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Domestic Relations: Levy of Execution for Accrued Alimony and Child Support Payments

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The parties negotiating the marriage would come to an agreement upon the major issues before the promises of marriage were exchanged. In our modern society the couples are more apt to fend for themselves. There must necessarily be a period of discussion and agreement concerning the more serious questions of their future life as husband and wife. A discussion of these questions prior to the engagement would be highly presumptive. It is the engagement which permits the parties to come to agreement upon the issues which will largely determine the success of their future marriage. The engagement then, is not a contract, but rather a relationship or status which the parties enter by giving a conditional promise of marriage; the condition is that the parties still wish to marry at the end of the engagement.

By permitting the action of breach of promise, the law treats a conditional promise as binding. In so doing it destroys the social function of the engagement, which is to permit the parties to change their minds. The California legislature, recognizing that the existence of the action for breach of promise of marriage was not in the public interest, abolished it. The decision in *Langley v. Schumacker,* by narrowly construing the legislative intent, permits the legislative purpose to be frustrated by simply alleging that the promise of marriage was made without intent to perform. The threat of an embarrassing lawsuit is apt to cause a party who has not made a promise of marriage to settle out of court, and the party who has made such a promise may be induced to go through with the marriage even though the engagement has cast some doubt as to its probable success.

The legislative intent in abolishing actions for breach of promise of marriage should not be construed as abolishing only actions based upon breach of contract, for the statute which abolished the action abolished three other torts as well, *i.e.* alienation of affections, criminal conversation, and seduction. The legislature has placed the action of breach of promise within a classification of torts to be abolished, because the action is tortious as well as contractual.[29] The legislature apparently intended to remove the evil resulting from suits for breach of promise regardless of the form of action the evil chose to take. The statute states that *no cause of action* arises for breach of promise of marriage. The statute as construed by the Supreme Court of California succeeds in abolishing only *one form of the action.*

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DOMESTIC RELATIONS: Levy of Execution for Accrued Alimony and Child Support Payments

In granting a divorce, California trial courts are empowered under the provisions of California Civil Code section 139[1] to make orders for permanent alimony and child support. When the payments so ordered become overdue, one

[29] See note 20 *supra.*

[1] Calif. Civ. Code § 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 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, 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

remedy available to the judgment creditor is a writ of execution which may be levied against the assets of the judgment debtor.[2] *Messenger v. Messenger*,[3] decided by the California Supreme Court in 1956, clearly indicates that trial courts now have a wider discretionary power over the issuance of a writ than has heretofore existed.

On January 8, 1951 the wife in the *Messenger* case was granted an interlocutory decree which approved and incorporated a property settlement agreement of the parties. This agreement contained provisions relating both to the division of community property and to the husband's support obligation to the wife. The final decree was entered on January 16, 1952. Thereafter, in December 1953, the plaintiff wife applied for an order of execution for claimed arrearages of $6,700 and secured an order to show cause why the defendant husband should not be held in contempt for failure to make the overdue payments. The husband then obtained an order to show cause why the payments should not be reduced. As to this reduction, the court held that the paymenets could not be modified, because the provision for support was an integrated part of the property settlement agreement. California Civil Code section 139 deals only with modification of alimony and child support orders; it does not authorize modification of property awards. Thus, since the provision for wife support was an inseparable part of the agreement concerning the division of property, the necessary result was that no part of the agreement could be modified.

Bearing upon the issue of whether execution should be granted, the husband presented evidence that he had been twice married since the divorce, that his only income was from his medical practice, and that he had suffered a partial stroke. The trial court concluded that execution should not issue on the grounds that the defendant had no property or monies against which such execution could be successfully levied and that the only way to serve execution would be by placing the constable in charge of daily receipts, which would discredit the defendant, a professional man, and thereby impair his ability to pay alimony. Arrearages were ordered to be paid in installments and issuance of execution was suspended so long as defendant paid the installments, but in event of default, an execution was to issue forthwith.

