

# **THE JERSEY LAW COMMISSION**



## **CONSULTATION PAPER**

# **SECURITY ON IMMOVEABLE PROPERTY**

The Jersey Law Commission was set up by a Proposition laid before the States of Jersey and approved by the States Assembly on 30 July 1996.

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## **PART I. HISTORICAL AND COMPARATIVE BACKGROUND**

### **1 Jersey immoveables charged by hypothecation and not by mortgage**

- 1.1 The securing of debts against immoveable property in Jersey has always been effected by hypothecation and not, as in England, by mortgage. As the Royal Commissioners enquiring into the island's civil laws in 1859-60 remarked: "We are not aware that there is anything in the law of Jersey which forbids the creation of a mortgage in the English mode, but that mode is never practised".<sup>1</sup> It still does not seem to be expressly forbidden, but any attempt to practise it today would be contrary to the evident intention of the *Loi (1880) sur la Propriété Foncière* that immoveable property in Jersey may only be charged in accordance with the provisions of that law.
- 1.2 Nevertheless, in ordinary speech, a borrowing secured by hypothec on a house or land is often loosely called a 'mortgage'. Though this is not done with intent to mislead, it shows the need for a clear understanding of the difference between the two systems. These are explained in the next two sections.

### **2 Historical survey of the law of mortgage in England and Wales**

- 2.1 A mortgage is traditionally defined as a disposition of property as security for a debt. It consists of two elements: a personal contract for payment of the debt, and a transfer or charge of an estate or interest of the mortgagor in property, real or personal, as security for the repayment of the debt, the security being redeemable when the debt is repaid or discharged. It may be effected in various ways in relation to different kinds of property; the following summary is limited to mortgages relating to land or real estate.
- 2.2 The practice of giving rights over land as security for debt is of great antiquity. In England, in the twelfth century, the transaction was by way of lease by the mortgagor to the mortgagee, who went into possession. If the income from the land was applied to the discharge of the principal of the loan as well as the interest on it, the transaction

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<sup>1</sup> Commissioners' Report, 1861, p.xxii.

was called *vivum vadium* (*vif gage*, live pledge), because it was self-redeeming; if the mortgagee took the whole income in discharge of the interest only – a practice which, though not unlawful, was regarded by the Church as sinful – it was called *mortuum vadium* (*mort gage*, dead pledge). In either case, if the money was not repaid by the time the lease expired, the mortgagee took the fee simple.

- 2.3 These transactions were not wholly satisfactory to the mortgagee as the seisin that he acquired was not protected by law, and it was also doubtful whether a term of years could validly be enlarged into a fee simple. Gradually, therefore, mortgages of freehold land came to be made by conveyance of the fee simple, subject to the mortgagor's right to re-enter and determine the mortgagee's estate if the money was repaid on the named date. This was the usual form in the late Middle Ages; but by the seventeenth century the intervention of equity had brought about an important change. At common law, if the mortgagor was a single day late in repaying the money, he forfeited his land to the mortgagee while still remaining liable for the debt. This was repugnant to the courts of equity, which took the view that the object of a mortgage was only to give the lender security for the repayment of his loan and not to allow him to profit from the fee simple; above all, he ought not to be able to retain his security as well as claiming payment of the money. So the doctrine became established that the mortgagor had a right in equity to redeem his property from the mortgagee on payment of the principal with interest and costs, even though the date fixed for repayment had passed.
- 2.4 This right, called the equity of redemption, paved the way for the modern type of mortgage under which the mortgagor remains in possession of the property. However, since an unfettered right to redeem would obviously have nullified the object of the mortgage, which was to enable the mortgagee to recover his capital, it was necessary for the right to be limited. The courts achieved this by a decree of forfeiture for which the mortgagee had to apply, a process known as foreclosure. The effect of the decree was to destroy the mortgagor's equity of redemption, leaving the mortgagee owner of the property both at law and in equity. To guard against oppressive foreclosures, the court would order a sale instead if the value of the property greatly exceeded the amount of the debt: the mortgagee then received only the balance due to him.

- 2.5 Immediately prior to the reforms introduced by the Law of Property Act 1925, the system of mortgage had thus developed to become a conveyance of the fee simple to the mortgagee by way of security, subject to the mortgagor's equity of redemption. The latter was not a mere right but an equitable estate or interest in the property, comprising the mortgagor's right of ownership subject to the mortgage; it could thus itself be mortgaged, and in fact second and subsequent mortgages of freeholds were normally mortgages of the equity of redemption, since the fee simple was held by the first mortgagee. This meant that only the first mortgage was a legal mortgage, all subsequent ones being necessarily equitable, as there could be no legal mortgage of something that existed only in equity.
- 2.6 The Law of Property Act 1925 abolished the creation of legal mortgages of freeholds by conveyance of the fee simple and provided instead for them to be created either –
- (a) by a demise for a fixed term of years (usually 3,000 years) subject to a provision for cesser on redemption, i.e. a provision that the term was to cease when the loan was repaid; or
  - (b) by a charge by deed expressed to be by way of legal mortgage.
- 2.7 Mortgages of leaseholds were likewise henceforth to be granted either by sub-demise for a fixed term of years subject to cesser on redemption, or by charge by deed expressed to be by way of legal mortgage. The former had already been the usual method before 1925: the alternative of assigning the lease to the mortgagee with a covenant to reassign was seldom used as it created privity of estate between the landlord and the mortgagee, who thus became liable on such of the tenant's covenants in the lease as ran with the land, including the obligation to pay rent.
- 2.8 Since a mortgage by demise for a term of years left the freehold reversion of the property in the mortgagor, he retained the legal fee simple and could grant further terms of years out of it. Successive legal mortgages could therefore be created by granting a series of leases each one day longer than the preceding lease, so that each mortgagee had a reversion on the prior mortgage term. On the other hand, the fact that the mortgagor retained the legal freehold estate meant that he could not at the same time have an equitable estate co-extensive with it. The equity of redemption therefore

no longer constituted an equitable estate or interest but subsisted only as a right in equity to redeem the property, this right being attached to his legal freehold estate.

- 2.9 A chargee by deed expressed to be by way of legal mortgage has the same protection, powers and remedies as a mortgagee by demise. However, a deed of charge does not convey any proprietary right to the chargee, so the borrower retains the full title instead of being left with only the nominal reversion. The charge, instead of demising the property, merely states that the borrower, as beneficial owner, charges it by way of a legal mortgage with the payment of the principal, interest and any other moneys secured by the charge.
- 2.10 Of the two methods, the legal charge soon became widely preferred for its greater convenience and is now universal. Mortgages by demise have not been abolished and in theory could still be created, but they have been rendered obsolete by the combined effect of sections 4 and 23 of the Land Registration Act 2002. Under section 23, only a mortgage by legal charge is acceptable in respect of registered land; and section 4 provides that any transfer or mortgage of either the freehold or a leasehold for more than seven years of land that is not registered induces compulsory registration. Formerly a charge certificate was issued to the lender by the Land Registry, but these certificates, along with land certificates, are no longer required to be produced as evidence in court proceedings and have been discontinued as part of the move towards electronic conveyancing which is one of the objectives of the 2002 Act.
- 2.11 Though a charge by way of legal mortgage gives rise to exactly the same rights as a mortgage by demise, and the terms ‘charge’ and ‘mortgage’ are in practice often used interchangeably, there is a conceptual difference between the two. A mortgage by demise embodies the common law principle of a transfer of an estate in property which the mortgagor retains a right to redeem when the debt is extinguished; whereas a charge involves no transfer of title and so has no need to provide for redemption, but merely gives the chargee a right of recourse to the charged property as security for the loan. For more on this, see below at 3.6-7.
- 2.12 A legal mortgagee or chargee has the following ways of enforcing his security:
- (a) By sale. A mortgagee has no right either at common law or in equity to sell the mortgaged property free from the equity of redemption, but a statutory power

of sale was provided in the Conveyancing Act of 1881 and is now contained in sections 101-107 of the Law of Property Act 1925.<sup>2</sup> This power does not arise until the date for repayment of the mortgage money has passed (or, in the case of a mortgage repayable by instalments, as soon as any instalment is in arrear); and it does not become actually exercisable until either –

- (i) notice requiring payment of the money has been served on the mortgagor and default has been made in payment of it, or of part of it, for three months after such service; or
- (ii) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or
- (iii) there has been a breach of some provision in the mortgage deed or under the Law of Property Act 1925 which is a breach other than non-payment of principal or interest.

The Act sets out in detail what the mortgagee may and may not do in the exercise of his power of sale; overall, he is given a wide discretion. He is not a trustee for the mortgagor in respect of the power of sale itself, but he is a trustee of the proceeds of sale.

- (b) By foreclosure (see above, 2.4). This right, likewise, does not arise until the legal date for redemption has passed. Proceedings for foreclosure must be taken in court and the decree is granted in stages, in the form of an order *nisi* which is made absolute on subsequent application provided the right to redeem has not been exercised.
- (c) By entering into possession. This is a right of the mortgagee which arises immediately upon execution of the mortgage deed, unless the deed expressly provides for possession by the mortgagor until default. In practice, it is as a remedy in case of default that the right is used; but it has the drawback that a mortgagee in possession becomes the manager of the property and has to account to the mortgagor not only for the rents and profits that he actually receives but also for those he could have received by greater diligence.

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<sup>2</sup> It is also possible, though unusual, for an express power of sale to be inserted in the mortgage deed.



