#51 5/10/65

Memorandum 65-20

Subject: Study No. 51 - Right to Support after Ex Parte Divorce

You will receive with this memorandum a copy of the study prepared by Professor Horowitz of the U.S.C. Law School. You will note that the study was written in 1959 prior to the decision of the California Supreme Court in Hudson v. Hudson, 52 Cal.2d 735 (1959). Attached to this memorandum as an exhibit is the Uniform Civil Liability for Support Act (Civil Code §§ 241-254).

By way of background, Dimon v. Dimon, 40 Cal.2d 516 (1953), prompted the Commission's consideration of this subject. That case involved a wife who obtained a Connecticut divorce based on constructive service. She then filed an action in California against her former husband to obtain past and future alimony for herself and past and future support for the children. Neither party was a resident of this state. The California Supreme Court held that the wife could not obtain alimony. It held that a wife's right to recover alimony or support for herself is limited to the period when the parties are husband and wife. The Connecticut divorce, therefore, terminated her right to bring an action for alimony or support. Justice Traynor wrote a lengthy dissent that spells out in some detail his views concerning divisible divorce.

In Hudson v. Hudson, 52 Cal.2d 735 (1959), the court was concerned with a California wife whose husband left the state to procure an Idaho divorce. The California wife filed her divorce action in California and served the defendant personally in Idaho. Shortly thereafter, the husband filed his action for divorce in Idaho and the wife was personally served in California. The wife did not appear in the Idaho proceeding, and the Idaho divorce was granted prior to the termination of the California proceeding. Thereafter the

California court ordered the defendant husband to pay temporary alimony and related costs, whereupon the defendant husband appealed on the ground that the Dimon decision made such action on the part of the trial court erroneous. The Supreme Court, in an opinion by Justice Traynor, affirmed the order and overruled the decision in Dimon v. Dimon. Although much of the opinion in the Hudson case is dicta, the following principles seem to emerge as existing California law: (1) An ex parte divorce does not necessarily terminate the right to support arising out of the marriage. (2) Therefore, a fortiori, an ex parte divorce does not necessarily terminate the right to support formerly established and defined by a valid separate maintenance decree, and that right continues until modified or terminated in appropriate proceedings. (3) A valid ex parte divorce must be given full faith and credit only to the extent that it terminates the marriage relationship. (4) A wife's action for support can be maintained in some action other than a divorce action. Divorce and separate maintenance actions provide an occasion for the court's granting support, but the laws authorizing support orders in such actions do not preclude a court from granting support in other cases. (5) Because Dimon is overruled, it apparently makes no difference whether the obligee spouse was the plaintiff or the defendant in the ex parte divorce action. (6) Neither spouse need be a resident of California either at the time of the divorce or at the time of the later support action. (7) Justice Traynor's dissent in the Dimon case suggests that the former wife cannot maintain an action in California for support following an ex parte divorce if a similar action could not be maintained in the courts of the state where she was domiciled at the time of the ex parte decree. Thus, the right to support is determined by the domicil of the obligee spouse at the time of the decree. This is probably existing California law in view of the fact that the Dimon case was overruled in Hudson.

Although Hudson v. Hudson seems to have resolved most of the problems in this area, there appear to be a few left that the Commission might consider. (1) Is any statute necessary to provide the form of action to recover support alone? In Hudson v. Hudson, the action was a divorce action already commenced, and hence no problem existed. The Dimon case involved an action for support. Language in the Hudson case indicates that the court can entertain a general equity action for support. It is possible that the Uniform Civil Liability for Support Act has resolved this problem. The Civil Liability for Support Act was added to the Civil Code in 1955. It provides, in Section 242, that a man must support his wife; and it provides, in Section 243, that every woman must support her husband when he is in need. Section 244 provides that an obligor present or resident in this state has the duty of support specified in the act regardless of the presence or residence of the obligee. The Act provides that the superior court has jurisdiction of actions brought under the act, that the court may retain jurisdiction to modify or vacate orders of support made under the act, and that the obligee may enforce his right of support against the obligor in such actions.

Thus, this act provides for an action to recover support independent of of the divorce and separate maintenance actions. Apparently, then, an action for support can be maintained under the Civil Liability for Support Act without proving grounds for divorce as is necessary under the divorce and separate maintenance sections of the Civil Code. The rationale of Hudson v. Hudson that the court granting an ex parte divorce does not have the power to terminate an obligor's duty arising under the act would tend to indicate that an action can be brought under the act even though the marriage is terminated by an ex parte divorce. Should any provisions be added to the act to make this clear?

(2) What about defenses? The only defense referred to in the Civil Liability for Support Act is abandonment; and this is not a defense if the abandonment was caused by the obligor's misconduct. In a divorce or separate maintenance action, the obligor could cross complain for divorce and if he were successful both in opposing the complaint and in establishing his cross-complaint the court would be without power to order him to support the other spouse. Hager v. Hager, 199 Cal. App.2d 259 (1962).

In his Dimon dissent, Justice Traynor opined that the obligor spouse could contest the merits of the divorce in the later support action. Thus, he could assert any defense that would have been available to him in the divorce action. This would not amount to a collateral attack on the divorce, for the divorce would conclusively establish the termination of the marriage. It would merely be a defense to the claim for continuing support. The opinion does not indicate the jurisdiction whose laws would be used for defensive purposes, but apparently the law of the jurisdiction granting the divorce is to be used.

Should some statutory provision for defenses be made in addition to the defense of abandonment?

(3) Should the obligor be provided with a means for terminating his obligation to support after an ex parte divorce? As previously mentioned, if a husband sues a wife for divorce and the divorce is granted, the court is without power to order the husband to support the wife. Of course, if she cross complains and a divorce is awarded to both parties, then the court can order support. But at least during the marriage the husband has the power to bring an action to terminate his obligation to support. After an ex parte divorce, should an obligor have the right to bring some sort of action to

terminate any future obligation to support? What should be the grounds for relief in such an action?

We suggest that an obligor be permitted to bring an action to establish that he has a valid defense to any asserted support right.

(4) The Uniform Reciprocal Enforcement of Support Act provides in Code of Civil Procedure Section 1670:

> Duties of support enforceable under this title are those imposed or imposable under the laws of any state where the alleged obligor was present during the period for which support is sought or where the obligee was present when the failure to support commenced, at the election of the obligee.

You will recall that Justice Traynor's dissent in the Dimon case suggests that the proper law to apply after an ex parte divorce is the law of the obligee's domicil at the time of the divorce. It is true that there is no holding based on this suggestion in the Dimon dissent; but should any attempt be made to qualify the rule declared in the reciprocal act in cases where an ex parte divorce has been granted. There is an apparent conflict between Justice Traynor's dictum and Section 1670. Under the reciprocal act, an obligor's duty to support may be found in California law even though the law of the obligee's domicil does not grant a right of support. Thus, the obligee's support right may depend on whether the obligee elects to remain out of state and proceed under the reciprocal act or to enter the state and proceed directly against the obligor.

Should the inconsistency be resolved? Should Justice Traynor's dictum on the choice of law question be codified?

(5) An open question is whether an obligee spouse may split her cause of action by obtaining an ex parte divorce (thus leaving support questions

undetermined) even though personal service on the other spouse might have been possible. Should any statutory solution to this problem be proposed?

We suggest that if the obligor spouse is given the right to bring an action to terminate his support duty, the problem, if any, in this area disappears.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

Memo. 65-20

EXHIBIT I

TITLE III

Uniform Civil Liability For Support Act

[Added by Stats. 1955, ch. 835, § 1.]

Former Title III, entitled "Guardian and Ward," consisting of §§ 236-259, enacted 1872; Repealed by Stats. 1931, p. 687.

§§ 236–240. [Repealed by Stats. 1931, p. 687.]

See Prob. C. §§ 1400, 1401.

§ 241. [Definitions.] As used in this title:

(a) "State" includes any state, territory or possession of the United States, the District of Columbia and the Commonwealth of Puerto Rico.

(b) "Obligor" means any person owing a duty of support.

(c) "Obligee" means any person to whom a duty of support is owed.

(d) "Child" means a son or daughter under the age of 21 years and a son or daughter of whatever age who is incapacitated from earning a living and without sufficient means.

(e) "Parent" includes either a natural parent or an adoptive parent. [Added by Stats. 1955, ch. 835, § 1.]

Former § 241, enacted 1872; Repealed by Stats. 1931, p. 687. See Prob. C. §§ 1402, 1403.

§ 242. [Duty of man to support wife, etc.] Every man shall support his wife, and his child; and his parent when in need. The duty imposed by this section shall be subject to the provisions of Sections 175, 196, and 206 of the Civil Code. [Added by Stats. 1955, ch. 835; § 1.]

