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## THE CONSTITUTIONAL PROTECTION OF CONTRACTS: ARE JUDGMENTS INCLUDED?

The question of whether and when a judgment is to be considered a contract has arisen in many states and has been decided with little uniformity.<sup>1</sup> Although the question presents three distinct issues,<sup>2</sup> this note will confine itself to a discussion of whether a judgment is a contract in the constitutional sense. Both the Federal<sup>3</sup> and California<sup>4</sup> Constitutions prohibit the state from enacting any law which would impair the obligations of contracts. The problem to

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<sup>1</sup> Those cases holding that a judgment is a contract are: *Humphrey v. Gerard*, 83 Conn. 346, 77 A. 65 (1910); *Heath v. Fennig*, 219 Ind. 629, 40 N.E. 2d 329 (1942); *Butler v. Bolinger*, 16 La. App. 397, 133 So. 778 (1931); *Morse v. Toppan*, 69 Mass. (3 Gray) 411 (1855); *Lohrstorfer v. Lohrstorfer*, 140 Mich. 551, 104 N.W. 142 (1905); *Board of President & Directors of St. Louis Pub. Schools v. Estate of Broadway Sav. Bank*, 12 Mo. App. 104 (1882); *Bailey v. Great W. Oil*, 32 N.M. 478, 259 P. 614 (1927); *Gutta-Percha & Rubber Mfg. Co. v. City of Houston*, 108 N.Y. 276, 15 N.E. 402 (1888); *Meyer v. Brooks*, 29 Ore. 203, 44 P. 281 (1896); *Sawyer v. Vilas*, 19 Vt. 43 (1846); *Marsteller v. Ward*, 52 W. Va. 74, 43 S.E. 178 (1903); *Child v. Harris Mfg. Co.*, 68 Wis. 231, 32 N.W. 43 (1887).

Holding a judgment not to be a contract are: *McAfee v. Covington*, 71 Ga. 272 (1883); *Hoehamer v. Village of Elmwood Park*, 361 Ill. 422, 198 N.E. 345 (1935); *Sprott v. Reid*, 3 Greene 489 (Iowa 1852); *Burnes v. Simpson*, 9 Kan. 658 (1872); *Bank of United States v. Dallam*, 34 Ky. 574 (1836); *Jordan v. Robinson*, 15 Me. 167 (1838); *Olson v. Dahl*, 99 Minn. 433, 109 N.W. 1001 (1906); *Stanford v. Coram*, 28 Mont. 288, 72 P. 655 (1903); *La Salle Extension Univ. v. Barr*, 19 N.J. Misc. 387, 20 A.2d 609 (1941); *McDonald v. Dickson*, 87 N.C. 373 (1882); *Wakeman v. Peter*, 52 Okla. 639, 152 P. 455 (1915); *Ryan v. Southern Mut. Bldg. & Loan*, 50 S.C. 185, 27 S.E. 618 (1897); *City of Sherman v. Langham*, 92 Tex. 13, 42 S.W. 961 (1897); *Wyoming Nat'l Bank v. Brown*, 7 Wyo. 494, 53 P. 291 (1898). The disparity of decisions on this question has been recognized, but no attempt has been made to explain or reconcile them. A. FREEMAN, JUDGMENTS § 5 (5th ed. 1925).

<sup>2</sup> The other two issues are (1) whether code provisions dealing with "actions brought on contracts" include actions brought on judgments (e.g., CAL. CODE CIV. PROC. § 537(1)), and (2) whether state constitutional prohibitions against imprisonment for nonpayment of debts include judgment debts (e.g., CAL. CONST. art. I, § 15). Since the three issues present separate and distinct problems, an argument used to reach a conclusion as to one issue would not necessarily support the same conclusion for another issue.

<sup>3</sup> U.S. CONST. art. I, § 10(1).

<sup>4</sup> CAL. CONST. art. I, § 16. For the purpose of this note, it will be assumed that the construction of the California Constitution is identical with that of the Federal. The California cases which are seemingly in conflict with the United States Supreme Court are not to be distinguished on the ground that the California Constitution is being given a broader or more inclusive interpretation. This assumption is justified by the similar wording and spirit of both provisions. In addition, no holding or dicta in any California decision is based on the ground that the California Constitution is being interpreted differently from the Federal. Although "the Constitution" refers to the Federal throughout this note, everything said in reference to it might apply equally to the California provision. Compare *Bronson v. Kinzie*, 42 U.S. (1 How.) 311 (1843), with *Smith v. Morse*, 2 Cal. 524 (1852).

be discussed here arises when the state enacts a law which impairs the right of a party to collect a judgment rendered by a court of law on some particular action. It must then be decided whether a judgment is to be included in the term "contract" so that the impairment of the obligation due under the judgment will also be prohibited by the Constitution.

