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Temporary Alimony in a Suit for Absolute Divorce - Montana

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Hennessey: Temporary Alimony in a Suit for Absolute Divorce - Montana

measure of any loss or detriment of the plaintiff.'"[45] Accordingly, when an action under the survival statute is against the living tortfeasor, and the case is one where exemplary damages are otherwise appropriate, they may well be awarded. If, however, the tortfeasor is dead, no social interest can be served by holding his estate liable for punitive damages.

The vitality which *actio personalis* exhibits can be impaired only by statute, for already noted are its strong common law roots. Language as general as that in Section 9086 and interpretations as broad as Montana's are necessary to achieve the desired result. It is believed that our general survival statute merits wider initiation and adoption.

—James A. Nelson.

TEMPORARY ALIMONY IN A SUIT FOR ABSOLUTE DIVORCE—MONTANA

The doctrine of alimony is a necessary consequence of the legal relations between husband and wife.

At common law it appears that the husband became seized, during coverture, of a freehold estate in all the lands in which his wife had an estate of inheritance,[1] with control of such property.[2] All personal property in her possession at marriage, or which came to her during coverture, vested absolutely in the husband.[3] In return, the law cast on the husband the duty of maintaining his wife according to his ability and condition in life.[4]

Temporary alimony and suit money were regularly granted by the ecclesiastical courts to a wife, defendant as well as plaintiff in a suit for divorce, on showing of marriage, if she were really in need, and had probable grounds for her success in the action.[5] The natural result of the legal investiture of the husband with his wife's property was that the wife was generally in need! "If the woman's ante-nuptial money has practically vested in the man and is in his pocket, so that without the order of the court she can obtain control of none of it, her claim to what will enable her to live and carry on the lit-

[45] McCORMICK ON DAMAGES (1935) §77, p. 275.
[1] 30 C. J., *Husband and Wife*, p. 526, §42; see also 26 AM. JUR., *Husband and Wife*, p. 684, §55.
[2] 30 C. J., *Husband and Wife*, p. 528, §47; see also 26 AM. JUR., *Husband and Wife*, p. 684, §55.
[3] 30 C. J., *Husband and Wife*, p. 530, §50; see also 26 AM. JUR., *Husband and Wife*, p. 685, §57.
[4] II, BISHOP, MARRIAGE & DIVORCE (6th Ed.), p. 318, §369.
[5] II, VERNIER, AMERICAN FAMILY LAWS, p. 309, §110.

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igation is no less when she expects it to revert in her by the final decree, than when she does not.'"[6]

The tendency of modern legislation has been to remove the disabilities of coverture,[7] and there ensue new questions as to allowance of alimony, since the wife's money is no longer "in the husband's pocket." But, as a practical matter, we should take notice of the fact that the average wife is still financially dependent upon her husband. Her separate estate seldom consists of actual cash, but is, if anything, non-income producing realty.

In *Rumping v. Rumping*,[8] the then Montana Supreme Court made the following broad statement: "The wife must show upon her application for temporary alimony that she has no means under her control sufficient to maintain herself pending the litigation. If she has sufficient means of her own to provide for separate maintenance, no such alimony will be allowed." This statement was lifted bodily from 14 Cyc. 752.

It does not appear that the word "means" has been given a judicial interpretation by the Montana Supreme Court,[9] but it has been variously defined as meaning: "money or any property that can be converted into supplies,"[10] "synonymous with 'property' ";[11] "the phrase, 'means of support' in its general sense, embraces all those resources from which the necessaries and comforts of life are or may be supplied—such as lands, goods, salaries, wages or other sources of income."[12]

"Income," on the other hand, has been defined[13] to mean "that gain or recurrent benefit which proceeds from labor, business, or property."

It appears, therefore, that "means" is a more comprehensive term than "income," and includes the latter. The Supreme Court of this state, in effect, is saying that a wife having no present income, but owning real or personal property whose sale would produce a sufficient money return to maintain her during the litigation, must sell it and use the proceeds before calling on her husband for temporary alimony.

