

The Jersey Law Commission

CONSULTATION PAPER

DÉGRÈVEMENT

JERSEY LAW COMMISSION

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The Jersey Law Commission invites comments in writing on this Consultation paper before **31 March 1999**. The address of the Jersey Law Commission is:

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1. Introduction and Background

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1.1 One of the landmarks of the legislation passed by the States of Jersey in the 19th century was the *Loi sur la Propriété Foncière* of 1880. Although it is today properly regarded as an outstanding piece of legislation it did not reach the statute book without considerable opposition.

1.2 The author and architect of the law was Robert Pipon Marett, who was then Attorney General and, as Sir Robert Pipon Marett, later became Bailiff of the Island. In 1878, after the *projet* of the law had been lodged by the States, Marett wrote a letter to the *Nouvelle Chronique de Jersey* in which he explained his reasons for the law. In this *Lettre Explicative*, as it is generally called, he referred to the unsatisfactory state of the law of real property in the Island at that time. Real property, or immoveable property as it is more correctly termed in Jersey, included not only land and buildings but also *rentes*, an ancient form of fixed annual charge on land ¹. Not only were *rentes* considered immoveable but they were also hypothecable, forming part of the security of a hypothec or charge on their owner's property ². Furthermore, *rentes* could not be redeemed and the only way of discharging them from the property on which they were due was for the debtor to assign to the owner of the *rente* a like sum of *rente* to receive from someone else. This assignment had the effect of creating a hypothec on all the existing and future realty of the assignor for his perpetual guarantee of the *rente* assigned.

1.3 Moreover, the clause of *fourniture et garantie* which all contracts contained had the effect of subjecting all existing and future property, moveable and immoveable, of the vendor or transferor (and generally, in the case of a sale, that of the purchaser or transferee also) to a hypothec to guarantee the fulfillment of the clauses and conditions of the contract ³. This hypothec had all the defects that a mortgage could have: its duration was unlimited, its amount was indeterminable and it could not be extinguished either by prescription or by money payment.

1.4 As a result, properties were frequently subjected to the procedure known as *décret* whereby creditors and other persons who had transacted with the owner were called in turn either to take over the whole of the debtor's property subject to all prior charges due on it, or to renounce their claims or titles. This meant that no purchaser of a house or land ever had security of tenure, since he could be dispossessed at any time through a subsequent *décret* of the property of the vendor or of other persons with whom the vendor had transacted. Cash sales of houses or land were consequently rare. Almost all sales were effected wholly or partly in *rente* and most involved the creation of fresh sums; since these were irredeemable, the total amount of *rentes* in existence mounted inexorably and properties became increasingly overburdened with them.

1.5 In the *Lettre Explicative*, Marett stated that the only way forward was to establish a new system of securing mortgages and *rentes* and to modify the law relating to guarantee. His new law proposed a system of hypothecs based on the French *Code Civil*. In future, *rentes* would no longer be hypothecable; only land and buildings were to be hypothecated, and the *fourniture et garantie* in respect of the sale of a property was to be restricted to that property only. This would, for the first time, enable a hypothec to be created on a specific property or piece of land, clearly identified by both borrower and lender. Also, *rentes* created after the law came into force were to be secured strictly on the *fonds* on which they were due, and all existing *rentes* (with a few exceptions which no longer apply) were made reimbursable. There was no question of making such sweeping changes apply retrospectively and the old system was to be left in place with respect to property that had been in its owner's hands since before the new law came into force, so that it would gradually be phased out by time.

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1.6 The *projet* was presented to the States by Jurat Edward Mourant on 20th January 1878. The States appointed a Committee to look at the proposed law; this Committee reported back in April 1878 and the draft law, as amended by Marett and others, was debated by the States in 1879, being adopted article by article over several sittings. The complete law was finally adopted by the States on 18th July 1879 with 26 votes in favour and 12 against.

1.7 As mentioned above, the law met with considerable resistance in the Island. Parish Assemblies were called and resolutions adopted opposing its reforms.

The interest shown in the law was not confined to the Island. The following is an extract from *The Times* of 26th February 1879:

"The Jersey States are proceeding with the discussion of a Bill of great importance to the island, and the necessity for which is on all hands keenly felt - a thorough change in the system by which real property is held in tenure. The evils that attach to the present anomalous state of the law have long been acknowledged, and several attempts have been made to provide an adequate remedy, but all without result, owing to the great difficulties experienced in dealing with the innumerable complications to which property is liable, owing to the system of guarantee. The working of this is that a person obtaining a mortgage on any portion of his property renders his entire estate responsible for the liability incurred on however small a portion. The result is that, if in after years he falls into bankruptcy, the property he sold becomes equally with the rest responsible for the claims of his creditors, and the holder must either repay the amount he gave for the property or abandon it altogether, unless he make option of becoming "tenant" to the bankrupt's estate -that is, takes the whole of the property and renders himself responsible for all past and future claims upon it. Under the working of this system cases are of frequent occurrence in which persons who have honestly paid for property have been dispossessed of it after a period of thirty years, and not a few have been known to extend to forty years. Her Majesty's Attorney-General for Jersey, Mr. Robert Pison Marett, has, after long study of the innumerable complications and difficulties to be encountered and dealt with, elaborated a measure that is acknowledged to be the best adapted for the purpose of all that have been presented to House, and though "vested interests" are making strong efforts to prevent the passing of the measure, there is good reason for hoping that success will attend the effort. Public feeling is decidedly in favour of the Bill, which would materially increase the value of property by enabling English residents to purchase with a security they cannot now obtain. As an accompaniment to this Bill there has been issued, by order of the States, return of the direct actual loss incurred by holders of property during the last 30 years, arising from dispossession, mortgages &c., under the peculiar working of the bankruptcy law in the island. The total amount thus lost in cases actually in the cognizance of the Royal Court is upward of ,310,000; while it is asserted that, account being taken of numerous claims that have been waived and depreciation of property, &c., the amount would reach at least double that sum."

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1.8 Opposition to the law did not stop following its adoption by the States. The law had to be approved by Her Majesty in Council and a petition by the opponents of the law was presented to Her Majesty seeking her to withhold her sanction of the law until the petitioners had an opportunity of addressing their grievances or opposition before Her Majesty. However the law was sanctioned by Her Majesty in Council on the 26th February 1880 with the following Order:-

"AT THE COURT AT WINDSOR

The 26th day of February, 1880

present:

The Queen's Most Excellent Majesty;

His Royal Highness Prince Leopold,

Lord President.

Earl of Bradford.

Lord Privy Seal.

Earl of Beaconsfield.

Colonel Taylor.

