

forms would be carefully examined. Thus supervision might result in removal of the important exception for the acts of governmental bodies, one of the major existing deficiencies. In any event a thorough investigation for the reason behind all the exceptions is warranted, since any exception may have disastrous results to the policy holder.⁸²

More extensive regulation would undoubtedly mean control of the rate making process. The public and the legislatures should at least be provided with the details of the costs and earnings of these semi-public utilities. If necessary, overcharges should be prevented by a formal process of rate making as with other insurance.

*Otto A. Goth**

LEGAL PROBLEMS OF DIVORCE PROPERTY SETTLEMENTS IN CALIFORNIA¹

In an action for divorce incompatibility is frequently forced to masquerade as adultery, mental cruelty, desertion, or neglect.² Although public policy disfavors divorce, mere occurrence of one of these wrongs is made grounds for dissolution.³ Chief Justice Gibson indicated the real bounds of the public policy against divorce, and thus what should be the real issue, when he declared:^{3a}

public policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed.

Yet the remedial machinery in all states is adversary litigation predicated for the most part on concepts of guilt.⁴ By requiring both an "innocent" and a "guilty" party, divorce law discourages open airing of marital difficul-

⁸² Collaterally, it may also be desirable to investigate the various forms used by title companies. A form entitled "Buyer's Instructions" employed by some escrow departments authorizes the company to use the documents and funds delivered to it to close the transaction when it is able to issue its regular standard form title insurance policy subject to "... 2. Covenants, conditions, restrictions and reservations of record and existing rights of way . . ." These papers are signed by the average person without realization of the effect of such conditions. A careful attorney would justifiably suggest the deletion of a blanket approval of matters which might seriously impair the title or intended use of the property. This clause is probably used to facilitate the closing of escrows by eliminating the need to report such matters specifically and obtain approval of them. What action a title insurance company would take in case of loss to the insured because of his unwitting approval, is a matter of speculation.

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¹ The tax aspects of property settlements are beyond the scope of this comment. Under the present federal income tax law alimony is classified generally as income to the wife and deductible expense to the husband. INT. REV. CODE §§ 22 (k), 23 (u). As to treatment under the federal gift tax law, see *Harris v. Commissioner*, 71 S. Ct. 181 (1950).

² CAL. CIV. CODE § 92.

³ "Public policy seeks to foster and protect marriage, to encourage parties to live together, and to prevent separation." *Hill v. Hill*, 23 Cal.2d 82, 93, 142 P.2d 417, 422 (1943).

^{3a} *Ibid.*

⁴ Alexander, *The Follies of Divorce: A Therapeutic Approach to the Problem*, 36 A.B.A.J. 105, 107 (1950); but see Carver, *Divorce: Statutory Abolition of Marital Fault*, 35 CALIF. L. REV. 99 (1947).

ties or direct attempt at their resolution, for the doctrines of recrimination, connivance, collusion and condonation are forever casting their shadows on an already dark corner of private litigation.⁵ One of the outgrowths of this unfruitful approach to a serious social problem is that more than ninety percent of divorces are granted in uncontested suits.⁶ Under such circumstances judges are unable to determine the equities of particular situations, for complete facts are never before the court.

Whatever may be the proper approach to the problem of divorce,⁷ attorneys under present law are in a position to render a great service by drafting intelligent and well planned divorce property settlement agreements. The parties to a divorce know the facts and equities of their case. They know the origin and growth of the marital strife which has led them, or one of them, to seek dissolution. They and their attorneys are far better equipped than the courts in an uncontested divorce for the task of creating a just and reasonable solution to the problems of division of property and support of the wife. It is therefore not surprising that divorce property settlements are favored.⁸ Occupying a place of regard in the law, these agreements and the problems surrounding them are deserving of careful consideration.

INCORPORATION INTO DIVORCE DECREES

The Doctrine of Merger

A husband and wife in California may by mutual consent enter into property settlements.⁹ These agreements, if free of fraud and not in violation of the confidential relationship of the parties, are enforceable in the same manner as other contracts.¹⁰ Before 1945 the judicial view was that even incorporation of a property settlement in a divorce decree did not impair its independent legal existence, and therefore contractual remedies as well as judgment remedies were available to aid enforcement by an aggrieved party.¹¹ In that year the supreme court held in *Hough v. Hough*

⁵ CAL. CIV. CODE § 111.

⁶ Recent California statistics on domestic relations cases brought to trial:

1949: 39,882 (94.1%) uncontested; 2500 (5.9%) contested.

1950: 39,873 (92.7%) uncontested; 3117 (7.3%) contested.

THIRTEENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 44 (1950).

⁷ See Alexander, *supra* note 4, for an enlightened view.

⁸ Barham v. Barham, 33 Cal. 2d 416, 430, 202 P. 2d 289, 297 (1949); Adams v. Adams, 29 Cal. 2d 621, 625, 177 P. 2d 265, 267 (1947). "Property settlements between husband and wife, when there is no fraud, are highly favored in the law." Hensley v. Hensley, 179 Cal. 284, 287, 183 Pac. 445, 446 (1918).