Although the United States Supreme Court has held that a judgment is not a contract in the constitutional sense,<sup>5</sup> one California decision has stated the contrary.<sup>6</sup> This note will take the position that the conflict is more illusory than actual and that the California decision, when analyzed in conjunction with its cited authority, is in full agreement with the views expressed by the United States Supreme Court. In support of this position it will be argued that (1) the remedy available for enforcing a contractual obligation is part of that obligation; (2) the remedy may not be impaired if to do so would leave no satisfactory method of enforcing the contractual obligation; (3) a judgment is merely evidence of the obligation upon which it is founded; (4) impairing the laws available to enforce the judgment is tantamount to impairing the remedy of the contractual obligation for which the judgment now stands; and (5) only in this sense will the impairment of a judgment be prohibited by the constitutional clause protecting contracts.

### Scope of the Constitutional Prohibition

The constitutional prohibition against impairing the obligations of contracts applies only to contracts in the true sense of the word.<sup>7</sup> That is, the obligation must arise out of an agreement mutually assented to by the parties. Therefore quasi-contracts, in which no actual assent exists between the parties, are not protected by the constitutional provision.<sup>8</sup> Also, the provision applies only to contracts *in esse* at the time the alleged impairing statute takes effect.<sup>9</sup> The overriding purpose of the constitutional prohibition is to free individuals from any fear of the state impairing an obligation due from another by its enactment of a law which affects their voluntary agreement.<sup>10</sup>

One obvious aspect of the constitutional provision is that it prohibits the state from enacting any law which voids, discharges, or partially releases a contractual obligation.<sup>11</sup> Such a law would amount to a direct impairment of the contract and is always prohibited.

The more subtle aspect of the prohibition is that it encompasses indirect as well as direct impairment. An indirect impairment results

<sup>5</sup> *State ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285 (1883).

<sup>6</sup> *Jones v. Union Oil Co.*, 218 Cal. 775, 25 P.2d 5 (1933).

<sup>7</sup> *Holland v. General Motors Corp.*, 75 F. Supp. 274 (W.D.N.Y. 1947), *aff'd* 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

<sup>8</sup> *See State ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285, 288 (1883).

<sup>9</sup> *Munday v. Wisconsin Trust Co.*, 252 U.S. 499 (1920).

<sup>10</sup> *Planters' Bank v. Sharp*, 47 U.S. (6 How.) 301, 327 (1848).

<sup>11</sup> *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 197 (1819); *Brown v. Ferdon*, 5 Cal. 2d 226, 54 P.2d 712 (1936).

from the enactment of a law which, while not affecting the terms of the contract per se, substantially removes or abrogates a remedy for enforcing the obligation of that contract.<sup>12</sup> It is a well-recognized principle that the remedy authorizing enforcement of an obligation is part of that obligation,<sup>13</sup> if it was available when the obligation was originally created.<sup>14</sup> But the obligation and the remedy are not fully equated, for while a direct impairment of the obligation is never allowed,<sup>15</sup> an indirect impairment, by affecting the remedy, is sometimes permissible.

This is the principle set forth in the case of *Bronson v. Kinzie*.<sup>16</sup> That case involved a mortgage executed with a power of sale vested in the mortgagee. The law existing at that time made no restrictions on the powers of sale obtained from such contracts. Subsequent to this mortgage the legislature enacted a statute prohibiting the sale of any property under such mortgages for less than two-thirds of the value of the property and further providing for a redemption by the mortgagor within 1 year of the sale. In holding that the statute impaired the obligation of the original mortgage contract, the court said:

Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution.<sup>17</sup>

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<sup>12</sup> *Walker v. Whitehead*, 83 U.S. (16 Wall.) 314 (1872); *People ex rel. Thorne v. Hayes*, 4 Cal. 127 (1854).

<sup>13</sup> *Van Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 552 (1866).

<sup>14</sup> *Garret & Sons v. City of Memphis*, 5 F. 860, 874 (W.D. Tenn. 1881).

<sup>15</sup> *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 197 (1819); *Brown v. Ferdon*, 5 Cal. 2d 226, 54 P.2d 712 (1936).

<sup>16</sup> 42 U.S. (1 How.) 311 (1843).

<sup>17</sup> *Id.* at 316; *accord*, *Barnitz v. Beverly*, 163 U.S. 118 (1895); *Edward v. Kearzy*, 96 U.S. 595 (1877); *Howard v. Bugbee*, 65 U.S. (24 How.) 461 (1860); *Lessee of Daniel Gantley v. Ewing*, 44 U.S. (3 How.) 707 (1845); *McCracken v. Hayward*, 43 U.S. (2 How.) 608 (1844); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 92 (1823). Cf. *Gunn v. Barry*, 82 U.S. (15 Wall.) 610 (1872). In stating the reasons for its holding, the *Bronson* court said: "If the laws of the state passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And, although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional." 42 U.S. (1 How.) at 315-16.