Whereas there was this day read at the Board a Report from the Right Honourable the Lords of the Committee of Council for the affairs of Jersey and Guernsey, dated the 26th day of January 1880, in the words following, viz:

"YOUR MAJESTY having been pleased by Your General Order of Reference of the 21st day of March, 1862, to refer unto this Committee a letter from the Greffier of the Island of Jersey, transmitting an Act passed by the States of that Island on the 18th day of July, 1879, entitled 'Law on real property:'

And Your Majesty having been pleased by your said Order to refer unto this Committee a Petition of certain Landowners and Residents of the Island of Jersey praying Your Majesty to withhold Your sanction from the said law until the Petitioners had had an opportunity of being heard before Your Majesty by their Counsel:

THE LORDS OF THE COMMITTEE, in obedience to Your Majesty's said Order of Reference, have this day taken the said Act and Petition into consideration, together with a Petition from certain landed proprietors of the Island of Jersey against the confirmation of the said Act, and do agree humbly to report, as their opinion, to Your Majesty, that it may be advisable for Your Majesty to approve of and ratify the said Act."

HER MAJESTY, having taken the said Report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to approve of and ratify the said Act, and to order, as it is hereby ordered, that the same Act (a copy whereof is hereunto annexed), together with this Order, be entered upon the Register of the Island of Jersey, and observed accordingly. Whereof the Lieutenant-Governor or Commander-in-Chief, the Bailiff and Jurats, and all other Her Majesty's Officers, for the time being, in the said Island, and all other persons whom it may concern,

are to take notice and govern themselves accordingly.

(Signé)

C.L.

PEEL."

The Attorney General presented the Order in Council to the Royal Court on 6th March 1880 and the Court ordered that it be registered in the Book of Orders in Council. The law came into force six months from that date, on 6th September 1880.

1.9 A vital feature of the new law was the establishment of the *dégrévement* procedure dealing with the effect of bankruptcy on immovable property. Until 1880 the normal procedure had been a *décret*, in which all the bankrupt's property, however extensive, was dealt with as a single entity. Under the new procedure each property was disencumbered (*dégrévé*) separately, so that a creditor who opted to take over the property on which his charge was secured did not become liable for debts charged on other properties. Under the transitional provisions of the 1880 law, the *décret* and *dégrévement* procedures ran side by side. *Décret* continued in relation to property owned before the law came into force (*propriété ancienne*); *dégrévement* applied to property acquired afterwards (*propriété nouvelle*). With the passage of time the *décret* procedure eventually became defunct, but *dégrévement* continues virtually unaltered today.

2. The Jersey Law of Bankruptcy

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2.1 One of the peculiarities of Jersey law is its remarkable profusion of insolvency procedures. These have arisen in a variety of ways. Some are derived from Norman customary law, others have been created by statute. The *désastre* procedure, now the standard one in most circumstances, was created by common law in the late 18th and early 19th centuries and was subsequently developed and modified by rules of Court until it was eventually given a modern statutory framework in 1990.

2.2 This chapter briefly reviews each insolvency procedure in turn, including some that are now obsolete or have been repealed by statute but are relevant to the development of procedures existing today.

2.3 *Cession de biens*

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2.3.1 The basic customary procedure was the *cession de biens* or *cession générale*, the origins of which can be traced back through Norman custom to the civil law.¹ An insolvent debtor who was being sued by his creditors could apply to the Royal Court to make a voluntary cession, or renunciation, of all his moveable and immovable property (*faire cession générale de tous ses biens-meubles et héritages*) for the creditors' benefit. This was followed by the procedure known as a *décret*, so called because its object was to decree (*décreter*) all the property of the *cessionnaire* to one of the creditors.²

2.3.2 A debtor who was permitted to make *cession* had to declare on oath that he did so for want of means to meet his debts. Originally, he swore to make full satisfaction to the creditors out of his after-acquired assets if he could;³ but this part of the oath had been omitted by the time of the Code of 1771, and the *Loi sur les Décrets* of 1832 expressly laid down that a debtor who made *cession*, provided he fulfilled all the requirements of that law, was freed of liability for all debts incurred before the *cession*.⁴ For this reason, *cession* was often opposed by creditors. The Court had a discretion whether to permit the debtor to make *cession* or not, and

would refuse the application if it had reason to doubt his good faith.⁵ This discretion is still exercised on the rare occasions when a debtor applies to make *cession* today.⁶

2.3.3 The present procedure is governed partly by the law of 1832 (which codified and amended the pre-existing custom) and partly by the *Propriété Foncière* laws of 1880 and 1904. A debtor wishing to make *cession* must first obtain and publish an act of the Royal Court signifying his intention to do so.⁷ If the Court permits him to make *cession*, he makes his sworn declaration of insolvency and is thereupon discharged of liability in respect of all existing debts.⁸ The *cession* is followed by a *dégrèvement* of the debtor's immovable property if he has any, and a *réalisation* of his moveables.⁹

2.4 **Décret**

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2.4.1 Until 1880, for the reasons set out in Chapter 1, in an insolvency, all the debtor's immovables had to be disposed of in one lot. This was done by the procedure known as a *décret*, in which creditors and persons who had transacted with the debtor were called upon in turn, in ascending order of precedence by date (i.e. unsecured creditors first as a group, then individual secured creditors and transactors in reverse date order of their claims or titles), to take over the whole of the debtor's property subject to all prior charges on it. Whoever accepted the property on these terms was referred to, once formally invested with it by act of the Royal Court, as the *tenant après décret*. Any creditor or transactor who, when called, declined to take over the property (*se porter tenant*) had to renounce his claim or contract, which thereupon became null and void - unless, in the case of a contract of purchase from the debtor, the *tenant* opted to revive it and thus make good the purchaser's title.

2.4.2 The general form of a *décret* was similar to that of a *dégrèvement*, but the procedure differed in that all the creditors and other interested parties - not only unsecured creditors as in a *dégrèvement* - had to file their claims or contracts of title with the Greffier beforehand. Any claims or titles not filed were liable to be deemed *renoncés faute d'insertion*. In an attempt to reduce costs, the *Loi (1832) sur Ies Décrets* stipulated that only transactions within the fifteen years preceding the *renonciation* were to be filed initially; if this was not sufficient to produce a *tenant*, the proceedings were extended to contracts and hypothecary charges dating back between fifteen and thirty years.¹⁰ If all the debtor's transactions were exhausted without finding a *tenant*, it might be necessary to hold a *décret* on the property of his ancestors or predecessors in title. It was often hard to find anyone willing to accept the *teneure* because most properties in the island were heavily overburdened with *rentes*, but this was itself the consequence of a system that made people reluctant to buy real property for cash in case they lost it in a *décret* - a vicious circle.