⁹ CAL. CIV. CODE §§ 158, 159, 160; Ettlinger v. Ettlinger, 3 Cal. 2d 172, 44 P. 2d 540 (1935); Robertson v. Robertson, 34 Cal. App. 2d 113, 93 P. 2d 175 (1939); Gummerson v. Gummerson, 14 Cal. App. 2d 450, 58 P. 2d 394 (1936).

¹⁰ Hill v. Hill, *supra* note 2; Huntsberger v. Huntsberger, 2 Cal. 2d 655, 43 P. 2d 258 (1935); Joyce v. Joyce, 5 Cal. 161 (1855); Anthony v. Anthony, 94 Cal. App. 2d 507, 211 P. 2d 331 (1949); Rosson v. Crellin, 90 Cal. App. 2d 753, 203 P. 2d 841 (1949); Roberts v. Roberts, 83 Cal. App. 345, 256 Pac. 826 (1927).

¹¹ Gummerson v. Gummerson, *supra* note 9; see Griffith v. Superior Court, 1 Cal. 2d 381, 384, 35 P. 2d 317, 318 (1934); Landres v. Rosasco, 62 Cal. App. 2d 99, 104, 144 P. 2d 20, 23 (1943).

that the contractual status of the agreement was destroyed by incorporation, the agreement becoming merged in the decree.¹²

The agreement incorporated in the decree in the *Hough* case included a provision for payment of \$200 per month for the wife's support. After the decree had become final, the court reduced the amount to \$100 per month on the husband's motion. The wife then brought an action on the contract for the difference between the \$200 provided for in the agreement and the \$100 ordered by the trial court. The supreme court reversed a judgment for the wife, and speaking through Justice Carter said:¹³

When [an agreement] is incorporated in and made an operative part of the decree, there is no longer any occasion for its independent existence. Additional rights have been thereby gained by the one to whom the payments are to be made. The judgment is enforceable in the customary manner and also by contempt proceeding in a proper case. For these benefits, any disadvantages ensuing from the merger should justly be borne.

The court also noted that a trial court's right to modify alimony provisions in divorce decrees,¹⁴ based on public interest in the marital status and its dissolution, would be impaired if the agreement was permitted to stand, for there could be no effective modification if the contract had continued legal efficacy. The merger theory was therefore held applicable.

Although the *Hough* case thus made merger a consequence of *incorporation*, the district court case of *Shogren v. Superior Court*¹⁵ seemingly would add the requirement of an *order to perform*.¹⁶ The *Hough* rationale negatives such a requirement. The existence of an order to perform is determinative of the propriety of contempt enforcement,¹⁷ not of merger. While contempt enforcement might "in a proper case" be one of the benefits flowing from incorporation and justifying merger, it was by no means isolated by the supreme court as a controlling factor. The existence of other "customary" judgment remedies as a result of incorporation was expressly recognized as sufficient to invoke the doctrine of merger.¹⁸

Methods of Incorporation

The *Hough* case determined the result but not the method of incorporation. Incorporation is the "union of different ingredients in one mass; mix-

¹² 26 Cal. 2d 605, 160 P. 2d 15 (1945).

¹³ *Id.* at 610, 160 P. 2d at 17.

¹⁴ See text at note 37 *infra*.

¹⁵ 93 Cal. App. 2d 356, 209 P. 2d 108 (1949).

¹⁶ An "examination of the authorities show that, although not clearly stated in any of them, with the possible exception of *Price v. Price* . . . the courts have practically said that to be merged in the decree the agreement must *not only* be *incorporated* therein, but that the decree must actually *order* the payment of money provided by the agreement." *Id.* at 358, 359, 209 P. 2d at 110. (Emphasis added). See text at note 11 *infra*.

How can this be reconciled with the statement in the *Hough* case that "if the agreement is presented to the court in the divorce proceeding for adjudication, and the agreement, or a part thereof, is incorporated in the decree and made a part thereof, the part so incorporated is merged in the decree?" 26 Cal. 2d at 609, 160 P. 2d at 17.

¹⁷ See text at note 68 *infra*.

¹⁸ The *Hough* case mentions "execution, contempt and other enforcement process of the court." *Supra* note 12 at 614, 160 P. 2d at 19.

ture; combination; synthesis."¹⁹ There are two recognized methods of incorporating documents: actual or bodily incorporation, and incorporation by reference.²⁰ When a property settlement agreement is set out in full in a divorce decree there can be no doubt but that it is incorporated. The courts so hold.²¹ Whether or not there may be incorporation of such agreements by reference is a more difficult question.

Although previous cases had indicated there could be incorporation by reference,²² a district court of appeal held in *Price v. Price* that "incorporated" and "being made a part of the decree by reference" were not the same.²³ In remanding for determination of which existed, the court said:²⁴

Obviously there is a difference for if there is an actual *incorporation* of the agreement into the decree, the decree standing alone then carries within itself the complete measure of the rights and obligations of the parties. In the court's files, the decree or judgment itself supplies all the information necessary to whomsoever may be interested. If recorded it announces to the world the respective interests of the parties in any property involved.

If on the other hand the agreement is *made a part of the* decree by *reference* only the above is not true. One searching the file could not construct a complete picture of the rights and obligations of the parties from the decree or judgment alone.