The court thus held that the remedy might be altered by the state, provided that a substantial remedy is still available for one party to enforce the obligations due from the other. When the state has altered the remedy to the point that the obligation of the contract cannot be enforced, that obligation is said to be impaired and the Constitution is violated. Unfortunately the extent of remedial alteration necessary to result in impairment is not clear and appears to be largely within the discretion of the court.<sup>18</sup>

<sup>18</sup> From an opinion denying rehearing in *Welsh v. Cross*, 146 Cal. 621, 633, 81 P. 229, 232 (1905), Beatty, C.J., distinguishes a United States Supreme Court case and explains why an extension of the time period available for a mortgagor to redeem his property impairs the obligation of the mortgage contract, but the reduction of the interest he must pay during the redemption period would not be such an impairment. For examples of subsequent alterations in remedies held constitutional, see *Security Sav. Bank v. California*, 263 U.S. 282 (1923) (changing escheat procedure for turning over unclaimed bank deposits); *Henley v. Myers*, 215 U.S. 373 (1910) (changing procedure for stock transfers); *Bernheimer v. Converse*, 206 U.S. 516 (1907) (change in procedure for suing stockholders of a corporation); *Oshkosh Waterworks Co. v. Oshkosh*, 187 U.S. 437 (1903) (amendment of city charter imposing additional conditions on parties bringing suits against city); *Wilson v. Standefer*, 184 U.S. 399 (1902) (change in procedure for purchasers in default on contracts); *Red River Valley Bank v. Craig*, 181 U.S. 548 (1901) (change in mechanic's lien law); *New Orleans C. & L.R.R. v. Louisiana ex rel. New Orleans*, 157 U.S. 219 (1895) (allowing for specific performance of a contract without a jury trial); *Hill v. Merchant's Ins. Co.*, 134 U.S. 515 (1890) (enlarging rights of judgment creditor where liability of debtor not increased); *Gilfillan v. Union Canal Co.*, 109 U.S. 401 (1883) (binding creditors to reorganization of state corporation after due notice given); *Vance v. Vance*, 108 U.S. 514 (1883) (requiring the recording of mortgages); *Connecticut Mut. Life Ins. Co. v. Cushman*, 108 U.S. 51 (1883) (reducing interest rate due to a purchaser of mortgage if property redeemed after sale); *State ex rel. Folsom v. New Orleans*, 102 U.S. 203 (1880) (change in procedure for executing judgments); *Tennessee v. Sneed*, 96 U.S. 69 (1877) (change in procedure for proving evidence); *Railroad Co. v. Hecht*, 95 U.S. 168 (1877) (changing procedure for serving process); *Terry v. Anderson*, 95 U.S. 628 (1877) (reducing statute of limitations which still left a reasonable time in which to file suit); *Curtis v. Whitney*, 80 U.S. (13 Wall.) 68 (1871) (changing requirements for obtaining a tax deed); *Crawford v. Branch Bank*, 48 U.S. (7 How.) 279 (1849) (allowing bank to sue in its own name on notes made payable to its cashier); *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457 (1831) (shorter statute of limitations applied to land which used to be in another state prior to boundary change); *Jackson v. Lamphire*, 28 U.S. (3 Pet.) 280 (1830) (requiring the recording of a deed to protect grantee from subsequent purchaser).

For altered remedies held to be unconstitutional, see *Bank of Minden v. Clement*, 256 U.S. 126 (1921) (change in creditors' rights to the proceeds of debtors' life insurance policies); *Bradley v. Lightcap*, 195 U.S. 1 (1904) (change in rights of mortgagee after taking possession of property); *Fisk v. Jefferson Police Jury*, 116 U.S. 131 (1885) (repeal of taxing statute disabling the payment of agreed salary to city official); *Virginia Coupon Cases (Poin-dexter v. Greenhow)*, 114 U.S. 269, 298, 299 (1885) (repeal of law allowing interest coupons from bonds to be used for payment of taxes); *Memphis v. United States*, 97 U.S. 293 (1878) (repeal of authority to levy tax to satisfy a judgment rendered on a contract); *Wilmington & W.R.R. v. King*, 91 U.S. 3 (1875) (allowing jury to disregard value of contract when value has been stipulated by the parties).