Former § 242 added by Stats. 1917, p. 645; Repealed by Stats. 1931, p. 687. See Prob. C. § 1404.

Original § 242, enacted 1872; Repealed by Stats. 1905, p. 728.

§ 243. [Duty of woman to support child, etc.] Every woman shall support her child; and her husband and her parent when in need. The duty imposed by this section shall be subject to the provisions of Sections 176, 196, and 206 of the Civil Code. [Added by Stats. 1955, ch. 835, § 1.]

Former § 243, enacted 1872; Repealed by Stats. 1905, p. 728.

§ 244. [Duty of obligor present or resident in State.] An obligor present or resident in this State has the duty of support as defined in this title regardless of the presence or residence of the obligee. [Added by Stats. 1955, ch. 835, § 1.]

Former § 244, enacted 1872; Repealed by Stats. 1905, p. 728.

§ 245. [Jurisdiction of superior court.] The superior court shall have jurisdiction of all actions brought under this title. [Added by Stats. 1955, ch. 835, § 1.]

Former § 245, enacted 1872; Repealed by Stats. 1905, p. 729.

§ 246. [Facts to be considered in determining amount due for support.] When determining the amount due for support the court shall consider all relevant factors including but not limited to:

(a) The standard of living and situation of the parties;
(b) The relative wealth and income of the parties;
(c) The ability of the obligor to earn;
(d) The ability of the obligee to earn;
(e) The need of the obligee;
(f) The age of the parties;
(g) The responsibility of the obligor for the support of others.

[Added by Stats. 1955, ch. 835, § 1.]

Former § 246, enacted 1872; Repealed by Stats. 1931, p. 687. See Prob. C. §§ 1406–1409.

§ 247. [Modification or vacation of order of support.] The court shall retain jurisdiction to modify or vacate the order of support where justice requires. [Added by Stats. 1955, ch. 835, § 1.]

Former § 247, enacted 1872; Repealed by Stats. 1905, p. 729.

§ 248. [Enforcement of obligee's right of support: Right of county.] The obligee may enforce his right of support against the obligor and the county may proceed on behalf of the obligee

to enforce his right of support against the obligor. Whenever the county furnishes support to an obligee, it has the same right as the obligee to whom the support was furnished, for the purpose of securing reimbursement and of obtaining continuing support. The right of the county to reimbursement shall be subject to any limitation otherwise imposed by the law of this State. [Added by Stats. 1955, ch. 835, § 1.]

Former § 248, enacted 1872; Repealed by Stats. 1905, p. 729.

§ 249. [Appeals.] Appeals may be taken from orders and judgments under this title as in other civil actions. [Added by Stats. 1955, ch. 835, § 1.]

Former § 249, enacted 1872; Repealed by Stats. 1905, p. 729.

§ 250. [Evidence: Husband and wife as witnesses: Disclosure of communications between spouses.] Laws attaching a privilege against the disclosure of communications between husband and wife are inapplicable under this title. Husband and wife are competent witnesses to testify to any relevant matter, including marriage and parentage. [Added by Stats. 1955, ch. 835, § 1.]

Former § 250 enacted 1872; Repealed by Stats. 1931, p. 687. See Prob. C. § 1400.

§ 251. [Cumulative rights.] The rights herein created are in addition to and not in substitution for any other rights. [Added by Stats. 1955, ch. 835, § 1.]

Former § 251 enacted 1872; Repealed by Stats. 1931, p. 687. See Prob. C. § 1400.

§ 252. [Effect of partial invalidity.] If any provision of this title or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the title which can be given effect without the invalid provision or application, and to this end the provisions of this title are severable. [Added by Stats. 1955, ch. 835, § 1.]

Former § 252 enacted 1872; Repealed by Stats. 1931, p. 687. See Prob. C. § 1591.

§ 253. [Interpretation and construction.] This title shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. [Added by Stats. 1955, ch. 835, § 1.]

Former § 253 enacted 1872; Repealed by Stats. 1931, p. 687. See Prob. C. § 1580.

§ 254. [Citation of act.] This title may be cited as the Uniform Civil Liability for Support Act. [Added by Stats. 1955, ch. 835, § 1.]

Former § 254 enacted 1872; Repealed by Stats. 1931, p. 687.

§§ 255–258. [Repealed by Stats. 1905, p. 729; Stats. 1931, p. 687.]

See Prob. C. §§ 1592, 1593.

January 19, 1959

A STUDY TO DETERMINE WHETHER A FORMER WIFE, DIVORCED IN AN ACTION IN WHICH THE COURT DID NOT HAVE PERSONAL JURISDICTION OVER BOTH PARTIES, SHOULD BE PERMITTED TO MAINTAIN AN ACTION FOR SUPPORT*

*This study was made at the direction of the California Law Revision Commission by Professor Harold W. Horowitz of the School of Law, University of Southern California.

#51

A STUDY TO DETERMINE WHETHER A FORMER WIFE, DIVORCED IN AN ACTION IN WHICH THE COURT DID NOT HAVE PERSONAL JURISDICTION OVER BOTH PARTIES, SHOULD BE PERMITTED TO MAINTAIN AN ACTION FOR SUPPORT*

This study discusses the question of what the California law should be on the issue whether a former wife, divorced in an action in which the court did not have "personal" jurisdiction over both spouses, should be permitted to maintain an action against the former husband for support.[1] This problem arises after an "ex parte" divorce action brought by either spouse, i.e., a divorce action in which the court had jurisdiction to grant the divorce because the plaintiff spouse was domiciled in the forum state, but in which there was not "personal" jurisdiction over the defendant spouse.[2] Several California decisions, particularly that of the supreme court in Dimon v. Dimon,[3] in 1953, have said that the existing California statutes do not permit the wife to recover support from the husband following such an ex parte divorce. This principle of California law is contrary to that in many states.[4] This study will discuss the considerations which seem to be relevant in answering the question whether legislation should be enacted to change the result reached under the present statutes.[5] The study is divided into the following parts:

I. General principles concerning alimony and support, and jurisdiction in matrimonial actions.

II. Dimon v. Dimon--a critique.

III. Some special problems.

IV. Summary of recommendations.

GENERAL PRINCIPLES CONCERNING ALIMONY AND SUPPORT, AND JURISDICTION IN MATRIMONIAL ACTIONS

Before discussing the problem with which this study is directly concerned it will be helpful first to provide a general background discussion of the statutory law of California relating to alimony and support and of the constitutional bases of jurisdiction in matrimonial actions.

The California Civil Code provides for the awarding of maintenance and support to a spouse in three situations:

(1) Separate Maintenance--Civil Code section 137--"Where the plaintiff spouse has a cause of action for divorce, or the defendant spouse deserts the plaintiff, or the defendant spouse wilfully fails to provide for the plaintiff, the plaintiff may, without applying for a divorce, maintain an action for "permanent support and maintenance." "Such action shall be known as an action for separate maintenance."[6]

(2) Temporary Alimony--Civil Code sections 137.2-137.3--"During the pendency of any action for divorce or for separate maintenance" the court may order the defendant spouse to pay any amount that is necessary for the "support and maintenance" of the plaintiff, or for the cost of maintaining or defending the action and for attorney's fees.[7]

(3) Permanent Alimony--Civil Code section 139--"In any interlocutory or final decree of divorce or in any final judgment or decree in an action for separate maintenance, the court may compel the party against whom the decree or judgment is granted to make such suitable allowance for support and maintenance of the other party as the court may deem just, . . . having regard for the circumstances of the parties . . . ."[8]

The purpose of temporary alimony in a divorce action is to provide for the support and maintenance of the spouse entitled thereto "until the decision of the cause on the merits."[9] An award of temporary alimony is consequently

terminated by the interlocutory divorce decree. Permanent alimony in a divorce action is awarded at the conclusion of the trial after the court has "full knowledge of the condition, abilities, and circumstances of the respective parties, and may then advisedly adjudge what is lawful and just to each of them . . . ." [10] Permanent alimony can be granted only against the party "against whom" the decree of divorce is granted. [11] The primary problem considered in this study is whether a California court should be permitted to grant permanent alimony to an otherwise qualified spouse following an ex parte divorce.