[6] II BISHOP, MARRIAGE & DIVORCE (6th Ed.), p. 346, §402.
[7] 30 C. J., *Husband and Wife*, p. 716, §322; see also 26 AM. JUR., *Husband and Wife*, p. 666, §37.
[8] (1910) 41 Mont. 33, 38, 108 P. 10.
[9] See 10 MONTANA DIGEST, *Words and Phrases*.
[10] WEBSTER'S UNABRIDGED DICTIONARY.
[11] 26 WORDS & PHRASES, Permanent Edition, p. 895, citing Vass v. Southall, 26 N. C. 301, 303.
[12] 26 WORDS & PHRASES, Permanent Edition, p. 901, citing Schneider v. Hosier, 21 Ohio St. 98, 112 and other cases.
[13] WEBSTER'S UNABRIDGED DICTIONARY; II BOUVIER'S LAW DICTIONARY, Rawle's Third Edition; 20 WORDS & PHRASES, Permanent Edition, p. 456, citing Diefendorf v. Gallet (Idaho) 10 P. (2d) 307, 310.

The general rule as to granting of temporary alimony appears to be:

"In practice, however, allowance [of temporary alimony] is usually granted almost as a matter of course upon proof of marriage[14] and the pendency of a suit for divorce. The general rule is that a wife is a privileged suitor in divorce cases; if she is without an *income* [italics mine] competent for her support and the maintenance of the suit, living separated from her husband, the court will allow her alimony *pendente lite* and money to carry on her suit without inquiry into the merits."[15]

"The mere fact that a wife has property in her own right, however, will not prevent an allowance of alimony *pendente lite;* if her income is not sufficient for her maintenance and that of her husband is ample, she may be allowed from his income such a sum as will, when added to her own, enable her, during the pendency of the suit, to live comfortably in the station of life to which he has accustomed her. The law does not require a wife to have recourse to her own resources first, to the impairment of the capital of her own separate estate, before calling on her husband for temporary alimony."[16]

Another commentator in the field, Robert N. Golding, after a study of the cases, concludes[17]: "The general rule is, that since alimony relates solely to income, non-productive property is not considered and the wife is not required to encumber the corpus of her estate, or to sell her jewelry."

These statements are not in conflict with the rule laid down in 14 Cyc. 752, and for this reason: The quotation used by the Court in the *Rumping* case[18] is limited by two statements in footnote 62, annotating that paragraph in the body of the work. These are:

"Temporary alimony will not be denied the wife because she possessed a separate estate if the income derived therefrom is not sufficient for her support."[19] "She need not resort

[14]Note that in Finkelstein v. Finkelstein (1893) 14 Mont. 1, 34 P. 1090, the Court required only *prima facie* showing of the alleged fact of marriage.

[15]17 AM. JUR., *Divorce & Separation*, p. 432, §531.

[16]17 AM JUR., *Divorce & Separation*, p. 439 §545; see also similar statements in 19 C. J., *Divorce*, p. 215, §517 and in 27 C. J. S., *Divorce*, p. 898, §208; 15 A. L. R., p. 788, *anno.*

[17]Golding, *Alimony Pendente Lite in Annulment & Divorce Cases Wherein the Wife is the Defendant*, 18 ILL. L. REV. 528 (1924).

[18]*Supra*, note 8.

[19]14 CYC., *Divorce*, p. 753, footnote 62, column 1.

to the corpus of her estate before calling on that of the husband.'"[20]

It is to be noted that the cases cited in support of the statement (quoted in the *Rumping* case[21]) seem better suited to support the limitations set out in the footnote.

For instance, *Jenkins v. Jenkins*[22] *held that:* "Where a bill is pending for divorce, and the wife is without means to prosecute her suit, and it appears to the court that complainant has a probable ground for divorce, it has always been regarded as proper for the court to enter an order requiring the defendant to pay solicitor's fees." *But,* it will be noted that the question in that case was not as to the point we are considering, but was directed to the issue whether, to obtain temporary alimony, the wife must establish that she is entitled to a decree for divorce. Or in other words, whether, on an application for alimony *pendente lite,* the court will go into the merits of the case.

