

1-1957

Enforcement of Divorce Decrees and Settlements by Contempt and Imprisonment in California

James L. Browning Jr.

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

James L. Browning Jr., *Enforcement of Divorce Decrees and Settlements by Contempt and Imprisonment in California*, 9 HASTINGS L.J. 57 (1957).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol9/iss1/5

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

ENFORCEMENT OF DIVORCE DECREES AND SETTLEMENTS BY CONTEMPT AND IMPRISONMENT IN CALIFORNIA

By JAMES L. BROWNING, JR.

"From October 1, 1838, to December 1, 1839 (a period of fourteen months), 3,905 persons were arrested for debt in London and the provinces, and of these 361 remained permanently in gaol for default of payment or satisfaction. . . . The debtor who was left in durance vile shared a common prison with the murderer and the thief, and the spectacle of misfortune linked in this manner to the side of crime was as demoralizing as it was cruel."¹

Creditors had the power to compel the restraint and confinement of their debtors during the period when imprisonment for debt was authorized by law.² Debtors went to prison when they had no money, and stayed in prison because, being imprisoned, they could get no money. Because of the popular outcry against such procedures, it is not surprising that the constitutions of the American states were formulated containing provisions against the practice. Most of the state constitutions today contain such provisions, whether imprisonment for debt be entirely outlawed, or its availability merely restricted to specific cases.³ They were adopted to protect the poor but honest debtor who is unable to make good his obligations.⁴ Such provisions have naturally raised questions regarding the extent to which the availability of the remedy of contempt and imprisonment has been diminished.

Foremost among these questions is the applicability of contempt and imprisonment to enforce divorce decrees awarding alimony and property settlements. For example, may a contract of property settlement, entered into between the parties anticipating a divorce action, be enforced by contempt proceedings aimed at imprisoning the obligor for wilful failure to perform; or, is the obligee precluded from asking such a remedy because of the state constitutional prohibition against imprisonment for debt? Does the availability of remedies change when such an agreement is incorporated into the divorce decree itself? If the agreement is one for the payment of alimony only, and does not concern a division of marital property, is imprisonment possible where the agreement has been made a part of the divorce decree? What are the remedies available when the agreement is intended both as a contract for the division of marital property and as a provision for payments in lieu of alimony, or payments intended as alimony? The answers to these questions have been obscured by a diversity of views among the states, and the California position seems to have under-

¹ Lord Bowen, *Select Essays in Anglo America Legal History*, I, 544 (as quoted in HOLDSWORTH, CHARLES DICKENS AS A LEGAL HISTORIAN 136-37) (1928).

² 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW 231-32 (1926).

³ 16 C.J.S., *Constitutional Law* § 204(1) (1956).

⁴ *Ex parte Trombley*, 31 Cal.2d 801, 193 P.2d 734 (1948).

gone an important change in the recent case of *Bradley v. Superior Court*.⁵

Before discussing this case, however, it will be helpful to draw several preliminary distinctions and consider the basic factual categories affecting the availability of contempt and imprisonment as a remedy.

It is well settled that husband and wife may contract with each other in California, respecting property rights and provisions for support during separation.⁶ Where the parties, anticipating a divorce decree, make reasonable provisions for alimony payments, the court usually makes the terms of the agreement a basis for the decree, if the agreement is otherwise valid. This comment will refer to such agreements as "alimony agreements." Where the parties desire a division of the community property, they may provide for specific division in kind, or for proportionate money payments. Because the money payment type provides the main battleground in the application of contempt and imprisonment, this comment is chiefly concerned with that type of property division, which will herein be termed "property settlement agreements," or "property settlements." Note that there are two separate types of agreements possible here, made for different aims and purposes: the alimony agreement, made to establish the amount of the support and maintenance obligation; and the property settlement, made to define the property rights, community and separate, of the husband and wife.