The background doctrine in constitutional bases of jurisdiction in matrimonial actions, relevant in considering the problem of permanent alimony after divorce, is found in decisions of the United States Supreme Court, which set forth the following principles:

The marital "status," viewed for purposes of the present discussion solely from a "legal" standpoint, is made up of various legal relationships between the spouses. Two sets of legal relationships, of the many that make up the marital status, should be isolated and distinguished from each other: (1) the incapacity of each of the spouses to marry another person while the other spouse is still living, and (2) the reciprocal legal rights and duties of maintenance and support between the spouses. When a marriage is to be dissolved it is necessary in our legal system that there be a valid judgment of a court decreeing the dissolution. For a complete dissolution of the marital status it may be necessary that there be an adjudication of a number of aspects of the status, considered as separate sets of legal relationships between the spouses. Under the due process clause of the Fourteenth Amendment

to the United States Constitution a state court can render a valid judgment, affecting a person's legal relationships with another person, only if the court had a valid "basis of jurisdiction" ith respect to the person affected by the judgment. If the plaintiff spouse in a divorce action is "domiciled" in a state a court in that state may constitutionally render a valid judgment adjudicating some, but not all, of the aspects of the legal relationships between the plaintiff and defendant spouse. For example, domicile of the plaintiff spouse in the state is a sufficient basis of jurisdiction for a court in that state to render a valid judgment that the plaintiff spouse is no longer under an incapacity to marry another person. Such a judgment must be given full faith and credit by the courts of another state if the issue of capacity to marry another is raised in the second state.[12] This is the so-called "ex parte" divorce.

Another aspect of the legal relationships between the spouses which may require adjudication upon divorce is the right of the wife to support by the husband following the divorce. Domicile of the plaintiff spouse--whether the plaintiff is the wife or the husband--in the divorce forum is not of itself a sufficient basis of jurisdiction for the court to render a valid judgment dealing with the defendant spouse's duty to pay or right to receive support after the divorce.[13] In order for a state court to have jurisdiction to render a valid judgment dealing with this aspect of the marital status it is necessary that there be a basis of so-called "personal" jurisdiction over the defendant spouse. This means that the defendant spouse must, generally speaking, either have been personally served within the divorce forum, or himself be domiciled in the divorce forum, or make a "general appearance" in the divorce

action.[14] Unless such a basis of jurisdiction exists any portion of the judgment of the court that purports to deal with the defendant spouse's duty to pay or right to receive support is invalid, and is not entitled to, and cannot be given, effect by a court of another state.

In most divorce actions the court has a basis of "personal" jurisdiction over the defendant spouse and is, therefore, able to render a valid judgment affecting all aspects of all of the legal relationships between the spouses, including the question of the wife's right to permanent alimony. In such a case the court's disposition of the permanent alimony issue is res judicata, and no court may inquire again into that issue.[15] But the ex parte divorce is frequently resorted to. For the reasons stated above, the ex parte divorce decree can have no valid res judicata effect on the issue of the defendant spouse's right to receive or duty to pay permanent alimony. The problem with which this study is concerned is then this: Where a divorce forum has rendered a valid judgment of divorce in an "ex parte" proceeding, jurisdiction being based solely on the domicile of the plaintiff spouse in the forum state, should a California court, if the circumstances otherwise justify it, be empowered, after the divorce decree has been rendered, to order that one of the spouses pay permanent alimony to the other spouse? The problem can arise in a California court primarily in two factual situations:

(1) Where the wife obtained a valid ex parte divorce decree in a California court, and now seeks permanent alimony from the husband;

(2) Where the husband obtained a valid ex parte divorce decree from the wife in a court outside California, and the wife now seeks permanent alimony.[16]

In each of these situations the divorce forum has rendered a valid

judgment dealing with some aspects of the legal relationships between the spouses, but had no jurisdiction to render a judgment dealing with the support rights or duties of the defendant spouse. When the issue whether the wife can then obtain permanent alimony from the husband is later raised in a California court the prior ex parte divorce judgment is not binding on the issue whether the wife is entitled to alimony. In this situation the California court is not precluded, either by the doctrine of res judicata, or, if the divorce forum was another state, by the full faith and credit clause of the United States Constitution, from granting permanent alimony to the wife. Because the ex parte divorce decree in these situations is not a conclusive adjudication of the wife's right to permanent alimony, the appropriate law-making institutions in California are then free to answer for themselves, on policy, the question whether permanent alimony should be permitted after an ex parte divorce.

The present California law on this question is as follows:

(1) Where the wife was the plaintiff in the ex parte divorce action: Dimon v. Dimon [17] holds that the wife cannot thereafter recover permanent alimony;

(2) Where the husband was the plaintiff in the ex parte divorce action: there is no exact holding in a California case on these facts,[18] but the reasoning in Dimon v. Dimon and statements in other California decisions suggest that the Dimon holding would probably, though not necessarily, be applied in this situation, so that the wife could not recover permanent alimony after the ex parte divorce.

DIMON V. DIMON--A CRITIQUE

The California decision which has most thoroughly considered the issue of permanent alimony following an ex parte divorce is that of the supreme court in Dimon v. Dimon.[19] That case involved a wife and husband who had never been, and who were not at the time of the trial, residents of California. The wife had obtained a valid ex parte divorce decree in her domicile, Connecticut. She sued in California to obtain support from the husband for the period of time following the divorce until her remarriage a few years later. The husband at the time of the California proceeding was a resident of Nevada, and was apparently served with process in California. There was a choice of law question here into which the majority opinion in the supreme court did not inquire--i.e., what state's law should govern on the issue whether the wife is entitled to permanent alimony following the ex parte divorce? The majority said that the case was to be decided under California law, though neither spouse was a domiciliary of California, either at the time of the divorce or at the time of the support suit.[20] Hence the opinion reads as one concerning the California law on alimony after divorce.

The decision of the supreme court was based on the California statutes summarized at page 2 supra. These statutes, the court said, mean that "in this state a wife's right to recover alimony or support for herself is limited to the period when the parties are husband and wife."[21] The court pointed to the language in Civil Code section 137 (now 137.2 and 137.3) which provided for the payment of temporary alimony and suit money "during the pendency" of a divorce action, and in Civil Code section 139, which at the time of the Dimon case provided that permanent alimony could be awarded "where a divorce is granted for an offense of the husband." These statutes,

the court said, show

> a consistent legislative purpose to confine the powers of the court to decree support in any form to the period when actions for divorce, annulment and separate maintenance are pending, including time on appeal and such further time as may be within the scope of the decree in the particular action. . . . The language employed indicates a continued legislative purpose to limit the time during which application for alimony and support may be made. Our courts have consistently recognized that the existence of the marital status is a prerequisite to the granting of alimony . . . .'after the judgment granting the divorce the plaintiff was no longer the wife of the defendant; and he owed her no longer any marital duty. From that time on she could enforce against him no obligation not imposed by the court at the time of the judgment.' [22]

The plaintiff wife in Dimon sought to avoid the force of the argument based on the statutory references to alimony being awarded "during the pendency" of a divorce action, or " here a divorce is granted," by bringing the action as one in equity "not dependent upon the provisions of the codes." [23] Her contention was that she had a right to permanent alimony "at the time of the divorce, that the question of that right was not and could not be litigated in the divorce proceeding because the Connecticut court did not have personal jurisdiction over" the husband, that her right survived the divorce, and that she could enforce that right in a court of equity in a "new and independent action" following the divorce proceedings. The court's answer to this contention was that if the wife's "arguments are to prevail the provisions of the Civil Code which have been held to prohibit remedies similar to that which she seeks must be disregarded." [24]

Justice Traynor, dissenting as to the portion of the court's opinion dealing with support after ex parte divorce, pointed out that the reasoning of the majority of the court rested on two propositions:

> . . . that an action for support depends upon the existence of the marital relation and that dissolution of the marriage ends the right to support. Two theoriss are thus advanced to justify denial of the action by the former wife for support: (1) that the divorce terminated the marriage status and the duty to support dependent thereon and (2) that a support order is obtainable only in an action for divorce or separate maintenance. [25]

Consideration of the problem in Dimon can be conveniently approached by dealing with the two propositions underlying the majority opinion as set forth by Justice Traynor:

(1) That the divorce terminated the marriage "status" and thus the duty to support because it is dependent thereon.--This proposition is based on a misconception of what alimony is. It is sometimes said that permanent alimony, following divorce, is compensation to the innocent wife for the wrong of the husband which forced the wife to sever the marital relationship, the relationship from which the husband's duty of support arose. Or alimony may be said to be a continuation, in appropriate circumstances, of the duty of support which arose when the marriage relationship was entered into.[26] But however the awarding of alimony is explained, it is clear that the theory of permanent alimony is that the husband may in some circumstances be obligated to support the wife after a divorce. "Dissolution" of the marriage does not mean that the former husband's obligation to support the former wife is automatically terminated. If the circumstances justify it, the wife's cause of action for permanent alimony after the divorce accrues at the time of the divorce. Ordinarily the question whether the wife is entitled to permanent alimony will be adjudicated at the time of the divorce decree, because ordinarily there will be adequate jurisdiction

over both spouses. But where an ex parte divorce is involved the divorce court has no jurisdiction to render a judgment dealing in any way with the husband's duty to pay permanent alimony following the divorce. If, in such a case, the circumstances at the time of the divorce would give the wife a right to permanent alimony the divorce court's judgment should have no effect on the wife's right. Hence in the ex parte divorce case the judgment of the court does not, and cannot, terminate or otherwise deal with the wife's right to permanent alimony.

