife's separate property, it would clearly appear to be such a judgment as would be binding and conclusive in that state. . . . Since, however, a state cannot through its courts extend its coercive power to, nor effect by judicial determination, property outside of its own territory, it may be conceded that the judgment of the North Carolina court could have no direct operation upon real property in this state and could not per se affect the legal or equitable title thereto, and hence that it is not entitled to recognition and enforcement under the full faith and credit clause of the federal Constitution [citing cases]. But, under the law of comity, as the judicial determination of a competent court of a sister state, whereby the marital status of a husband was denatured of its efficacy to give rise to or support a legal right in the wife's separate property, we see no reason why that judgment should not be given the same force and effect in this jurisdiction as in the state of its rendition."

---

148. *Sharp v. Sharp* (1916) 65 Okla. 76, 166 Pac. 175, L. R. A. 1917F 562. So also in *Taylor v. Taylor* (1923) 192 Cal. 71, 218 Pac. 756, 51 A. L. R. 1074; *Rodgers v. Rodgers*, (1896) 56 Kan. 483, 43 Pac. 779, as to homestead rights in foreign lands.

149. *Baird v. Baird* (1920) 98 Ore. 169, 188 Pac. 699; *Procter v. Procter* note 147, *supra*.

150. (1923) 125 S. C. 89, 118 S. E. 178.

151. See note 67, *supra*.

151a. *Taylor v. Taylor* (1893) 112 N. C. 134, 16 S. E. 1019.

The court thereupon seemed to shift its position and regarded the North Carolina decree as operating upon the person of the husband to bar his right to claim a share in his wife's property:

"The North Carolina judgment may fairly be construed as having established a personal obligation on the part of the husband to renounce and convey to the wife any expectant marital interest in the wife's separate property wherever situated. Such a personal obligation to renounce could have been lawfully undertaken by contract either in North Carolina or in this state and its performance enforced in either jurisdiction."

After such obviously erroneous reasoning, the court seemed to stumble on a sound ratio decidendi by assuming that the husband had obtained a divorce before his remarriage in Georgia,<sup>152</sup> which divorce, though doubtless void,<sup>153</sup> would estop him from denying the jurisdiction of the court which rendered it,<sup>154</sup> and thus he would be barred under the South Carolina statute<sup>155</sup> or the common law quasi-estoppel rule.

One more phase of the general problem deserves passing comment, viz., the effect of an order by the foreign court in granting the divorce compelling one of the parties to convey land in another state. If a procedural statute at the state where the decree is rendered will not operate to affect land in another state, what effect will an order of the court directing the owner to transfer such land have? Obviously, the order can have no more direct effect upon the foreign land than the statute does. But what action will the court where the land is situated be induced to take when the question is subsequently raised between the parties to the divorce action or their privies? Without entering into an extended discussion of the principles involved, which have been elaborately analyzed elsewhere,<sup>156</sup> it is believed that the court at the situs of the land will be induced to regard the question as conclusively adjudicated and that it will decree a conveyance of the land to the party entitled thereto under the foreign decree, as a matter of right and

---

152. Cf. *Murray v. Scully* (1914) 259 Mo. 57, 167 S. W. 1017.

153. Because the husband could not acquire such a domicile in Georgia as would confer jurisdiction upon that state to divorce him. He was living there, apart from his wife by his own fault as judicially determined by the North Carolina decree of limited divorce. Consequently the Georgia decree was void. See Restatement, sec. 118.

154. See note 19, supra.

155. See note 101, supra.

156. See *Barbour* "The Extraterritorial Effect of the Equitable Decree" (1919) 17 Mich. Law Rev. 527; *Cook* "The Powers of Courts of Equity" (1915) 15 Col. Law Rev. 37, 106, 228.

irrespective of the "discretion" of the court at the situs.<sup>157</sup> The question cannot be regarded as settled.

#### WAIVER, ELECTION AND ESTOPPEL UNDER PROCEDURAL STATUTES

While the rule that the law at the situs of the land determines the interest of a divorced spouse therein, it may be that statutes at the forum of the divorce decree may induce the court at the situs to deprive a divorced spouse of dower when otherwise it would not be barred. Statutes like that in Rhode Island<sup>158</sup> afford such possibilities, and *White v. Warren*<sup>159</sup> presents such a result. The wife had obtained a divorce in Rhode Island for her husband's adultery. Under the statute there she was entitled to dower in his lands as if the husband were dead, providing she brought an action within six months after the divorce and unless a claim for alimony be made within such period. Such a claim was made and alimony allowed. It might be supposed that such a statute would affect the wife's dower only in Rhode Island land. It was held, however, that the claim made by the wife, in view of the statute, operated as an election to the alimony in lieu of dower and constituted a waiver, binding upon her everywhere. Rhode Island had no jurisdiction, of course, to deprive a wife of dower in Massachusetts land. It did have power to prescribe conditions which, when brought into operation by the voluntary act of the wife, would be personally binding upon her. It is to be remembered that in granting alimony under such circumstances the Rhode Island court takes into consideration the property owned by the husband in foreign states. Consequently, it would be unfair for the wife to be permitted to