It may happen that the parties to such agreements fail to adequately label the provisions for payment of money, as to whether they are intended as alimony, in lieu of alimony, as provisions for property settlement, or perhaps as provisions for *both* alimony and property settlement. If single provisions are intended as both a satisfaction of alimony and property settlement, this comment will use the designation "commingled and inseverable alimony and property agreements," or simply "commingled agreements." It should further be noted that each of these types of transactions, *i.e.*, alimony agreements, property settlements, and commingled agreements, may be drawn with reference to the anticipated divorce decree, and incorporated therein when rendered. The availability of contempt and imprisonment as a remedy to enforce decrees in which such remedies have been incorporated will be largely determined by which of the foregoing situations is present in the particular case.

Of course, when the availability of contempt and imprisonment is discussed herein, it is assumed that the failure to comply with the obligation or order is wilful, unless otherwise stated. It is generally recognized that there is no contempt where the defendant is unable to comply with the order of the court, if the inability was not created voluntarily for the purpose of escaping performance.⁷ Thus, inability of the husband to pay alimony is generally a defense to a contempt proceeding.⁸

⁵ 48 Cal.2d 509, 310 P.2d 634 (1957).

⁶ See CAL. CIV. CODE §§ 158, 159, 160.

⁷ Galland v. Galland, 44 Cal. 475, 13 Am. Rep. 167 (1872).

⁸ Keck v. Keck, 219 Cal. 316, 26 P.2d 300 (1933); *Ex parte Leet*, 99 Cal.App. 788, 279 Pac. 466 (1929).

Alimony Established by the Court

Is contempt and imprisonment an available remedy for the enforcement of the obligation to pay alimony as decreed by a court, without any extrinsic agreement of the parties involved? It is a well settled and long recognized proposition that a divorce decree allowing alimony is enforceable by proceedings in contempt instituted in the court awarding alimony.⁹ This power to enforce by contempt applies to both permanent and temporary alimony, and is founded both upon the court's inherent power, and upon statute.¹⁰ Such a contempt being civil in nature because it is committed outside the presence of the court,¹¹ is distinguished from a criminal contempt. The distinction may be important in determining issues relating to the statute of limitations, burden of proof, procedure and scope of appellate review, the power of pardon, and jury trial. Also, the proceedings in a civil contempt should be initiated by the aggrieved party rather than by the prosecuting attorney, or in the name of the state.¹²

A California Supreme Court case, *Ex parte Perkins*,¹³ as early as 1861, recognized the traditional power of a divorce court to enforce its decree by contempt proceedings. In that case, petitioner, who was adjudged in contempt for failure to comply with the divorce court's decree that he pay \$400 counsel fees, sought habeas corpus from the state supreme court on the grounds that the facts were insufficient to constitute a contempt. While the payment of counsel fees, and not alimony, was involved here, the case is important because petitioner had further argued that the sum which it was adjudged he should pay was a debt within the meaning of the constitutional proscription against imprisonment for failure to pay a debt. The court, holding the payment of counsel fees analogous to the payment of alimony, decided that the obligation to pay counsel fees was not a debt within the constitutional prohibition. The court said:

" . . . [D]uty [to support a wife] is an imperfect obligation which is not technically a debt. [The husband] does not owe her any specific amount of money, but he owes a duty to her which may be enforced by the order of a court, compelling him to pay her the money."¹⁴

The clause to which petitioner Perkins had referred was included in the original constitution of 1849, and remains unchanged in the present constitution:

⁹ *Van Dyke v. Van Dyke*, 125 Ga. 491, 54 S.E. 537 (1906); *In re Cave*, 26 Wash. 213, 66 Pac. 425 (1901); *Ex parte Robert Gordan*, 95 Cal. 374, 30 Pac. 561 (1892); *Ex parte Spencer*, 83 Cal. 460, 23 Pac. 395 (1890); 19 C.J., *Divorce*, §§ 645, 646 (1920).