The majority opinion in Dimon v. Dimon probably should not be read as reaching a conclusion that the ex parte divorce decree itself terminated any duty the husband might have had to support the wife after the divorce. The major emphasis of the court's opinion was on the second of the propositions outlined by Justice Traynor.

(2) That a support order is obtainable only in an action for divorce.--The majority in Dimon concluded that if the wife's right to permanent alimony in theory survived her ex parte divorce decree still she could not enforce that right because the California statutes provide for award of alimony only in the divorce action itself. The court here relied in part on one statute which is not pertinent in the alimony after divorce situation: the temporary alimony and suit money statute, which provides for the award of sums for those purposes "during the pendency" of the divorce action.[27] These are sums for the support of the wife while the matter of divorce is being litigated, and these sums can of course be awarded only when a divorce action is in progress. It is section 139 of the Civil Code which governs the award of permanent alimony

and which must, therefore, be relied on to find any justification for the position of the majority that the application for alimony is a "collateral proceeding or episode within the action for divorce, authorized for a particular purpose, but dependent for its maintenance upon the existence of the action." [28] Section 139 at the time of the Dimon suit provided that the court may make an award of alimony in appropriate circumstances "where a divorce is granted for an offense of the husband." This language was ambiguous. It could reasonably have been understood to provide that alimony could be awarded only as part of a divorce decree. On the other hand, it could have been construed to mean that if a wife was granted a divorce from her husband one condition, among others, to her recovery of permanent alimony was then satisfied; she might then later sue for permanent alimony after the divorce. However, the present form of section 139 more clearly restricts an alimony award to the divorce decree itself, for it reads that permanent alimony may be awarded in appropriate circumstances "in any interlocutory or final decree of divorce."

There is reason for a principle of restricting the award of alimony to the divorce proceeding itself. It is desirable that in adjudicating the dissolution of the marital status all aspects of the relationship of the spouses which need to be adjudicated be settled at once. In this kind of domestic relations action it is desirable that there not be piece-meal litigation of different parts of the "dispute," so that there will not be lingering claims between the spouses to be adjudicated in the future when they will perhaps have established "new" lives. In addition the principle of res judicata provides an argument that the

wife not be permitted to obtain alimony after the divorce proceeding is terminated. California decisions hold that if there is no provision for permanent alimony in the interlocutory decree of divorce, and no provision for future modification is made with respect to alimony, the wife cannot obtain alimony in the future.[29] The two principles discussed in this paragraph underly these decisions.

But these two interdependent reasons for a principle that permanent alimony can be recovered only in the divorce action itself have little or no application to the permanent alimony after ex parte divorce situation. It is an accepted principle of res judicata that a judgment has conclusive effect against a person only if the court rendering the judgment had an adequate basis of jurisdiction over that person.[30] The judgment of a court in an ex parte divorce cannot have valid res judicata effect as to the duty of the husband to pay permanent alimony.

The policy favoring complete adjudication of all issues between the spouses at the end of the divorce action could be applied to bar the wife's claim for permanent alimony after an ex parte divorce, even though the divorce court did not have jurisdiction to adjudicate the husband's duty to pay alimony. The argument would be that the policy favoring settlement of all matters between the spouses at the time of the divorce would require that the wife, if she was the plaintiff in the ex parte divorce action, either bring her action in a forum which can adjudicate her alimony claim or give up her alimony claim if she wishes to procure an ex parte divorce. Or, if the husband is the divorce plaintiff, the policy favoring complete settlement of all matters between the spouses in the divorce action would require the wife, if she desires ever to assert an alimony claim, to make

an appearance in the husband's divorce action and litigate the alimony issue at that time, even though the divorce forum had no jurisdiction to require her appearance in the action for that purpose.[31] The possibility and desirability of drawing a distinction between cases where the wife and the husband are the divorce plaintiffs, for purposes of permanent alimony after divorce, will be discussed in the next section. Ignoring for the moment the possibility of such a distinction being drawn, it seems reasonable to conclude that the policy favoring complete adjudication of all issues at the time of the divorce decree, however weighty it may be, should not be pressed to the point of a general disqualification of the wife to obtain permanent alimony after an ex parte divorce. Such a result undermines the principles of jurisdiction which limit the power of a court to render a judgment with respect to the husband's duty to pay permanent alimony. These established principles, based on sound considerations of public policy, become almost meaningless with the adoption of a general principle that would, for all practical purposes, make the ex parte divorce decree conclusive on the issue of permanent alimony following the divorce. Adoption of this principle presents a scarcely satisfactory pattern of alternatives to the wife in the two factual situations in which the permanent alimony after ex parte divorce problem can primarily arise:

(1) Where the wife is the plaintiff in the ex parte divorce action, e.g., a wife domiciled in California whose husband is living in another state. The wife here, under the principle of Dimon v. Dimon, can either (a) obtain an ex parte divorce in California, thereby giving up any claim to permanent alimony; (b) not obtain a divorce, in order to preserve her

permanent alimony rights; (c) bring an action for divorce and alimony in her husband's domicile;[32] or (d) acquire a domicile elsewhere, where she can obtain a divorce and either obtain an alimony judgment against the husband if he is amenable to jurisdiction there or, at least, not lose her alimony rights by obtaining an ex parte divorce.

(2) Where the husband is the plaintiff in the ex parte divorce action, e.g., the husband moves from California to another state and brings an action for divorce from his California domiciliary wife. The wife here, under Dimon v. Dimon, must make a general appearance in the husband's divorce action and prosecute her alimony claim, or otherwise lose any rights she might have to permanent alimony.

It may be doubted whether the principle favoring complete adjudication of all disputes between the spouses at the time of the divorce action is of sufficient social utility to justify requiring the wife to select among the unsatisfactory alternatives available to her in the two factual situations, particularly in light of the following considerations:

The policy favoring complete adjudication of all issues between the spouses at the time of the divorce action is not given controlling effect for other purposes. The very nature of permanent alimony is contrary to the view that there is or should be an inflexible principle of complete adjudication of the support issue at the time of the divorce. Alimony rights and duties are almost invariably modifiable and revocable in the event of changed circumstances.[33] Thus an adjudication of permanent alimony rights in the divorce proceeding itself is not by any means a "final" adjudication. An award of permanent alimony is often followed by

"piece-meal litigation" of the issue of the wife's alimony rights against the husband.

Nor would permitting permanent alimony after ex parte divorce necessarily seriously impair whatever policy there may be favoring adjudication of the alimony issue in the divorce proceeding. That policy is also reflected in the statute of limitations and laches doctrine, which would still be applicable to limit the time, after the ex parte divorce, within which the wife could bring her action to enforce any right to permanent alimony which had accrued to her at the time of the divorce.

It would seem, then, that, adhering to the basic principle that a wife under appropriate circumstances may be entitled to permanent alimony after a divorce, there is insufficient justification for a general principle that a wife who was entitled to permanent alimony at the time of the divorce cannot enforce that right afterward if the divorce was adjudged in an ex parte proceeding. Hence it is recommended that legislation be enacted to change the result in the Dimon case, so as to permit suit in appropriate circumstances for permanent alimony after an ex parte divorce. This could be accomplished by an amendment to Civil Code section 139 to provide in effect that a right to a permanent alimony award must be enforced in the divorce action if adequate jurisdiction over the defendant spouse to adjudicate the alimony issue was obtained, but that in other cases the right may be enforced in an appropriately defined later action.

SOME SPECIAL PROBLEMS

If it is concluded that Civil Code section 139 should be amended to permit a California court to grant permanent alimony after an ex parte divorce, inquiry should then be directed to several problems that arise in connection with the implementation of that principle:

Should a Distinction be Drawn Between Cases Where the Wife was the Divorce Plaintiff and Where the Husband was the Divorce Plaintiff?