Does the premise of the *Price* case, that certainty and completeness obtain only if all the rights and obligations of the parties are discernible from the decree or judgment alone, preclude all incorporation by reference? It would seem not, for even if there is no more than reference, physical attachment of an agreement to a decree would dispose of the particular objection made by the court.

The *Price* case relied on the following language of the supreme court in *Lazar v. Superior Court*:²⁵

If a property settlement agreement is complete in itself and is merely referred to in a divorce decree or approved by the court but not actually made a part of the decree, then the provisions of such agreement cannot be enforced by contempt proceedings. . . . On the other hand, if, by the language of the agreement itself, it is shown that the intent was to make the agreement a part of a future divorce decree and, if the agreement is actually incorporated in the decree, then such provisions become a part of the order of the court and may be enforced as such.

The *Lazar* case, however, as shown by this very language, was concerned not with the requirements of incorporation, but with the problem

¹⁹ WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1934).

²⁰ BLACK'S LAW DICTIONARY (3d ed. 1933).

²¹ *E. g.*, *Hough v. Hough*, *supra* note 12 at 607, 609, 160 P. 2d at 16, 17.

²² *See* *Petry v. Superior Court*, 46 Cal. App. 2d 756, 759, 116 P. 2d 954, 956 (1941); *Baxter v. Baxter*, 3 Cal. App. 2d 676, 682, 40 P. 2d 536, 539 (1935); *Ex parte Weiler*, 106 Cal. App. 485, 483, 289 Pac. 645, 646 (1930).

²³ 85 Cal. App. 2d 732, 194 P. 2d 101 (1948).

²⁴ *Id.* at 735, 194 P. 2d at 103.

²⁵ 16 Cal. 2d 617, 620, 107 P. 2d 249, 250 (1940).

of finding a court order which would support contempt proceedings.²⁶ Furthermore, even if the *Lazar* case did decide the issue of incorporation, a declaration that *mere* reference fails to achieve that end would be little aid in determining whether something more than *mere* reference might not suffice. There are at least three degrees of reference which may be used: (1) *mere* reference, perhaps with an approval of the contract terms, (2) reference with a recital that the property settlement agreement is thereby made a *part* of the decree, and (3) reference with a recital that the agreement is made part of the decree plus physical attachment of the agreement to the decree.

It is not surprising that courts should find no incorporation where there is *mere* reference. To advert to an agreement in such a manner is no indication that the trial court intended to embody it in the decree, but may be only a way of identification or approval.²⁷

On the other hand, the common definition of "incorporation" appears satisfied where the agreement is by reference and express words made a *part* of the decree.²⁸ Yet the *Price* case excludes incorporation by such a method on the practical grounds that resort to external documents would be necessary to determine all rights and obligations of the parties.²⁹

The *Price* case, however, was silent as to the result where the agreement, in addition to being made a part of the decree by reference, is physically attached. Although the objection of the *Price* case is obviated by such a procedure, another division of the court which decided that case announced by dictum in *Shogren v. Superior Court* that even this method was insufficient to accomplish incorporation.³⁰ Since the issue was not actually before the court in the *Shogren* case³¹ the question remains an open one, but no adequate reason appears why incorporation by this method should not be recognized. If permitted, it would eliminate the unnecessary and costly process of bodily setting out intricate agreements in the decree. Contempt enforcement, the issue of the *Shogren* case, is another matter.³²

One must conclude that until there is an authoritative holding as to the sufficiency of incorporation by reference and attachment, sound practice requires an attorney to have the agreement set out bodily in the decree when incorporation is the desired result.

²⁶ See text at note 74 *infra*.

²⁷ *Howarth v. Howarth*, 81 Cal. App. 2d 266, 183 P. 2d 670 (1947); *Tieso v. Tieso*, 67 Cal. App. 2d 872, 155 P. 2d 659 (1945).

²⁸ See text at note 19 *supra*.

²⁹ See *Queen v. Queen*, 44 Cal. App. 2d 475, 480, 112 P. 2d 755, 757 (1941), to the same effect.

³⁰ *Supra* note 15 at 364, 209 P. 2d at 114 (1949).

³¹ See text at note 75 *infra*.

³² But see *Hamilton v. Hamilton*, 94 Cal. App. 2d 293, 300, 210 P. 2d 750, 753 (1949). A property settlement agreement was attached to divorce decree and "by reference incorporated." There was also an express order to perform. That the agreement was *incorporated* was accepted, but the court, citing the *Shogren* case, indicated *merger* was a consequence of the *order*. The court could have found merger on the authority of the *Hough* case, *supra* note 12, without reference to the order. See text at note 68 *infra*.

MODIFICATION

Classification of Property Settlement Agreements

Divorce settlement agreements may relate to a multitude of items which the parties desire to settle formally in anticipation of divorce. However, two basic elements commonly included, either separately or together, are division of the community property and homestead, and support and maintenance of the wife. These elements and their permutations can be grouped into four categories of divorce property settlements:³³

(1) "Pure alimony" agreements provide for the support and maintenance of the wife by payment of a lump sum or installments, but not for division of the community property and homestead.³⁴

(2) "Pure property division" agreements provide for the division of the community property and homestead, but not for alimony. This type of agreement may or may not include a *non-alimony* support provision. Thus, the agreement may provide for a division of the community assets or it may allocate the property itself to the husband and provide for payment of money to the wife by installments or lump sum in lieu of her community share.