¹⁰ MADDEN AND COMPTON, *CASES ON DOMESTIC RELATIONS* n.4 at 396 and cases cited (2d ed. 1940).

¹¹ *In re McCarty*, 154 Cal. 534, 98 Pac. 540 (1908).

¹² *Maryott v. Maryott*, 124 Neb. 274, 246 N.W. 343 (1933).

¹³ 18 Cal. 60 (1861).

¹⁴ *Id.* at 64.

"No person shall be imprisoned for debt in any civil action, or 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 . . ." ¹⁵

Furthermore, the debtor's imprisonment prohibition extends to federal law:

"Imprisonment for debt. (a) A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any state wherein imprisonment for debt has been abolished. . . ." ¹⁶

Since the *Perkins* case, the concept has prevailed that the obligation to pay alimony is not strictly a "debt" for purposes of the constitutional prohibition against imprisonment for debt.¹⁷ It would seem that the distinction between a "debt" as alluded to in the state constitutional provision, and "alimony," is that the former relates to business transactions, whereas alimony arises from the marital obligations of the husband.¹⁸ No doubt the distinction arises because alimony carries on after divorce the common law duty of marital support, and the duty of support does not rest on contract, but springs from the matrimonial relation.¹⁹ It is true that cases may be found which support the proposition that alimony is merely a debt, but such cases are definitely a small minority.²⁰ The overwhelming authority in this country is to the effect that alimony provisions in a divorce decree may be enforced by contempt proceedings, and that wilful disobedience of the court order may be punished by imprisoning the recalcitrant, without violating the constitutional proscription against imprisonment for debt. It may be noted that while a contempt in these cases is also punishable by fine, such an order by the courts is rare, and imprisonment is more usually decreed.²¹

Property Settlement Not Incorporated into the Decree

What of the enforcement of the obligation to make payments under a property settlement not incorporated in the divorce decree? A property settlement agreement which does not purport to set up alimony payments, which demonstrates no indication that the parties intended it to be made a part of a future divorce decree, and which in fact *is not incorporated into the subsequent divorce decree* (although the divorce court may *approve* the settlement) is not enforceable by contempt proceedings aimed at im-

¹⁵ CAL. CONST. art. I, § 15.

¹⁶ 28 U.S.C. § 2007 (1952); see also FED. R. CIV. P. 64, 69.

¹⁷ *Ellery v. Superior Court*, 25 Cal.App.2d 222, 77 P.2d 280 (1938); *Miller v. Superior Court*, 9 Cal.2d 733, 72 P.2d 868 (1937); *Cain v. Miller*, 109 Neb. 441, 191 N.W. 704 (1922), Annot., 30 A.L.R. 130 (1924).

¹⁸ 11 WORDS AND PHRASES 195, *Debt* (Perm. ed.).

¹⁹ TIFFANY, PERSONS AND DOMESTIC RELATIONS 80-81 (3d ed. 1921).

²⁰ See *In re Kinsolving*, 135 Mo. App. 631, 116 S.W. 1068 (1908).

²¹ MADDEN AND COMPTON, DOMESTIC RELATIONS n. 3 at 406 (2d ed. 1940); see *Ramsay v. Ramsay*, 125 Miss. 185, 87 So. 491 (1921).

prisoning the defaulting party.²² It would not be accurate to make the broad statement that all money decrees fall within the stipulation against imprisonment for debt. As we have seen, an alimony decree is enforceable by contempt and imprisonment in nearly all jurisdictions. A fiduciary under an express trust who fails to pay over money as ordered may be imprisoned for contempt.²³ And even in cases of actual debt, any element of misrepresentation as to the basis of indebtedness may bring the case within the exception of fraud, permitting imprisonment.²⁴ But the money decrees based upon contracts may not generally be enforced by contempt and imprisonment.²⁵ The rule in California, whether the case be concerned with a property settlement or alimony agreement, is that contempt cannot be justified unless the order by the court to make the payments is formal and explicit.²⁶ That is, the court must clearly and specifically order the doing of the act upon which the party is allegedly in default. The mere "approval" of an extrinsic agreement by the parties will not suffice. In the absence of such an order, a holding in contempt is a nullity.²⁷