2.4.3 Until 1832, a *décret* had to be preceded by a *cession de biens*. If a debtor, despite being imprisoned on bread and water, stubbornly refused to make *cession*, his creditors were powerless to realize his assets. The 1832 law therefore empowered the Court, on the application of a creditor at whose instance the debtor was incarcerated, to adjudge the debtor's moveable and immovable property renounced involuntarily so that a *décret* could proceed.¹¹ This adjudged renunciation, which (with some procedural amendments) must still precede a *dégrèvement* today unless the debtor has made *cession*, had the same effect as a *cession* except that it did not discharge the debtor from liability towards his creditors.¹² Possibly this was because a debtor whose property was adjudged renounced in his absence took no oath of insolvency and might have been holding undisclosed assets.¹³

2.4.4 As stated in Chapter 1 the *Loi sur la Propriété Foncière* of 1880 created a distinction between property that had been in its owners' hands since before the law came into force (*propriété ancienne*) and that to which they became entitled afterwards (*propriété nouvelle*), and stipulated that only the former was henceforth to be subject to *décret*.¹⁴ By a further statute of 1915 all guarantees originating before the 1880 law came into force were

discharged, which meant that no future *décret* could be pursued back beyond 1880:¹⁵ if no one made himself *tenant* on an insertion of later date, or if there were no such insertions to make, the property was sold through a special *affranchissement et réalisation* procedure.¹⁶ The last actual *décret* was held in 1917, there is not thought to have been an *affranchissement* since before 1940, and it is virtually certain that neither process will take place again. The only *propriété ancienne* that could exist today, other than in the hands of the public, the parishes or the Crown, is property that has been corporately owned since before 1880 (and not by limited companies as there are none left that were formed before that date). In theory, if a *dégrèvement* was conducted on a property whose owner had acquired it many years ago from an elderly vendor in whose hands it was *propriété ancienne*, and the *dégrèvement* were to be *vidé sans tenant*, the Court could order a *décret* on the property in the hands of the vendor's heirs; but it is inconceivable that this would now happen in practice.

2.5 *Remise de biens*

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2.5.1 As an alternative to making *cession générale*, a debtor who was under pressure from his creditors could ask to place his affairs temporarily in the hands of the Royal Court (*remettre ses biens entre les mains de la Justice*). This was not a definitive renunciation but a suspensory procedure, a respite granted to the debtor with the aim of settling his affairs sufficiently to avoid a *décret*. It was, in effect, a cession conditional on the failure of the debtor to satisfy his debtors by means of the *remise*. A successful *remise* therefore discharged the debtor from liability for his existing debts in the same way as if he had made a *cession générale*. The difference was that the *remise* involved an accounting. If, by selling all or part of the debtor's assets, sufficient funds could be raised to pay off all the creditors in full and leave a balance in hand, this balance and any unsold assets were returned to the debtor.

2.5.2 In relation to immoveable property, *remise de biens* was thus the most equitable of our insolvency procedures until immoveables were brought within the scope of a *désastre* in 1990. Consequently it has remained in use until modern times because a *remise* realizes only as much of the debtor's assets as is necessary to satisfy his creditors and has been held to be preferable to *dégrèvement* wherever possible.¹⁷ It is nevertheless an indulgence that can only be granted on strict conditions. These are laid down by the *Loi (1839) sur les Remises de Biens*, which codified and amended the previous customary practice in a similar manner to the *Décret* law of 1832 (see above under *Cession de biens*).

2.5.3 A debtor who applies to make a *remise de biens* must present to the Court a detailed statement of his moveable and immoveable property, which, unless the Court rejects the application forthwith, he is required to verify on oath.¹⁸ The Court thereupon names two Jurats to examine the debtor's property and report as to its value, giving their opinion as to whether or not any useful purpose would be served by granting the *remise*. To assist in the forming of this opinion, the Jurats may discuss the application with creditors and other interested parties. After the report has been presented, and anyone wishing to oppose the application has been heard, the Court grants or refuses the application.¹⁹

2.5.4 If the application is granted, the Court stipulates the duration of the *remise*, which by custom is usually six months, sometimes twelve and occasionally longer: If the time originally granted is less than one year the court will usually extend the time if such an extension is recommended by the Jurats.

2.5.5 The act of the Court granting the *remise* contains an authorization by the debtor to the Jurats appointed to examine his property (thereafter called the *autorisés*) to sell or otherwise dispose of his moveable and immoveable assets; after this he cannot act without their advice and consent,²⁰ though they can if necessary act without his. The *autorisés* in fact have very wide powers, including absolute discretion as to which claims to admit or treat as preferential, and which properties to sell if it is not necessary to sell all.²¹ In practice it is usual for the moveable assets to be sold before the immoveables.

2.5.5 Before 1839, a *remise* only succeeded in avoiding a *décret* if it realized sufficient funds to pay off all the creditors in full, secured and unsecured²². Since 1839 the requirement has been less exacting: if the total assets are not sufficient to satisfy all the claims, but the secured charges can be paid in full out of the sale of the immoveables, the *autorisés* can sell everything, pay the secured and privileged debts in full, and divide the balance among the other creditors.²³ The payment of this dividend, however small, discharges the debtor of all further liability.²⁴ If, however, the secured debts cannot be paid off in full and the *remise* fails, the placing of the assets in the hands of the Court operates as a *cession*, and a *dégrèvement* and *réalisation* follow on that basis²⁵ (see above under *Cession de biens*).

2.5.6 By a judgment of the Royal Court in 1870 it was held that any contracts of sale of land by the *autorisés* under a *remise de biens* became void if the *remise* failed.²⁶ The Court evidently felt it would be wrong for the purchaser of part of a debtor's immoveables under an unsuccessful *remise* to be given the opportunity, by inserting the contract of purchase in the ensuing *décret*, of acquiring as *tenant après décret* the equity in the rest of the debtor's immoveables. Though this reasoning has less force in relation to *dégrèvement*, the judgment has been assumed to apply equally to *propriété nouvelle* and has led to the practice whereby all contracts of sale under a *remise* are passed on the same day, so that it is immediately self-evident whether the *remise* has succeeded or not.²⁷ More recently the Court has held that, if there was an apparent belief at the time of the sale that the proceeds of sale of the rest of the land would suffice to pay off the rest of the debts, the contract is not void *ab initio* but merely voidable at the instance of a creditor or other interested party (though not at that of the debtor).²⁸

2.5.7 Finally it should be noted, following another modern judgment, that the Court will receive and consider an application for a *remise de biens* even after the debtor has made *cession* or had his property adjudged renounced and a *dégrèvement* has been ordered, provided the property has not yet been vested in a *tenant après dégrèvement*.²⁹

2.6 **Dégrèvement**

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2.6.1 Following the reforms of the law of Décret introduced by the *Loi sur la Propriété Foncière* of 1880, whenever a property was bought or sold, the *fourniture et garantie* of the transaction was restricted to that property only. This meant not only that individual properties could for the first time be made subject to specific hypothecary charges, but also that, in an insolvency, each property could be treated as a separate entity. As a transitional measure, the old law of *décret* continued to apply to *propriété ancienne*; but, with respect to - *propriété nouvelle*, it was superseded by the new procedure called *dégrèvement* (discumberment). This was effectively a *décret* conducted separately on each *corps de bien-fonds* (each separate and distinct property or parcel of land), recalling, as Marett observed in his *Lettre Explicative*, the old Norman practice of *décret par pièces*.³⁰