(d) By appointment of a receiver. This is a statutory power exercisable in the same circumstances as the power of sale, and is extensively used in practice. Its advantage over going into possession is that the mortgagee can take the property out of the mortgagor's control without having to assume any responsibilities towards him. The duty of a receiver to account for money received is laid down by statute, with a prescribed order of priority in making payments which respects the established priority of all mortgages affecting the property.

2.13 If a mortgagor has no legal estate in the mortgaged property but only an equitable interest, the mortgage itself must necessarily be equitable. The 1925 legislation did not affect the form of this type of mortgage, which is still made by a conveyance of the equitable interest with a proviso for reconveyance. An equitable charge is created if property is appropriated to the discharge of a debt or other obligation without any change of ownership either at law or in equity (for example, if the owner charges money on the property by simple written contract or by will). Equitable mortgagees and chargees have most of the rights of their legal counterparts; but, having no legal estate, they cannot enter into possession other than by agreement, and, though an equitable mortgagee can foreclose in the same way as a legal mortgagee, an equitable chargee cannot, because his charge conveys no legal or equitable interest. Also, though an equitable mortgagee or chargee by deed has the statutory power to sell the property, it is not clear that this enables him to convey the legal estate to the purchaser.

### **3 Hypothecation – the civilian alternative**

3.1 In Roman law the earliest form of real security was a conveyance subject to a covenant to reconvey on payment of the debt, much as in the late medieval English mortgage (see above, 2.3). This was called *fiducia* (more properly *mancipatio cum fiducia* or *in jure cessio cum fiducia*, depending on the mode of conveying the mortgaged land to the creditor). It was very disadvantageous to the debtor, as the law gave him no right of redemption: if the creditor sold the property in breach of the covenant, the debtor's only remedy lay against the creditor personally.

- 3.2 Later, as the old formal methods of conveyance fell out of use in favour of simple delivery, *fiducia* was superseded by *pignus* (pledge), which did not involve a transfer of ownership but only of possession. For the debtor, however, this still had the drawbacks inherent in any system that involved handing over property as security for a loan. In the case of land, with which we are concerned here, he was (or was liable to be) deprived of its fruits and thus denied a part of the means of repaying the loan; also, since obviously the land could not be delivered as security to more than one creditor at a time, successive mortgages were impossible. The Roman solution to these problems was the *hypotheca*, a variant of *pignus* that gave the creditor neither ownership nor possession. The creditor merely held a charge against the property applied as security for the loan, which gave him rights over it in order of priority relative to the debtor's other creditors. If two or more debts to different creditors were hypothecated on the same piece of land, the earlier hypothec simply took priority over the later.
- 3.3 Partly, no doubt, because *hypotheca* is a Greek word, the hypothec itself has traditionally been perceived as a Greek institution adopted into Roman law. Thus Basnage, in his *Traité des Hypothèques* of 1681: “*cela fut premierement introduit, & pratiqué par les Grecs, & depuis les Romains empruntèrent d’eux & le nom & la chose*”.<sup>3</sup> He goes on to describe the Greek custom of bringing the existence of a hypothec to the attention of other creditors by posting a notice on the land itself – a practice adequate (he says) in an era of short-term loans seldom exceeding the value of the security, but not one that would have been acceptable in his own day when properties were heavily encumbered with perpetual *rentes*.<sup>4</sup> However, modern textbooks on Roman law reject the theory that the Roman hypothec was of Greek origin and insist that it evolved from *pignus*, not acquiring its Greek name until later.<sup>5</sup> It is, of course, from Roman law that the hypothec has been inherited by modern civil law systems, of which Jersey law in this area ranks as one.

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<sup>3</sup> ‘This was first introduced and practised by the Greeks, and later the Romans borrowed from them both the name and the thing.’ Basnage, *Traité des hypothèques* (Rouen, 1681), p.3.

<sup>4</sup> *Ibid.*, pp.4-6.

<sup>5</sup> See for example Lee, *The Elements of Roman Law* (4<sup>th</sup> edn., 1956), p.177; Nicholas, *Introduction to Roman Law* (1969), pp.151-2. Nicholas goes so far as to say that the use of the words *pignus* and *hypotheca* to denote pledges respectively with and without possession is only allowable “provided the conclusion is not drawn that there were two distinct institutions” (p.152). The Romans seem not to have given any public notice of hypothecation at all until the first steps towards a system of registration were taken in A.D.472 (Nicholas, p.153, and see also Zimmermann, *The Law of Obligations* (1990), p.116).

- 3.4 The concept of hypothecation had a flexibility that made it readily adaptable to different needs. Hypothecs could be charged either on the debtor's property in general or on specific assets, and it was not long before the scope of a general hypothec was expanded to embrace after-acquired property, at first by express designation and then by default in the absence of a stipulation to the contrary.<sup>6</sup> This was the basis of the position in French law before the Revolution,<sup>7</sup> and the hypothecation of future assets survives in the French-based *Code Civil* of Lower Canada (Quebec), though abolished in that of France itself (see below, 4.6). In Jersey, the customary law went to the extreme of making universal hypothecation an absolute and inflexible rule which not only prevented the charging of specific properties but secured the guarantee of every transaction in immovable property as a perpetual hypothec on all the transactors' existing and future assets, thus negating many of the original benefits of hypothecation until the law was changed in 1880 (below, 4.1-5).
- 3.5 Alongside the creation of 'conventional' hypothecs by agreement (*conventio*) between debtor and creditor, the Romans found another application for the hypothecary principle in what were called 'legal' or 'tacit' hypothecs, brought silently into being by operation of law to guarantee an interest or entitlement. A minor, for example, had a tacit hypothec on the property of his guardian, and a legatee had one on the testator's property in the hands of the heir at law. Subsequent civil law systems have retained this type of hypothec for a variety of purposes, but terminology has not been consistent. Pothier, writing of the law of eighteenth-century France, differentiates *hypothèques conventionnelles* created by agreement, *hypothèques légales* resulting from court judgments, and *hypothèques tacites* generated by mere operation of law. The Napoleonic *Code Civil* drops the term *hypothèque tacite*: instead, the hypothec created by operation of law becomes the *hypothèque légale* and the type resulting from a court judgment – a form apparently not known in Roman law<sup>8</sup> – is renamed *hypothèque judiciaire*. This classification was adopted in Jersey in 1880 by the *Loi sur la Propriété Foncière*, but the Quebec code still differs, recognizing conventional and legal hypothecs only and combining both judicial and 'tacit' hypothecs under the definition of *hypothèque légale*.

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<sup>6</sup> Basnage, *loc.cit.*

<sup>7</sup> Pothier, *Traité de l'hypothèque (Oeuvres complètes, 1821, tome 20)*, p.178.

<sup>8</sup> "L'hypothèque judiciaire est purement de notre droit français; elle était inconnue dans le droit romain . . ." Merlin, *Répertoire de Jurisprudence*, 5e éd., t.xiii (1826).

3.6 From the short historical survey of mortgage and hypothec in this and the preceding section, it will be seen that they are rooted in different legal concepts. Whereas a mortgage is, or used to be, a transfer or assignment of property as security for a debt, a hypothec is a *droit réel accessoire* attached to the debt itself. It is a real right (*jus in re*) in that it subsists in the property on which it operates as a charge,<sup>9</sup> but it is merely an ‘accessory’ or supporting right, existing for no other purpose than to effect the charge. These, says Basnage, are the principles to be inferred from the practice of his time with regard to hypothecs:

Le premier [de ces principes] est que l’hypothèque emporte de soy un droit réel & un droit de suite sur le fond hypothéqué, jus reali quod fundum sequitur adversus quemcumque possessorem . . .

Le second est que l’hypothèque ne peut subsister si la substance de l’obligation principale ne demeure & ne subsiste . . .<sup>10</sup>

The second of these principles is restated plainly in the modern Quebec code: “L’hypothèque n’est qu’un accessoire et ne vaut qu’autant que l’obligation dont elle garantit l’exécution subsiste”.<sup>11</sup> Though a debt or obligation can exist without having a hypothec attached to it, no hypothec can exist independently of an obligation or continue to exist once the obligation is paid off.

3.7 Meanwhile the English mortgage, growing from entirely different roots in the common law, has evolved to the point where, in most practical respects, it resembles a hypothec. The rights secured originally by conveyance or demise of the mortgaged property are now secured instead by legal charge, which, as has not escaped observation, is a hypothec in all but name.<sup>12</sup>

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<sup>9</sup> Pothier, *Traité de l’hypothèque*, p.177.

<sup>10</sup> ‘The first [of these principles] is that the hypothec of itself bears a real right and a right to pursue the thing hypothecated against whomsoever may possess it . . . The second is that the hypothec cannot subsist if the substance of the principal obligation does not endure and subsist.’ Basnage, *Traité des hypothèques*, pp.47-8.

<sup>11</sup> *Code civil du Québec*, 1991, art. 2661.

<sup>12</sup> “The charge by way of legal mortgage . . . is in substance pure hypothec; though technically it is rather awkwardly tied up with the mortgage by long term . . .” Buckland and McNair, *Roman Law and Common Law* (ed. Lawson, 1965), p.317.