(3) "Severable combination" agreements provide both for alimony and division of property, but the provisions as to each are severable. Here, as in the "pure property division" agreements, the terms of the property division portion of the agreement may provide for division of community assets, or for assignment of the assets to the husband and payments to the wife in lieu of her community property rights.

(4) "Integrated bargain" agreements provide for both alimony and division of property, but the *entire* provision for one spouse is in consideration of the *entire* provision for the other so that the alimony and property terms are inseparable. In such agreements there may be either a waiver by the wife of alimony, in whole or in part, in consideration of more favorable property division, or a waiver of property rights, in whole or in part, in consideration of a more favorable alimony settlement.

If a property settlement agreement, whatever its type, is *not* incorporated into a court decree there can be no modification of its terms without consent of both parties, for the agreement has the attributes of any other

³³ Mr. Justice Traynor took the opportunity in *Adams v. Adams*, *supra* note 8, at 624, 177 P. 2d at 267, to classify support-maintenance agreements into three types. The classification offered here is that of the *Adams* case, broadened to cover non-support settlements, except that severable combination contracts have been, for convenience, given a separate category instead of being included with the "pure" agreements.

³⁴ "It is true 'alimony,' in its strict technical sense, proceeds only from husband to wife, and that where the relation of husband and wife does not exist, strictly speaking there can be no alimony. It is true, also, that the legislature has used the term only in its strict legal sense, and therefore used the word 'alimony' only when prescribing the provision which the court might make for the support of the wife *pendente lite*. But the courts have not always been as careful in their use of the word. They have frequently used it as a mere name for another and different allowance, made, and authorized to be made, under section 139 of the Civil Code." *Ex parte Spencer*, 83 Cal. 460, 463, 23 Pac. 395, 396 (1890). The term is used in this comment in the latter, more popular, sense.

contract.³⁵ Where an agreement is incorporated, the court may or may not have the power to modify its terms, depending on the *character* of the agreement. Since this is so, proper identification of an incorporated agreement becomes crucial where there is an attempt at modification.³⁶

Modification of "Alimony" Agreements

"The state has an interest in the support of the wife, lest she become a public charge."³⁷ This interest, among others,³⁸ is implemented by Civil Code Section 139 which authorizes a court to award support to the wife and modify the award to meet changed conditions.³⁹ The power to modify extends to awards based on an agreement of the parties.⁴⁰ Therefore, alimony provisions of agreements (other than "integrated bargains") presented to a divorce court are subject to modification in the court's discretion at the time of, or after, incorporation.⁴¹

Under judicial doctrine before the *Hough* case the court's power to modify alimony provisions of an incorporated agreement operated only in favor of the wife. If the court increased payments, the wife could avail herself of judgment remedies to enforce her claim.⁴² If the court decreased payments, the wife could still recover the original amount in an action on the contract.⁴³ The *Hough* merger doctrine destroyed this inequity.

Modification of "Property Division" Agreements

If the incorporated agreement relates solely to the division of property, even with a support provision, the policy involved is different from that controlling alimony. There is an underlying policy that the division of property shall be final in order to secure stability of titles.⁴⁴ Therefore, "pure property division" agreements and property provisions of "severable

³⁵ CAL. CIV. CODE §§ 1697, 1698; *Taylor v. Taylor*, 39 Cal. App. 2d 518, 103 P. 2d 575 (1940); *Robertson v. Robertson*, *supra* note 9; *see Ross v. Ross*, 1 Cal. 2d 368, 369, 35 P. 2d 316 (1934).

³⁶ Classification as "support" or "non-support" may be important in contempt enforcement. See text at note 62 *infra*. Classification as "alimony" or "property division" is important for tax purposes. See text at notes 92 and 93 *infra*.

³⁷ *Miller v. Superior Court*, 9 Cal. 2d 733, 739, 72 P. 2d 868, 872 (1937).

³⁸ *E. g.*, compensation for a wrong done to the wife. *Ex parte Spencer*, *supra* note 34 at 464, 23 Pac. at 396.

³⁹ "Where a divorce is granted for the offense of the husband, the court may compel him . . . to make such suitable allowance to the wife for her support, during her life or for a shorter period as the court may deem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects." CAL. CIV. CODE § 139. There is no such "permanent alimony" for a husband when a divorce is granted for the offense of the wife. *Hogarty v. Hogarty*, 188 Cal. 625, 627, 206 Pac. 79, 80 (1922).

⁴⁰ *Hough v. Hough*, *supra* note 12; *Weedon v. Weedon*, 92 Cal. App. 2d 367, 207 P. 2d 78 (1949); *see Smith v. Smith*, 94 Cal. App. 35, 47, 270 Pac. 463, 468 (1928).

⁴¹ *See Adams v. Adams*, *supra* note 8 at 624, 177 P. 2d at 267.

⁴² *Smith v. Superior Court*, 89 Cal. App. 177, 264 Pac. 573 (1928); *see Henzgen v. Henzgen*, 62 Cal. App. 2d 214, 218, 144 P. 2d 428, 430 (1944).