2.6.2 Before 1880, a *cession* or an adjudged renunciation under the *Décrets* law of 1832 had led to an immediate *décret*; but the 1880 law, as first enacted, interposed a procedure called *liquidation* which was intended normally to take place before a *décret* or *dégrèvement* was ordered (though the Court had the power to dispense with it and order an immediate *décret* or *dégrèvement* if it saw fit in individual cases). *Liquidation* was a sort of involuntary *remise de biens*, in which the *attourné* appointed by the Court got in and sold all the debtor's moveable and immovable assets and distributed the proceeds among the secured and unsecured creditors in order of preference. The immoveables were offered for sale in lots; any that failed to sell were subjected to *dégrèvement* if they were *propriété nouvelle* in the debtor's hands, but, if any *propriété ancienne* remained unsold, a *décret* took place in which the purchasers of any other *propriété ancienne* in the *liquidation* had to participate as though they had bought direct from the debtor.

2.6.3 Experience proved the *liquidation* procedure to be slow and costly, and in 1904 it was abolished and replaced by *réalisation* (see below), similar in principle but applying only to moveable assets and to *rentes* and conventional hypothecs to receive. All other immoveables were henceforth to be subjected to immediate *dégrévement* (or to *décret* as long as there was *propriété ancienne* to consider).³¹ *Dégrévement* was thus left as the only means of dealing with the *propriété nouvelle* of an insolvent debtor unless the Court granted him the indulgence of a *remise de biens*, until immoveables were brought within the scope of the *désastre* procedure in 1990.

2.6.4 Unless the debtor has made *cession*, a *dégrévement* is preceded by an adjudged renunciation of his property after two months' notice given to him by the Royal Court at the instance of a judgment creditor (or three months' notice if the judgment is of the Petty Debts Court). The Court appoints *attournés* (only one is required by the law but the modern practice is to appoint two) who publish notice of the proceedings in the press and summon all secured creditors and other persons who have transacted with the debtor to appear before the Greffier for the *dégrévement*. Unsecured creditors are not individually summoned but may file their claims with the Greffier if they wish.

2.6.5 At the *dégrévement*, the *intéressés* are called in the same way as in a *décret*: first the unsecured creditors as a group, then the secured creditors and other transactors in ascending order of date, ending with the person from whom the debtor acquired the property. Each in turn has the option of making himself *tenant* of the property *en dégrévement* or renouncing the charge or contract by virtue of which he has been called. After some debate in the past, it is now judicially established that a secured creditor who renounces his hypothec in a *dégrévement* loses his claim against the property only: the underlying debt is not discharged, unless either there has been a *cession* or the *dégrévement* follows an unsuccessful *remise de biens*.³² However, if a contract other than a *creation d'hypothèque* is renounced, any title that passed under it or any right or easement that it created becomes void.

2.6.6 If the property *en dégrévement* is the remnant of a larger *corps de bien-fonds* part of which the debtor has sold off since he acquired it, the persons summoned to participate in the *dégrévement* should strictly include the purchasers and current owners of all the parts that have been sold.³³ In practice, since an agreed judgment in 1952 in which the Royal Court deliberately refrained from giving a ruling on the law,³⁴ this requirement is frequently ignored. If, when part of a *corps de bien-fonds* is sold off, all creditors secured on the property are made parties to the contract to discharge the part sold, the purchaser and his successors in title will not be asked to participate in a subsequent *dégrévement* of the part retained by the vendor. This practice is convenient but evidently does not reflect the legislator's intention, since the law requires the *tiers détenteur* to be summoned regardless of whether or not there were charges on the property before it was split up. It is plain from the wording of the law that the purchaser or current owner of the part of the property that was sold has the right, if he so wishes, to participate in the proceedings and make himself *tenant après dégrévement* of the rest of the original *corps de bien-fonds*.

2.6.7 If all the creditors and other *intéressés* convened before the Greffier refuse to accept the *teneure*, the Court may either compel the person from whom the debtor acquired the property (or, if he is dead, his heirs or devisees) to accept repossession of it, or order that the *dégrévement* be continued on the property in the hands of those persons.³⁵ The only case in which this might happen nowadays is if the property was acquired by the debtor subject to a pre-existing charge which is still the main charge secured on it at the time of the *dégrévement*.

2.6.8 When a creditor or other *intéressé* eventually takes the property as *tenant après dégrévement*, he takes it free of any charges or servitudes later in date than his own claim or title (the holders of which will already have been called and will have renounced), but subject to all charges and encumbrances of prior date.³⁶ He is also responsible for the payment of certain privileged claims (income tax, parish rates, etc.) in respect of which a *protêt* has been lodged with the Greffier.³⁷ If he does not wish to take possession of the property himself, he

may subrogate another person in his place, assigning to that person all the rights and liabilities of the *teneure*: this is done in order to save the trouble and expense of a conveyance by contract. The subrogation can be effected at the *dégrévement* itself, but more commonly takes place when the *tenant* is summoned before Court afterwards by the *attournés* to have the *teneure* confirmed.

2.6.9 When in 1990 the scope of the *désastre* procedure was extended to include immoveable property, there appears to have been an assumption that *dégrévement* would fall into disuse. The reasons why this has not in fact happened are discussed in Chapter 3 below.

2.6.10 Notwithstanding the inclusion of immoveable property in a *désastre* since 1990, there is one instance where *dégrévement* is still the only means by which creditors can proceed against immoveable assets. This is in the case of a debtor who has died. The estate of a deceased person cannot be declared *en désastre*³⁸ and insolvency proceedings against the estate must therefore take the form of a *dégrévement* of the immoveable property and a *réalisation* of the moveables.

2.7 *Réalisation*

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2.7.1 This procedure was introduced by the *Propriété Foncière* amendment law of 1904, replacing the *liquidation* procedure created by the law of 1880, which had been found unacceptably cumbersome in practice (see above under *Dégrévement*).

2.7.2 When a debtor makes *cession* or his property is adjudged renounced, the law requires the Royal Court to order not only a *dégrévement* of his immoveables (and/or, originally, a *décret* in the case of *propriété ancienne*) but also a *réalisation* of his moveable property and of any *rentes* or conventional hypothecs to receive. If a *dégrévement* has been ordered, the act of the Court must state whether the *réalisation* is to be held before, after or concurrently with it.³⁹

2.7.3 There are two important points to note here. Firstly, the Court must order the *réalisation* of the debtor's moveables if he has any: it has no discretion to order a discumbrment of the immoveables while leaving the moveables untouched.⁴⁰ Secondly, the wording of the law clearly implies that a *réalisation* can take place without a *dégrévement* if there are no immoveables to discumber. Possibly *réalisation* was meant to be the normal process for use in bankruptcies whether the debtor owned immoveables or not.