## PART II. DEVELOPMENT OF HYPOTHECATION IN JERSEY

### 4 The position in Jersey before 1880

- 4.1 With a few exceptions, every contract conveying Jersey immovable property contains a clause of reciprocal *fourniture et garantie* whereby the vendor guarantees good title to the property conveyed and the purchaser guarantees his own obligations under the contract. Until 1880 this clause had the effect of securing the guarantee as a hypothec on all the vendor's existing and future assets, moveable and immovable, and in most cases on those of the purchaser also. This hypothec lasted for ever, its amount was unlimited, and it could not be extinguished either by prescription or by money payment: as far as immovables were concerned, once a guarantee became attached to a property it remained attached to it in the hands of all subsequent owners.<sup>13</sup> Thus if, for example, A sold to B for £100 a plot of land on which B then built a large house, and B was later dispossessed by reason of some fault of title, B had a claim against A not merely for the £100 he had originally paid for the land but for the full cost of the house he had built on it; and this claim was hypothecated on all the property owned by A at the time of the dispossession and on all that A had owned at the time of the sale and subsequently disposed of, no matter how many times it had since been sold on.
- 4.2 To make matters worse, immovables included not only land and buildings but also *rentes*, an ancient form of fixed annual charge on land. Not only were these, too, hypothecated with the guarantee of every realty transaction of their present and past owners, but the vendor of a *rente* guaranteed payment of it in perpetuity (though the obligation might be reduced after forty years); and, by virtue of a provision in the *Loi (1832) sur les Décrets*, all *rentes* created after that date were irredeemable. The nearest that could be got to discharging them from the property on which they were due was for the debtor to 'assign' to the owner of the *rente* an equivalent sum of *rente* to receive from someone else. This assignment did not release the debtor but merely delegated the obligation: the original *rente*, though it became dormant, was not extinguished and there were certain circumstances in which it would revive. Also, the

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<sup>13</sup> Moveable assets, unlike immovables, could not be pursued into the hands of third parties, but the guarantee attached to them was automatically transferred to the proceeds of their sale and to any assets that were acquired subsequently.

assignment hypothecated all the existing and future property of the assignor for his perpetual guarantee of the *rente* that he assigned.

- 4.3 The effect of this system was to lump together all of a person's real property transactions in an indivisible whole. It was impossible for anyone to buy a property without becoming involved in all the realty transactions of the vendor and being enmeshed by the web of guarantees attaching to whatever other property remained in the vendor's hands. Nor could individual properties or parcels of land be separately hypothecated. Judgments of the Royal Court for the payment of a fixed sum of money, or by which a person acknowledged his indebtedness in such a sum, could be registered to create an *hypothèque judiciaire*, but this hypothec was a general one that bore on all the real property of the debtor.
- 4.4 It followed from all this that in a bankruptcy the whole of the debtor's property, however extensive, had to be disposed of in one lot. This was done by the procedure known as a *décret*, whereby creditors and other persons who had transacted with the debtor were called in turn, in ascending order of precedence – first the unsecured creditors as a group, then the hypothecary creditors and transactors in reverse date order – and required either to take over the whole of the debtor's property or to renounce their rights or claims.<sup>14</sup> Whoever accepted the property – the *tenant après décret*, as he was called once formally invested with it by the Royal Court – had to assume liability for all prior charges on it. However, it was often difficult to find anyone willing to accept the *teneure*: the owner of a property might well opt to renounce it rather than take over all the other realty of the person from whom he had bought, overburdened with *rentes* as that realty would almost certainly be. So all the debtor's transactions might be exhausted without finding a *tenant*, in which case the unpicking process was carried back further by holding a *décret* on the property of the debtor's ancestors or predecessors in title.
- 4.5 As may be imagined, the social effects of the system were disastrous. It meant that no purchaser of a house or land in Jersey ever had security of tenure, since he could be

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<sup>14</sup> Originally a *décret* could only follow a voluntary *cession générale* by which the debtor abandoned all his moveable and immoveable property to his creditors. Stubborn debtors, however, might refuse to make *cession* despite being imprisoned on bread and water; so in 1832 the Royal Court was given the power to adjudge the debtor's property renounced involuntarily so that a *décret* could proceed. For more on

dispossessed at any time, even after many years' peaceful possession, through a *décret* of the property of the vendor or of other persons with whom the vendor had transacted. This made people reluctant to buy real property for cash, which they would have no hope of recovering should they lose the property in this way. Nearly all sales were effected wholly or partly in *rente*, and most involved the creation of fresh sums as well as the assignment of existing ones. Since the sums newly created were irredeemable, the amount of *rentes* in existence rose inexorably and properties became ever more grossly overburdened with them.

- 4.6 Interestingly, the principle whereby all of a person's existing and future assets are pledged for the fulfilment of his obligations has survived in the modern civil codes of France and Quebec. It does not, however, operate as a hypothec on the assets as it did in Jersey before 1880 but merely forms part of the framework within which hypothecs and other privileged claims are defined.<sup>15</sup> Thus it does not inhibit the hypothecation of individual properties. In France the *Code Civil* allows only immovable property and ships to be hypothecated: *meubles* are not hypothecable,<sup>16</sup> nor, in principle, are future assets, though the latest revision of the Code creates wide exceptions.<sup>17</sup> The Quebec law allows the hypothecation of all kinds of property, moveable and immovable, corporeal and incorporeal, present and future; a hypothec on moveables may be created with or without delivery of possession, and individual debtors and creditors also have a general power to contract out of the principle of common pledge by limiting the security for the debt to a designated property.<sup>18</sup>

## 5 The Loi (1880) sur la Propriété Foncière and subsequent amendments

- 5.1 The Quebec code might, perhaps, have served as a model for the reform of the law in Jersey; but the man who took up the cause of that reform had other ideas. Robert Pipon Marett was convinced that the evils of the old system could only be remedied by legislation that was both radical and prescriptive. It was a goal that would take him many years to achieve, for there were powerful vested interests opposed to change. By the time his *Loi sur la Propriété Foncière* finally reached the Jersey statute book

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these and other pre-1880 insolvency procedures see Jersey Law Commission Consultation Paper No.2, *Dégrévement* (October 1998), Chapter 2.

<sup>15</sup> *Code Civil Français*, arts. 2284-5; *Code Civil du Québec*, art. 2645.

<sup>16</sup> *C.C.F.*, arts. 2397-9.

<sup>17</sup> *C.C.F.*, arts. 2419-20.

early in 1880, Marett was on the point of becoming Bailiff and receiving his knighthood; but his first *projet* of the law had been drafted before his appointment as Solicitor General in 1858, and the discussion of it that fills twenty pages of evidence before the Royal Commissioners of 1859-60 obviously relates to a set of proposals very similar to those that were to be enacted twenty years later.<sup>19</sup>

5.2 Instead of modifying the universal guarantee system with derogations and contracting-out powers, Marett abolished the system altogether in relation to property to which its owners became entitled after his law came into force. In its place came a new system of hypothecs based on the French *Code Civil*. As in France, there was a saving provision for the hypothecation of ships; but otherwise all moveable property, as well as *rentes* and future assets, ceased to be hypothecable. Henceforth, with one exception in respect of the *hypothèque légale* for a widow's dower, only *biens-fonds* (corporeal immoveables) could be hypothecated, and the *fourniture et garantie* in respect of a contract no longer hypothecated the guarantor's property unless and until the guarantee was sued on and the judgment registered as an *hypothèque judiciaire*. With the operation of hypothecs thus brought within defined limits it became possible, for the first time in Jersey, to create a hypothec on a specific property or piece of land, clearly identified by both borrower and lender and constituting a distinct *corpus fundi* (or *corps de bien-fonds*). 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.

5.3 In December 1878, when the law was about to be debated in the States, Marett wrote a letter to the *Nouvelle Chronique de Jersey* newspaper explaining at length the defects of the old law and the reasons for his projected changes. In this *Lettre Explicative*, as it is known, he identifies *biens-fonds* and *rentes* as the two kinds of immoveables that constitute *propriété foncière* in Jersey, and defines *biens-fonds* as 'the soil and that which attaches to it', i.e. buildings – a definition firmly based on the principle that the owner of land owns everything vertically in line with it to the sky above and to the depths of the earth below. This principle was to remain more or less

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<sup>18</sup> *C.C.Q.*, arts. 2645, 2665 *et seq.*

<sup>19</sup> Commissioners' Report, 1861 (Minutes of evidence, questions 11,592-11,837). The discussion is highly informative on the system of guarantee and *décret* as it operated in practice.



intact for another century until the *Loi (1991) sur la copropriété des immeubles bâtis* introduced to Jersey the concept of ‘flying freeholds’, lots within a building stacked one above another and not physically attached to the soil, each of which is deemed to be a *corps de bien-fonds* for the purposes of the 1880 law. Marett’s definition of *biens-fonds* did not include leaseholds: for the hypothecation of these under the *Loi (1996) sur l’hypothèque des biens-fonds incorporels* see below, section 8.