Alimony Agreement Incorporated in Decree

The question of imprisonment may arise where the obligee seeks the enforcement of an obligation for payment under an alimony agreement made between the parties to a divorce action, which is incorporated as a part of the divorce decree. One leading case on this subject is *Holloway v. Holloway*.²⁸ There, petitioner was held in contempt for failing to make alimony payments as ordered by the divorce decree, the payments being predicated upon a separation agreement made between the parties, and subsequently incorporated in the divorce decree. The court affirmed the order of contempt, on the theory that the provisions of the agreement became a part of the decree when incorporated therein, and as such, were not imposed by contract, but by court order, so as to support the judgment of contempt.

This view apparently has been accepted in California, in the case of *Hough v. Hough*.²⁹ Speaking for the Court, Mr. Justice Carter said:

"True, the basis for an alimony award arises out of the law imposed obligation of support rather than contract, but where the parties agree to a specified amount and the agreement is presented to the court, it becomes part of

²² *Plummer v. Superior Court*, 20 Cal. 2d 158, 124 P.2d 5 (1942).

²³ 60 A.L.R. 322 (1929).

²⁴ *Ex parte Trombley*, *supra* note 4.

²⁵ *People ex rel. Sarlay v. Pope*, 230 App. Div. 649, 246 N.Y.S. 414 (1930).

²⁶ *Schnerr v. Schnerr*, 128 Cal. App. 363, 17 P.2d 749 (1932); *McCaleb v. McCaleb*, 177 Cal. 147, 169 Pac. 1023 (1917).

²⁷ *Andrews v. Superior Court*, 103 Cal. App. 360, 284 Pac. 494 (1930); see *Young v. Superior Court*, 105 Cal. App. 2d 65, 233 P.2d 39 (1951).

²⁸ 130 Ohio St. 214, 198 N.E. 579 (1935); see *Estes v. Estes*, 192 Ga. 94, 14 S.E.2d 681 (1941); *Dean v. Dean*, 136 Ore. 694, 300 Pac. 1027 (1931); *Brown v. Brown*, 156 Tenn. 619, 4 S.W.2d 345 (1928).

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

the issues litigated. . . . When it is incorporated in and made an operative part of the decree, there is no longer any occasion for its independent existence. . . . The judgement is enforceable . . . by contempt proceedings in a proper case."³⁰

It should be noted that other factors may affect the availability of contempt as a remedy, even though the incorporated settlement is clearly one providing for alimony. For example, in *Glynn v. Glynn*,³¹ such a remedy was denied for the enforcement of a settlement providing for alimony, which was incorporated in the divorce decree. The reason given was that the wife, who sued for cruel and inhuman treatment, was the party at fault, and the prevailing law in that state at the time did not authorize the awarding of alimony to the party at fault. Consequently, the payments were held to be a contractual obligation, and not alimony, and on that basis contempt was unavailable as a remedy. *Bushman v. Bushman*,³² a Maryland case, held that if the payments (purported in the agreement to be for alimony) did not fall within the legal definition of alimony in effect in the particular jurisdiction at the time, the decree incorporating the agreement was merely an order for the payment of a debt, and therefore fell within the constitutional prohibition against imprisonment for debt. The provision in the *Bushman* case did not fall within the legal definition of alimony, because it was provided in a gross amount, the legal definition rejecting the provision of a gross amount as properly alimony.