2.7.4 In practice today, both these points are commonly overlooked. Some legal practitioners, when conducting a *dégrévement*, are punctilious in requesting the Court to order a *réalisation* of the moveable assets, but many are not. Nor does a *réalisation* ever take place except as an adjunct to a *dégrévement*, its function as a general bankruptcy procedure having long since been taken over by *désastre*.

2.7.5 The procedure is for the *attournés* to take possession of the debtor's moveables and sell them; if there are any *rentes* or conventional hypothecs to receive, these are sold also. They then remit the proceeds of sale into the hands of the States' Treasurer and publish a notice requiring creditors to file their claims with the Greffier. Once all interested parties have had the opportunity of examining the claims, and any objections have been settled by the Court, the Greffier calculates the distribution of the money to the creditors in order of preference and sends the Treasurer a list of their names and the amount payable to each, after which the *attournés* publish a notice to the creditors to collect their money from the Treasury.⁴¹

2.7.6 The fact that a creditor has filed his claim in a *réalisation* does not affect his right to participate in the *dégrévement* of the debtor's immoveables.⁴²

2.8 *Désastre*

2.8.1 Unlike the procedures reviewed above, which were either derived from Norman law or created by statute, *désastre* is a creation of the Jersey common law. Originating at the end of the 18th century, it was developed and refined by case law and practice until its procedure was codified by rules of Court in 1964. It has now been given a modern statutory framework by the Bankruptcy (Désastre) (Jersey) Law 1990, which, among other changes, extended its scope to embrace immoveable property for the first time.

2.8.2 At common law, a creditor's normal recourse against his debtor's moveable assets was to obtain an act of Court authorizing them to be sold. If there were several creditors and not enough assets to satisfy them all, the first creditors to effect distraints would gain an unfair advantage over the others. In the days when an individual debtor generally had only a few creditors who would be aware of the debtor's deteriorating financial position, this was not a sufficiently serious problem to create a need for an alternative procedure. The situation changed with the growth of commerce in the 18th century. Not only might one trader have a great number of creditors, but trading reverses could cause a business to fail almost overnight. In such situations, time was of the essence. Nor, from the creditors' point of view, was it of much help if the debtor made *cession*, since this was followed by a *décret* in which all the moveable assets went to whichever creditor made himself *tenant*, and the debtor was discharged of all further liability (see above under *Cession*).

2.8.3 As a remedy, a procedure was evolved in which the Court, when satisfied that a debtor's affairs were in a state of collapse (*en désastre'*), would fix a date on which all actions against him would be heard together so that no creditor could gain preference over the others by obtaining a prior judgment. This hearing was later known as the *passation des causes*. At first there was only a general similarity between the procedure followed in each case, but during the 19th century it became standardized, with the Viscount made responsible for sequestrating the debtor's effects, books and papers and selling the goods for the benefit of the creditors.

2.8.4 It is unnecessary to chart here the later history of *désastre* beyond mentioning the impact on it of the *Loi (1867) sur les concordats entre débiteurs et créanciers*. This law provided for the making of agreements between debtors and their creditors under the supervision of the Judge of the Petty Debts Court acting as *Juge-Commissaire*, the agreements being afterwards approved and registered by the Royal Court. One of several alternative prerequisites for making an agreement under the law was that the debtor's goods should have been declared *en désastre*, in which case the *désastre* was annulled by the making of the agreement. Much use was made of the 1867 procedure in the late 19th century and the early years of the 20th, so that the Viscount's role in many of the *désastres* declared during that period was merely to deliver to the *Juge-Commissaire* such assets as he had collected. However, the procedure fell into disuse after the Second World War and was abolished in 1990.

2.8.5 The *désastre* procedure was codified for the first time by the Royal Court Rules of 1964 (later superseded by those of 1982), and in 1966 the Court held that the law had evolved to the point where a *désastre* could be defined as a declaration of bankruptcy.⁴³ The Bankruptcy (Désastre) Law of 1990 completed its transformation into a modern bankruptcy process and confirmed it as the standard Jersey insolvency procedure in all but a few special circumstances. The 1990 law is not, however, a codification of the law on bankruptcy: its provisions are supplementary to, and not in derogation of, those of the *Décret* law of 1832, the *Remise de biens* law of 1839 and the *Propriété Foncière* laws of 1880 and 1904, except in so far as the provisions of those laws are inconsistent with those of the new law.⁴⁴

2.8.6 An application to the Court for the declaration of a *désastre* may be made by the debtor himself, by a creditor with a liquidated claim above a certain amount (though not if his only claim is for repossession of goods), or, if the debtor is a person or corporate body licensed to carry on business in the financial sector, by the States Finance and Economics Committee.⁴⁵ The application must be made in a specified form giving information about the debtor's assets

and liabilities, and is supported by an affidavit. The 1990 law defines for the first time the categories of debtors whose property is capable of being declared *en désastre*: basically those resident in Jersey, those carrying on business here, those having immovable property here, and companies registered here. For the avoidance of doubt, it also confirms the pre-existing position that a *désastre* cannot be declared in respect of the estate of a deceased person.⁴⁶

2.8.7 Before the 1990 law came into force a declaration of *désastre* had the effect of vesting in the Viscount the possession of the debtor's moveable property in Jersey, but there was no consensus as to whether the possession of assets outside the island also vested in him, nor as to whether he acquired title as well as possession.⁴⁷ In no case did his powers extend to immovable property. Under the 1990 law all the debtor's property, both moveable and immovable (though not property held by him in trust for any other person) vests in the Viscount, who thus evidently acquires title as well as possession.⁴⁸ Special provisions are made for after-acquired property, immovables, matrimonial homes, co-owned moveables and immovables, and security interests,⁴⁹ and the Viscount is given a limited power to disclaim onerous property.⁵⁰

2.8.8 The old *passation des causes*, originally the main purpose of the procedure, was abolished in 1964, since when the Viscount has been required to publish a notice in the press giving creditors a specified period of time within which to file their claims. The 1990 law requires all creditors to prove their debts; the Viscount must examine the proofs and either admit or reject them, the creditors having a right of appeal to the Court against rejection. The assets are then distributed in accordance with an order of payment set out in the law. Any surplus remaining after all debts and costs have been paid is applied in paying interest on all provable debts, and any surplus remaining thereafter is repaid to the debtor.⁵¹

2.8.9 Though the Viscount retains - and the law gives him wide powers in connection with⁵² - his original function of getting in the debtor's property and realizing it for the benefit of the creditors, his overall role today in relation to a *désastre* is broader and more investigative in nature. The debtor is under various duties to assist him, and he has the power to convene virtually anyone he thinks fit and require them to produce or surrender to him any documents relating to the debtor's affairs.⁵³