In *Rose v. Rose*[23] the defendant husband claimed that, since the wife has separate property, she should not be awarded temporary alimony and expense money. Plaintiff possessed valuable but encumbered realty from which she had an income of less than $200 annually. Defendant's income was $2,000. *Held,* complainant made a satisfactory showing as to her financial condition upon which to base the allowance.

This decision seems a more suitable citation to substantiate the statements in footnote 62 to 14 Cyc. 652.[24]

In *Haddon v. Haddon,*[25] which appears to support the rule as laid down by the Montana court, these facts appear: The wife had considerably more property and available means than the defendant husband, having acquired all of it from him within the year and one-half before the suit; the husband was partially invalided. Also to be noted is the fact that the main part of the wife's separate property was income-producing. The Court therefore reversed the order granting alimony *pendente lite* and suit money. And in *Collins v. Collins,*[26] the Court refused an award where the wife had, shortly before suit, received a voluntary settlement from the husband; there was doubt as to the validity of the marriage; and more than a hint

[20] 14 Cyc., *Divorce,* p. 753, footnote 62, column 2.
[21] *Supra,* note 8.
[22] (1878) 91 Ill. 167.
[23] (1884) 53 Mich. 585, 19 N. W. 195.
[24] *Supra,* notes 19 & 20.
[25] (1895) 36 Fla. 413, 18 So. 779.
[26] (1880) 80 N. Y. 1.

that the wife's purpose in instituting the suit was primarily for the purpose of obtaining alimony.

A companion case to *Haddon v. Haddon*,[27] is *Turner v. Turner*,[28] also cited to support the debated statement in 14 Cyc. 752. This case, arising under Section 137, California Civil Code, (and after which the Montana statute[29] was modeled) held as follows: "Code empowering the court, in its discretion, to require the payment of alimony by a husband to a wife, pending an action for divorce, where necessary to the support of herself or her children, or the prosecution or defense of the action, invests the court with nothing but a legal discretion, reviewable on appeal, and an order granting such alimony will be reversed when it appears that the wife occupies the homestead, which yields a good income; that she is in no immediate need of money; that the property enjoyed by her is more valuable and productive than that held by the husband; and that he is maintaining a greater number of their children."

It appears, then, in the foregoing cases denying temporary alimony, that the court will look to see whether the wife having a separate estate, has, at the same time, a greater income than the husband's. This, although the editors of Corpus Juris state: "It is of no importance whether the husband or wife possessed the greater means, so long as the wife has sufficient for her needs."[30]

In *Rumping v. Rumping*,[31] where the issue actually involved was "suit money" (i.e., an allowance for the wife's solicitor's fees and other expenses attendant upon the prosecution of a divorce suit),[32] the Court followed its statement as to temporary alimony with these words: "It is conceded also, that the rules governing allowances for suit money and expenses of litigation are the same as those which apply to allowances made for temporary alimony."

The language used would thus imply that, before the court grant an allowance for suit money, it should be made to appear that this is a proper case in which to file an affidavit in *forma pauperis*, as provided by the statute.[33]

But "while ordinarily the wife must show that she has not sufficient means of her own to enable her to defend the suit, it is not requisite that it be an impossibility for her to

[27] *Supra*, note 25.
[28] (1889) 80 Cal. 141, 22 P. 72.
[29] R. C. M. 1935, §5769.
[30] 19 C. J., *Divorce*, p. 216, §517.
[31] *Supra*, note 8.
[32] 17 Am, Jur., *Divorce & Separation*, p. 448, §564.
[33] R. C. M. 1935 §5780.

present her case without an allowance.'[34] And where she is plaintiff, the court may award suit money to "equalize her resources for the purposes of litigation with those of her husband.'[35]