Property Settlement Incorporated in Decree

Now consider the case where the parties enter into what is strictly a property settlement agreement, without provisions purporting to apply exclusively to alimony, the agreement being incorporated in a subsequent divorce decree which orders the parties to carry out the provisions thereof. Here, the rules become less uniform, and more uncertain. It has been suggested that part of this uncertainty has resulted from the neglect of draftsmen, form-book writers, and to some extent, the courts, in distinguishing between provisions for alimony, and provisions for disposition of property, when considering settlement agreements.³³

It also seems apparent that two separate theories exist, leading to different conclusions as to the remedies properly available. The first of these, the minority view, holds that when the property settlement recites that the terms thereof shall be embodied in a subsequent divorce decree, and its provisions *are incorporated* in the ensuing divorce decree, the wife may enforce the decree by contempt.³⁴ Presumably, under this theory, the wife could then either bring an action upon the agreement itself, or initiate con-

³⁰ *Id.* at 610, 160 P.2d at 17.

³¹ 8 N.D. 233, 77 N.W. 594 (1898).

³² 157 Md. 166, 145 Atl. 488 (1929).

³³ Comment, 2 STAN. L. REV. 731 (1950).

³⁴ *Miller v. Superior Court*, *supra* note 17.

tempt proceedings. If the wife chose the latter, this theory permits imprisonment of the party in default without violating the constitutional debtor imprisonment provision, since the incarceration is for the violation of the court's order, rather than for non-payment of a debt.³⁵

The majority theory holds that a property settlement anticipating the subsequent divorce decree is not changed into an alimony type agreement enforceable by contempt merely because the court does include it as a part of its decree. This is the more logical view. While the minority theory looks to the type of *action* which is to be enforced, the majority theory more properly looks to the type of *right* sought to be asserted.³⁶ Is it not more logical to say that a contractual agreement remains contractual, and must be treated with the prohibitions peculiar to contractual debts, including the prohibition against imprisonment for debt, than to say that a contractual agreement becomes marital when a court orders the parties to carry out its provisions? Does a leopard change its spots? The net result of application of the majority view is to repudiate the concept that the property agreement merges into the divorce decree for purposes of supporting a contempt order. It should be noted, however, that the concept of merger may still be applied so as to allow the bringing of subsequent proceedings leading to issuance of a writ of execution, such proceedings being based upon the divorce decree into which the agreement has been merged. In this respect, incorporation of the property agreement may have an effect on the remedies available.

It would seem, however, that in the case of an action to enforce the property settlement by contempt proceedings, the majority view should prevail. The pure property settlement not incorporated in a decree is not enforceable by contempt.³⁷ The incorporation of such a basically contractual obligation into a decree should not have the effect of defeating the constitutional prohibition against imprisonment for debt by enabling the court to order contempt and imprisonment when the court had no such power based upon enforcement of the right itself. Indeed, this is the more widely accepted view,³⁸ although apparently it has not been the prevailing view in California.³⁹

The Old Rule in California

California courts have, in the past, been inclined to reason under the minority theory. The California case most often cited in this regard is *Lazar v. Superior Court*.⁴⁰ In that case, the parties made a property settle-

³⁵ *Ibid.*

³⁶ *Bradley v. Superior Court*, 48 Cal. 2d 509, 310 P.2d 634 (1957).

³⁷ *Plummer v. Superior Court*, *supra* note 22.

³⁸ 154 A.L.R. 443, 468, 469 and cases cited (1945).

³⁹ *Young v. Superior Court*, 105 Cal.App.2d 65, 233 P.2d 39 (1951); *Shogren v. Superior Court*, 93 Cal.App.2d 356, 209 P.2d 108 (1949); 154 A.L.R. 443, 483, 484 (1945); Comment, 2 STAN. L. REV. 731, 737 (1950).