2.8.10 Under the old law, the termination of a *désastre* was not clearly defined and did not discharge or release the debtor from any unsatisfied debts.⁵⁴ The position under the 1990 law is clearer and different. If the debtor is an individual, an order of discharge is made by the Court on the application of the Viscount, normally four years after the date of declaration of the *désastre*, though the Court may extend or reduce this period. The order, which may be immediate, suspended, or conditional, has the effect of releasing the debtor from all debts provable in the *désastre* other than those resulting from his own fraud.⁵⁵ If the debtor is a company, it is not discharged but dissolved automatically following payment of the final dividend to the creditors.⁵⁶ Directors or former directors of the company may, in certain circumstances, be made personally liable for any or all of the company's debts.⁵⁷

2.8.11 Formerly, a *désastre* where there was a ship within the harbours of Jersey came within the admiralty jurisdiction of the Royal Court and was distinguished from an ordinary *désastre* by a different order of preferential claims. This custom, known as a *désastre maritime*, has been abolished by the 1990 law.

2.8.12 During the course of a *désastre*, the debtor is not permitted to hold any public office or act in a fiduciary capacity.⁵⁸ The Court may, on the application of the Attorney General, disqualify a director of a company *en désastre* from acting as a director of any company for up to five years, if it is satisfied that his conduct in relation to the bankrupt company makes him unfit to be involved in company management.⁵⁹

3. The Deficiencies and Problems associated with Degrevement

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3.1 As explained in Chapter 2, before the coming into force of the Bankruptcy (Désastre) (Jersey) Law 1990 ("the 1990 Law") a declaration of *désastre* had the effect of vesting in the Viscount the possession of the debtor's moveable property. There was no vesting of immoveable property. However, under the 1990 Law all the debtor's property both moveable and immoveable vests in the Viscount who acquires title as well as possession.

3.2 Therefore, since the 1990 Law came into force there have existed two separate laws and procedures that can be utilized to deal with immoveable property whose owner is in default. The *dégrévement* procedure, which was expected to lapse into obsolescence, has in fact continued to be used and a number of reasons have been advanced for this.

3.3 In a *dégrévement*, the creditor who takes over the property as *tenant après dégrévement* is entitled to whatever equity there may be in the property. No equity passes back to the debtor or is available for other creditors whose claims or charges rank below that of the *tenant*. This may encourage some creditors to opt for the *dégrévement* procedure rather than to declare the debtor *en désastre*.

3.4 After the commencement of *dégrévement* proceedings, unless the debtor has made *cession*, the Court does not lose the power to declare him *en désastre* until his property is adjudged renounced and a *dégrévement* ordered (1990 Law, Art.5). Thus a debtor notified of an impending *dégrévement* has two months in which to forestall it, if he wishes, by declaring himself *en désastre*. In certain circumstances, however, he may prefer to encourage his creditors to proceed by way of *dégrévement* in order to avoid the four year restriction imposed on a bankrupt by the 1990 Law.

3.5 The 1990 Law contains special provisions (Art.12) regarding immoveable property that is also the debtor's matrimonial home. The Royal Court, on the application of the debtor's spouse, may order such property (or a right of enjoyment of it) to be vested in the spouse or alternatively may order that the property be sold and the proceeds distributed as the Court thinks fit, its first duty being to attempt to reserve the matrimonial home for the occupation of the debtor's spouse and dependants. It is likely that, in some cases, these provisions are perceived as inhibiting the rights of creditors and provide a further incentive for them to bypass the 1990 Law by using the *dégrévement* procedure.

3.6 Again, though the *dégrévement* procedure is neither brief nor cheap, it has the merit of achieving finality with the *dégrévement* itself, at which point most costs end. A declaration of *désastre*, being the commencement and not the conclusion of a procedure, involves the risk of unforeseen costs and delays. Nor is a *désastre* widely viewed as the best means of realizing a property's full value. Under the procedure laid down in the 1990 Law, the debtor's immoveable property vests in the Viscount who is empowered to sell it and is entitled to a percentage of the sale price by way of commission. There is a perception that the price a property will fetch if sold by the Viscount is likely to be less, even before deduction of his commission, than a creditor can get by selling it himself as *tenant après dégrévement*.

3.7 Until 1993 a further attraction of *dégrévement* was that the subrogation process was outside the control of the States Housing Committee and so could be used as a means whereby a person without residential qualifications could effectively purchase and reside in the debtor's property without the Committee's consent. The value of an "unrestricted" property was usually greater than the otherwise open market value. By assigning the hypothec to a company, the creditor could retain the increase in the equity by selling the share capital of the company. This loophole was closed by Article 2 of the Housing (Amendment No.7) (Jersey) Law 1993.

3.8 Of the surviving arguments for preferring *dégrévement* to *désastre*, not all are without merit. In general, however, we believe that the continuing popularity of *dégrévement* is due to the very features that render it deficient as a bankruptcy procedure in the 1990's. In the 1990

Law, the States have enacted a modern procedure that is capable of dealing with immovable property in all circumstances (except in the single case of a deceased debtor) and incorporates the controls that present day social priorities call for. The continued availability of *dégrèvement* as an alternative enables debtors and creditors effectively to contract out of those controls for their own convenience.

3.9 In addition, the Judicial Greffier and the Viscount have drawn attention in our discussions to a number of technical deficiencies in the *Loi sur la Propriété Foncière* ("the 1880 Law") with regard to *dégrèvement*. These may be summarized as follows.

3.9.1 There is no provision in the 1880 Law for the holder of a hypothec to postpone its effective date in favour of a hypothec created subsequently. This is often done but there is much uncertainty concerning the practice, which is ignored in the event of a *dégrèvement* as the law gives the Greffier no power to vary the date order in which secured creditors are called.

3.9.2 There is no provision in the 1880 Law for the holder of a hypothec to disclose the amount still due in respect of the hypothecated debt or borrowing. Therefore, in a *dégrèvement*, creditors other than the holder of the first secured charge have no means of knowing whether the full amount of any prior hypothec is still due or whether the debt has been partly repaid.

3.9.3 The position of a creditor who takes a property as *tenant après dégrèvement* is not clear. The 1880 Law does not clearly define what the effect of taking is: it has always been assumed that the debt is extinguished, but there is uncertainty over whether any guarantee of the debt is extinguished or not. If not, there seems to be nothing to prevent a grasping or vengeful creditor from effectively exacting double payment of his claim by suing the guarantor after taking over the property. This could lead to particular injustice in the case of a creditor who has a number of guaranteed hypothecs on the same property and takes it in a *dégrèvement* on the latest charge (being the first one on which he is called), leaving him free to sue the guarantors not only of this but of the earlier charges also.