⁴³ *Roberts v. Roberts*, *supra* note 10; *Henzgen v. Henzgen*, *supra* note 42 at 217, 144 P. 2d at 430 (1944).

⁴⁴ *See Hough v. Hough*, *supra* note 12, at 612, 160 P. 2d at 18.

combination" agreements, far from being mutable, are beyond the jurisdiction of a court to modify.⁴⁵

Modification of "Integrated Bargain" Agreements

The immutability of an "integrated bargain" was settled by the supreme court in *Adams v. Adams*.⁴⁶ In the *Adams* case the parties had entered into a contract where the wife waived all right to support, except as provided in the agreement, in consideration of the husband's promise to assign her a major portion of the community property. The wife presented this agreement to the divorce court, which purported to approve it but at the same time increased the wife's right to alimony. The supreme court recognized the public policy which requires protection of the wife and authorized a court to award necessary alimony in its discretion pursuant to Civil Code Section 139, but held that such discretion does not empower a trial court to modify an agreement which is free of fraud or compulsion and not in violation of a confidential relation. Since an additional provision for alimony would change basically the valid agreement it could not be countenanced.

When is the Character of a Property Settlement Res Judicata?

In addition to the problem of the relation between the nature of a property settlement and the power of modification, there is the question of when the character of a particular agreement is so settled that it cannot subsequently be disturbed. The recognized immutability of divorce decrees based on "property division" contracts had assured parties that collateral attempts at modification need not be defended. But the *Hough* case, in a dictum, noted that although previous opinions had said there was no jurisdiction to modify decrees predicated on "property division" agreements, a court does have power to decide, correctly or incorrectly, whether a decree is based on such a contract or on an alimony agreement and therefore modifiable.⁴⁷ If this is the law,⁴⁸ reliance on a subsequent court's lack of jurisdiction is a trap for the unwary. Modification proceedings years after the final decree may upset rights believed settled pursuant to the actual intent both of the parties and of the court which passed upon and incorporated the original agreement.

It might be argued that the jurisdiction announced by the *Hough* case extends only to situations where there is ambiguity as to the character of the agreement,⁴⁹ but the court expressed no such limitation. While the court acknowledged that it would be preferable if there was a final adjudication of the nature of an agreement in the divorce court,⁵⁰ it is doubtful

⁴⁵ *Puckett v. Puckett*, 21 Cal. 2d 833, 136 P. 2d 1 (1943); *Dupont v. Dupont*, 4 Cal. 2d 227, 48 P. 2d 677 (1935); *Robinson v. Robinson*, 94 Cal. App. 2d 802, 211 P. 2d 587 (1949); see *Ettlinger v. Ettlinger*, *supra* note 9 at 178, 44 P. 2d at 543.

⁴⁶ 29 Cal. 2d 621, 177 P. 2d 265 (1947).

⁴⁷ *Hough v. Hough*, *supra* note 12 at 615, 160 P. 2d at 20.

⁴⁸ *Robinson v. Robinson*, *supra* note 45.

⁴⁹ *Alexander v. Alexander*, 88 Cal. App. 2d 724, 199 P. 2d 348 (1948); see *Puckett v. Puckett*, *supra* note 45.

⁵⁰ *Hough v. Hough*, *supra* note 12 at 615, 160 P. 2d at 20, quoting *Puckett v. Puckett*, *supra* note 45, at 841, 136 P. 2d at 5; *Weedon v. Weedon*, *supra* note 40.

that this is now possible.⁵¹ If the agreement is approved and incorporated by the trial court the character of the contract is not in issue and whatever the court may say as to its classification is mere recital. The effect of the *Hough* dictum is to limit the application of *res judicata* and force parties to appear and defend, whenever the issue is raised by a request for modification. Upon challenge of the right to modify there can then be a final adjudication as to the character of the particular agreement incorporated in the decree. Unfortunately, since the question may be raised years after the original decree, this may prove onerous.

Remedies for the Problem of Identification

If a property settlement is of the "pure alimony" type there should be no difficulty in identifying it in a modification proceeding subsequent to the divorce. Likewise, if the agreement provides merely for division of property by assignment of assets identification is no real enigma. However, if a "pure property division" agreement includes support provisions there is a danger that these may be mistaken for alimony and categorized as mutable. There is also the possibility that a "severable combination" agreement may be erroneously identified as an "integrated bargain" so that even its alimony provisions are put beyond the court's power of modification. The reverse error, an "integrated bargain" being held to be a "severable combination," would subject the alimony provisions to modification and the stability inherent in integrated agreements would be destroyed.

The possibility of unanticipated and unbargained for results from mistaken identity, occurring perhaps years after the final divorce, makes it important to put the character of a settlement beyond the realm of speculation. The agreement should be drafted with such clarity of language, such express labels, and such adequate statement of the obligation sought to be satisfied that a subsequent court will find it difficult not to reach a conclusion in accord with the intent of the parties.⁵² In addition an attorney should, in proposing the divorce decree, include an ample, unequivocal recital of the character of the contract so that later courts will have a persuasive guide.