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

ment agreement, the stated purpose of which was a complete settlement of all their property rights. The agreement provided for monthly payments and its provisions were to be incorporated in any decree by any court in a divorce action. The agreement was duly incorporated in the subsequent divorce decree which, however, made no determination that the payments were for maintenance and support. Petitioner defaulted on the monthly payments under the agreement after the divorce had become final. He was held in contempt on a basis that made the crucial distinction one between a property settlement merely referred to in the decree, or approved by the court, but not actually made a part of the decree; and a property settlement which, by its own language, expresses the intent that it be made a part of a future divorce decree and incorporated therein. The court ruled that in the former case contempt was improper, while in the latter case, it was proper when the decree incorporation actually occurred. The court denied petitioner a writ of habeas corpus in *In re Lazar*,⁴¹ holding that his imprisonment was not prohibited by the constitution.

It is suggested that what might be termed the "agreement-reference and decree-incorporation" test, as adhered to in the *Lazar* case, is incorrect as a guide to the proper application of imprisonment for contempt. As previously suggested, the distinction should be one between agreements purely for property settlement payments on one hand, and agreements for alimony payments on the other. This would insure that the remedy would be appropriate to the right asserted. A contractual right, then, should not be enforceable by contempt and imprisonment, because of the constitutional proscription. Using this approach the court might require that the parties stipulate as to whether provisions in the agreement are intended for alimony or property settlement, or both, requiring that if the provisions are intended for both purposes, some statement of apportionment be made.⁴²

Upon only a cursory examination of the incorporated settlement cases it is obvious that they are often unclear as to whether the settlement is one of property disposition or provision for alimony. Consider *Miller v. Superior Court*,⁴³ where the court ruled that a modification agreement made subsequent to the final divorce decree, by which the former wife released petitioner from "any or all claims for alimony" in return for petitioner's promise to execute a promissory note and make monthly payments to the former wife for a period of three years, or until she remarried, might be enforced by the former wife in contempt proceedings. The decree which the subsequent agreement modified had been based on an earlier agreement between the parties providing for a monthly payment for the wife's maintenance. If the modification agreement here was an agreement to pay ali-

⁴¹ 37 Cal.App.2d 327, 99 P.2d 342 (1940).

⁴² 154 A.L.R. n. 50 at 478 (1945) notes the Michigan Court Rules (No. 51, § 5) requiring that divorce decrees making property settlements be drawn so that the provisions are differentiated as either "property settlement" or "alimony" in separate paragraphs.

⁴³ 9 Cal.2d 733, 72 P.2d 868 (1937).

mony the holding is consistent with the general rule that an alimony agreement incorporated in a divorce decree may be enforced by contempt. Because the court stated that it would have been unable to modify the original agreement had not the parties done so themselves, however, it is not unreasonable to assume that the agreement was a contractual property settlement. If the latter is true, the holding is consistent with the *Lazar* case.

The New Rule in California

It would seem that both the *Miller* and the *Lazar* decisions have been altered by the view taken in *Bradley v. Superior Court*.⁴⁴ In this case, petitioner and his then wife entered into a property settlement agreement for the disposition, *inter alia*, of community and separate property. The agreement recited that it was intended as "a property settlement agreement and to refer *only to property rights*," although it was also to constitute full satisfaction of the wife's right to support, maintenance, or alimony. It provided that petitioner was to make payments to the wife amounting to forty per cent of his net income. The wife secured an interlocutory divorce decree in Nevada, and the agreement was duly incorporated therein. The petitioner remarried twenty-one months after the Nevada decree, and his former wife remarried after twenty-eight months. Petitioner ceased making the designated payments on the belief that his former wife's remarriage had terminated his obligation. The former wife brought an action on the Nevada decree in California,⁴⁵ which held petitioner liable for payments under the settlement for a period following the wife's remarriage. The court further decided that a section in the Civil Code,⁴⁶ providing for the termination of the alimony obligation upon the former wife's remarriage, was inapplicable, inasmuch as the payments were part of an integrated bargain which had made no express provision for termination of payments upon the remarriage of the wife. In the present action,⁴⁷ the lower court held petitioner in contempt, and ordered him imprisoned unless he made installment payments. Petitioner urged, *inter alia*, that the imprisonment was a violation of the constitutional safeguard against imprisonment for debt. The court, noting the finding in the previous action that the payments under the agreement constituted an inseverable part of an integrated adjustment of all property rights of the parties, and not a severable provision for alimony,⁴⁸ sustained petitioner's argument, and adopted the "more generally prevailing rule" that decrees based upon property settlement agreements constituting an adjustment of property interests are not enforceable by contempt proceedings. The court, squarely facing this issue, heretofore hazy in California law, stated:

⁴⁴ 48 Cal.2d 509, 310 P.2d 634 (1957).