The holding of *Bronson* was approvingly followed quite early by California,<sup>19</sup> and many subsequent decisions have held the Constitution violated when the alteration of a remedy had the effect of impairing the obligation of a contract.<sup>20</sup>

Having established that the constitutional provision extends to protecting the remedy as part of the obligation, it will now be useful to determine what is meant by "the remedy." While a layman might think of his remedy for any wrong done to him as the right to have a judgment entered in his favor, his true remedy consists of the entire scope of legal process affording him the right to enforce his claim—with or without the consent of the defendant. Remedies are the judicial means by which an obligation is effectuated.<sup>21</sup> Since a judgment is a necessary step in effectuating an obligation, it is part of the remedy; but as used throughout this discussion, the remedy consists primarily of statutory provisions for the execution and satisfaction of judgments.<sup>22</sup> As stated by one court: "A judgment . . . is merely the affirmation of a liability. The judgment . . . leaves the parties to pursue remedies which the law provides."<sup>23</sup>

### The Nature of a Judgment

While a judgment has been considered to be a "contract of record"<sup>24</sup> and a "quasi-contract,"<sup>25</sup> it is not considered to be a contract in the constitutional sense.<sup>26</sup> Among other essentials of a contract, there must be mutual assent among the parties who are to be bound by the terms thereof.<sup>27</sup> Not only does a judgment lack this mutual assent, but the legal compulsion to abide by the judgment would appear to be the antithesis of such assent.<sup>28</sup>

Blackstone's ancient argument<sup>29</sup> that a man contracts with society to obey its laws and court decisions when he partakes of society's benefits has been highly and justly criticized.<sup>30</sup> This "social con-

<sup>19</sup> *Smith v. Morse*, 2 Cal. 524, 548 (1852).

<sup>20</sup> *E.g.*, *Rand v. Bossen*, 27 Cal. 2d 61, 162 P.2d 457 (1945); *Brown v. Ferdon*, 5 Cal. 2d 226, 54 P.2d 712 (1936); *Morris v. Pacific Electric Ry.*, 2 Cal. 2d 764, 43 P.2d 276 (1935); *People ex rel. Thorne v. Hayes*, 4 Cal. 127 (1854); *Arques v. National Superior Co.*, 67 Cal. App. 2d 763, 155 P.2d 643 (1945).

<sup>21</sup> *Commercial Centre Realty Co. v. Superior Court*, 7 Cal. 2d 121, 59 P.2d 978 (1936); see J. POMEROY, *CODE REMEDIES* § 2 (5th ed. 1929).

<sup>22</sup> See generally CAL. CODE CIV. PROC. §§ 681-713½.

<sup>23</sup> *San Luis Power & Water Co. v. Trujillo*, 93 Colo. 385, 391, 26 P.2d 537, 540 (1933).

<sup>24</sup> 1 T. PARSONS, *LAW OF CONTRACT* 8 (9th ed. 1904).

<sup>25</sup> 1 W. ELLIOT, *CONTRACTS* § 2 (1913); W. KEENER, *QUASI-CONTRACTS* 16 (1893); F. WOODWARD, *QUASI CONTRACT* § 1 (1913).

<sup>26</sup> *Morley v. Lake Shore & M.S. Ry.*, 146 U.S. 162 (1892); 1 H. BLACK, *JUDGMENTS* §§ 8, 10 (2d ed. 1902).

<sup>27</sup> 1 A. CORBIN, *CONTRACTS* §§ 3, 9 (1963); 1 S. WILLISTON, *CONTRACTS* § 18 (3d ed. 1957).

<sup>28</sup> 1 H. BLACK, *JUDGMENTS* § 10 (2d ed. 1902). Black concedes that a judgment by confession or default could be considered a contract, but the former is based on the confession and the latter on the theory that the defendant submits to whatever the court decides when he defaults.

<sup>29</sup> 3 BLACKSTONE, *COMMENTARIES* \*161.

<sup>30</sup> 1 BLACK, *supra* note 28, § 10.

tract" theory might easily support the proposition that a judgment rendered by a court is a contract, but the logical extension of this theory would also support the conclusion that every tort is a contract. This conclusion is reached by implying an agreement by man to compensate his fellow man for any damage inflicted upon him. But since the distinction between tort and contract is so well embedded in our legal system, the premise giving rise to such a contradictory extension must be fallacious. In any event, no case holding a judgment to be a contract has based its decision on this theory.

A distinction will be drawn between judgments founded on torts and those based on contracts. The reason for this distinction lies in the fact that a judgment founded on a contract is nothing more than the affirmation of a liability and the acknowledgment of an obligation of one party in favor of another.<sup>31</sup> It is merely the judicial determination and sanction of pre-existing debt, and not the creation of a new debt.<sup>32</sup> On the other hand, a judgment founded on tort cannot evidence any pre-existing debt for the obvious reason that there was none. And though it might be argued that such a judgment creates a new and original obligation, as far as the constitutional issue is concerned, it is the absence of any pre-existing debt that represents the critical distinction between judgments based on torts and those founded on contracts.