---

157. The Restatement does not adopt this view. See Restatement, sec 485.

158. The statute involved is as follows: (4216) Sec. 5. "Whenever a divorce is granted for fault on the part of the husband, the wife shall have dower as if the husband were dead; but such dower shall be claimed on proceedings begun within six months after the absolute decree, and, if not claimed within said period, or if claim be made for alimony within said period, then dower shall be deemed to be waived and released, and the only relief of the wife shall be a claim for alimony chargeable upon the estate of the husband, or some specific portion thereof, as the court may decree (but any such decree whether entered before or after April nineteen, nineteen hundred seventeen, ordering payment of alimony in any fixed sum or sums either indefinitely or for a certain period may for sufficient cause at any time be altered, amended, and annulled by said court, after notice to the parties interested therein): *Provided*, that in case of such divorce between parties married before the digest of eighteen hundred and forty-four went into operation, the wife shall be reinstated in all of her real estate and have restored to her all of her personal estate not, in either case, disposed of at the date of the filing of the petition for said divorce." P. L., 1917, ch. 1532.

159. (1913) 214 Mass. 204, 110 N. E. 1103.



enforce a dower claim in those states after having taken advantage of the Rhode Island statute by an alimony decree.

If such a question as the one presented in *White v. Warren*, supra, were presented in Ohio, there would be an additional reason for the same result, viz., the Ohio statute preserving dower to an innocent wife in lands "not allowed to her as alimony."<sup>160</sup> If a court granting a divorce should include in the decree, pursuant to a statute like the one in Michigan,<sup>161</sup> a provision in lieu of dower, or where the statute on alimony is construed as conferring upon the court power to make an order for alimony which is conclusive as to the parties' interests in the other's property,<sup>162</sup> what will be the effect in a foreign state where realty is situated and where the dower right would ordinarily be preserved? There seems to be no case directly in point, but a situation so closely analogous has arisen that the decision may be regarded as decisive of the present problem. The case in point is *Bates v. Bodie*.<sup>163</sup> There had been an Arkansas divorce and a decree and award of alimony, both parties, of course, appearing. The wife was prohibited from presenting a further claim for alimony in Nebraska out of the husband's lands there. The Supreme Court of the United States held that the full faith and credit clause interposed an insuperable difficulty and required an estoppel of record against the wife in such an action. The result seems fair when it is presumed that the Arkansas court took into consideration the Nebraska lands and that the award was made "in full of all demands."

The opinion in the *Bodie* case is not very clear cut, but the soundest rationalization seems to be that the wife's appearance in an action in which the alimony award made was in substance in lieu of all claims, constituted a waiver of any claim for further maintenance out of foreign property and such election is personally binding upon her everywhere. It would seem pretty clear that her acceptance of property or money "in lieu of dower" or as a final adjudication of property interests under circumstances which would bring into consideration the value of all her husband's property wherever situated would constitute a similar waiver or election and, under the federal Constitution, be an effective estoppel of record in every sister state.

---

160. See note, 38, supra.

161. See note 95, supra.

162. As the Indiana statute. See note 106, supra.

163. (1918) 245 U. S. 520, 62 L. Ed. 444.

## SUMMARY

The propositions of law developed in the foregoing discussion may be summarized as follows:

(1) At the common law any divorce a vinculo terminated dower and courtesy.

(2) It made no difference whether the divorce were local or foreign. The law was the same in all common law jurisdictions.

(3) As to statutes preserving dower to the innocent party after divorce, only such a statute at the situs of the land will be effective. Whether it applies to a foreign divorce, and if so, to what foreign divorces depends upon its interpretation by the courts of the state. Such statutes have been interpreted in all of the following three ways, depending upon the courts' notion of the policy of the legislature:

(a) To apply only to domestic decrees; "fault" or "misconduct" or "aggression" means such as are grounds for divorce in the local state when judicially found by local courts.

(b) To apply to foreign decrees when granted for grounds for divorce recognized by local law.

(c) To apply to all foreign decrees.

(4) Statutes authorizing or directing a court to divide property in a certain way or purporting to "entitle" one spouse to certain property of the other are not applicable to foreign decrees nor can they empower a court to divide foreign land.

(5) Provisions of a foreign decree, pursuant to a statute, ordering the one or the other spouse to convey property to the other, will be recognized by a court at the situs as conclusive between the parties as to which one is entitled to specific land in question, although the foreign decree alone will have no direct effect upon the title to the land nor will it be a lien upon the land. One who takes with notice of the provision of the foreign decree will be subject to the equities of the spouse in whose favor the foreign decree runs. The full faith and credit clause of the federal Constitution does not require this result, but the common law Conflict of Laws rule does require it.

(6) Where both parties appear before the court and a divorce and award of alimony is made under a statute which makes such a claim and award of alimony a waiver of dower, or where the alimony statute provides for a decree "in lieu of dower," or where any other type of statute is involved which terminates the spouses'

interests in each other's property and authorizes the court to take into account all property owned by the parties, wherever situated, such a claim and award of alimony will be effective to bar a subsequent claim for dower in any other state, regardless of the statutes in the state where the land is situated.

(7) The result, in all such cases as those last mentioned, would seem to be required by the full faith and credit clause of the federal Constitution.