And further, "The capital of the wife's separate estate need not be resorted to by her in prosecuting or defending her action against the husband; it is the income from her estate that determines her necessity.'[36]

The status of the Montana decisions on this subject is further complicated by the case of *Walker v. Hill*.[37] This is a suit by the wife's attorney against the husband, on an oral agreement by the latter to pay for the attorney's services in an action for separate maintenance in case the attorney brought about a reconciliation of the parties. It was claimed that the court erred in permitting the jury to consider the wealth of the defendant in making its award. But the Supreme Court held that: "It is the rule in this jurisdiction that the wife in a suit for separate maintenance, on a proper showing, will be granted temporary alimony, suit money and counsel fees in an amount to be determined by the court, the circumstances of the parties considered," citing *Bordeaux v. Bordeaux*.[38] Such in fact appears to be the decision of the lower court in that case. But does this rule follow from the *Rumping* case?[39] In that case the court apparently looked only at the property owned by the wife, not differentiating between income and non-income producing property, ignoring the husband's estate and the station in life of the parties.

An allowance upon an appeal is largely governed by the same rules as is provision for suit money in the lower court, although, where appellant, the wife must be acting in good faith, upon reasonable grounds.[40] Where the husband is appellant, such allowance is granted almost as a matter of course.[41]

In *Bordeaux v. Bordeaux*,[42] the Court held that "the district court had power . . . to require the husband to pay any money *necessary* [italics mine] to enable the wife to support

[34] 17 AM. JUR., *Divorce & Separation*, p. 450, §567.
[35] 17 AM. JUR., *Divorce & Separation*, p. 450, §567.
[36] 19 C. J., *Divorce*, p. 236, §553; 27 C. J. S., *Divorce*, p. 925, §222 (d), ¶. 2.
[37] (1931) 90 Mont. 111, 300 P. 260.
[38] (1903) 30 Mont. 36, 75 P. 524.
[39] *Supra*, note 8.
[40] 17 AM, JUR., *Divorce & Separation*, p. 459, §580; also see 19 C. J., *Divorce*, p. 232, §547.
[41] 19 C. J., *Divorce*, p. 232, footnote 92 (a).
[42] (1903) 29 Mont. 478, 480, 75 P. 359.

herself and to further prosecute the action." This allowance being, it appears, for services to be incurred during the action, not for past expenses. "There is one apparent exception . . . and that is that the district court may allow the wife money with which to pay such past expenses, when it becomes necessary to make such payment in order to enable her to continue her prosecution or defense. But in order to apply the doctrine announced in the cases last cited, there must always be a showing of necessity."[43]

Unfortunately, most divorce cases do not go farther than the trial courts, so that the situation has not been clarified by the Supreme Court. Indeed, under the law as it appears to stand at present, a lawyer doing the appeal work in such case would be working *gratis;* in its discussion in the Albrecht case,[44] on page 46, the court commented, "It does not appear anywhere that the defendant's counsel relaxed their efforts in her behalf on account of the non-payment of fees."

In this last connection it is interesting to note *Mosher v. Mosher,* a North Dakota case,[45] where the court said: "The construction [of the statute] which limits this literally to the question of her ultimate ability to prosecute or defend is extremely technical. She may have friends able or willing to provide the funds, or some printer may have confidence enough in her case to take his chances on future payment, and give her credit in the necessary amount. The printing may be done for the attorneys representing her, and the fact that she may be able, on the strength of one or all of these considerations, to procure the necessary printing to get her side of the case before the Court in no way relieves the husband of this obligation to provide these necessaries for the wife. . . . She should be placed upon an equality in this respect with her husband."