This note proceeds on the premise that a judgment founded on a contract is not a new debt, but rather evidence of the old one in a higher form. Before establishing this proposition it is necessary to dispose of the possible contention that, under the doctrine of merger, a judgment creates a new debt resulting from its extinguishment of the original cause of action.<sup>33</sup> The only purpose, however, of merging a cause of action into the judgment is to give effect to the doctrine of *res judicata*. For it is the policy of the law to prevent a man from twice being vexed for the same cause and to bestow some degree of finality to litigation.<sup>34</sup> The reasons for extinguishing the original cause of action are to exhibit judicial finality granted to the issues involved, to establish conclusive evidence of the liability, and to preclude any further action ever being instituted on those particular issues.<sup>35</sup>

Except for the above policies underlying the doctrine of merger, the contractual debt existing prior to the judgment is the same debt after the judgment notwithstanding its absorption into it.<sup>36</sup> Even though the original cause of action may never again be the basis of a claim between the parties encompassed by the judgment, it may aid in the interpretation of that judgment.<sup>37</sup> Courts often look to what a judgment is founded upon in order to give proper effect to it.<sup>38</sup>

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<sup>31</sup> *Id.* at §§ 1, 4.

<sup>32</sup> See *Oil Tool Exch., Inc. v. Schuh*, 67 Cal. App. 2d 288, 153 P.2d 976 (1944). Notwithstanding their traditional usage, the terms "debt" and "obligation" are used synonymously throughout this note.

<sup>33</sup> See *RESTATEMENT OF JUDGMENTS* § 47, comment *a* (1942).

<sup>34</sup> *Miller & Lux, Inc. v. James*, 180 Cal. 38, 179 P. 174 (1919).

<sup>35</sup> See 2 *BLACK*, *supra* note 28, § 674.

<sup>36</sup> *A. FREEMAN, JUDGMENTS* § 546 (5th ed. 1925).

<sup>37</sup> *Id.*

<sup>38</sup> *Boynnton v. Ball*, 121 U.S. 457 (1887).

The doctrine of merger, then, does not preclude the theory that a judgment is a change in the form rather than the substance of the contractual obligation and is thereby still included within the constitutional provision.

### The United States Supreme Court's View

The Supreme Court of the United States seems to be well-settled on whether a judgment is a contract in the constitutional sense. In *State ex rel. Folsom v. Mayor of New Orleans*,<sup>39</sup> the plaintiff was awarded a judgment on a tort committed by the city. Although the city was liable for the amount of the judgment, a statute prohibited any levy against city property for the satisfaction of its debts. The city therefore, had to rely on its taxing power to raise funds to pay its judgments. Subsequent to this judgment, however, the state enacted a law restricting the power of the city to tax, and this restriction disabled the city from paying plaintiff's judgment. As to whether the new statute impaired the obligation of a contract under the Constitution, the Court held that the term "contract" applied only to agreements entered into with the mutual assent of both parties and that a judgment was not such an agreement. The Court declared that:

[T]he prohibition of the Federal Constitution was intended to secure observance of good faith in the stipulation of the parties against any state action. Where a transaction is not based upon any assent of the parties, it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the prohibition.<sup>40</sup>

The Court upheld the restriction of the taxing statute as constitutional and found that it did not impair the obligation of any contract in spite of the nugatory effect given the judgment. This case has been cited as authority for the position that a judgment founded in tort is not a contract under the Constitution.<sup>41</sup>

In the very next session, however, the Supreme Court had an almost identical situation before it.<sup>42</sup> Again a state legislature had repealed a law allowing taxes to be assessed to satisfy judgments, but in this case the judgment was founded on a contract rather than a tort. In holding that the repeal was prohibited by the Constitution, the Court distinguished *State ex rel. Folsom v. Mayor of New Orleans* on the grounds that it involved a judgment founded on tort and did not therefore involve the obligation on a contract in the constitutional sense.<sup>43</sup> Thus, the United States Supreme Court has differentiated judgments founded on torts from those based on contracts. The court has prohibited the impairment of a judgment only when it was founded on an antecedent contract and when it was considered to be evidence of that contract.<sup>44</sup>

Research has disclosed no case wherein the impairment of a judgment founded on a tort has been prohibited in any manner by

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<sup>39</sup> 109 U.S. 285 (1883).

<sup>40</sup> *Id.* at 288.

<sup>41</sup> 1 BLACK, *supra* note 28, § 9.

<sup>42</sup> *State ex rel. Nelson v. Police Jury*, 111 U.S. 716 (1884).

<sup>43</sup> *Id.* at 720-21.

<sup>44</sup> *Blount v. Windley*, 95 U.S. 173 (1887); *Walker v. Powers*, 104 U.S. 245 (1881).

the Supreme Court. This is consistent with the rationale that such a judgment would not represent any obligation of contract in the constitutional sense. This reasoning attains its logical conclusion in *Freeland v. Williams*<sup>45</sup> where the United States Supreme Court found no constitutional objection to a state law declaring all judgments founded on a specific tort to be null and void<sup>46</sup>—upholding what must certainly be the pinnacle of impairments.

### The California View

Having set forth the premises that (1) the remedy available for enforcing a contractual obligation is part of that obligation, and (2) that a judgment founded on a contract is merely evidence of that contract in a higher form, an analysis of the California decisions may be commenced.