3.10 The Judicial Greffier also made some further comments which relate to other deficiencies in the 1880 Law which may need to be addressed at a later date. For the record these are:-

3.10.1 Whereas a conventional hypothec (created by contract between borrower and lender) must be charged on a specific property, Article 15 of the 1880 Law stipulates that a judicial hypothec (resulting from the registration of an act of the Royal Court for the payment or acknowledgment of a debt) shall operate as a charge on all the immovable property owned by the debtor at the time of registration. There is no provision for judicial hypothecs to be charged on specific properties. In practice they often are, but the validity of this has never been tested by the Court.

3.10.2 Articles 12 and 13 of the 1880 Law provide solely for the registration of an act or judgment of the Royal Court. Acts or judgments of any other Court of the Island are therefore unregistrable.

3.10.3 Furthermore, the 1880 Law makes no provision for the registration of a guarantee without acknowledgment of the principal debt. Once again, this is common practice but its legal basis is uncertain.

4. The Commission's Proposals

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4.1 We have found no evidence of any debate at the time of passing of the 1990 Law as to the relative merits and demerits of retaining the *dégrèvement* procedure. The procedure was simply retained by Article 1(6) of the Law.

The Report which accompanied the then proposed Bankruptcy (Désastre) (Jersey) Law, 198__.

at p11 para (c) (ii) made the following comment:

"The '*dégrèvement*' procedure has not been abolished but its effects have been mitigated. A single secured creditor will continue to have the ability to instigate that procedure. He may eventually have himself declared '*tenant après dégrèvement*' and take the equity in the property (if any) having satisfied all other creditors. However under the new law the debtor may declare himself '*en désastre*' (or any creditor may declare the debtor '*en désastre*') at any time until the Act of the Royal Court adjudging the debtor's property renounced. (Article 4(1) (c) and Article 5(1) (c)). Because of this ability to have a '*désastre*' declared in this way a secured creditor will not in future be able to deprive the debtor of the benefit of any equity in the immovable property. Ordinary creditors may of course claim both in '*dégrèvement*' proceedings and in '*désastre*' proceedings."

4.2 For the reasons explained in Chapter 3 we believe that *dégrèvement*, though a bold reform when first introduced, has now become outdated and inequitable and enables creditors and debtors to contract out of the provisions of the 1990 Law. We consider this to be undesirable. In our view there should be a single modern procedure for all Jersey bankruptcies (other than for the winding up of companies which is governed by the Companies (Jersey) Law 1991) and that this should be the *désastre* procedure as set out in the 1990 Law.

4.3 The Commission therefore proposes that *dégrèvement* be abolished.

4.4 The way in which it is proposed to approach this is by abolishing the customary practice of *cession de biens*. All the procedures that depend either on a *cession* or on an adjudged renunciation - i.e. *décret*, *dégrèvement* and *réalisation* - will then fall away naturally.

4.5 The provisions of Article 4 of the 1990 Law should be amended to allow a *désastre* to be declared in respect of the estate of a deceased person if the estate includes immoveable property to which all the heirs and/or devisees have renounced their claim. (If the heirs or devisees have taken the immoveables the creditor could proceed against them directly.) With *dégrèvement* abolished, the ability to declare the estate *en désastre* will give creditors secured on the immoveable estate the necessary means of proceeding against their security.

4.6 *Remise de biens*, which still serves a useful purpose and does not depend on a *cession* or renunciation, should be retained, but with its procedure adapted to relate to *désastre* where at present it relates to *dégrèvement*.

4.7 The Viscount has made the point that *remise* could at some future date be replaced by a modern suspensory procedure with the Viscount taking the role of the Jurats.

5. Implementation of the Commission's Proposals

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5.1 In order to determine how our proposals should be implemented, it has been necessary for us to examine the following enactments:

- (1) the *Loi (1832) sur les Décrets*;
- (2) the *Loi (1839) sur les Remises de Biens*;
- (3) the *Loi (1880) sur la Propriété Foncière*, with its amendments of 1904 and 1915;
- (4) the Bankruptcy (Désastre) (Jersey) Law 1990.

5.2 First of all, we recommend that the customary procedure of *cession générale* be abolished and the *Loi (1832) sur les Décrets* repealed together with various subsequent laws relating to *décret* procedure. This will do away with the conceptual basis of *cession* and *renonciation* on which the *dégrèvement* procedure rests.

5.3 The *Loi (1839) sur les Remises de Biens* should be left in place but will require consequential amendments.

5.4 In relation to the *Propriété Foncière* Law of 1880, we have made a detailed study of the consequences of abolishing *dégrévement* in order to decide whether the law can withstand the amendments that the implementation of our proposals will necessitate. We are satisfied that it can, and accordingly we recommend that it should be so amended rather than repealed and replaced by an entirely new statute. The amending laws of 1904 and 1915 will become redundant and should be repealed.

5.5 In addition, the 1880 Law requires amendment to rectify the technical deficiencies set out in the final part of Chapter 3.

5.6 A schedule of the amendments that we believe to be necessary to the 1880 Law is annexed for the purpose of assisting the Law Draftsman.

5.7 If our recommendations are adopted we would further recommend that the 1880 Law be re-enacted in its amended form.

5.8 Article 4(2) of the Bankruptcy Law of 1990, which prevents the declaration of a *désastre* in respect of the estate of a deceased person, needs to be made subject to an exception where the estate includes immovable property to which all claims by the heirs and/or devisees have been renounced.

5.9 A provision must also be added to the 1990 Law enabling a person imprisoned for debt to be released by declaring himself *en désastre* notwithstanding that he may have no realisable assets. This may lead to imprisonment for debt becoming obsolete. At present an imprisoned debtor is released on making *cession générale*, and an alternative procedure needs to be substituted if *cession* is to be abolished.

5.10 In addition, consequential amendments will be required to the 1990 Law and other statutes.

6. Appendix

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Draft schedule of amendments necessary to existing *Propriété Foncière* legislation if *cession* and *dégrévement* are abolished.

6.1 Law of 1880

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6.1.2 Art.1 - delete definition of *dégrévement*; in definition of *corps de bien-fonds*, delete words "*et qui doit être loti ... qui furent au cessionnaire*" and perhaps substitute "*qui peut être vendu, en cas de désastre, indépendamment des autres biens-fonds du cessionnaire*" (though for practical purposes the Viscount has this power under Article 27 of the Bankruptcy (Désastre) Law 1990).

6.1.3 Art.2 - adapt paragraph 1 with references to *liquidation* altered to *désastre*; delete paragraph 2; renumber paragraph 3 as 2 and delete sentence from "*La renonciation*" to end of paragraph.