California cases on the subject are particularly interesting to Montana lawyers, since the statute authorizing the allowance[46] was modeled on Section 137, California Civil Code. Section 142, California Civil Code, reads as follows: "When the wife has either a separate estate, or there is community property sufficient to give her alimony or a proper support, the court, in its discretion, may withhold any allowance to her out of the separate property of the husband." The Montana

[43]Albrecht v. Albrecht (1928) 83 Mont. 37, 47, 269 P. 158.
[44]*Supra,* note 43.
[45](1907) 16 N. D. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. Rep. 654.
[46]R. C. M. 1935, §5769.

statute,[47] excluding the reference to community property, is identical. But note that the California statute has been interpreted to mean that "It is no defense to an application for temporary alimony that the wife has property in her own right, if it does not appear that her property is income producing. Where the wife is the owner of non-income producing property, the law does not require her to have recourse to her own resources first, or to impair the capital of her separate estate."[48]

"The income of the husband is one of the elements to be considered in determining the amount of temporary alimony which should be awarded to the wife. Thus, where the income of the husband is very large, and the parties have publicly lived together in a style conformable to such income, a just allowance would seem to be one sufficient to enable the wife to continue the enjoyment of many luxuries which habit has made apparent necessities."[49] Thus, where the wife had separate property worth $15,000, producing an annual income of $500, while the husband had a monthly income of $3,000, it was held that the contention that an allowance of alimony was not "necessary," under Civil Code Section 137, could not be sustained, the wife not being required to resort to a sale of her property in order that she might maintain herself in the manner to which she had been accustomed.[50]

As in the case of an allowance of temporary alimony, the California Court will not require the wife to have recourse to her own resources first, to the impairment of the capital of her separate estate, as a condition to compelling the husband to pay suit money.[51] The granting of suit money is a matter which rests in the sound discretion of the court.[52]

The power of the court to grant an allowance for suit money is not exhausted by the rendition of judgment in the case, but the court may, in its discretion, award attorney's fees and costs of preparing the record and briefs on an appeal.[53]

[47]R. C. M. 1935, §5773.
[48]1 CAL. JUR., *Alimony*, p. 968, §21, citing Farrar v. Farrar (1920) 45 Cal. App. 584, 188 P. 289; 1 CAL. JUR. SUPP., *Alimony*, p. 219, §21, citing Busch v. Busch (1929) 99 Cal. App. 198, 278 P. 456 to same effect.
[49]Whiting v. Whiting (1923) 62 Cal. App. 157, 216 P. 92; Kowalsky v. Kowalsky (1904) 145 Cal. 394, 78 P. 877; 1 CAL. JUR., *Alimony*, p. 978, §31; 1 CAL. JUR, SUPP., *Alimony*, p. 221, §31.
[50]Westphal v. Westphal (1932) 122 Cal. App. 379, 10 P. (2d) 119.
[51]Westphal v. Westphal (1932) 122 Cal. App. 388, 10 P. (2d) 122.
[52]1 CAL. JUR., *Alimony*, p. 992, §45 and cases cited.
[53]1 CAL. JUR., *Alimony*, p. 1002, §54, note 11; also 1 CAL. JUR. SUPP., *Alimony*, p. 228, §54 and cases cited.

The method of computing the amount to be awarded as temporary alimony is discussed at length in the Illinois case of *Harding v. Harding*.[54] There the Court quotes Bishop as stating that where the wife has an income arising from her separate estate, the method of computation is to add the wife's annual income to her husband's; consider what, under all the circumstances, should be allowed her out of the aggregate, then from the sum so determined, deduct her separate income, and the remainder will be the annual allowance to be given her. Mr. Bishop concludes that the ordinary rule of temporary alimony is to allow the wife about one-fifth of the joint income, deducting therefrom the income from the wife's separate estate in the way already explained. The Illinois Court goes on to say, however, that the amounts actually allowed by the courts are not uniformly in such proportion, but vary from a sum sufficient to meet the actual wants and necessities of the wife, in some cases to a third, or even a half, of the income of the husband.