In *Jones v. Union Oil Co.*<sup>47</sup> the defendant had previously obtained a judgment against one Hovley for breach of a contract.<sup>48</sup> At the time that the judgment was rendered a statute provided that all judgments became automatic liens on the defendant's real property within the county. Under this statute Union Oil had a lien on Hovley's land. Subsequent to this judgment the statute was amended to require an abstract to be filed in every county in which the defendant had real property before any lien could arise on it. Jones bought the land from Hovley after the amendment and brought this action to clear title to the land. Jones claimed that he was without notice of Union Oil's lien because Union Oil was now required to comply with the amended statute. The issue before the court was whether this amendment could apply retroactively to Union Oil's judgment.

In holding the amendment invalid as to the judgment lien on Hovley's property, the court said that "a judgment is a contract as contemplated by the Constitution" and impairment of it was prohibited. It may be noted that it is this statement which has given rise to California's apparent conflict with the holdings of the United States Supreme Court set out above. An effort will now be made to show that the court did not mean what it purported to say in the quoted statement.

*Jones* cited only two cases to support its holding. One was *Miller v. Murphy*<sup>49</sup> which did not deal with a judgment as a contract under the Constitution but held only that a judgment was included in the term "contract" under a state code provision.<sup>50</sup> *Miller* is there-

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<sup>45</sup> 131 U.S. 405 (1889).

<sup>46</sup> *Id.* at 413-16.

<sup>47</sup> 218 Cal. 775, 25 P.2d 5 (1933).

<sup>48</sup> The fact that the judgment was based on a contract does not appear in the California Supreme Court opinion. But this fact is shown by the original pleadings filed with the Superior Court for El Centro county in the case of *Union Oil Co. v. Hovley*, case no. 10817, docket book 3, p. 76, line 8, June 16, 1926. The pertinent matter in the original pleadings may be found in a letter from the clerk of El Centro Superior Court to the author, November 3, 1967, on file in the office of the *Hastings Law Journal*.

<sup>49</sup> 186 Cal. 344, 199 P. 525 (1921).

<sup>50</sup> *Id.* at 347, 199 P. at 527, citing Cal. Code Civ. Proc. § 438(2) (1872), derived from Cal. Stats. 1860, ch. 314, § 5 at 299.

fore distinguishable from the facts before the *Jones* court.

But *Scarborough v. Dugan*,<sup>51</sup> the other authority cited by *Jones*, did deal with a constitutional issue and might be interpreted as supporting the *Jones* conclusion. In this case *Scarborough* brought an action on an Ohio judgment rendered against *Dugan* in 1853. In 1855 California's 5-year statute of limitations for bringing actions on foreign judgments was amended to read:

An action upon any judgment, contract, obligation, or liability, for the payment of money or damages obtained, executed, or made out of this State, can only be commenced within two years from the time the action has accrued or shall accrue.<sup>52</sup>

The action on the Ohio judgment was brought in 1856, subsequent to the amended statute, but prior to the expiration of the 5 years allowed under the original statute.

It can be seen from the excerpt that the statute expressly dealt with actions brought on judgments as well as those brought on contracts; therefore, no question arose as to whether the judgment was to be treated as a contract under the amendment. What did have to be determined was whether the state could, by making the amendment retroactive, deprive *Scarborough* of his right to bring an action on the Ohio judgment. The court asked,

Can the Legislature, under the pretence or with the object of regulating the remedy, deny all remedy, and thus destroy *the contract*? for it is well settled that a judgment, in this sense of the Constitution, is a contract.<sup>53</sup>

The question now arises as to whether *Scarborough* was in fact authority for the proposition that a "judgment is a contract as contemplated by the Constitution" as held by the court in *Jones*. It is suggested that *Jones*, in reaching this conclusion, either erred in interpreting *Scarborough* or inadvertently misquoted it. To demonstrate this, it is necessary to explore and analyze the means by which *Jones* could have ferreted such a holding from the *Scarborough* decision.

One means by which *Jones* could have construed *Scarborough* as holding a judgment to be a contract would be by regarding the *Scarborough* reference to "*the contract*" as being in fact a reference to the Ohio judgment. But a more likely and certainly more logical interpretation of the quotation is that "*the contract*" refers to the original contract upon which the Ohio judgment was founded, rather than to the judgment itself.

Second, and more probable, *Jones* may have considered that the *Scarborough* court expressly held a judgment to be a contract in the constitutional sense. This is erroneous, however, for what *Scarborough* actually said was "a judgment, in this sense of the Constitution, is a contract."<sup>54</sup> While *Jones* used almost the identical words in its holding, they were used in a different order. By omitting or repositioning the phrase "in this sense of the Constitution," the *Scarborough* quotation might be interpreted as holding a judgment to be a contract. But the appositive substantially qualifies the statement.

<sup>51</sup> 10 Cal. 305 (1858).

<sup>52</sup> Cal. Stats. 1855, ch. 66, § 1, at 75.