⁴⁵ Lane v. Bradley, 124 Cal.App.2d 661, 268 P.2d 1092 (1954).

⁴⁶ CAL. CIV. CODE § 139.

⁴⁷ Bradley v. Superior Court, *supra* note 36.

⁴⁸ Lane v. Bradley, *supra* note 45.

“[I]f the obligation sought to be enforced is contractual and negotiated, as distinguished from marital and imposed by law, *even though the contract relates to marriage obligations, the remedy must be appropriate to the right asserted.*”⁴⁹ (Emphasis added.)

It is further significant that the court saw fit, in its opinion, to disapprove any implications contrary to this rule which might be found in several other California cases, which included *In re Lazar*, discussed previously. It would seem that the opinion in this case has carried California over into the ranks of those states which recognize the majority rule, *i.e.*, that where an agreement is unquestionably of the property settlement type, involving only property rights, and not alimony, support, or other marital obligations, enforcement by contempt and imprisonment is forbidden by the constitutional proscription. Neither the fact that the settlement may involve the valuation of property acquired during marriage, nor that the payments recited in the settlement are decreed by a court possessing the power to issue contempt citations for non-compliance with its orders, will be sufficient to circumvent the constitutional prohibition against imprisonment for debt.

Objections to the majority opinion in the *Bradley* case were expounded by Mr. Justice Traynor, who spoke in favor of holding petitioner in contempt, listing seven California cases⁵⁰ as standing for the proposition that contempt may be used to enforce decrees incorporating property settlements even though the settlements were not in lieu of the statutory duty of support. Four of these cases⁵¹ were expressly disapproved by the majority opinion to the extent to which they contained implications contrary to the rule now announced by the majority. Of the remaining three cases cited by the dissent, *Young v. Superior Court*⁵² is distinguishable in that the decision there concerned a decree incorporating an agreement which was purely an alimony and support agreement, without any mention of the adjustment of property rights.

The sixth case cited by the dissent, *Petry v. Superior Court*,⁵³ while not involving a strictly alimony type of settlement, nevertheless is distinguishable in that the agreement was made in full settlement of all rights of alimony, and contained no indication that it was to refer only to property rights, which indication was expressly made in the agreement in the *Bradley* case. While the *Petry* decision may be somewhat questionable on the facts, the allowance of contempt by the opinion there is not inconsistent with the holding in *Bradley v. Superior Court*.

Finally, the seventh case which the dissent cited, *Sullivan v. Superior*

⁴⁹ *Bradley v. Superior Court*, *supra* note 36 at 517, 310 P.2d at 642.

⁵⁰ See notes 51 through 54, *infra*.

⁵¹ *Shogren v. Superior Court*, 93 Cal.App.2d 356, 209 P.2d 108 (1949); *Seymour v. Seymour*, 18 Cal.App.2d 481, 64 P.2d 168 (1937); *Ex parte Weiler*, 106 Cal.App. 485, 289 Pac. 645 (1930); *Tripp v. Superior Court*, 61 Cal.App. 64, 214 Pac. 252 (1923).

⁵² 105 Cal.App.2d 65, 233 P.2d 39 (1951).

⁵³ 46 Cal.App.2d 756, 116 P.2d 954 (1941).