To eliminate doubt the parties might obtain a final adjudication by bringing a modification proceeding, by agreement, shortly after entry of the divorce decree. But since the draftsman's techniques are never infallible and a modification proceeding is unnecessary litigation and expense, avoidance of the inadequacy of unsettled rights might best be accomplished by a statute conferring on the divorce court power to render a decision as to the character of an agreement at the time of its incorporation. Such a decision should be appealable, but *res judicata* against collateral attack so that the problem of identification would be put to rest.

⁵¹ See CAL. CODE CIV. PROC. § 1060.

⁵² Comment, 2 STAN. L. REV. 731, 740 (1950).

CONTEMPT ENFORCEMENT OF INCORPORATED AGREEMENTS

Of the judgment remedies available after incorporation of a property settlement agreement, the most effective is contempt enforcement. This remedy presents two major problems: (1) when is contempt enforcement precluded by constitutional guarantees against imprisonment for debt?⁵³ (2) when, absent an express court command, is there an order on which contempt proceedings may be based?

Limitation of Contempt to Non-debts

If a court validly orders a party to perform a specific act within his power,⁵⁴ as to convey Blackacre, there is no question of the power to employ contempt proceedings to enforce performance.⁵⁵ A money judgment, however, does not have the advantage of enforcement by imprisonment, for it is not an order to pay but merely an adjudication of the rights of the parties and a "debt" within the meaning of the constitutional prohibition against imprisonment for "debt."⁵⁶ Is alimony, or a sum in lieu of community property, which is overdue a "debt?" The answer depends on the nature of the obligation to be satisfied.

Where alimony is involved, the solution is simple. A husband has a statutory obligation to support his wife.⁵⁷ A sum due for the performance of this obligation, predicated on public policy, is not a "debt" within the constitutional meaning.⁵⁸ Since alimony is but a substitute for the statutory duty of support, unpaid alimony is likewise not a "debt."⁵⁹ Therefore, an order for the payment of alimony, whether or not made pursuant to a property settlement, has no constitutional barrier to enforcement by contempt proceedings.⁶⁰

The problem is thornier, however, where there is a money award in lieu of community property rights. In California one facet of the contempt problem in such a situation was adjudicated in *Miller v. Superior Court*.⁶¹ The parties by a "property division" agreement had provided for monthly payments to the wife "for her maintenance" in satisfaction of her community property rights. The agreement was incorporated in the divorce

⁵³ "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud, nor in civil actions for torts, except in cases of wilful injury to person or property; and no person shall be imprisoned for a militia fine in time of peace." CAL. CONST. ART. I, § 15 (1879).

⁵⁴ CAL. CODE CIV. PROC. § 1219.

⁵⁵ *Selowsky v. Superior Court*, 130 Cal. 404, 181 Pac. 652 (1919); *The Seventy-Six Land and Water Co. v. Superior Court*, 93 Cal. 139, 28 Pac. 813 (1892); CAL. CODE CIV. PROC. § 1209 (5).

⁵⁶ *In re Trombley*, 31 Cal. 2d 801, 193 P. 2d 734 (1948); *Knutte v. Superior Court*, 134 Cal. 660, 66 Pac. 875 (1901).

⁵⁷ CAL. CIV. CODE § 139, *supra* note 39.

⁵⁸ *In re Lazar*, 37 Cal. App. 2d 327, 99 P. 2d 342 (1940); *Ellery v. Superior Court*, 25 Cal. App. 2d 222, 77 P. 2d 280 (1938); before 1879: *Ex parte Perkins*, 18 Cal. 60 (1861).

⁵⁹ See *Miller v. Superior Court*, *supra* note 37 at 739, 72 P. 2d at 872.

⁶⁰ However a husband imprisoned for contempt for failure to pay alimony is entitled to discharge if unable to pay. *In re Wilson*, 75 Cal. 580, 17 Pac. 698 (1888); *In re Johnson*, 92 Cal. App. 2d 467, 207 P. 2d 123 (1949); CAL. CODE CIV. PROC. § 1219.

⁶¹ 9 Cal. 2d 733, 72 P. 2d 868 (1937); Note, 26 CALIF. L. REV. 707 (1938).

decree and expressly ordered performed. Subsequently the ex-husband was found in contempt for failure to make the payments. The court in effect held that the provision for monthly payment, although not alimony, was nevertheless a method of providing for the wife's support, and as such was not a "debt" but a substitute for a statutory obligation and enforceable by imprisonment for contempt.

If the *Miller* case means no more, it does not solve the problem of contempt enforcement where there is a money award in lieu of community property which is not labeled "for support." Contempt proceedings in property division cases should, however, depend not on the "support" analogy, but on the right of the wife to a division of community property.⁶² Since the wife has a right to immediate possession of her share of the community property on divorce,⁶³ the court is certainly obligated to see that she recovers the sum awarded in lieu of that right. Furthermore, case law indicates the element of "support" has not been deemed essential. Although "guilty" wives are not entitled to support,⁶⁴ two intermediate courts would allow contempt proceedings to enforce monthly payments against husbands who have been granted a divorce.⁶⁵ The "support" theory evaporates in such cases. There should be no objection, therefore, to carrying the rationale of the *Miller* case to its logical end and permitting contempt enforcement of an order based on a non-support agreement to pay money in lieu of community property.⁶⁶

Orders Supporting Contempt: Express and Implied

The availability of contempt proceedings as a remedy for non-performance of an act depends on the existence of a valid order to perform.⁶⁷ Where there is an express order, as in the *Miller* case, no problem presents itself. On the other hand, implied orders, while recognized, raise serious questions.⁶⁸ Because contempt enforcement is an extreme remedy an order is not easily implied.⁶⁹ Mere approval of an agreement is not sufficient,⁷⁰ but incorporation of a contract has been held to establish an order by implication in several California cases.⁷¹

⁶² See Note, 26 CALIF. L. REV. 707, 710 (1938).