The suggestion made above that permanent alimony should be obtainable after an ex parte divorce would seem to be most clearly applicable where the husband was the divorce plaintiff. For example, if the spouses are domiciled in California, and the husband moves to Nevada, acquires a domicile there, and sues for divorce in Nevada in an ex parte action, the California wife should not be required to submit to the jurisdiction of the Nevada court and adjudicate her possible alimony claim in the foreign (to her) forum. Dimon v. Dimon involved a wife who was the divorce plaintiff. Justice Schauer concurred in the court's opinion that the wife could not recover permanent alimony following the divorce, but, applying a principle he had referred to in a concurring opinion in an earlier case,[34] said that if the husband was the divorce plaintiff the wife should then be permitted to maintain the action. The majority opinion in Dimon suggested the possibility of drawing such a distinction, but did not rely on the distinction in deciding the case. Justice Traynor said that the wife's action for permanent alimony should be permitted whether the divorce plaintiff was the husband or the wife. This issue should be resolved in considering possible amendment of Civil Code

section 139.

The contention that no distinction should be drawn between the wife and husband as divorce plaintiffs in permitting permanent alimony would be this: If the spouses are domiciled in California and the husband then moves to Nevada, acquires a domicile there, and obtains an ex parte divorce decree in a Nevada court, the wife, under the principle discussed supra, should be permitted later to recover permanent alimony if she is otherwise entitled to it. Refusal to permit the later alimony action would mean that the wife would have to participate in the divorce action brought in another state by the migratory husband, and prosecute her support claim in which might be an inconvenient and otherwise disadvantageous forum for her. A similar argument on behalf of the wife may be made in the case where the wife is a California domiciliary and her husband is not, and the wife is the divorce plaintiff in a California court. If the wife desires a divorce the only forum in which she can obtain the decree is her domicile, California. The husband not being in California and not being a California domiciliary, the California court would not have jurisdiction to order him to pay permanent alimony to the wife. If the wife cannot obtain permanent alimony after an ex parte divorce she has three alternatives: (1) she can obtain the ex parte divorce and thereby give up her claim to permanent alimony, or (2) she can stay married to the absent husband, or (3) she can follow the husband, in an effort to sue him in a state (a) where he would be subject to the "personal" jurisdiction of the court long enough for her to acquire a domicile there and satisfy the residence requirements so as to be able to maintain her divorce action, or (b) where she would not

give up her right to permanent alimony by obtaining an ex parte divorce. Such alternatives seem hardly to justify drawing a distinction between the wife and husband as divorce plaintiff as far as permanent alimony after the ex parte divorce is concerned.[35]

Justice Schauer's position that a distinction should be drawn, permitting the wife to obtain permanent alimony only after an ex parte divorce in which the husband was the divorce plaintiff, is explained in the following extract from his concurring opinion in Dimon:

> She chose the forum and must be charged with knowledge of the limitations upon what relief she might get and also with knowledge of the character and extent of the rights which she would, or might, lose by bringing her action in that forum. In bringing that action she submitted herself to the jurisdiction of the Connecticut court for all purposes related to the litigation she instituted. Her in personam rights growing out of or dependent on the marital status are not in that case terminated by any act of the husband or without her having her day in court but, rather, are ended by her own act in bringing and prosecuting the suit to terminate the marriage, and procuring and accepting the judgment which does dissolve it. . . .
>
> If there is to be a divorce at all it is the better public policy that the decree of divorce shall settle for all time all the rights and obligations of the parties to the dissolved marriage to the end that litigation arising from such marriage shall end and be known to have ended, and that the parties may have an opportunity to build to a future, free from, and perhaps the better for, the past, rather than to be wrecked by recurring litigation. Except then, where there is a complete jurisdictional failure, as was the situation mentioned in the De Young case in respect to the personal property rights of the absent spouse [where the husband was the divorce plaintiff], the courts and legislatures should look with disfavor on delayed litigation between former spouses seeking to assert rights growing out of the status which has long since been dissolved.[36]

The majority opinion in Dimon also referred to the possibility of a distinction resting on who the divorce plaintiff was, and, answering the argument that when the wife is the plaintiff in the ex parte action she "is put to the election either of never divorcing him in a

jurisdiction where she cannot get personal service on him, or of sacrificing the right to alimony however necessitous her circumstances might be," said:

> . . . where she is, as here, the actor in the case she is put to the election of seeking a divorce in a jurisdiction where personal service on her husband may be obtained or of proceeding in a jurisdiction where subsequent awards of alimony are authorized.[37]

The arguments made in Justice Schauer's concurring opinion, and in Justice Shenk's opinion for the majority of the court, do not seem persuasive. It is difficult to see what policy would be served by maintaining the undesirable pattern of alternatives for the wife which this view entails, while changing the present rule where the husband was the divorce plaintiff. Hence it is recommended that no distinction be drawn between husband and wife as divorce plaintiff if it is decided that Civil Code section 139 should be amended to permit permanent alimony after an ex parte divorce.[38]

What Should be the Effect of an Ex Parte Divorce Decree on a Prior California Separate Maintenance Decree?

Cardinale v. Cardinale [39] raised a problem which should be considered if legislation is to be enacted to permit permanent alimony following an ex parte divorce. In that case the wife obtained a separate maintenance decree in California, with a valid provision for permanent support from the husband. Following this the husband acquired a domicile in Nevada and obtained a valid ex parte divorce decree entitled to recognition in California as terminating the marital "status" of the parties. The wife later sought in a California court to enforce the support provisions of the separate maintehance decree. The court held that because the parties

were no longer married the husband's obligation to support the wife under the separate maintenance decree was terminated.[40] The problem here was technically different than that in the Dimon case. The claim of the wife in Dimon was for the permanent alimony to which she was entitled, once the marriage was dissolved. The claim in Cardinale was for separate maintenance, which under the statutes is granted to a wife who has a ground for divorce, or who has been deserted by her husband. It may then be said that the continued existence of the "marital status" is a requisite to a continuing obligation to pay permanent support in the nature of separate maintenance.[41] In this view no criticism is to be made of a principle that following an ex parte divorce the wife is not entitled to separate maintenance, and is not entitled to continued rights under a prior separate maintenance decree.[42]

But should the wife in Cardinale be permitted to obtain permanent alimony, if she is otherwise so entitled, after (1) the California separate maintenance decree, and (2) the ex parte divorce? There would seem to be no reason why not. Her position with respect to permanent alimony would seem to be no different than that of the wife who had not obtained a separate maintenance decree before the ex parte divorce. If this conclusion is sound, the question would then be raised of how to deal legislatively with the Cardinale problem as far as permanent alimony is concerned. One alternative would be to amend the separate maintenance statute to provide that a separate maintenance decree will survive an ex parte divorce decree. Another alternative would be to provide in the amendment permitting permanent alimony after ex parte divorce that permanent alimony could be awarded whether or nor there had been a prior

separate maintenance decree. Neither alternative seems to be significantly more desirable than the other, but the latter course of action might be preferable, so as to avoid the need for an amendment to the separate maintenance sections to create a kind of separate maintenance which would be effective following divorce. Such a disposition of the problem would create the following situation: the ex parte divorce would terminate the husband's obligation under the prior separate maintenance decree; the wife could then bring an action for permanent alimony under Civil Code section 139. The only objection to this procedure would seem to be the added legal proceeding by the wife, but this does not seem to be so burdensome a requirement as to outweigh the advantage of not creating a kind of "separate maintenance" which would survive divorce.

Temporary Alimony and Suit Money in an Action for Permanent Alimony Following an Ex Parte Divorce

If Civil Code section 139 is to be amended to permit permanent alimony after ex parte divorce, the question should be answered whether the wife should be entitled, under Civil Code sections 137.2 and 137.3, to temporary alimony and suit money in such a proceeding for permanent alimony. Sections 137.2 and 137.3 now provide for support and suit money "during the pendency of any action for divorce or for separate maintenance." There would not seem to be any reason to deny this right to the wife if she is suing for permanent alimony after an ex parte divorce. But the action would presumably not be one "for divorce or for separate maintenance" and thus would not come within the literal language of sections

137.2 and 137.3.[43] Thus, if section 139 is amended to permit permanent alimony after ex parte divorce it is recommended that section 137 be amended to permit temporary alimony and suit money in such actions.

Federal Taxation Consequences of the Recommended Amendment of Section 139

Brief mention will be made of a corollary question which would arise if section 139 were amended to permit an action for permanent alimony after an ex parte divorce: whether payments by a husband under such a decree would be income to the wife and deductible by the husband under the Internal Revenue Code. No conclusive answer seems possible to this question; the question is raised to be certain that in considering amendment of section 139 the possibility is considered that alimony payments after ex parte divorce conceivably might not, under the present language of the Internal Revenue Code, be treated as are other alimony payments.