- 5.4 The changes introduced by the 1880 law were not retrospective, except in so far as making *rentes* reimbursable could be considered so. Property that had been in its owner’s hands before the law came into force (called *propriété ancienne*, as distinct from *propriété nouvelle* to which title derived afterwards) remained subject to the old system, which was left to wither away gradually by lapse of time. This process is now virtually complete.
- 5.5 Much of the law was devoted to setting up new bankruptcy procedures applicable to *propriété nouvelle*. The most ambitious of these was *liquidation*, by which attorneys were appointed by the Court to get in and liquidate all the debtor’s moveable and immoveable assets and distribute the proceeds among the secured and unsecured creditors in order of precedence. This was a more elaborate version of the customary *remise de biens* procedure by which a harassed debtor on the verge of bankruptcy could place his affairs in the hands of the Royal Court in the hope of avoiding a *décret*. The immoveables in a *liquidation* were offered for sale in lots; any that failed to sell, if they were *propriété nouvelle* in the debtor’s hands, were subjected to another new process called *dégrévement*, which was in effect a *décret* conducted separately on each *corps de bien-fonds*. If any *propriété ancienne* remained unsold, a *décret* in the old form was inevitable – in which the purchasers of any other *propriété ancienne* in the *liquidation* had to participate as though they had bought direct from the debtor.
- 5.6 The idea behind *liquidation* was that an equitable accounting process for dealing with immoveable assets, hitherto only possible if the Court granted a debtor the indulgence of a *remise de biens*, should become normal practice in a bankruptcy. Marett feared that the States might consider this a measure too far, and was careful to stress in the *Lettre Explicative* that the provisions for *liquidation* could, if necessary, be dropped without injury to the rest of the law. In fact the States left them in, but experience

proved the *liquidation* process to be slow and costly. Accordingly the *Loi (1904) (Amendement no.2) sur la Propriété Foncière* abolished it and replaced it by *réalisation*, similar in principle but applying only to moveable assets and to *rentes* and *hypothèques conventionnelles* to receive. The rest of the debtor's immoveables became subject to immediate *dégrévement*, or to *décret* as long as there was *propriété ancienne* to consider. A further enactment in 1915 accelerated the phasing out of *décret* and the last one took place two years later, leaving *dégrévement* effectively the only means of dealing with the immoveable property of an insolvent debtor unless the Court allowed him to make a *remise de biens*.<sup>20</sup>

- 5.7 This remained the position until immoveables were brought within the scope of the *désastre* process by the Bankruptcy (*Désastre*) (Jersey) Law 1990. *Désastre* had originated at the end of the eighteenth century as an *ad hoc* procedure for dealing collectively with actions against a debtor in financial difficulties, but the 1990 law completed a long process of transforming it into the standard Jersey bankruptcy procedure in all but a few special circumstances. Its extension to embrace immoveable property was expected to cause *dégrévement* to fall into disuse, but for a number of reasons this has not in fact happened (see below, 10.13-14).

## 6 Present position: rights of hypothecary creditors

- 6.1 Article 2 of the 1880 law defines a hypothec as a *droit réel* attached to a *rente* or other claim, by which one or more *corps de bien-fonds* owned by the debtor are specifically allocated for the discharge of that *rente* or claim. The article then goes on to specify the rights that a hypothec confers on its possessor. Those relating to *liquidation*, though never repealed, have been defunct since 1904, and those relating to *décret* may be regarded as obsolete; the two that remain operative are as follows.
- (a) In a *dégrévement* of the hypothecated property the creditor has the right, according to the order of priority of his hypothec, to take over the property as *tenant après dégrévement* or to be paid off by whoever accepts the tenure of

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<sup>20</sup> Before 1880, according to Marett (*Lettre Explicative*, p.9) it was rare for a *remise de biens* to succeed in avoiding a *décret*, and his evident intention was that the new *liquidation* procedure should supersede it entirely. However, with *liquidation* gone and properties no longer as heavily encumbered relative to their market value as they were in Marett's time, *remise de biens* has continued to be used, often successfully, down to modern times.

the property on a contract or hypothec of later date (or on an unsecured claim, though unsecured creditors are not mentioned in the provision).

- (b) If the debtor's assets are insufficient to satisfy the secured claim, the creditor has the right to follow any part of the hypothecated property into the hands of a third party (*tiers détenteur*) and compel him to pay off whatever balance remains due or to give up the property in satisfaction. This is known as the *droit de suite*. Nowadays, when portions of a property are sold off, it is common practice for secured creditors to be made parties to each contract to give up their rights voluntarily, but otherwise the *droit de suite* subsists even if the *tiers détenteur* has not been directly charged by his contract of title with payment of the secured debt. In this respect, however, the right is qualified by Article 26 of the law, which stipulates that unless the third party's title deed expressly charges him with payment, the creditor cannot take any steps to enforce the hypothec against him until the principal debtor's assets have been exhausted.

6.2 Under Article 32 of the Bankruptcy (*Désastre*) Law 1990, creditors secured by judicial or conventional hypothec are given much the same rights in a *désastre* as they had in a *liquidation* before 1904. Paragraphs (4) and (5) of the article provide that such creditors are entitled to preference, in order of date of creation of their hypothecs, on the proceeds of sale of any *corps de bien-fonds* on which their respective hypothecs are secured; should the proceeds of sale of a *corps de bien-fonds* be insufficient to meet the claim of any creditor with a hypothec secured on it, the balance ranks for payment *pari passu* with the other debts proved in the *désastre* (see below, 10.21).

6.3 In a *remise de biens*, creditors secured by hypothec have in theory the right to be paid in full. Under Article 6 of the *Loi (1839) sur les Remises de Biens*, if the total assets are insufficient to satisfy all the claims but the secured charges can be paid in full out of the sale of the immoveables, the Jurats appointed to conduct the proceedings can sell everything, pay the secured and privileged debts in full, and divide the balance among the other creditors. If there are not sufficient funds to pay the secured creditors in full, the *remise* fails and a *dégrévement* is held, in which the rights of those creditors are as set out above.

## 7 Types of hypothec

7.1 The 1880 law follows its French model (above, 3.5) in classifying hypothecs as legal, judicial or conventional. An *hypothèque légale* is defined by Article 6 as one that arises by operation of law, though in one case a judicial action has to be taken by the creditor to bring it into existence. An *hypothèque judiciaire* results from the registration of an act or judgment of the Royal Court or the Petty Debts Court, and an *hypothèque conventionnelle* is created by contract (*convention*) between the debtor and the creditor.

### *Hypothèques légales*

7.2 There are two kinds of *hypothèque légale*, of which we may take first (though it does not come first in the law) the hypothec of the creditors of a deceased debtor against the *biens-fonds* of the estate. Under Article 11 of the law, which imports the provisions of the *Loi (1862) sur les successions ouvertes*, this hypothec may arise in two ways.

- (a) If an unsecured creditor actions the estate within a year and a day of the debtor's death (or within eighteen months of an act of the Court granting the heirs *bénéfice d'inventaire* to establish whether or not the estate is solvent) and then, having obtained judgment for his claim, registers the judgment in the Public Registry, the registration gives him an *hypothèque légale* as from the date of death against all the *biens-fonds* belonging to the estate. Formerly it also gave him an *hypothèque judiciaire* against the *biens-fonds* belonging to the principal heir in his own name, but this was abolished by the Wills and Successions (Jersey) Law 1993.
- (b) If, on the other hand, a *dégrèvement* of the debtor's estate is ordered within the same time limits, all existing unsecured claims against him are automatically converted into *hypothèques légales* on the *biens-fonds* of the estate without any action on the part of the creditors. As before, the date of the hypothec is the date of death.

In either case, the *droit de suite* attached to the hypothec is prescribed after ten years by virtue of Article 29 (see further below, 7.14).

- 7.3 The other kind of legal hypothec, covered by Articles 7-9, is the *hypothèque de douaire*. Under Article 7, the dower rights of a married woman are secured at law by a hypothec with *droit de suite* on all her husband's immoveable property. Originally this hypothec dated either from his death or, if she opted on widowhood to take her dower according to Norman instead of Jersey custom, from their marriage; but Norman customary dower was abolished by the Bankruptcy Law of 1990, so that the *hypothèque de douaire* now always dates from the death of the husband. By extending to all his immoveables (which by definition includes *rentes* and *hypothèques conventionnelles*) this hypothec constitutes an exception to the general rule of the 1880 law that only *biens-fonds* are hypothecable, but it has none of the vices of a pre-1880 hypothec: it is calculated on the value of the estate, becomes extinct on the death of the widow, and is thus determinate in both amount and duration.
- 7.4 The law makes elaborate provision for the rights of a widow in the event of a *dégrévement* either of her husband's estate after his death or of the property of his heirs. In the former case the widow cannot claim actual enjoyment of the *biens-fonds* subject to her dower, but is entitled instead to a dower in money (*franc douaire*). As a secured creditor by virtue of her *hypothèque légale*, she is also called to participate in the *dégrévement* of those *biens-fonds* and has the right to take them over as *tenante après dégrévement*. If she does not take them, she loses the security for her *franc douaire*; whether she loses the right of dower itself or retains a claim enforceable personally against the heirs is less clear.<sup>21</sup>
- 7.5 A third kind of legal hypothec was created by Article 22 of the *Loi (1891) sur le Partage d'Héritages*. This gave the principal heir to a succession a hypothec against his co-heirs' shares of the immoveable estate, lasting for a year from the date of the *partage*, as security for their contribution to any deficit in the moveable estate. It has now been abolished by the Wills and Successions (Jersey) Law 1993.