In affirming this order, the California Supreme Court said that California Civil Code section 139, as amended in 1951, now provides it's own means of enforcement. The relevant added provision states that orders

> "may be enforced by the court by execution or by such order or orders as in its discretion may from time to time deem necessary."[4]

In respect to this addition the Supreme Court declared:

> "Under this provision the trial court *now* has discretion to determine in each case whether execution is an appropriate remedy for enforcing its order. In the present case the court found on sufficient evidence that to permit the issuance and enforcement

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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.

[2] Van Cleave v. Bucher, 79 Cal. 600, 21 Pac. 954 (1889).

[3] 46 Cal.2d....., 297 P.2d 988 (1956).

[4] See note 1 *supra*.

> of a writ of execution would discredit defendant professionally and impair his ability to make the monthly payments and discharge the arrearages. Accordingly, it did not abuse its discretion in conditioning the issuance of execution . . . ."[5] (Emphasis added.)

This opinion seems to indicate that the trial court for the first time may exercise discretion in the issuance of execution. This is not precisely true, for as will presently be seen, trial courts have for some time exercised a limited discretionary power over issuance of the writ. In order to understand the scope of this power, it would be well to consider the distinction between California Code of Civil Procedure section 681[6] and California Code of Civil Procedure section 685,[7] the two sections which previously defined the requirements necessary in order that execution be granted pursuant to orders for alimony and child support made under California Civil Code section 139.

California Code of Civil Procedure section 681 states that "The party in whose favor judgment is given may, at any time within five years after entry thereof, have a writ . . . .", and that any period during which the judgment or order is stayed or enjoined will be excluded from the computation of the time. Under this section, it is not necessary that the judgment debtor be given notice when application is made to the court for a writ.[8] In order to avoid confusion when the cases under this section are discussed, it should be noted that the date of entry for an installment payment was construed to be the date that such installment became due.[9] Thus, if a final decree of divorce had been granted in 1930, in 1950 the judgment creditor could have made application under California Code of Civil Procedure section 681 for installments becoming due between 1945 and 1950.

California Code of Civil Procedure section 685 provides for the reviving of dormant judgments and states in part:

> In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion.[10]

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[5] 46 Cal.2d at ....., 298 P.2d at 994.

[6] CALIF. CODE CIV. PROC. § 681 (1933). The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issue for its enforcement. If, after the entry of the judgment, the issuing of execution thereon is stayed or enjoined by any judgment or order of court, or by operation of law, the time during which it is so stayed or enjoined must be excluded from the computation of the five years within which execution may issue. (The 1955 amendment increases the time from five to ten years.)

[7] CALIF. CODE CIV. PROC. § 685 (1933). In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of Section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion.

Judgment in all cases may also be enforced or carried into execution after the lapse of five years from the date of its entry, by judgment for that purpose founded upon supplemental proceedings; but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of this act. (The 1955 amendment increases the time from five to ten years.)

[8] Castle v. Castle, 71 Cal.App.2d 323, 162 P.2d 656 (1945).

[9] Gaston v. Gaston, 114 Cal. 542, 46 Pac. 609 (1896); Cochrane v. Cochrane, 57 Cal.App.2d 937, 135 P.2d (1943).

[10] See note 7 *supra*.

The purpose of this section was succinctly stated in *Butcher v. Brower*:[11]

> "[I]t is clear that the principal object of the new enactment was to place upon a creditor seeking to enforce a judgment more than five years after its entry, the burden of showing why he was not able to satisfy his claim within the statutory period during which he is entitled to an execution as a matter of right."[12]

As can be imagined, the principal inquiry under this section was whether the judgment creditor had used due diligence to seek out and subject the property of the judgment debtor to execution at the earliest possible moment.[13] But even if due diligence was proved, the judgment debtor could show other circumstances that might cause a court within its sound discretion to withhold execution.[14] It will be seen in the ensuing discussion, that despite an unfortunate conflict in the meaning of words, the courts did exercise their discretion in behalf of the judgment debtor whenever future circumstances arose which made it obviously unfair for the judgment creditor to take advantage of a right which in good conscience should no longer exist.