Section 71(a)(1) of the Internal Revenue Code provides that "if a wife is divorced . . . under a decree of divorce . . . the wife's gross income includes periodic payments . . . received after such decree in discharge of . . . a legal obligation which, because of the marital . . . relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce . . . ."[44] Section 71(a)(3) provides that "if a wife is separated from her husband, the wife's gross income includes periodic payments . . . received by her . . . from the husband under a decree . . . requiring the husband to make payments for her support or maintenance." And section 7701(a)(17) provides: "As used in section . . . 71, . . . if the husband and wife therein re-

ferred to are divorced, wherever appropriate to the meaning of such sections, the term 'wife' shall be read 'former wife' and the term 'husband' shall be read 'former husband.'"

It would seem that permanent alimony payments awarded after an ex parte divorce should certainly fall within one of the provisions of section 71. Whatever the reasons for considering support payments to be income to the wife and deductible expenses of the husband may be which underly the federal tax treatment of support awards made in a divorce or separate maintenance decree, those reasons would certainly be present also in the alimony after ex parte divorce situation.[45] But there might be some difficulty with the specific language of section 71. Section 71(a)(1) refers to payments made by the husband "under the decree," and that language might be held to refer to the divorce decree itself, as distinguished from the subsequent permanent alimony judgment. That section also refers to payments made by the husband "under a written instrument incident to such divorce." The problem here would be whether this section would be construed to include the subsequent permanent alimony decree as a "written instrument," in light of the fact that the purpose of this portion of section 71 seems to have been designed to cover payments made by a spouse under a written instrument, such as a separation agreement, executed by him. A contention might be made that permanent alimony after an ex parte divorce would come within section 71(a)(3), referring to a "decree . . . requiring the husband to make payments for her support or maintenance." The problem here would be that section 71(a)(3) refers to situations where a wife is "separated" from her husband, and is

apparently directed at including support decrees between spouses who are not divorced, but which are not called "separate maintenance" decrees.[46]

SUMMARY OF RECOMMENDATIONS

The present California rule, that a wife cannot obtain permanent alimony following an ex parte divorce, is contrary to the rule in many states. New York,[47] on the recommendation of the New York Law Revision Commission,[48] and New Jersey[49] have recently enacted legislation to permit permanent alimony after ex parte divorce. Other states have reached this result under existing statutes or case law.[50]

It is recommended that legislation be enacted to change the present California rule. Specifically, it is recommended that legislation be enacted which would accomplish the following:

(1) Permit the wife (or husband) to obtain permanent alimony after an ex parte divorce;

(2) Draw no distinction based on whether the wife or the husband was the plaintiff in the ex parte divorce proceeding;

(3) Permit such permanent alimony whether or not there was a prior California separate maintenance decree between the spouses;

(4) Permit temporary alimony and suit money in a proceeding to recover such permanent alimony;

(5) Achieve the preceding results without in any other way affecting the law concerning the circumstances in which alimony may be awarded to a spouse.

SUGGESTED LEGISLATION

The following legislation is suggested as a starting point in drafting amendments to the Civil Code to accomplish the five purposes set forth above:

Section 137.2:

"During the pendency of any action for divorce, ~~or for~~ separate maintenance, support and maintenance under Section 139.1 of this code, or ~~for~~ the support, maintenance or education of children, the court may order . . . ."

Section 137.3:

"During the pendency of any action for annulment in which costs and attorney's fees are authorized by Section 87 of this code and of any action for divorce, ~~or for~~ separate maintenance, support and maintenance under Section 139.1 of this code, or ~~for~~ the custody, support, maintenance or education of children, the court may order . . . ."

Section 139.1: (a new section)

"An action for support and maintenance may be maintained under Section 139 of this code even though there has already been a valid decree of divorce between the parties, if the court which granted the divorce decree did not have jurisdiction to render a valid judgment determining whether there should be an allowance for support and maintenance in favor of one of the parties. In such a case the

court may compel a party to make an allowance for support and maintenance of the other party if (1) at the time of the prior divorce decree a decree of divorce could have been granted against the party being compelled to make the allowance for support and maintenance,[51] and (2) the other party is otherwise entitled to such support and maintenance under Section 139 of this code. The court may compel a party to make an allowance for support and maintenance under this section even though there was a separate maintenance decree, under Section 137 of this code, between the parties prior to the divorce decree."

Footnotes

* This study was made at the direction of the Law Revision Commission by Professor Harold W. Horowitz of the School of Law, University of Southern California.

1 For purposes of convenience the discussion in this study is in terms of the right of the wife to recover support from the husband; the discussion also applies to recovery of support by a husband from his wife. The terms "support" and "alimony" are used interchangeably in this study, to refer to sums which one spouse may be required to pay to the other spouse, for the support of the other spouse, after dissolution of the marriage relationship by divorce.

2 "Jurisdiction" of a court, as used in this study, refers to the power of a court to make a conclusive adjudication of the legal relations of a person with respect to another person. The term "personal jurisdiction" in the context of this study refers to the "jurisdiction" of a court to make a conclusive adjudication of the spouses' legal relations with respect to rights and duties of support, as distinguished from other legal relationships between the spouses.

3 40 Cal. 2d 516, 254 P.2d 528 (1953). The decision of the district court of appeal is noted in 26 So. Cal. L. Rev. 325 (1953).

4 See p. 24 and note 50 infra, referring to the law of other states on this issue.

5 See, generally, Morris, Divisible Divorce, 64 Harv. L. Rev. 1287 (1951); Paulsen, Support Rights and Out-of-State Divorce, 38 Minn. L. Rev. 709 (1954); Note, Alimony: Power of Court to Award Alimony Subsequent to Divorce, 34 Calif. L. Rev. 193 (1946); Note, Alimony after Foreign Decrees of Divorce, 53 Harv. L. Rev. 1180 (1940); Note, Award of Alimony Subsequent to a Decree of Divorce, 34 Ky. L. Rev. 149 (1946); Note, 26 So. Cal. L. Rev. 325 (1953); Note, 13 Wash. & Lee L. Rev. 44 (1956).

6 Cal. Civ. Code § 137 provides in full as follows:

> When the husband or wife has any cause of action for divorce as provided in this code, or when the husband or wife wilfully fails to provide for the wife or husband, he or she, as the case may be, may, without applying for a divorce, maintain in the superior court an action against her or him, as the case may be, for the permanent support and maintenance of herself or himself, and may include therein at her or his discretion an action for support, maintenance and education of the children of said marriage during their minority. Such action shall be known as an action for separate maintenance.

7 Cal. Civ. Code § 137.2 provides in full as follows:

> During the pendency of any action for divorce or for separate maintenance or for the support, maintenance or education of children, the court may order the husband or wife or father or mother, as the case may be, to pay any amount that is necessary for the support and maintenance of the wife or husband and for the support, maintenance and education of the children, as the case may be. Any such order may be enforced by the court by execution or by such order or orders as, in its discretion, it may from time to time deem necessary. Any such order may be modified or revoked at any time during the pendency of the action except as to any amount that may have accrued prior to the order of modification or revocation.

Cal. Civ. Code § 137.3 provides in part as follows:

> During the pendency of any action for annulment in which costs and attorney's fees are authorized by Section 87 of this code and of any action for divorce or for separate maintenance, or for the custody, support, maintenance or education of children, the court may order the husband or wife, or father or mother, as the case may be, to pay such amount as may be reasonably necessary for the cost of maintaining or

defending the action and for attorney's fees if such relief is requested in the complaint, cross-complaint or answer . . . .

8 Cal. Civ. Code § 139 provides in full as follows:

> In any interlocutory or final decree of divorce or in any final judgment or decree in an action for separate maintenance, the court may compel the party against whom the decree or judgment is granted to make such suitable allowance for support and maintenance of the other party for his or her life, or for such shorter period as the court may deem just, having regard for the circumstances of the respective parties and also to make suitable allowance for the support, maintenance and education of the children of said marriage during their minority, specifying in such judgment or decree the name, age and amount of support for each child, and said decree or judgment may be enforced by the court by execution or by such order or orders as in its discretion it may from time to time deem necessary.
>
> That portion of the decree or judgment making any such allowance or allowances, and the order or orders of the court to enforce the same may be modified or revoked at any time at the discretion of the court except as to any amount that may have accrued prior to the order of modification or revocation.
>
> Except as otherwise agreed by the parties in writing, the obligation of any party in any decree, judgment or order for the support and maintenance of the other party shall terminate upon the death of the obligor or upon the remarriage of the other party.

9 Wilson v. Superior Court, 31 Cal. 2d 458, 463, 189 P.2d 266, 269 (1948), quoting from McCaleb v. McCaleb, 177 Cal. 147, 149, 169 P. 1023 (1917).