### ***Hypothèques judiciaires***

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<sup>21</sup> In the corresponding situation in a *décret* the widow seems to have lost her dower (note to Article 7 in Judicial Greffe copy of the 1880 law). Articles 8 and 9 suggest that she was also presumed to lose it in a *dégrévement*, since they provide that a widow's dower settlement is unaffected by a *dégrévement* of the property of any of her husband's heirs but becomes void if the *dégrévement* has to be extended back to the husband's estate. However, the status of claims whose accessory hypothecs have been renounced in a *dégrévement* now has to be viewed in the altered light of the judgments of the Royal Court and the

- 7.6 Judicial hypothecs are covered by Articles 12-16 of the 1880 law, which, as originally enacted, were based on similar provisions in the *Loi (1832) sur les Décrets* but with the important difference that the hypothec was limited to property owned by the debtor at the time when the hypothec came into force. The *Loi (2000) (Amendement No.4) sur la Propriété Foncière* has made a number of modifications to this part of the law to adapt it to modern needs.
- 7.7 A judicial hypothec is obtained by registering an act or judgment of Court in the register of *Obligations* at the Public Registry. Originally the law provided for registration of acts of the Royal Court only, but those of the Petty Debts Court have been made registrable by the *Loi (2005) (Amendement no.5) sur la Propriété Foncière*.<sup>22</sup> The act or judgment must be for either the payment or the acknowledgment (*reconnaissance*) of a debt or other obligation; the words “*actuelle ou contingente*” were added by the 2000 law to cover fluctuating liabilities (e.g. bank overdrafts) and guarantees acknowledged independently of the principal debt. *Reconnaissances* in respect of both of these had been common long before, but their validity under the law as it then stood was never judicially tested.
- 7.8 As enacted in 1880, Article 13 of the law provided that registration of an act or judgment gave the plaintiff a judicial hypothec “for the amount definitively acknowledged to be owed to him”, and Article 14 reiterated this by stipulating that the act or judgment must be for one or more “*sommes certaines*”, which the creditor’s secured claim could not exceed. This useful phrase was always quoted as the test of whether or not an act was eligible for registration as a judicial hypothec, but it left unclear the position regarding accrued interest on the capital. The 2000 law has revoked Article 14, *somme certaine* and all; instead, paragraph (1) of an amended Article 13 now less elegantly provides that registration confers on the plaintiff a hypothec –

*pour le montant qui est déterminé par la Cour ou reconnu par le défendeur lui être dû ou, en cas d’une caution ou autre obligation*

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Court of Appeal in *New Guarantee Trust Finance Ltd v. Birbeck* (1980) J.J.117, on appeal *Birbeck v. Midland Bank Ltd* (1981) J.J.121.

<sup>22</sup> Judgments of the Court of Appeal are also generally considered to be registrable by virtue of Article 12(3) of the Court of Appeal (Jersey) Law 1961, though the problem of loss of date when a judgment of this

*contingente, reconnu lui être dû potentiellement, étant une ou plusieurs sommes, avec ou sans intérêts . . .*<sup>23</sup>

- 7.9 Under the old Article 13, the hypothec obtained by registration of an act or judgment operated as a general hypothec “*sur les biens-fonds [du] débiteur*”, and this was reasserted more fully in Article 15:

*L’hypothèque judiciaire donnera à celui qui l’aura obtenue un droit réel et spécial et de suite par hypothèque, du jour qu’elle prendra date, sur tous et un chacun des biens-fonds que le débiteur possédait actuellement ou auxquels il avait droit à cette date . . .*<sup>24</sup>

This seemed to leave no room for doubt that an *hypothèque judiciaire* must always be a general charge: the way to charge individual properties was by *hypothèque conventionnelle*. By the 1930s, however, *reconnaisances* were beginning to appear in which the charge resulting from registration of the act of Court was expressed to be limited to a specific property. This practice grew rapidly and eventually became general, though its validity, like that of the registration of guarantees and floating liabilities, was uncertain.<sup>25</sup> The new Article 13(1) legitimizes it by providing that an *hypothèque judiciaire* shall operate either on all the defendant’s *biens-fonds* or on such one or more of them (or any part thereof) as the act of Court specifies.

- 7.10 If an act or judgment is registered as an *hypothèque judiciaire* within fifteen days of being issued by the Court (inclusive of the day of issue), the date of the hypothec is the date of the act. If it is registered after fifteen days, the hypothec dates from the day of registration. In 1880 the custom of asking the Court to order registration of its acts in the Public Registry *séance tenante* (i.e. at the time of taking judgment) had not yet

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court is substituted for a previously registered judgment of the Royal Court has not been addressed (see below, 17.8).

<sup>23</sup> ‘for the amount which is determined by the Court or acknowledged by the debtor to be due to [the plaintiff] or, in the case of a guarantee or other contingent obligation, acknowledged to be potentially due to him, being one or several sums, with or without interest . . .’

<sup>24</sup> ‘A judicial hypothec shall give to the person who has obtained it a real and special right and [a right] of pursuit by hypothec, from the date on which it takes effect, over each and every one of the *biens-fonds* which the debtor actually possessed or to which he had a right at that date . . .’

<sup>25</sup> Some early examples, because of their unusualness, were reported in the *Table des Décisions*, giving rise later to the false idea that they had been sanctioned judicially by the Court. That this was not the case was made clear in *Ex parte Hyams* (1979) 266 Ex.104, when a judgment creditor and debtor agreed to ask the Court to make an order limiting the hypothec resulting from the registration of the judgment to two

developed, and all acts had to be remitted by hand to the *Enregistreur*, who was made responsible for noting the date of registration on each act so that the date of the hypothec it bore could be calculated. Asking the Court to order registration *séance tenante* later became normal practice for *reconnaisances*; modern rules of Court have extended it to ‘true’ judgments also, and the practice is also followed by the Petty Debts Court since the 2005 amendment.

- 7.11 Until 1995 *reconnaisances* still required an action before the Friday afternoon sitting of the *Cour du Samedi*. Debtors had to appear in person or by attorney, or (most commonly in latter years) through an advocate authorized by letter, to acknowledge the debt and submit to judgment. The lender’s advocate would normally request an act ‘*en présence condamné reconnaître et acte enregistré*’ (defendant having appeared, condemned to acknowledge the debt and witness registration of the judgment); if registration was to be deferred, he would request ‘*en présence condamné reconnaître seulement*’ (defendant condemned to acknowledge only). Since 1995 the procedure has been different. The Royal Court Rules now require *reconnaisances* to be executed in the form of an acknowledgment document signed by the parties, which must be delivered to the Judicial Greffe on a Friday no later than 4 p.m. This document is still generally known as a *billet*, as in the days when the actions were called in Court. If, as is usually the case, the borrower gives his consent to immediate registration, the Registrar of Deeds affixes an official stamp to the *billet* which converts it into an act of Court and it is then registered; so if the hypothec is to be limited to a particular property, this must be specified in the *billet*. In the interests of brevity and standardization, the rules stipulate the manner in which this is to be done.
- 7.12 Acts recording acknowledgment without registration are still occasionally asked for, and provision is made for them in the rules. The *billet* is submitted in the same way as for immediate registration, but the Judicial Greffe issues a conventional act of Court which the plaintiff can remit for registration later if necessary. The usual purpose of this is to create an order of priority of charge between two or more borrowings

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specified properties belonging to the debtor. The Court did as asked, but expressed that the order was made “by consent but without pronouncing on the effect thereof”.



acknowledged on the same day: one is registered immediately as a first charge, the others acknowledged *seulement* and registered after fifteen days.<sup>26</sup>

- 7.13 When a debt secured by *hypothèque judiciaire* becomes “*éteinte par n’importe quelle cause*”, Article 16 of the 1880 law requires the creditor to attend at the Public Registry to cancel the registration of the act of Court and thus discharge the hypothec. This provision is also stated to apply to *hypothèques légales*, meaning presumably those obtained by unsecured creditors who sue the estate of a deceased debtor within a year of his death (above, 7.2.1), as this is the only *hypothèque légale* that involves the registration of an act of Court. After some debate in the past, ‘extinct for whatever reason’ is now considered to cover not only repayment in the ordinary way but also extinction by *confusion* or by satisfaction, for example after the creditor has taken over a property in a *dégrévement*. The procedure must also be followed if the registration of a judgment has ‘lost its date’ by virtue of the subsequent registration of a further act in respect of the same debt. The creditor (who is usually represented by an advocate or solicitor) must produce the original act of Court or, if this cannot be produced, an affidavit stating why. Should the creditor neglect to have the registration cancelled, he may be condemned to do so by the Court on a simple action by the debtor.
- 7.14 As in the case of the *hypothèque légale* of the creditors of a deceased debtor, the *droit de suite* attached to an *hypothèque judiciaire* becomes extinct by prescription after ten years by virtue of Article 29. The hypothec itself remains in existence, but the creditor’s right to follow the *fonds* into the hands of third parties is lost. Thus if a *reconnaissance* or other debt secured by *hypothèque judiciaire* is still outstanding after ten years, it has to be re-registered in order to conserve the lender’s *droit de suite*.
- 7.15 Within the present generation, the *hypothèque judiciaire* has almost entirely taken over from the *hypothèque conventionnelle simple* as the usual form of house mortgage in Jersey (see below, 15.1-3). The provisions of the 2000 law have helped tailor it to that purpose, but it has an inherent weakness which can create a problem if the

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<sup>26</sup> Before the charging of *reconnaissances* on specific properties became common practice, another reason for obtaining an act *reconnaître seulement* and registering it later was to avoid charging the property that the borrowers were selling on the same day as they purchased their new one.

borrower dies while the charge is outstanding. A debt secured by *hypothèque judiciaire* is a *dette mobilière*, and so, following the debtor's death, a claim for repayment of the capital is a charge in the first instance on the moveable and not the immovable estate.<sup>27</sup> The position in respect of an *hypothèque conventionnelle simple* does not appear to have been judicially tested, but, since the secured debt is immovable property by virtue of Article 27 of the 1880 law, it can hardly be considered a *dette mobilière*.

