

JERSEY LAW COMMISSION
TOPIC REPORT NO. 2 - October 1999

REPORT
DÉGRÈVEMENT

To be laid before the States by the President of the Legislation Committee pursuant to the Proposition to establish the Commission approved by the States on 30 July 1996

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Part I Introduction

1.1 The Commission received comments from only three persons following the publication of its Consultation Paper No. 2 on Dégrèvement in November 1998 ("the Consultation Paper"). However, general comment has been favourable and therefore there are few amendments to the proposals set out in the Consultation Paper.

1.2 The respondents to the Consultation Paper raised important matters in relation to the hypothecation of immoveable property rather than dégrèvement itself and their comments have been referred to David Moon who is the Topic Commissioner leading a review of the Jersey law of real property. Amongst the matters referred to him is a suggestion that consideration be given to a lender being able to realise his security over immoveable property by selling the property in a similar way to a lender who takes security over intangible moveable property.

Part II The Commission's Proposals

2.1 As we remarked in the Consultation Paper we found no evidence of any public debate at the time of passing of the Bankruptcy (Désastre) (Jersey) Law, 1990 ("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 1990 Law.

2.2 We believe that dégrèvement, though a bold reform when first introduced, has now become outdated and inequitable and enables creditors and debtors to contract out of the provisions of the 1990 Law.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 this should be the désastre procedure as set out in the 1990 Law.

2.3 The Commission therefore proposes that dégrèvement be abolished.

2.4 The abolition of dégrèvement can be achieved 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.

2.5 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 immovable property which all the heirs and/or devisees have renounced. With dégrèvement abolished, the ability to declare the estate en désastre will give creditors secured on the immovable estate the necessary means of proceeding against their security. If the heirs or devisees have taken the immovable estate of the deceased the creditors may under the existing law proceed against them directly in which case the immovable property of the deceased inherited by the heirs and/or devisees would also be available in the désastre. The amendment to Article 4 should make this clear.

2.6 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.

Part III Implementation of the Commission's Proposals

3.1 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 (“the 1832 Law”);
- (2) the Loi (1839) sur les Remises de Biens (“the 1839 Law”);
- (3) the Loi (1880) sur la Propriété Foncière, the Loi (1904) (Amendment No.2) sur la Propriété Foncière and the Loi (1915) sur la Propriété Foncière (Garanties) (together “the 1880 Law”);
- (4) the 1990 Law.

3.2 First of all, we recommend that the customary procedure of cession générale be abolished and the 1832 Law repealed together with various subsequent laws relating to décret procedure. This will remove the conceptual basis of cession and renunciation on which the dégrèvement procedure rests.

3.3 The 1839 Law should be retained with consequential amendments.

3.4 In relation to the 1880 Law, we have made a detailed study of the consequences of abolishing dégrèvement in order to decide whether the 1880 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 re-enacted in its amended form by an entirely new statute.

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

3.6 The schedule of the amendments (in note form) that we believe to be necessary to the 1880 Law set out in the Appendix to the Consultation Paper is repeated in Appendix A to this report with slight variation.

3.7 Article 4(2) of the 1990 Law, 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 which all the heirs and/or devisees have renounced.

3.8 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.

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

KEITH BAKER, Chairman

DONALD LE BOUTILLER

DAVID LYONS

DAVID MOON

WILLIAM BAILHACHE

October 1999

APPENDIX A CONSEQUENTIAL AMENDMENTS TO THE 1880 LAW

(in note form)

A1 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 1990 Law.

A2 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.

A3 Arts. 7-10 will need complete redrafting. Norman customary dower was abolished by the 1990 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 succession by Article 6 of the Wills and Successions (Jersey) Law, 1993 so that its only surviving incidence is 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 dégrèvement.

A4 Art. 11 - assuming the 1990 Law is to be amended to enable the renounced estate of a deceased person to be declared en désastre where it includes immovable property, this article can be repealed in its entirety.

A5 Arts. 12-16 require general revision for other reasons (see proposed amendments already in draft).

A6 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.

A7 Art. 36 - delete words “sauf l’exception résultant de l’Article 49

A8 Art. 40 - passage from “Lorsqu’une rente ancienne aura été assignée” to end of paragraph could probably be deleted.

A9 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.

A10 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 dégrèvement, the necessary amendments to Article 45 would seem to be as follows:

A11 Paragraph 1(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”.

A12 Paragraph 1(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”.)

A13 Paragraph 2: for “un tenant ou autre personne après ou en conséquence d’un décret ou dégrèvement” substitute “un créancier hypothécaire qui veut exercer son recours sur ledit bien-fonds par suite d’hypothèque, après ou en conséquence d’un désastre.”

A14 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, “épourvu 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 1(a) above). At end of paragraph, for “ la cession ou renonciation” substitute “ la déclaration du désastre”.

A15 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 fountiture ni garantie") should be left unchanged.

A16 Arts. 47-49, 53 and 54 can be repealed entirely.

A17 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

A18 Art. 52 - if these provisions are to remain in force, the references to procedures other than désastre must be deleted.

A19 Arts. 91-99, 103 and 105 can be repealed entirely.

A20 Arts. 100-102 will need redrafting to adapt their provisions to désastre instead of dégrèvement.

A21 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).

A22 Art. 106 is presumably now redundant and can be repealed.

A23 The amending laws of 1904 and 1915 can 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 Law allowing a deceased person's estate to be declared en désastre if, but only if, there are immoveables and all heirs and/or devisees have renounced. 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 1990 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).

APPENDIX B PERSONS WHO COMMENTED ON THE CONSULTATION PAPER

The Bailiff of Jersey	Sir Philip Bailhache
H. M. Attorney General	M. C. St. J. Birt Esq., Q. C.
Messrs Crills, Advocates	Advocate W. A. M. Bridgeford

APPENDIX C ACKNOWLEDGEMENTS

The Topic Commissioner for this case was David Lyons and he joins with the other Commissioners in thanking Mr. Peter Luce, Solicitor, for giving his services free of charge in acting as Topic Practitioner.

We would also like to thank Mr. Peter Bisson for his expert and invaluable assistance with the research for the Commission on this topic, and with the initial drafting of the Consultation Paper with Mr. Peter Luce