The semantic difficulty arises by proceeding under the theory that "Primarily, however, it is the ownership of or interest in the judgment . . . that authorize a party to cause a writ of execution to be issued."[15] When this idea is coupled with the provision of California Civil Code section 139 that the judgment or orders "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."[16] (Emphasis added), it seems quite logical that the California Supreme Court stated in the 1948 case of *DiCorpo v. DiCorpo*[17] that:

> "A writ of execution will issue under the foregoing section CCP 681 as a matter of right upon installments accruing within the five year period on an ex parte application by the judgment creditor merely showing that such installments remain unpaid."[18]

But the court went on and said,

> "Thus, upon proof by plaintiff that installments have accrued within five years, the burden was upon defendant to establish facts justifying an order recalling the writ."[19]

The court held in this case that the defendant did not sustain the burden by his assertions that he was in bad health, unable to work, and would become a public charge if execution were levied.

The court in the *DiCorpo* case cited its previous decision in *Lohman v. Lohman*.[20] In that case the wife having failed to show that she had used due diligence in seeking out the husband's assets, was denied execution under California Code of Civil Procedure section 685 for amounts accruing more than five years previous to the date of application for the writ. But as to the accrual under California Code of Civil Procedure section 681, it was stated that,

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11 21 Cal.2d 354, 132 P.2d 205 (1942).
12 *Id.* at 357, 132 P.2d at 206-07.
13 See note 11 *supra.*
14 *Ibid.*
15 19 CAL. JUR.2d, *Executions* § 12 (1954).
16 See note 1 *supra.*
17 33 Cal.2d 195, 200 P.2d 529 (1948).
18 *Id.* at 201, 200 P.2d at 532.
19 *Ibid.*
20 29 Cal.2d 144, 173 P.2d 657 (1946).

> "Although issuance of execution upon a judgment requiring monthly payments may be denied upon equitable grounds, proof that the installments have accrued within five years establishes a prima facie right to execution and the burden is cast upon the judgment debtor to establish facts justifying an order denying the writ."[21]

In holding that the plaintiff was entitled to execution, the court pointed out that defendant executrix had not made a denial of indebtedness; that the issue of due diligence under California Code of Civil Procedure section 685 was not pertinent in argument under California Code of Civil Procedure section 681. The dissent, believing the trial court order should have been affirmed, said in part:

> "It seems . . . to be wholly inconsistent to hold . . . that such enforcement could be denied 'upon equitable grounds'. Enforcement is either a matter of right or a matter of discretion, but it cannot be both."[22]

That it could be "both" was explained in *Wilkins v. Wilkins*,[23] which involved issuance of execution upon an award which had provided both alimony and child support in a non-segregated amount. The husband had ceased payments when the last child reached majority in 1943. In 1948, the wife remarried and then sought execution for the entire amount of accrued payments. In disallowing execution for the full amount of the original order, the court declared:

> "While the creditor is, as a matter of right, entitled to an execution, the affidavit, order and execution issued thereon are subject to review . . . the trial court may exercise its judicial discretion in determining whether the facts set forth in the affidavit are true, and whether there has been a misrepresentation of the facts or willful suppression of facts which should have been related to the court in the first instance, or whether the husband was or was not under a legal duty to support the children or wife during the period in question."[24]

Dealing with a similar situation, the court was asked in *Anderson v. Anderson*[25] if the decree providing alimony and support of the children, without segregation of amount, became void when one child reached majority. The court answered:

> "The rule is that the court may modify a prior decree prospectively but may not make a modification operative on payments already accrued. But execution on the latter payments may not issue as a matter of right. The court has the discretion of determining under the equities . . . whether execution should issue . . . ."[26]

Colby v. Colby[27] presented another situation where the wife's claim to a writ as a matter of right was denied. The interlocutory decree in 1943 provided for weekly payments of $42.50 for the wife and two children. In 1945 the wife received a lump sum of $742.50 from the husband, agreeing that he would be relieved of further weekly payments until called upon by the wife. In 1953, the wife attempted to levy execution without having called upon the husband to resume payments. The writ was quashed. As to the matter of right claimed by the wife, the court replied:

> "[It] does not alter the court's equitable jurisdiction to grant relief against a judgment which has actually been satisfied in toto."[28]

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[21] *Id.* at 150, 173 P.2d at 660.
[22] *Id.* at 157–58, 173 P.2d at 665.
[23] 95 Cal.App.2d 605, 213 P.2d 748 (1950).
[24] *Id.* at 610, 213 P.2d 751.
[25] 129 Cal.App.2d 403, 276 P.2d 862 (1955).
[26] *Id.* at 406, 276 P.2d 865.
[27] 127 Cal.App.2d 602, 274 P.2d 417 (1954).
[28] *Id.* at 605, 274 P.2d at 419.

The foregoing consideration has dealt primarily with decisions under California Code of Civil Procedure section 681 in order to clarify certain instances where, despite the idea of execution being a matter of right, it would have been inequitable for the judgment creditor to take advantage of an order which was legally still valid. The same type of circumstances have been effective on behalf of the judgment debtor under California Code of Civil Procedure section 685 even when the wife was able to show that she had not been wanting in diligence. Thus, the wife was not entitled to collect arrearages for child support or alimony because a third party had provided the support,[29] or because the child had reached majority and the husband had neglected to obtain a modification order.[30]

The decisions recited thus far have not pointed out whether the courts ever recognized economic hardship of the judgment debtor as a factor which might prompt the withholding of a writ. Indeed, the *DiCorpo* case indicated the contrary by granting execution to the wife in spite of the husband's plea that he was in ill health, incapable of labor, and possessed of only one asset, his home. This result seems to be in keeping with previously established views elicited primarily to overrule *Shields v. Superior Court*[31] and *Williams v. Goodin*.[32] These two cases, decided shortly after the 1933 amendment to California Code of Civil Procedure 685, did recognize hardship as a factor to be considered in the exercise of discretion. The former case was expressly disapproved in the *Lohman* case. The dissent in the *Williams* case was followed in subsequent decisions.[33] This dissent said that the husband's ill health was not "a legal reason for depriving the judgment creditor of that which rightfully belonged to him."[34]

Whereas the court in the *Shields* and *Williams* opinions may have been thinking in terms of laches, both decisions having been rendered under California Code of Civil Procedure section 685, clearly the result reached in *Messenger v. Messenger* cannot be attributed to the lapse of time, for only three years passed between the granting of the interlocutory decree and the application for execution. The grounds upon which the trial court based its decision suggest two factors of importance: 1) execution if levied would not be successful, and 2) the husband would be subject to harrassment. Apparently, then, the court must have been influenced by the relative hardship to plaintiff and defendant.

The additional question might be posed whether extreme economic hardship to the judgment debtor might alone cause a court to conditionally suspend execution even though such execution was assured of success. Thus, suppose as in the *DiCorpo* case, the husband owned a house but received only a very small income. If execution was allowed, the husband would possibly become a public charge. But if execution was suspended upon payment of small installments, and if the original payment order was prospectively modified, would this not be tantamount in result to retroactive modification of the original award? Of course this could not have occurred in the *Messenger* case because the support provisions were integrated with the property settlement provisions. But if the support agreement was sever-

[29] Parker v. Parker, 203 Cal. 787, 266 Pac. 283 (1928); Radonich v. Radonich, 130 Cal.App. 250, 20 P.2d 51 (1933).

[30] Danz v. Danz, 96 Cal.App.2d 709, 216 P.2d 162 (1950); Hale v. Hale, 6 Cal.App.2d 661, 45 P.2d 246 (1935).

[31] 138 Cal.App. 151, 31 P.2d 1045 (1934).

[32] 17 Cal.App.2d 62, 61 P.2d 507 (1936).

[33] Atkinson v. Atkinson, 35 Cal.App.2d 705, 96 P.2d 824 (1939); Passow v. Bell, 27 Cal. App.2d 360, 81 P.2d 224 (1938); McClelland v. Shaw, 23 Cal.App.2d 107, 72 P.2d 225 (1937).

[34] 17 Cal.App.2d at 67, 61 P.2d at 509, 510.