Court,⁵⁴ involved a situation entirely different from any case we have considered thus far. The agreement incorporated in the decree there provided that petitioner should convey to the wife *certain* real estate, and should erect upon such property a dwelling house of *certain* specifications. Petitioner defaulted and was held in contempt. Such an obligation was obviously not a "debt" in the strict sense in which the word is said to exist within the constitutional prohibition. That provision relates to civil actions for *money* debts, not to proper imprisonment based upon the defendant's failure to transfer or relinquish *specific objects* or property.⁵⁵

Settlement Containing Commingled Property and Alimony Provisions

Frequently the obligee seeks to enforce payments under a settlement agreement containing property settlement provisions and alimony provisions which are inseverable and commingled in such a way that it is impossible to distinguish between them. Obviously, if the settlement contains an identifiable, separate provision for alimony or support, then *to that extent* contempt proceedings are proper upon the court's incorporation of the entire settlement into its decree.⁵⁶ But where it is probable, although questionable, that the parties intended the settlement to provide both for alimony and property settlement, the majority justices in *Bradley v. Superior Court* seemed inclined toward the holding of several Michigan cases,⁵⁷ that enforcement by contempt proceedings is precluded, although this was not actually decided. Since the majority opinion considers the case on the basis that the agreement is a pure property settlement, and not concerned with alimony, or dual purpose, it would be presumptuous to say that the California rule in regard to commingled agreements has been changed in any way by the *Bradley* decision.

The dissent in the *Bradley* case considered this question in the light that payments under such an integrated agreement will ordinarily have a dual character, in the nature of both an alimony obligation and property adjustment obligation, and that therefore, contempt should be available as a remedy. It is entirely conceivable that this actually was the intention of the parties in the *Bradley* case, because, while it was to refer only to property rights, the agreement was at the same time to be "in full satisfaction of [the wife's] right to support maintenance or alimony." As a matter of fact, it was one of petitioner's contentions in the original California action that the agreement not only provided settlement of property rights, but also for the support of the wife. Whether it may be assumed that the ma-

⁵⁴ 72 Cal.App. 531, 237 Pac. 782 (1925).

⁵⁵ *In re Butler*, 82 Kan. 130, 107 Pac. 540 (1910); *Ex parte Latham*, 47 Tex. Crim. Rep. 208, 82 S.W. 1046 (1904).

⁵⁶ *Tessmer v. Tessmer*, 261 Mich. 681, 247 N.W. 93 (1933); see also 154 A.L.R. 443, 477 (1945).

⁵⁷ *Peden v. Peden*, 259 Mich. 559, 244 N.W. 162 (1932); *Shafer v. Shafer*, 257 Mich. 372, 241 N.W. 144 (1932); *Harner v. Harner*, 255 Mich. 515, 238 N.W. 264 (1931).

majority would have applied the Michigan rule, to the effect that contempt and imprisonment are precluded under a commingled incorporated agreement, had the agreement been identified as possessing a dual character or commingled nature, is a moot question. But it may be noticed that the Michigan rule was certainly *not disapproved* by the majority.

Conclusion

Immunity from imprisonment for debt is today part of our heritage, and no one seriously argues with the immunity, as a general proposition. The difficulty and disagreement, as with so many other legal propositions, lies in its application. When urged as a bar to imprisonment for failure to comply with a divorce decree or settlement, the California rule, as stated in *Bradley v. Superior Court*, makes the success of the contention depend upon the type of obligation sought to be enforced.

If the obligation is purely marital, the immunity will not apply. If it is purely contractual, the immunity will be an available ground for attack upon the court's order of imprisonment. If the obligation is intended by the parties and the court as inseparably marital and contractual, we may hope that the prevailing California rule will favor the application of immunity from imprisonment. "As in the case of all constitutional provisions designed to safeguard the liberties of the person, every doubt should be resolved in favor of the liberty of the citizen"⁵⁸

⁵⁸ 11 AM. JUR., *Constitutional Law* § 327, p.1128 (1937).