<sup>53</sup> 10 Cal. at 308.

<sup>54</sup> *Id.*

Evidently *Jones* de-emphasized this by failing to recognize the significant effect it has on the sentence. In the lines immediately preceding the appositive, *Scarborough* referred to the *Bronson v. Kinzie*<sup>55</sup> doctrine of protecting the remedy, and it is suggested that "in this sense of the Constitution" referred to that doctrine. The *Scarborough* court simply meant that a judgment was a contract in the sense that it evidenced a contract which could not constitutionally be impaired by denying a remedy for its ultimate enforcement.<sup>56</sup> *Scarborough's* chief concern was whether an amendment to an existing remedy—the right to bring suit on a judgment within 5 years—could apply retroactively; the finding of the judgment to be a contract was ancillary to this main issue. It became necessary only because of the reduction of the original contract to a judgment in Ohio, thus creating a need to encompass that judgment within the constitutional provision. All that *Scarborough* may be accurately cited for is that under limited circumstances a judgment will be considered a contract in the constitutional sense. Those circumstances consist of any legislation whereby a remedy is altered so as to result in a substantial impairment of the contractual obligation for which the judgment now stands.

Unfortunately the *Jones* court failed to discuss any rationale for its holding. The court merely made the statement and cited two cases. Because of this, it is difficult to determine if *Jones* did or did not misinterpret *Scarborough*. But since *Scarborough* set forth its reasoning for its decision, it would be reasonable to assume that the *Jones* court correctly understood and wholeheartedly concurred in what *Scarborough* actually held,<sup>57</sup> although greater precision should have been employed when repeating it.

*Scarborough* was an excellent authority for the *Jones* case. Both cases involved a statutory amendment which impaired the ability to enforce a judgment existing prior to that amendment. The results of the two cases were correct. Both recognized the right of the state to alter the remedy, but each considered the particular alteration before it to be too broad (*viz.*, the legislature departed from the allowable area of altering remedies and entered the constitutional sphere of contract impairment).

Since it is conceded that the ultimate decision reached by *Jones* is correct and should not be changed regardless of the court's interpretation of *Scarborough*, one may doubt the noteworthiness of the foregoing analysis. But "[t]he path is smooth that leadeth on to danger,"<sup>58</sup> and allowing the *Jones* statement to go unchecked "smooths the path" for the type of error made in *Grotheer v. Meyer Rosenberg, Inc.*<sup>59</sup> There it was held, *inter alia*, that a judgment was a contract

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<sup>55</sup> 42 U.S. (1 How.) 311, 315 (1843).

<sup>56</sup> Among the cases citing *Scarborough v. Dugan* for this proposition are *Teralta Land & Water Co. v. Shaffer*, 116 Cal. 518, 523, 48 P. 613, 614 (1897); *Houston v. McKenna*, 22 Cal. 550, 554 (1863).

<sup>57</sup> The *Jones* court recognized that an obligation included the remedy for enforcing it and that the remedy could not be substantially impaired. 218 Cal. at 778, 25 P.2d at 6.

<sup>58</sup> Shakespeare, *Venus and Adonis*, in G. KITTRIDGE, COMPLETE WORKS OF SHAKESPEARE 1462, line 788 (Players ed. 1958).

<sup>59</sup> 11 Cal. App. 2d 268, 53 P.2d 996 (1936).

irrespective of its being founded on a tort or contract.<sup>60</sup>

The *Grotheer* case involved a judgment awarded to the plaintiff for a tort committed by the defendant. But before the plaintiff could levy execution the defendant organized a private corporation and transferred all of his assets to it. The plaintiff, claiming that the *alter ego* doctrine applied, instituted proceedings to attach the property then in the possession of the corporation.

In holding that the *alter ego* doctrine prohibited the defendant from escaping payment of the judgment debt in such a fashion, the court cited two cases.<sup>61</sup> These cases, however, did not involve an attempted avoidance of a judgment debt; they were brought on the original contractual obligation and the fraudulent transfer of assets took place prior to the filing of any action on the original contracts. The authorities held that the *alter ego* doctrine protected creditors by allowing attachment of the debtor's assets even after the fraudulent transfer to a new, privately held corporation.

While the *Grotheer* court agreed with the decisions in the cited cases, it also recognized that the debt owed to *Grotheer* arose from a judgment founded on a tort. In order to bring the facts of the case under the purview of the cited authorities, the court stated that this distinction did not alter the situation. To support this contention the court relied on *Jones v. Union Oil Co.* for the premise that a judgment is a contract,<sup>62</sup> and *Corpus Juris*<sup>63</sup> for the proposition that this is so irrespective of the nature of the claim upon which the judgment is founded. The court held that the original cause of action, whether tort or contract, became merged with judgment.