⁶³ CAL. CIV. CODE § 146.

⁶⁴ *Lampson v. Lampson*, 171 Cal. 332, 153 Pac. 238 (1915); *Everett v. Everett*, 52 Cal. 383 (1877); CAL. CIV. CODE § 139.

⁶⁵ *Petry v. Superior Court*, *supra* note 22; *Seymour v. Seymour*, 18 Cal. App. 2d 481, 64 P. 2d 168 (1937).

⁶⁶ But in *Lazar v. Superior Court*, *supra* note 25, the supreme court first decided the award was "support" before holding there could be contempt enforcement.

⁶⁷ CAL. CODE CIV. PROC. § 1209 (5). No one may be punished for contempt for disobedience of a void order. *Wutchumna Water Co. v. Superior Court*, 215 Cal. 734, 12 P. 2d 1033 (1932); *Ex parte Brown*, 97 Cal. 83, 31 Pac. 840 (1892); *Harlan v. Superior Court*, 94 Cal. App. 2d 902, 211 P. 2d 942 (1949); *In re Nielsen*, 19 Cal. App. 2d 305, 65 P. 2d 360 (1937).

⁶⁸ *Lazar v. Superior Court*, *supra* note 25; *Petry v. Superior Court*, *supra* note 22; *Baxter v. Baxter*, *supra* note 22; *Tripp v. Superior Court*, 61 Cal. App. 64, 214 Pac. 252 (1923).

⁶⁹ *Plummer v. Superior Court*, 20 Cal. 2d 158, 124 P. 2d 5 (1942).

⁷⁰ *Miller v. Superior Court*, *supra* note 37; *Schnerr v. Schnerr*, 128 Cal. App. 363, 17 P. 2d 749 (1932).

⁷¹ Cases cited *supra* note 68.

The question of an implied order was first met directly by a district court of appeal in *Tripp v. Superior Court*.⁷² A husband and wife had entered into a property settlement agreement which provided for payment of \$900 by the husband over a period of time. The agreement recited that it should be subject to approval by the court, and when approved should be embodied in the divorce decree. The agreement was set out in the interlocutory and final decrees, but without express order for payment. The court held that the parties *must* have contemplated that the agreement when embodied in the decree would have the compelling power of the court behind its every covenant, and therefore by embodying the agreement in the decree the divorce court *did* order performance and the terms of the agreement *did* become enforceable as mandates of the court.

Subsequently the supreme court was faced by not dissimilar facts in the case of *Lazar v. Superior Court*.⁷³ The husband agreed to make monthly payments to his wife. In accordance with the agreement the relevant terms were in substance set out in the decree. There was no express order to perform. The supreme court held that since the provisions involved were actually made "part and parcel" of the decree, they became "a part of the order of the court" and could "be enforced as such." The trial court, therefore, had jurisdiction to adjudge the ex-husband guilty of contempt.

Shogren v. Superior Court, emanating from division one of the first district, differs essentially from the *Lazar* case only in that the agreement, which provided for monthly payments to the wife and for incorporation, was not set out in the decree.⁷⁴ Instead, the agreement was physically attached to the decree which "ordered, adjudged and decreed" that the copy filed with it was ratified and made a part thereof as though fully set forth. The husband was found guilty of contempt for failure to make the payments. In reversing, the court stated two rules as a summation of the relevant law: (1) If a property settlement is not made a part of the decree, but merely referred to or approved, without an order to perform, then the agreement cannot be enforced by contempt proceedings.⁷⁵ (2) If the agreement is actually incorporated in the decree *and* ordered performed, then it is merged in the decree and may be enforced only as the order of the court.⁷⁶ In this case, said the court, there was no merger, for although the agreement was physically attached, and made part of the decree by reference, there was *no order to perform*. Therefore contempt proceedings could not be used to enforce payment.

The question at issue in the *Shogren* case was *not* one of merger,⁷⁷ but merely whether or not there was an *order* on which to predicate an adjudi-

⁷² 61 Cal. App. 64, 214 Pac. 252 (1923).

⁷³ 16 Cal. 2d 617, 107 P. 2d 249 (1940).

⁷⁴ 93 Cal. App. 2d 356, 209 P. 2d 108 (1949).

⁷⁵ There can be no quarrel with this statement. Compare *Lazar v. Superior Court*, text at note 25 *supra*.

⁷⁶ *Ibid.* Note the concern for merger by the *Shogren* court which was not part of the *Lazar* text.