6.1.4 Arts.7-10 will need complete redrafting. Norman customary dower was abolished by the 1990 Bankruptcy Law, but the consequential amendments that were made to the 1880 law did not address all provisions relating to that form of dower in these articles. Jersey dower has also been abolished in intestate successions by Article 6 of the Wills and Successions Law of 1993, so that its only surviving incidence is presumably in a testate succession where the will fails to make adequate provision for the widow. Arts.7-10 in their present form should thus be

replaced by a simplified set of provisions tailored specifically to the case in which Jersey dower can now arise, and relating the operation of the *hypothèque légale* to *désastre* instead of *cession* and *dégrévement*.

6.1.5 Art.II - assuming the Bankruptcy Law is to be amended to enable the renounced estate of a deceased person to be declared *en désastre* where it includes immoveable property, this article can remain as it stands with the words "*mis en décret ou dégrévement*" altered to "*déclarés en désastre*".

6.1.5 Arts.12-16 require general revision for other reasons (see proposed amendments already in draft).

6.1.6 Art.15 - words from "*et en outre*" to end of article will need adapting to express the creditor's rights in a *désastre*, preferably reflecting an amendment to this article allowing judicial hypothecation of specific properties.

6.1.7 Art.21 requires complete revision. Since no one ever creates a single h.c.s. on several *corps de bien-fonds* with the capital apportioned between them, as the article envisages, its provisions could be much simplified by insisting on a separate hypothec for each *corps* as is the invariable practice. The reference to separate hypothecation for *propriété ancienne* and *nouvelle* is obsolete and could be deleted.

6.1.8 Art.24 - the opportunity might be taken here to amend the procedure for marginal annotation (discuss with Judicial Greffe).

6.1.9 Art. 36 - delete words "*sauf 1 'exception résultant de l'Article 49*".

6.1.10 Art.40 - passage from "*Lorsqu'une rente ancienne aura été assignée*" to end of paragraph could probably be deleted.

6.1.11 Art.41 is now entirely defunct and should be so shown in the amended reprint. An Order in Council of 1891 regarding disposal of Crown property (enrolled at 9 O.C.155) enables *rentes* due to the *Ancien Domain* to be redeemed in the same way as other Crown *rentes*.

6.1.12 Art.45 will require careful attention. Paragraph 1, relating to *éviction* (e.g. dispossession because of bad title) and *délaissement* (abandonment in favour of a secured creditor exercising his *droit de suite*) must remain in force with consequential amendments. Whether paragraphs 2 and 3 should stay or go will depend on what is done with Article 50 (see below). If the fundamental principle of that article is to be retained (either there or in a modernized version of Article 104) but detached from the concept of *cession* and *dégrévement*, the necessary amendments to Article 45 would seem to be as follows;

6.1.13 Paragraph I(a): "*si celui-ci n'a point renoncé ou fait cession*" - either delete these words or substitute "*si les biens de celui-ci n'ont point été déclarés en désastre*".

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6.1.14 Paragraph I(b): for "*le tenant ou autre personne*" substitute "*celui*". (Alternatively, change "*le tenant ou autre personne qui est devenu*" to "*la personne qui est devenue*", in which case "*dans les biens duquel*" must become "*dans les biens de laquelle*".)

6.1.15 Paragraph 2: for "*un tenant ou autre personne après ou en consequence d'un décret ou dégrévement*" substitute "*un créancier hypothécaire qui veut exercer son recours sur ledit bien-fonds par suite d'hypothèque, après ou en consequence d'un désastre*".

6.1.16 Paragraph 3: for "*s'il opte de payer ... par suite d'hypothèque*" substitute "*s'il opte de payer ledit créancier aux termes dudit Article 50*". Further on, "*pourvu que celui-ci ... et l'appel en garantie*" - either delete this passage or change "*celui-ci ne soit pas devenu cessionnaire*" to "*les biens de celui-ci n'aient pas été déclarés en désastre*" (cf. paragraph I(a) above). At end of paragraph, for "*la cession ou renonciation*" substitute "*la déclaration du désastre*".

6.1.17 Otherwise, if the provisions of Article 50 are to be abolished altogether, paragraphs 2 and 3 of Article 45 can be deleted and the beginning of the article streamlined to:

L'acquéreur d'un bien-fonds, que la garantie ait été stipulé ou non de la part de l'aliénateur, aura, en cas d'éviction ou de délaissement, les droits et privilèges suivants:

(a) ...

(b) ...

(c) ...

In either case, the concluding provisions of the article ("*Lorsque l'aliénation ... assimilés & l'acquéreur sans fourniture ni garantie*") should be left unchanged.

6.1.18 Arts.47-49, 53 and 54 can be repealed entirely.

6.1.19 Arts.50 and 51 - now that *décret* is extinct, the only case covered by paragraph 1 of Article 50 appears to be that of the purchaser of part of a *corps de bien-fonds* who, on a strict reading of Article 92, is called into a subsequent *dégrèvement* of the part retained by the vendor, and renounces his contract because he cannot afford to take over the charges. This paragraph will therefore become redundant, since the situation does not arise in a *désastre*. As to paragraph 2, secured creditors will still have the right to follow their security into the hands of third parties if a *désastre* of the principal debtor's assets fails to satisfy their claim in full; but, instead of trying to adapt the archaic provisions of Articles 50 and 51 to meet this case only, it would probably be better to repeal them and give the *tiers détenteur* a simple choice in Article 104 between paying off the balance of the charge or giving up the property. Further discussion is needed on all this, including the impact of the changes on Article 45 (see above).

6.1.20 Art.52 - if these provisions are to remain in force, the references to procedures other than *désastre* must be deleted.

6.1.21 Arts.91-99, 103 and 105 can be repealed entirely.

6.1.22 Arts.100-102 will need redrafting to adapt their provisions to *désastre* instead of *dégrèvement*.

6.1.23 Art.104 needs to be modernized and simplified, cutting out the obsolete provisions and giving the *tiers détenteur* a simple choice between paying off the balance of the charge or giving up the property, so that Articles 50 and 51 can be repealed (see above).

6.1.24 Art.106 is presumably now redundant and can be repealed.

6.2 Laws of 1904 and 1915

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6.2.1 These can presumably be repealed in their entirety. The position covered by Article 3 of the 1904 law, insofar as it still exists since the enactment of the 1993 Wills and Successions Law (which is silent on the subject of renunciation by heirs), will be covered by the proposed amendment to the 1990 Bankruptcy Law allowing a deceased person's estate to be declared *en désastre* if, but only if, there are immoveables and all heirs and devisees have renounced the estate. The provisions of the 1880 and 1904 laws as to *dégrèvement* of separate *corps de bien-fonds* are not required in relation to *désastre*, as the Viscount already has power under Article 27 of the Bankruptcy Law to sell property in whatever lots he thinks fit, and this can if necessary be reinforced by the new definition of a *corps de bien-fonds* in Article 1 of the 1880 law (see above).

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Those who respond may be invited to meet the Commissioners to discuss their comments, and possibly also to participate in a symposium which the Commissioners may decide to organise prior to compiling their final report and recommendations.