The notion of merging a cause of action into the judgment has been discussed earlier in this note and found to be true only for certain purposes; the original cause of action may still exist when necessary to give proper effect to the judgment. The *Jones* case also has been discussed, with the conclusion that it does not stand for the general proposition that a judgment is a contract. There remains only the reference to *Corpus Juris* to support the statement in *Grotheer*. But the encyclopedia text does not appear to corroborate the court's sweeping statement. What the encyclopedia does verify is the court's conclusion that a judgment, regardless of being founded on tort or contract, is a debt which the defendant is under an obligation to pay.<sup>64</sup> This proposal has been set forth earlier in this

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<sup>60</sup> *Id.* at 272-73, 53 P.2d at 998-99.

<sup>61</sup> *Stanford Hotel Co. v. Mischwind Co.*, 180 Cal. 348, 181 P. 780 (1919); *Mezlish v. San Francisco Wool Sorting & Scouring Co.*, 213 Cal. 668, 6 P.2d 310 (1931).

<sup>62</sup> The court also relied on *Weaver v. San Francisco*, 146 Cal. 728, 81 P. 119 (1905), and *Gutta-Percha & Rubber Mfg. Co. v. City of Houston*, 108 N.Y. 276, 15 N.E. 402 (1886). The former case dealt only with the finality of a judgment and the effect of *res judicata*. The case did not discuss the question of treating a judgment as a contract and therefore is not a valid authority and will not be analyzed.

The *Gutta* case concerned itself with the question of treating a judgment as a contract under a state code provision. It did not discuss nor was it authority for treating a judgment as a contract in the constitutional sense.

<sup>63</sup> 33 C. J. *Judgments* § 9, at 1056.

<sup>64</sup> *Id.*

note<sup>65</sup> and is not contested; to the contrary, it is supported and relied upon.

It should be noted that the *Grotheer* case dealt with neither the question of treating a judgment as a contract under the Constitution nor under a state code provision. The only reason for finding a judgment to be a contract was to relate the facts before it to those in the cases it wished to cite. Since *Grotheer* involved a tort reduced to a judgment debt, and the authorities involved debts due under contracts, the court evidently deemed it necessary to find judgments, even when based on torts, to be contracts. By equating judgments and contracts, the debt owed *Grotheer* would be a contractual one and the authorities would be in point.

This reasoning, however, would be necessary if the *alter ego* doctrine were restricted to protecting contractual debts only; but such is not the case, for the doctrine is employed whenever necessary to prevent an unjust or inequitable result.<sup>66</sup> It extends to all legal debts and protects them by regarding the corporation as the "other self" of its dominant stockholder and liable for his obligations.<sup>67</sup>

The *Grotheer* court over-complicated its situation. All that was necessary was a finding that a judgment was a debt or obligation and as such was protected under the *alter ego* doctrine. Not only was it unnecessary to find that a judgment based on a tort was a contract, but such a holding would be in direct conflict with the United States Supreme Court's decision that judgments founded on torts are not contracts under the Constitution.

To reach its conclusion, *Grotheer* simply began with a questionable premise from the *Jones* case, unjustifiably extended it to include judgments based on torts, and then applied it to a distinguishable set of circumstances.

## Conclusion

While statements of some California courts that judgments are contracts appear to be in conflict with decisions of the United States Supreme Court, it is felt that no such conflict actually exists. There is no California decision which, on the same facts, the United States Supreme Court would have decided differently. It is suggested that California always has treated and will continue to treat a judgment as a contract under the Constitution *only* when the judgment is founded on a contract and one party is alleging that a state statute has substantially hindered his ability to enforce the obligation now evidenced by the judgment. This is the only situation under which either the United States or the California Supreme Courts have held a judgment to be a contract in the constitutional sense.

But in order to resolve the apparent conflict created by *Jones v. Union Oil Co.*, it is further suggested that the constitutional provision

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<sup>65</sup> See text accompanying note 31 *supra*.

<sup>66</sup> *Minifie v. Rowley*, 187 Cal. 481, 202 P. 673 (1921); *Erkenbrecher v. Grant*, 187 Cal. 7, 200 P. 641 (1921).

<sup>67</sup> *Wenban Estate, Inc. v. Hewlett*, 193 Cal. 675, 695-98, 227 P. 723, 731-32 (1924).

prohibiting the "impairment of the obligations of contracts" be construed to emphasize the word "obligation" rather than "contract." The word "contract" should merely be interpreted as describing the only type of obligation which is to be protected.

The question should not be whether a judgment is a contract, but whether it is an obligation or debt. Once the court has established that a judgment is an obligation, it should then ascertain whether the obligation (*i.e.* judgment) arose out of an action on a true contract. If so, the Constitution would prohibit the impairment of the judgment, for the judgment is merely evidence of the contractual debt. But if the judgment arose from an action on an implied contract or tort, the constitutional provision would not be applicable because the judgment could not be said to represent a contractual obligation as contemplated by the Constitution.

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