10 Ibid. The Wilson opinion contains a thorough discussion of the distinction between temporary and permanent alimony.

11 Cal. Civ. Code § 139. In DeBurgh v. DeBurgh, 39 Cal. 2d 358, 250 P.2d 598 (1952), it was held that in some cases where both spouses were at fault each can be granted a divorce. In such a case either spouse can be awarded alimony, because each spouse is a party "against whom" the decree is granted.

12 Williams v. North Carolina, 317 U.S. 287 (1942)

13 Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957).

14 The bases of jurisdiction referred to in the text are those typically available under present state statutes. Recent developments in the law of constitutional bases of jursidction suggest that a state could validly expand the jurisdiction of its courts in support actions--e.g., to give its courts jurisdiction to render a support order against a husband not present in nor domiciled in the state at the time of the wife's suit if the husband was domiciled in the state in the past, and left the state, deserting the wife.

15 The principle of res judicata would generally make the judgment of the court, if it had jurisdiction, conclusive on the support issue whether or not there was actual litigation of that question. Under the full faith and credit clause of the United States Constitution, U.S. Const. art. IV, § 1, and legislation enacted thereunder, 28 U. S. C. § 1738, each state must give a valid judgment of a court of another state the same res judicata effect which the judgment would receive under the "law or usage" of the rendering state.

16 These are not the only fact situations in which the present problem can arise in a California court. For example, the wife could have obtained a valid ex parte divorce decree in a state other than California and could now be seeking permanent alimony in a California proceeding. Or the husband could have obtained a California ex parte divorce decree, with the wife now seeking permanent alimony in a California proceeding. The two fact situations mentioned in the text would seem to be the most numerous cases in which the wife would be seeking permanent alimony in a California court following an ex parte divorce. They are the situations in which, as a matter of choice of law, California law on permanent alimony after ex parte divorce would be most clearly applicable, and the present study is concerned with the question of what the "internal law" of California should be on that issue. See note 20 infra for brief discussion of the choice-of-law problem in such cases.

17 40 Cal. 2d 516, 254 P.2d 528 (1953). See, also, Howell v. Howell, 104 Cal. 45, 37 P. 770 (1894).

18 There have been cases in which the husband obtained a valid ex parte divorce decree and the wife thereafter sought "separate maintenance," as distinguished from "permanent alimony," and in which it was held that the wife could not recover, because an existing marriage is a prerequisite to "separate maintenance." See the cases referred to in note 41 infra.

19 40 Cal. 2d 516, 254 P.2d 528 (1953).

20 The majority's application of California law on the facts of Dimon is perhaps not the best choice-of-law rule, for it was applying California law on permanent alimony after ex parte divorce in a fact situation in which no significant aspects of the transaction had, in past or present, any relationship to California. It was, in effect, an application of California law on the issue because the suit was brought in a California court. It would seem more desirable in such a situation as Dimon to apply the law of the domicile of the husband or the wife at the time of the ex parte divorce to determine if the wife is entitled to permanent alimony following the divorce, at least if the theory is adhered to that the wife's cause of action for permanent alimony arises at the time of the divorce. For discussion of this choice-of-law problem see Justice Traynor's concurring and dissenting opinion in Dimon, 40 Cal. 2d at 540-42, 254 P.2d at 541-42; Ehrenzweig, Interstate Recognition of Support Duties, 42 Calif. L. Rev. 382 (1954). See, also, Justice Traynor's opinion for a unanimous court in Lewis v. Lewis, 49 Cal. 2d 389, 317 P.2d 987 (1957), in which the following statement appears: "The effect on a wife's right to support of a foreign, ex parte divorce secured by her husband is determined by reference to the law of the state of the wife's domicile at the time of the divorce . . . ." 49 Cal. 2d at 394, 317 P.2d at 991. This principle seems contrary to the to the choice-of-law principle seemingly followed by the majority in Dimon. This study is concerned only with the California law on permanent alimony after ex parte divorce, i.e., the rule to be applied in those cases where the alimony issue would be governed by California "internal law."

21 40 Cal. 2d at 519, 254 P.2d at 529.

22 40 Cal. 2d at 520, 522, 254 P.2d at 529, 531.

23 40 Cal. 2d at 521, 254 P.2d at 530.

24 40 Cal. 2d at 521, 254 P.2d at 530.

25 40 Cal. 2d at 532, 254 P.2d at 536.

26 See, generally, Ex Parte Spencer, 83 Cal. 460, 464-65, 23 Pac. 395, 396-97 (1890): "It [permanent alimony] proceeds upon the theory that the husband entered upon an obligation which, among other things, bound him to support the wife during the period of their joint lives, and gave to her a right to share in the fruits and accumulations of his skill; that by his own wrong he has forced her to sever the relation which enabled her to enforce this obligation, and for the wrong which thus deprived her of the benefit of the obligation he must make her compensation. The court is to fix the measure of that compensation by 'having regard to the circumstances of the parties respectively'; those circumstances furnishing the best means for determining the extent of her loss." This language was quoted by Justice Traynor in his concurring and dissenting opinion in Dimon v. Dimon, 40 Cal. 2d at 532, 254 P.2d at 537. See, also, Hall v. Superior Court, 45 Cal. 2d 377, 384, 289 P.2d 431, 435 (1955).

27 Cal. Civ. Code §§ 137.2, 137.3.

28 40 Cal. 2d at 520, 254 P.2d at 530.

29 See discussion and citations in Wilson v. Superior Court, 31 Cal. 2d 458, 464, 189 P.2d 266, 270 (1948).

30 See, generally, Bernhard v. Bank of America, 19 Cal. 2d 807, 812, 122 P.2d 892, 894 (1942).

31 It is conceivable that the husband could obtain a valid ex parte divorce decree where the defendant wife had no actual knowledge of the divorce proceedings. This might be so, for example, if the whereabouts of the wife were not known, and all possible (though unsuccessful) means were employed to give her notice. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). In such a situation as that the wife would not even have had the alternative of appearing in the husband's divorce action as a means of enforcing her fight to permanent alimony.

32 It would probably be constitutionally valid for a court where the defendant spouse is domiciled to render a divorce decree. Typical state statutes require that the plaintiff spouse be domiciled in the state, and have physically resided in the state for a minimum period of time in order for the state courts to render divorce decrees. Hence this alternative course of action for the wife is one not actually available to her.

33 "That portion of the decree or judgment making any such allowance or allowances, and the order or orders of the court to enforce the same may be modified or revoked at any time at the discretion of the court except as to any amount that may have accrued prior to the order of modification or revocation." Cal. Civ. Code § 139.

34 De Young v. De Young, 27 Cal. 2d 521, 527, 165 P.2d 457, 460 (1946).

35 See Paulsen, Support Rights and Out-of-State Divorce, 38 Minn. L. Rev. 709, 727 (1954).

36 40 Cal. 2d at 544-45, 254 P.2d at 544.

37 40 Cal. 2d at 521-22, 254 P.2d at 530.

38 There may perhaps be a reason other than those discussed in the Dimon opinion for a distinction between the wife and husband as divorce plaintiff in a proceeding for permanent alimony after an ex parte divorce. It may be possible that under the Uniform Reciprocal Enforcement of Support Act, Cal. Code Civ. Proc. §§ 1650-90, adopted in all states, the wife, as divorce plaintiff in a California court, could, at the same time as she seeks her ex parte divorce decree, maintain an action for permanent alimony under the act. The statute provides for a two-state support proceeding, initiated by the wife in one state and defended by the husband in a state court in a state which has jurisdiction to order him to pay support. It is not clear whether the act will permit the maintenance of such a permanent

alimony suit, at the same time that the ex parte divorce action is being adjudicated. The act is designed to permit enforcement of a "duty to support," which is defined as "any duty of support imposed or imposable by law, or by any court order, decree or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, judicial separation, separate maintenance or otherwise." Cal. Code Civ. Proc. § 1653(6). This definition would seem to include an obligation to pay permanent alimony which arises upon the dissolution of the marital status by divorce. But § 1670 provides that "duties of support enforceable under this title are those imposed or imposable under the laws of any state where the alleged obligor was present during the period for which support is sought, or where the obligee was present when the failure to support commenced, at the election of the obligee." In the permanent alimony situation the obligation to support presumably "commences" at the time of the divorce, and it may be questionable then whether the uniform act includes an obligation to pay permanent alimony until after the divorce decree is granted.