And in the *Harding* case the court found that an award to the wife of $300 per month was not an abuse of its discretion by the lower court, where the wife had about $1,000 of yearly income, and the husband had at least $30,000 per year net, this being probably less than one-sixteenth of the husband's income alone. The court considered that the weight of authority, as well as equitable considerations, requires that the wife be enabled to live comfortably, pending the litigation, in the "station in life to which the husband has accustomed her."

(It is to be noted that the editors of L. R.A. found the Harding case to have so fully reviewed the law on the subject of an allowance of alimony that no annotation was attempted.)

That the wife should be allowed sums sufficient to enable her to maintain herself during the suit according to her former manner of living is also the rule enunciated by the Idaho court in *Day v. Day*,[55] or, as it was stated in the opinion, "The respondent . . . fixed the social standing which his wife should occupy and for which he was willing to pay, and the fact that she is now seeking a divorce, or he is seeking a divorce from her, ought not to authorize him to lower her social standing or embarrass her by failing to provide for her before a final judgment is entered."

It is stated in *Westphal v. Westphal*[56] that, while the dif-

[54](1892) 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310.
[55](1908) 15 Idaho 107, 96 P. 431.
[56]*Supra*, note 50.

ferent jurisdictions have announced different rules, "they are all in seeming accord that support and suit money are to be denied the wife only when she possesses property or means sufficient to support her in her accustomed mode of living and to defend the action." It was held in that case that $400 per month alimony was not excessive where the wife had an annual income of $500, the husband $2500 per month from his separate estate, plus $860 monthly salary,[57] the evidence showing that it would require $750 per month to maintain plaintiff and the child in the style to which he had accustomed them.[58]

"Natural justice and the policy of the law alike demand that, in any litigation between husband and wife, they shall have equal facilities for presenting their case before the tribunal. This requires that they shall have equal command of funds . . . he should be compelled to furnish them to her, to an extent rendering her his equal in the suit."[59]

In the *Harding* case,[60] the court said that since appellee was able, financially, to make a very determined and expensive contest, in order that the wife have a fair opportunity to present her cause, it was necessary that she have counsel. "In making such allowances, due regard should be had to the character of the litigation, the services necessarily to be performed, the probable expense to be incurred." An allowance of $1,000 for solicitor's fees and $400 for other expenses was therefore not so excessive as to warrant the interference of appellate jurisdiction. In accord with this are the decisions in *Westphal v. Westphal*[61] and *Kellett v. Kellett*.[62] Note the vigorous language employed by the Idaho court in *Day v. Day*.[63]

[57]"Conceded to be community property."

[58]In accord are also Schammel v. Schammel (1887) 74 Cal. 36, 15 P. 364; Poole v. Wilber (1892) 95 Cal. 339, 30 P. 548; Stampfli v. Stampfli (1921) 53 Cal. App. 126, 199 P. 829; and in Busch v. Busch (1929) 99 Cal. App. 198, 278 P. 456, an allowance of $1000 per month was sustained by the finding that the husband, in addition to paying many bills himself, had given $850 per month to wife as household allowance during the marriage.

[59]II, BISHOP, MARRIAGE & DIVORCE (6th Ed.), p. 331, §387.

[60]*Supra*, note 54.

[61]*Supra*, note 50.

[62](1934) 88 Cal. Dec. 481, 39 P. (2d) 203.

[63]Day v. Day (1908) 15 Idaho 107, 96 P. 431, 434, where the court said: "This contest is most vigorous, and seems to be waged upon the part of each party under a conviction that the position taken is right, or must at least be maintained. This disposition always demands the most vigorous, persistent and thorough labor. To even think about $800 as a proper allowance for plaintiff's counsel in preparing her case would hardly demand a moment's consideration from those familiar with legal procedure to determine its unreasonableness and inadequacy.