### ***Hypothèques conventionnelles***

- 7.16 Conventional hypothecs are covered by Articles 17-27 of the 1880 law. They are created or constituted by contract between the debtor and the creditor, passed before the Royal Court. This can happen in two ways. If a property is sold and part of the purchase price is left owing by the buyer to the seller as a charge on the property, an *hypothèque conventionnelle* is said to be *constituée* (or *stipulée*) by the seller and *consentie* by the buyer. Alternatively the owner of a property can create an *hypothèque conventionnelle* on it as an independent transaction, in which case the hypothec is said to be *créée*. These definitions, which also apply to *rentes*, are given in Article 1 of the law. An *hypothèque conventionnelle* may be either *foncière* or *simple*, depending on whether the charge consists of *rentes* or money (below, 7.17-19), but in either case, unlike the other types of hypothec, an *hypothèque conventionnelle* is an immovable in the hands of the creditor by virtue of Article 27.
- 7.17 The creation or constitution of either a perpetual sterling *rente* or a pension or annuity secured on real property (*rente viagère*) gives rise to an *hypothèque conventionnelle foncière*. New hypothecs of this type are now very rare. The creation of perpetual sterling *rentes*, though still possible under Articles 30-35 of the law, has been obsolete for at least forty years; *rentes viagères* persisted until more recently, but these too have now almost completely died out. The *usufruitier* of a reimbursed *rente* or *hypothèque conventionnelle* also has an *hypothèque foncière* on the property of the reimbursee under Article 43 (see below, 7.21).

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<sup>27</sup> See *Mitchell et autre v. Mousir, etc.* (1908) 77 Exs. [= *Billet*] 308, reported in *Table des Décisions 1908-1916*, p.112 (*Successions*, 1<sup>o</sup>). This was an action against the heirs to a deceased debtor's immovable estate in Jersey for the repayment of debts that had been acknowledged before the Royal Court and registered as *hypothèques judiciaires*. The Court held that the plaintiffs had no right of recourse against the Jersey immovables until they had exhausted the debtor's personal estate in England.

- 7.18 An *hypothèque conventionnelle simple* is created or constituted for a specified sum of money, with or without interest, repayable in whole or by instalments in such manner as the contract may stipulate, except that the repayment period may not be fixed at more than twenty years as to the debtor's right to repay or thirty years as to the creditor's right to demand repayment. Failing stipulation in the contract, repayment may be made by the debtor or demanded by the creditor at any time. There is no provision for the securing of contingent or fluctuating liabilities, as introduced for *hypothèques judiciaires* in 2000. The hypothec remains in force until the debt is extinguished: originally the *droit de suite* was subject to prescription under Article 29, but prescription in respect of this type of hypothec was abolished by an amendment of 1922.<sup>28</sup>
- 7.19 An *hypothèque conventionnelle*, whether *foncière* or *simple*, must be created or constituted either on a specific *corps de bien-fonds* or on a contract lease in accordance with the *Loi (1996) sur l'hypothèque des biens-fonds incorporels* (for the provisions of which see section 8). *Corps de bien-fonds* now include 'flying freeholds' under the *Loi (1991) sur la copropriété des immeubles bâtis*. In each case Article 21 of the 1880 law, as amended, lays down precisely how the *fonds* is to be described if the hypothec is created by an independent contract and not constituted as part of a sale. For a terrestrial *corps de bien-fonds* an area measurement in *vergées* and *perches* still has to be included, as originally provided in 1880; for small residential properties this has long since been an anachronism and it is a pity the opportunity was not taken to delete this requirement in the course of the recent amendments to the law.
- 7.20 If an *hypothèque conventionnelle* is created on several distinct *corps de bien-fonds*, the contract must state what part or proportion of the total hypothecated sum is to be borne by each of the properties. If one of the properties (or any part of it) is alienated, the creditor can only exercise his *droit de suite* against it for whatever part or

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<sup>28</sup> Article 29 originally stated that the *droit de suite* in respect of an *hypothèque conventionnelle simple* became prescribed either thirty years after the date of creation of the hypothec or ten years after the date when repayment was exactable by the creditor, whichever was the less. If thirty years was the fixed term of the loan, there was a special arrangement by which the creditor could obtain judgment in advance after the 28<sup>th</sup> year for repayment on the due date, and the prescription period was then automatically extended to 33 years to allow time for him to recover his money after the term expired. The repeal of all this in 1922 has sometimes been taken to imply the repeal of the 30-year maximum term of the hypothec itself, but it is not at all clear that this was intended.

proportion of the hypothec is charged on that property; likewise, he can only participate in the *dégrévement* of each *corps de bien-fonds* as a creditor for the amount charged on that *corps*. Thus the effect of creating an *hypothèque conventionnelle* on several *corps de bien-fonds* is the same as if a separate hypothec for a separate sum had been created for each one, and this is what is invariably done in practice, though they are usually created by a single contract.<sup>29</sup>

- 7.21 On repayment of the debt secured by an *hypothèque conventionnelle simple*, the hypothec must be discharged by registering a deed of *extinction* in the Public Registry. Formerly this deed was a contract passed before Court, but since 1959 it has been a signed receipt, as is also the case for the reimbursement of *rentes*. If the *rente* or hypothec is subject to a life-enjoyment, the *usufruitier* must be a signatory to the deed and its registration gives him an *hypothèque foncière* on all the *biens-fonds* of the reimbursee under Article 43. Because a simple conventional hypothec is immovable property, its sale or other transfer *inter vivos* can only be done by contract passed before Court.
- 7.22 If an *hypothèque conventionnelle* becomes *sans fonds* (i.e. loses its security), the creditor has the right to demand immediate repayment of the secured debt. This is discussed more fully in section 9.

## **8 Hypothecation of leaseholds**

- 8.1 By stipulating that only *biens-fonds* could be hypothecated, Article 3 of the 1880 law originally precluded the hypothecation of leaseholds. A demise of premises in Jersey for a term exceeding nine years must be effected by a *contrat héréditaire* passed before the Royal Court in the same way as a sale, and the term so created is an immovable in the hands of the lessee; but, even though in 1880 the practice of demising apartments or suites of rooms within buildings lay far in the future,<sup>30</sup> a term of years plainly did not fall within Marett's definition of *biens-fonds* as 'the soil and that which attaches to it'.

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<sup>29</sup> Matthews & Nicolle (*The Jersey Law of Property*, 1991, at 6.22), on whose text this paragraph is based, have expounded the principle impeccably but seem to misunderstand the practice.

<sup>30</sup> As late as the 1960s, when the Housing Committee began granting 99-year leases of flats to first-time buyers on terms equivalent to a States loan, there was uncertainty in some quarters over whether a lease could be classed as immovable property when the demised premises were themselves less than an *immeuble*.

- 8.2 A few years after the introduction of flying freeholds by the *Loi (1991) sur la copropriété des immeubles bâtis*, leases were made hypothecable by the *Loi (1996) sur l'hypothèque des biens-fonds incorporels*. The focus of the two laws is necessarily different. The 1991 law, introducing a form of property new to the jurisdiction, is chiefly concerned with establishing the procedure for setting up and administering a *copropriété* and with defining the reciprocal and common rights of the co-owners. Hypothecation is dealt with simply by deeming a *lot* within a building to be a *corps de bien-fonds* for the purposes of the 1880 law. Thus all flying freeholds properly constituted under the *copropriété* law are hypothecable in the same way as terrestrial freeholds. In the case of a lease, however, the problem faced by the legislature was how to reconcile the rights of a creditor secured on the lease with those traditionally reserved by the landlord. The resolution of this problem has brought about a situation in which leases are hypothecable only in certain circumstances.
- 8.3 Under Article 2 of the 1996 law, a lease that is immoveable property in the hands of the lessee may be hypothecated in the same way as a *corps de bien-fonds* if, and in accordance with the terms on which, the contract of lease expressly permits hypothecation; otherwise it may not be hypothecated except with the consent of the lessor given by means of a contract passed before Court. (Lease, lessor and lessee are defined as including sub-lease, sub-lessor and sub-lessee; lessor and lessee further include successors in title to the original lessor and lessee.)
- 8.4 Article 3 provides that if a *dégrévement* of a lease takes place without any of the creditors or other interested parties accepting it as *tenant* (see below, 10.9), the Greffier's record must be presented to the Court which thereupon declares the lease cancelled.
- 8.5 Protection for creditors against destruction of their security by determination of the lease is provided by Articles 4 and 5. Once a lease is charged with a hypothec, it cannot be modified or annulled by mutual agreement between lessor and lessee except with the consent either of all the hypothecary creditors or of the Royal Court; and it cannot otherwise be annulled for any reason except by act of the Court, notwithstanding any provision to the contrary. All creditors secured on the lease must be made parties to the action to cancel it, and, if the Court decides that it would have cancelled the lease but for the fact of its being hypothecated, the secured creditors

have rights akin though not identical to those in a *dégrèvement*. Each creditor in turn, beginning with the most junior by date, may elect to be subrogated in the place of the lessee, i.e. to take over the lease; but the Court, in allowing a creditor to exercise this right, has a discretion to impose whatever conditions it may think fit. These, without prejudice to the generality of the discretion, may include conditions as to the execution of the obligations of the lease and as to payment of damages, costs, indemnities, security, etc. Oddly, there is no clear stipulation in the law that the subrogee becomes liable for prior charges secured on the lease, as would be the case in a *dégrèvement*.