It may be then that the pattern of alternatives available to the wife when her husband is in another state should include the possibility of seeking support under a different proceeding, with the conclusion that failure at that time to resort to the two-state support action would preclude later attempt to recover permanent alimony. (The same argument could perhaps be made where the husband is the divorce plaintiff in another state, for the defendant wife could conceivably maintain an action under the uniform act at the same time that the divorce action was being litigated.) And another possibility should be noted, by which the wife as divorce plaintiff in California might have available a means of having the alimony issue adjudicated; this would be under Cal. Code Civ. Proc. § 417,

which gives the California courts jurisdiction in suits against a non-resident on a cause of action which arose at a time when the defendant was a resident of California. In some situations where the wife is the divorce plaintiff in a California ex parte proceeding it might be possible for the court to have jurisdiction to adjudicate the alimony issue with respect to the defendant husband under this statute. If it is decided that the availability of these other possible means of adjudicating the alimony issue at the time of the divorce action should be considered in defining the permissible scope of permanent alimony after ex parte divorce, amendment of Civil Code § 139 could take the form of providing, in effect, that where the wife is the divorce plaintiff the wife's right to permanent alimony must be enforced at the time of the divorce proceeding if either the divorce court or some other court had, or could have had, jurisdiction to adjudicate the alimony issue. It is recommended that no provision be made in any amendment of § 139 to cover the possibility of a simultaneous proceeding under the uniform act because (1) of the uncertainties connected with enforcement of the wife's alimony claim under the statute, and (2) of the nature of the issues involved in determining the wife's right to permanent alimony, including the issue of the "fault" of the husband, issues which are perhaps less satisfactorily adjudicated in the two-state proceeding than in a proceeding with both parties before the court.

39 8 Cal. 2d 762, 68 P.2d 351 (1937).

40 Estin v. Estin, 334 U.S. 541 (1948), holds that in such a case if California wishes to continue the husband's obligation under the separate maintenance decree after the ex parte divorce it can constitutionally do so. This is on the reasonning that the divorce forum had no jurisdiction to adjudicate the wife's rights under the prior separate maintenance decree.

41 See De Young v. De Young, 27 Cal. 2d 521, 165 P.2d 457 (1946) (W could not recover in separate maintenance action against H because H had obtained valid Mexican ex parte divorce decree); Proper v. Proper, 102 Cal. App. 2d 612, 228 P.2d 62 (1951); Coleman v. Coleman, 92 Cal. App. 2d 312, 206 P.2d 1093 (1949); Patterson v. Patterson, 82 Cal. App. 2d 838, 187 P.2d 113 (1948); Calhoun v. Calhoun, 70 Cal. App. 2d 233, 160 P.2d 923 (1945), 81 Cal. App. 2d 297, 183 P.2d 922 (1947).

42 The problem in Cardinale should be distinguished from that in Campbell v. Campbell, 107 Cal. App. 2d 732, 238 P.2d 81 (1951), where W obtained an interlocutory divorce decree and a jurisdictionally valid permanent alimony award in a California proceeding, following which H obtained an ex parte divorce decree in Nevada, before the entry of the final California divorce decree. It was held that W's rights would continue under her alimony award, the court reasoning that a California final decree would not terminate H's obligations under the alimony award made at the time of the interlocutory

decree, and that therefore neither would a Nevada "final" divorce decree.

43 There are California cases which refer to the need for a valid marriage between the parties as a condition to the wife's obtaining temporary alimony and suit money in a matrimonial action, but these are not cases similar to the permanent alimony after ex parte divorce problem. For example, if the wife, in a divorce or other matrimonial action, does not make at least a minimal showing a valid marriage to the defendant no order of temporary alimony and suit money will be made. This is a requirement that some minimal evidence be shown that a relationship at some time came into being between the alleged spouses which created rights and duties between the spouse, so as to justify the support and suit money during the pendency of the action. If the parties were once married, and have been divorced in an ex parte proceeding, they were certainly in the kind of relationship contemplated by the temporary alimony and suit money provisions. See, generally, Colbert v. Colbert, 28 Cal. 2d 276, 169 P.2d 633 (1946); Hite v. Hite, 124 Cal. 389, 57 P. 227 (1899); Hinson v. Hinson, 100 Cal. App. 2d 745, 224 P.2d 405 (1950); Parmann v. Parmann, 56 Cal. App. 2d 67, 132 P.2d 851 (1942); In re Cook, 42 Cal. App. 2d 1, 108 P.2d 46 (1940). See also Lerner v. Superior Court, 38 Cal. 2d 676, 242 P.2d 321 (1952) (discussion of meaning of "during the pendency of any action for divorce" as concerns proceedings after final decree of divorce); Armstrong, 1 California Family Law 319-35 (1953).

44 Emphasis added.

45 See, generally, U.S. Treas. Reg. 1.71-1(b)(1) (1957); Newton v. Pedrick, 212 F.2d 357 (2d Cir. 1954); Horne, Tax Pitfalls in Alimony and Separate Maintenance Payments, 35 Taxes 751 (1957); Kragen, Stoke, Oliver & Buckley, The Marriage Undone: Taxwise, 42 Calif. L. Rev. 408 (1954); Lagomarcino, Federal Tax Consequences of Alimony and Separate Maintenance Payments, 3 Buffalo L. Rev. 179 (1954); Mannheimer, Tax Consequences of Divorce Decrees, 40 Iowa L. Rev. 543 (1955); McDonald, Tax Aspects of Divorce, Separation, Alimony and Support, 17 U. of Pitt. L. Rev. 1 (1955); Paulsen, Support Rights and/an Out-of-State Divorce, 38 Minn. L. Rev. 709, 729 n.88 (1954); Surrey & Warren, Federal Income Taxation, Cases and Materials 927-30 (1955).

46 See S. Rep. No. 1622, 83rd Cong., 2d Sess. 10 (1954).

47 N.Y. Civ. Prac. Act §2 1170-b.(where husband was plaintiff in ex parte divorce action).

48 N.Y. Law Rev. Comm'n, Leg. Doc. No. 65 (K) (1953).

49 N.J. Rev. Stat. tit. 2, c. 50, § 37 (Supp. 1950)(no distinction between wife and husband as divorce plaintiff).

50 The following states permit an action for permanent alimony after an ex parte divorce: Colorado, Davis. v. Davis, 70 Colo. 37, 197 Pac. 241 (1921) (husband was divorce plaintiff); District of Columbia, Hopson v. Hopson, 221 F.2d 839 (D.C. Cir. 1955)(husband was divorce plaintiff); Florida, Fla. Stat., c. 65, §§ 65.04(8), 65.09 (where husband was divorce plaintiff); Illinois, Ill. Rev. Stat., c. 40, § 19 (1957)(no distinction between wife and husband as divorce plaintiff); Kansas, Kan. Gen. Stat., c. 60-1518 (Corrick 1949)(no distinction between wife and husband as divorce plaintiff); Kentucky, Honaker v. Honaker, 218 Ky. 212, 291 S.W. 42 (1927)(husband was divorce plaintiff); Massachusetts, Mass. Ann. Laws, c. 208, § 34 (1948)(no distinction between wife and husband as divorce plaintiff); Minnesota, Searles v. Searles, 140 Minn. 385, 168 N.W. 133 (1918)(husband was divorce plaintiff); Ohio, Melnyk v. Melnyk, 49 Ohio Ops. 22, 107 N.E.2d 549 (1952)(husband was divorce plaintiff); Rhode Island, Wilford v. Wilford, 38 R.I. 44, 94 Atl. 685 (1915)(permitted alimony after divorce even where there was "personal" jurisdiction in divorce action, as long as was no litigation of alimony issue in the divorce action); Utah, Hutton v. Dodge, 58 Utah 228, 198 P. 165 (1921) (wife was divorce plaintiff); Washington, Adams v. Abbott, 21 Wash. 29, 56 Pac. 931 (1899)(wife was divorce plaintiff); Wisconsin, Cook v. Cook, 56 Wis. 195, 14 N.W. 33 (1882)(husband was divorce plaintiff).

The following states do not permit an action for permanent alimony following an ex parte divorce: Georgia, Hall v. Hall, 141 Ga. 361, 80 S.E. 992 (1914)(wife was divorce plaintiff); Iowa, Doeksen v. Doeksen, 202 Ia. 489, 210 N.W. 545 (1926)(wife was divorce plaintiff); Maryland,

Staub v. Staub, 170 [illegible]. 202, 183 Atl. 605 (1936)(wife was divorce plaintiff); Vermont, Loeb v. Loeb, Vt. , 114 A.2d 518 (1955)(husband was divorce plaintiff. See, generally, Annot., 28 A.L.R.2d 13[illegible] (1953).

51 The judgment in the ex parte divorce action would not be res judicata on the issue of whether a divorce could have been granted against the husband insofar as that issue was a condition precedent to the husband's obligation to pay permanent alimony. See Justice Traynor's concurring and dissenting opinion in Dimon v. Dimon, 40 Cal. 2d 516 at 535-36, 254 P.2d at 538; Hutton v. Dodge, 58 Utah 228, 198 Pac. 165 (1921).