⁷⁷ See text at note 15 *supra*.

cation of contempt. By denying the use of contempt powers, the case seems to leave no room for an order by implication, unless there is a material difference between bodily incorporation and being made a part of the decree by physical attachment with a specific statement by the court that the agreement was "made a part of this decree as though the same were fully herein set forth." Is such a difference sufficient to justify a result contrary to the *Lazar* case? On principle, it would seem not.⁷⁸

Subsequent to its decision in the *Lazar* case, the supreme court considered the question of implied orders in *Plummer v. Superior Court*.⁷⁹ The *Plummer* case differed factually from *Lazar* in two particulars: (1) the agreement itself did not provide for incorporation, (2) the agreement was not set out in the decree, but was physically annexed and referred to in the decree as "hereby ratified, approved and confirmed." It differed essentially from the *Shogren* case only because the agreement did not provide for its incorporation. The supreme court denied contempt enforcement, stating that the situation before it differed from the *Lazar* case in that, unlike the earlier case, the decree contained no words indicating the court actually ordered the carrying out of the agreement, and even assuming there was incorporation from which an order could be implied "there is nothing in the agreement which necessarily shows an intent to make it a part of a future divorce decree." The court added the general caveat that the right of enforcement by contempt should depend on clear, specific and unequivocal language so that the parties might not be misled. It also indicated the better and usual procedure:⁸⁰

In those cases where it is the intention of the parties and the court to have certain provisions of such an agreement constitute a part of the decree or judgment and made enforceable as such, the court may set forth such provisions in the decree and provide therein that the same shall be performed. This is the usual practice and when it is followed all doubt as to the effect of such provisions is removed.

To What Extent Do Property Settlements Bind the Courts?

Until recently the parties to a property settlement had no assurance that a divorce court would follow the terms of their contract.⁸¹ In 1945 a district court of appeal held in *Majors v. Majors* that a divorce court could not, without cause, ignore the existence of a property settlement when complainant prayed for relief in accordance with its terms.⁸² This view was confirmed in 1947 in *Adams v. Adams* in which the supreme court held that a property settlement agreement, if free of fraud or compulsion and not in violation of a confidential relationship, was binding on the court.⁸³

The *Adams* case makes the validity of divorce settlement agreements depend upon equitable considerations.⁸⁴ Rules governing persons occupy-

⁷⁸ Cases cited *supra* note 22.

⁷⁹ 20 Cal. 2d 158, 124 P. 2d 5 (1942).

⁸⁰ *Id.* at 165, 124 P. 2d at 9.

⁸¹ See *Ettlinger v. Ettlinger*, *supra* note 9 at 178, 44 P. 2d at 543.

⁸² 70 Cal. App. 2d 619, 161 P. 2d 494 (1945).

⁸³ 29 Cal. 2d 621, 177 P. 2d 265 (1947).

⁸⁴ *Id.* at 624, 177 P. 2d at 267.

ing confidential relations are applicable.⁸⁵ Fraud, coercion, compulsion and overreaching are fatal, while the advice of independent counsel has been held an important factor.⁸⁶ Equitable considerations, of course, are for the trial court, but a contract will be binding on the court unless it makes a finding that the agreement is invalid.⁸⁷

What is the meaning of the phrase "binding on the court?" Clearly it means that the court must at least approve an agreement found valid. Does "binding" also mean that the court on request must incorporate the agreement in the divorce decree? In addition must an order be made, if requested, which will support contempt enforcement?

Since mandatory orders and contempt proceedings are so much within the discretion of a trial court it is not to be expected that by private contract parties can compel a court to make such machinery available. However, contempt enforcement is a usual method of exacting payment of alimony, so it is not probable a divorce court would deny an enforcement order for a true alimony provision.

There is apparently no adjudication requiring the court to incorporate a valid property settlement in the divorce decree.⁸⁸ But as a matter of policy and practice should not such agreements be incorporated if presented to the court? The court must in any event settle the issues placed before it. If the contract when incorporated would be subject to modification (that is, involves alimony provisions which are not integrated with property division) incorporation gives the court effective control. The impairment of effective court modification of real alimony was an evil of independent contracts which the *Hough* case sought to cure by the merger doctrine.⁸⁹ The evil should be avoided by use of merger where possible.

On the other hand, if the contract when incorporated would be immutable (that is, involves division of property or is an "integrated bargain") incorporation settles the property issues and avoids future litigation. Even if there is no incorporation, the *Adams* case disapproves a judgment contrary to the contract terms.⁹⁰ It would not be in the public interest to require parties to seek contract remedies in an additional independent suit at a later date when the court by incorporation could make judgment remedies directly available.

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⁸⁵ CAL. CIV. CODE § 158.

⁸⁶ *Gregory v. Gregory*, 92 Cal. App. 2d 343, 206 P. 2d 1122 (1949).

⁸⁷ *Adams v. Adams*, *supra* note 83; *Majors v. Majors*, *supra* note 82.

⁸⁸ *Makzoume v. Makzoume*, 50 Cal. App. 2d 229, 231, 123 P. 2d 72, 73 (1942).

⁸⁹ See text at note 14 *supra*.

⁹⁰ 29 Cal. 2d at 628, 177 P. 2d at 269.

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