## 9 Loss of security

- 9.1 A hypothec is indivisible and bears equally on all parts of its *fonds*, i.e. on all the property on which it is secured. If any part of the *fonds* – whether part of a single *corps de bien-fonds*, or one of several properties covered by a legal or judicial hypothec – is alienated by the debtor without the creditor being party to the contract to discharge it, the full amount of the debt will remain hypothecated both on what is alienated and what is reserved. This is not only plain from the provisions as to *droit de suite* in Article 2 of the 1880 law, but is part of the essential nature of a hypothec as expounded by Pothier.<sup>31</sup> However, there are various cases in which a hypothec charged on a specific property may become *sans fonds*, either through physical destruction of the *fonds* itself or because the debtor has been ousted of his title to it.
- 9.2 Actual cases are very few, and those arising from loss of title are obviated as far as possible by modern statute law and strict conveyancing practice. Under Article 20 of the Wills and Successions (Jersey) Law 1993, purchasers for value from the estate of a deceased person can no longer be dispossessed as a result of the subsequent registration of a will more than a year and a day after the testator's death. It is also now accepted consensually that 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 *dégrèvement* of the part retained by the vendor as they strictly should be

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<sup>31</sup> Pothier, *Traité de l'hypothèque*, ch. 2, quoted by Le Gros, *Droit Coutumier de Jersey* (1943), p.205.

under Article 92 of the 1880 law.<sup>32</sup> This forestalls the possibility that anyone buying a house from a developer who subsequently goes bankrupt will be forced to choose between taking over the unsold part of the development or renouncing his contract of purchase and thus rendering his mortgage *sans fonds*. However, there are a few other remote contingencies in which a debtor could still lose his title; and there is also the possibility of the *fonds* itself being physically destroyed, for example by landslip or incursion of the sea.

9.3 If an *hypothèque conventionnelle* becomes *sans fonds* for any reason, either in whole or in part, Article 25 of the law compounds the debtor's misery by empowering the creditor to demand immediate reimbursement of the *rente* or sum of money secured. In the case of a *rente viagère*, it must be replaced by a *rente* or annuity of equivalent value. These provisions, which the parties cannot contract out of, also apply if the *fonds* is changed without the creditor's consent. There is no similar provision in relation to *hypothèques judiciaires*, presumably because in 1880 these could not be charged on specific *corps de bien-fonds* and were not intended to be used as a means of mortgaging individual properties.

9.4 In a case in 1931 the Royal Court held that a perpetual sterling *rente*, created on a *corps de bien-fonds* that consisted of a house and several fields, had become partly *sans fonds* because the debtor had sold off some of the land and that the owner of the *rente* was therefore entitled to demand reimbursement. This judgment is severely criticized by Le Gros, who points out that it flies in the face of both the provisions and the principles of the 1880 law: the proper recourse of the owner of the *rente*, should recourse have been needed, was to exercise her *droit de suite*.<sup>33</sup> However, it was settled practice ever afterwards that a *rente nouvelle* had to be reimbursed when any part of its *fonds* was sold.

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<sup>32</sup> This practice stems from the agreed judgment in *re Moorhouse* (1952) 247 Ex.519, 248 Ex.6, in which the Royal Court deliberately refrained from giving a ruling on the law. For comment see Jersey Law Commission Consultation Paper No.2, *Dégrévement* (1998), at 2.6.6.

<sup>33</sup> *Le Blancq et uxor v. Blampied* (1931) 236 Ex.323, commented by Le Gros, *Droit Coutumier*, pp. 204-6. The position was unsatisfactory on both sides. The *rente* due to Mrs Le Blancq was one of four sums created on the property in favour of four different parties in 1896. When some of the land was sold off in 1924, one of the other three sums was charged on one of the fields sold; this, being done without the creditor's formal consent, was contrary to Articles 21 and 25 of the 1880 law. Yet it was not that creditor but Mrs Le Blancq, more than six years later, who took issue over the sale.

## 10 Enforcement of security

- 10.1 Under Jersey law as it stands, a creditor secured by hypothec on immovable property has no means of enforcing or realizing his security other than through some form of bankruptcy process.
- 10.2 These, on paper at least, are numerous. A debtor under pressure from his creditors may declare himself *en désastre*; or he may apply to the Royal Court to make a *remise de biens*; or he may even apply to make a *cession générale* of all his moveable and immovable property to his creditors under the customary law, though this is now very rarely done. A *cession*, if permitted, will discharge him of all further liability, but as far as secured creditors are concerned it is merely preliminary to a *dégrévement*. In a *remise de biens* the secured creditors have, in theory, the right to be repaid in full (above, 6.3); if this is not possible and the *remise* fails, they participate in the ensuing *dégrévement* in the usual way. From the point of view of the secured creditor, the choice of procedures is between *dégrévement* and *désastre*.

### *Dégrévement*

- 10.3 Unless preceded by a *cession* or a failed *remise de biens*, the *dégrévement* process is set in motion as follows.<sup>34</sup> A creditor whose judgment against his debtor remains unsatisfied after one month may apply *ex parte* to the Royal Court for an act *Vicomte chargé d'écrire*, i.e. an act authorizing the Viscount to notify the debtor that, if he does not pay the judgment debt within two months (or three if the judgment is of the Petty Debts Court), his property may be adjudged renounced and subject to *dégrévement* as to immovable property and *réalisation* as to moveables (see above, 5.6). Assuming that the debtor does not comply with the Viscount's notice, the creditor makes a further application to the Court asking it to adjudge the debtor's property renounced and to be subjected to *dégrévement* and/or *réalisation* as the case may be. At the time of making this application, the creditor must produce to the Court a *relevé* or list of all transactions that have taken place relative to the renounced property since the 1880 law came into force, so that the Court can see what hypothecs have been obtained on the property since that date. This requirement was introduced

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<sup>34</sup> Some details of the procedure are omitted here, as are all references to *propriété ancienne* and *décret* which the paperwork still has to include as laid down by the 1880 law.



by the *Loi (1915) sur la propriété foncière (garanties)* for reasons that were good at the time, but to take the list of transactions back 125 years now serves no useful purpose.

10.4 The Court declares the whole of the debtor's property to be renounced and orders a *dégrévement* of the immoveables and, if appropriate, a *réalisation* of any moveable property or conventional hypothecs to receive.<sup>35</sup> It appoints two advocates or solicitors as attorneys (only one is required by the law, but the modern practice is to appoint two) who publish notice of the proceedings in the press, fix a date with the Judicial Greffier for the *dégrévement* (which must be between four and six weeks from the date of the order) and summon all secured creditors and other persons who have transacted with the debtor (referred to collectively as the *intéressés*) to appear before the Greffier at the appointed time. Unsecured creditors are not individually summoned but may participate in the *dégrévement* provided they file their claims with the Greffier at least eight days beforehand. If any creditor who is summoned has a surety for his claim against whom he wishes to preserve his recourse, it is up to that creditor to summon his surety to appear at the *dégrévement*, giving at least two days' notice.

10.5 The *intéressés* whom the attorneys are supposed to summon under Article 92 of the 1880 law are, broadly, the following:

- (a) All those who have unsatisfied claims secured by hypothec on, and any widow with a right of dower over, either –
  - (i) the property *en dégrévement*, or
  - (ii) if the property *en dégrévement* is the remnant of a larger *corps de bien-fonds* part of which has been sold off by the debtor since he acquired it, any part of the original *corps de bien-fonds* that he acquired.
- (b) All those who have passed contracts with the debtor in relation to the property *en dégrévement* or any part of the original *corps de bien-fonds* of which it is

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<sup>35</sup> Strictly speaking, as the debtor's assets are renounced in their entirety, the Court has no discretion to order a *dégrévement* of the immoveables while leaving his moveables untouched, but in practice it only orders a *réalisation* if the applicant asks for one. The *réalisation* may be held before, after or concurrently with the *dégrévement*.

the remnant (including boundary agreements, creations of covenants or servitudes, etc).

(c) All those who own *rentes* created or consented by the debtor on the property *en dégrèvement* or on any part of the original *corps de bien-fonds* of which it is the remnant.

(d) The current owners of any part of the original *corps de bien-fonds*.

10.6 Modern practice has introduced a degree of flexibility to the interpretation of these requirements. If the property *en dégrèvement* is the remnant of a larger *corps de bien-fonds*, the current owners of the parts that were sold off are not required to participate in the *dégrèvement* provided that all creditors secured on the original *corps* at the time of each sale were parties to the contract to discharge the part sold (see above, 9.2). A precedent has also recently been set for omitting from the list of *intéressés* the owner of a neighbouring property to whose contract of purchase the debtor was made a party to agree the definition of a boundary.<sup>36</sup>

10.7 By the combined provisions of Article 93 of the 1880 law and Article 6 of the amending law of 1904, the attorneys are required to furnish the Greffier with a statement (*état*) of the debtor's immovable property and all charges on it, and a list of the persons whom they have summoned to appear under Article 92. From this information the Greffier draws up a register or *codement*, on which the creditors and other *intéressés* are listed in the same way as they were in a *décret*: first the unsecured creditors, then the secured creditors and other transactors in ascending order of date, ending with the person from whom the debtor acquired the property. If any *hypothèque conventionnelle* charged on the property has been transferred to a third party, both the original creditor and the *tiers détenteur* are listed in the *codement* on the date of the hypothec, the *tiers détenteur* ranking immediately after the original creditor (and so being called before him at the *dégrèvement*). The law makes no similar provision as to *hypothèques judiciaires*, presumably because assignments of these are not registrable and so the attorneys cannot be deemed to have notice of them. However, on referral of the point to the Court in 1907, it was ruled that the

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<sup>36</sup> *Dégrèvement* P.R.Pirzada (2005).

assignee of an *hypothèque judiciaire* could at his request be substituted for the original creditor for the purposes of Articles 92 and 93 of the law.<sup>37</sup>