A mere showing that the wife had some funds of her own, without showing that they were immediately available, does not conclusively show that the court abused its discretion in awarding suit money.[64]

Allowances to a wife for attorney's fees and the costs of preparing the record and briefs on appeal from a judgment of divorce are discretionary with the trial court,[65] and so an allowance of $1,500 counsel fees and $200 costs in resisting an appeal in which voluminous briefs were filed was held not unreasonable.[66]

This commentator would therefore recommend that the status of Montana law on the subject be clarified and the following principles enunciated:

That upon the pendency of a suit for divorce, the marriage being either admitted or shown *prima facie,* the court will allow to the wife, from the husband's estate, alimony *pendente lite,* counsel fees and other expenses included in the term "suit money":

1. Where the wife is without an income, as of course.

2. Where, although she has a separate estate, she has no income therefrom, or income insufficient for her support and the prosecution of the action.

3. That the amount of alimony awarded should be sufficient to maintain her in the style to which her husband has accustomed her, either in (1) *in toto,* or in (2) by supplementing the income from her separate estate.

4. That she should have equal facilities with her husband in presenting her case before the tribunal, and he should furnish her with the funds necessary to do so.

5. That such suit money should be awarded, although she have a separate income which is sufficient for her actual maintenance, the amount to be awarded being dependent upon the character and extent of the litigation.

6. That he be obliged to provide monies needed by her on

The record in this case shows without any contradiction that the respondent is fortified in his defense and cross-complaint by most able counsel. The plaintiff ought to have a fair show in this contest. A fair compensation based on the record in this case would be $4500. [The husband having engaged detectives for months . . .] to do justice to the plaintiff and give her the same rights in preparing her evidence we are also satisfied . . . that the plaintiff should be allowed the sum of $2000 as costs to be expended in preparing her said case for trial."

[64]Speck v. Speck (1928) 92 Cal. App. 365, 267 P. 1090.

[65]Minnich v. Minnich (1932) 127 Cal. App. 180, 15 P. (2d) 808.

[66]Busch v. Busch (1929) 99 Cal. App. 198, 278 P. 456; in Smith v. Smith (1929) 99 Cal. App. 658, 279 P. 208, the court allowed $250 counsel fees and $50 costs for appeal.

an appeal, as in cases of allowance of suit money in the court below.

And, in conclusion, may we point out that we find a certain male illogic in originating the rule that a wife be required to expend her own income for her support during a divorce action. Does or does not a husband owe the duty of support to his wife?

Geraldine Ede Hennessey.

WHEN IS A HOLOGRAPHIC WILL DATED?

The recent decision of the Supreme Court of Montana in the case of *Irvine's Estate*[1] has aroused and renewed the interest of legal minds in the subject of holographic wills. The history of this kind of will reaches back to early French law which was codified in the Code Napoleon, and its roots extend into Roman times.[2] The word "holographic" is derived from two Greek words meaning "whole" and "to write." The holographic will is a will which is entirely in the testator's handwriting.[3] In the words of the Napoleonic Code:[4] "An holographic testament shall not be valid, unless it be written entirely, dated and signed by the testator with his own hand: it is subjected to no other form." Montana has adopted the following definition: "A holographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed."[5]

The holographic will stemming from French law has come to be recognized in several European countries, including Austria, Belgium, Germany, Italy, Spain and Scotland.[6] It is also recognized in a few of the Central and South American states, and in Louisiana and nine of the western states of the United States.[7] In nine other states a different kind of holographic will is found, which, instead of being a distinct type of will, merely dispenses with the necessity of witnesses if the instrument is in the handwriting of the testator, but in other

[1]In re Irvine's Estate, Wild v. Hall (1943) .....Mont....., 139 P. (2d) 489.
[2]Citations to Roman origins are given in 28 YALE L. J. 72.
[3]PAGE, WILLS (3d ed. 1941) I, §383, p. 694; ATKINSON, WILLS, §133, p. 305.
[4]CODE NAP., Art. 970.
[5]R. C. M. 1935, §6981.
[6]28 YALE L. J. 72; 14 CALIF. L. REV. 245.
[7]California, Idaho, Montana, Nevada, North Dakota, Oklahoma, South Dakota, Utah, Wyoming.