- 10.8 A more serious point of uncertainty concerns agreements between secured creditors to change the order of priority of their charges. Such agreements are fairly common. Occasionally they are made by contract passed before Court between the creditors concerned and the debtor; more usually, in the case of *hypothèques judiciaires*, the holder of an existing charge is made party to the acknowledgment of a subsequent borrowing to agree that his charge will be subordinated to the new one. Until 1971 it was the declared policy of the Judicial Greffier not to take any notice of such arrangements in a *dégrévement*, because the law gave him no discretion to call the *intéressés* other than in reverse date order of their contracts or registered charges: it would be up to the parties to sort out the consequences afterwards between themselves. Whether such a strict view would be taken today is uncertain.
- 10.9 At the *dégrévement* itself, the Greffier first calls on the unsecured creditors either to take over the property *en dégrévement* or to renounce their claims. They do not all have to take the property collectively: some may elect to take and others to renounce. If two or more of them take, they do so as tenants in common in shares proportionate to their claims. If they all renounce, the Greffier calls on each of the secured creditors and other *intéressés*, starting with the most recent, either to take over the property or to renounce the charge or contract by virtue of which he has been called. Any creditor or other *intéressé* who fails to appear at the *dégrévement* is deemed to have renounced.
- 10.10 After some argument in the past, it is now judicially established that a creditor who renounces in a *dégrévement* loses his claim against the property only. The underlying debt is not discharged, unless either there has been a *cession générale* or the *dégrévement* follows an unsuccessful *remise de biens*.<sup>38</sup> Thus, although the property *en dégrévement* is freed both from the claim and from the hypothec attached to it, the creditor retains the right both to follow other property, if any, on which the hypothec is secured, and to pursue the debtor personally (and thus his after-acquired moveable

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<sup>37</sup> *Greffier v. Piquet et autre, attournés, et autres* (1907) 224 Ex.509.

<sup>38</sup> *New Guarantee Trust Finance Ltd v. Birbeck* (1980) J.J.117, on appeal *Birbeck v. Midland Bank Ltd* (1981) J.J.121.

or immovable assets). However, if a contract other than a *création d'hypothèque* is renounced in a *dégrèvement*, any title that passed under it or any right or easement that it created becomes void.

10.11 If all the creditors and other *intéressés* convened before the Greffier refuse to accept the property, 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 *dégrèvement* be continued on the property in the hands of those persons. The only case in which this might happen nowadays is if the property was acquired by the debtor subject to an existing charge which is still the main charge secured on it at the time of the *dégrèvement*.<sup>39</sup>

10.12 When a creditor or other *intéressé* eventually accepts the property as *tenant après dégrèvement*, 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. 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. 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 *dégrèvement* itself, but more commonly takes place when the *tenant* is summoned before Court afterwards by the attorneys to have the *teneure* confirmed.

10.13 When in 1990 the scope of the *désastre* process was extended to include immovable property, there was a widespread assumption that *dégrèvement* would fall into disuse. This has not in fact happened, and a number of possible reasons can be identified.

(a) In a *dégrèvement*, the creditor who takes over the property as *tenant après dégrèvement* 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

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<sup>39</sup> In this situation, though, it would be more sensible for the attorneys to make a representation to the Court at the outset, explaining the position and asking leave to summon all interested parties back to the principal creditor to participate in the *dégrèvement* at first instance. Cases can be found in the *Tables*

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*.

- (b) 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, Article 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 wait for a discharge imposed on a bankrupt by the 1990 law.
- (c) The 1990 law contains special provisions regarding immoveable property that is 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, providing a further incentive for them to bypass the 1990 law by using the *dégrévement* procedure.
- (d) 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* generally seen as the best means of realizing a property's full value. There is a perception that the price a property will fetch if sold by the Viscount under the procedure laid down by the 1990 law is likely to be less, even before deduction of his commission, than a creditor can get by selling it himself as *tenant après dégrévement*.

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*des Décisions* where the Court in the past has pragmatically allowed departures of this kind from the standard procedure.

(e) 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 purchase and live in the debtor's property without the Committee's consent. The value of an 'unrestricted' property was usually higher than it would otherwise have been on the open market, and the creditor could retain the increase in the equity by assigning his hypothec to a company and selling the share capital. This loophole was closed by the Housing (Amendment No.7) (Jersey) Law 1993.

10.14 There is also one instance where *dégrévement* is still the only possible means by which creditors can proceed against immovable assets. This is in the case of a debtor who has died. Article 4(2) of the 1990 law is very clear that the estate of a deceased person cannot be declared *en désastre*, and so insolvency proceedings against the estate must take the form of a *dégrévement* of the immovable property and a *réalisation* of the moveables.

10.15 In its Report on *dégrévement* in 1999 the Jersey Law Commission expressed the view that the process, though a bold reform when introduced in 1880, has now become outdated and inequitable, and that the opportunity it affords debtors and creditors of contracting out of the provisions of the 1990 law is undesirable. Accordingly, the Commission recommended the abolition of *dégrévement* and the amendment of Article 4 of the 1990 law to allow a *désastre* to be declared in respect of the estate of a deceased person if the estate includes immovable property to which all heirs and/or devisees have renounced their claim. This was perceived as the only case in which creditors secured on the immovables would need to proceed against their security through the estate: if the heirs or devisees had taken the immovables, the creditors could proceed against them directly.<sup>40</sup>

10.16 Though these recommendations were accepted by the Legislation Committee, reservations have continued to be felt in some quarters as to the wisdom of leaving hypothecary creditors with no means of realizing their security except through a process that requires the debtor to be declared bankrupt. The Law Commission has therefore now requested the Legislation Committee to defer the abolition of

*dégrévement* until the Commission's review of the law of security on immoveables has been completed.

### ***Désastre***

- 10.17 Unlike other insolvency proceedings in Jersey, which were either drawn from Norman customary law or introduced by statute, the *désastre* is a creation of the Jersey courts. It developed out of insolvencies in the late eighteenth and nineteenth centuries, a time when the growth of commerce created a need for a judicial process capable of handling sudden business failures involving a large number of simultaneous claims. It was subsequently developed and refined by case law and practice, but not until 1964 was its procedure codified by rules of Court. It has now been given a modern statutory framework by the Bankruptcy (*Désastre*) (Jersey) Law 1990, which confirmed it as the principal Jersey bankruptcy process and, among other changes, extended its scope to embrace immovable property for the first time.
- 10.18 *Désastre* is now in most respects a normal modern bankruptcy process and it is not necessary here to do more than note briefly the provisions of the 1990 law that affect immovable property and the rights of secured creditors.
- 10.19 An application 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 Jersey Financial Services Commission. The categories of debtors whose property is capable of being declared *en désastre* include those having immovable property in Jersey, even if they are not resident here. The declaration of a *désastre* has the effect of immediately vesting all the debtor's property, both moveable and immovable, in the Viscount; any immovable property vests subject to all hypothecs and debts secured on it. If the debtor immediately prior to the declaration was beneficially entitled to immovable property as a joint tenant (*conjointement par ensemble*), the declaration has the effect of converting the title to the property into a tenancy in common in equal shares (*en indivis en parts égales*), and any hypothecs charged on the property in question, together with the debts they secure, are to be apportioned equally between those

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<sup>40</sup> Jersey Law Commission Topic Report No.2, *Dégrévement* (October 1999), at 2.2-5.

shares. The special provisions of the law with regard to the debtor's matrimonial home have been outlined above (10.13.3, and see further below, 19.10-11).

10.20 Where any immoveable property of the debtor is charged with a judicial or conventional hypothec, that hypothec is automatically extinguished on the sale of the property by the Viscount, unless the hypothec was obtained against, or created or consented by, a predecessor in title of the debtor and not charged on the property in the debtor's contract of acquisition. In those circumstances, the provisions of Article 2 of the 1880 law as to *droit de suite* continue to apply.

10.21 In the distribution of the debtor's assets, hypothecary creditors are entitled to preference in the order of date of creation of their respective judicial or conventional hypothecs on the proceeds of sale of any corporeal or incorporeal hereditament (i.e. any *corps de bien-fonds* or contract lease) on which their respective hypothecs are secured. If the proceeds of sale of any hereditament on which a judicial or conventional hypothec is secured are insufficient to meet the claim of the secured creditor, the balance ranks for payment *pari passu* with all other non-privileged debts proved in the *désastre*.

### **PART III. DISCUSSION AND RECOMMENDATIONS**

#### **11 The future for Jersey: hypothecation or mortgage?**

11.1 Hypothecation, generally speaking, has served Jersey well since the reforms of 1880. It is a clear, simple and practical system which can be easily adapted to meet changing demands, as the new legislation of the 1990s has shown, and its inherent flexibility enables it to operate in any context where security on immoveable property is required. The bank or finance company providing mortgages for house buyers, the litigant with a judgment debt to secure against the defendant's property, the widow requiring security in law for her dower on her husband's immoveable estate, all have the same basic right, the benefits of which are defined by statute and which can be made to bear either specifically on any of the debtor's immoveable property or generally on all of it. Also, there is a clear system of registration which (except in the case of a widow's dower) gives notice to the world in general of the existence of the hypothec, its date, and the amount of the secured debt.



- 11.2 To change from this to a system modelled on the traditional English mortgage would be so illogical as to be hardly worth considering. Whatever virtues the common law mortgage may have had, simplicity and directness were not among them. “No one . . . by the light of nature ever understood an English mortgage of real estate” declared Lord Macnaghten from the bench in 1904,<sup>41</sup> and Maitland described it as “one long *suppressio veri* and *suggestio falsi*”.<sup>42</sup> Following the introduction of the legal charge in 1925 as an alternative to the mortgage by demise, its advantages were soon appreciated and the mortgage by demise has now become obsolete (see above, 2.10). Thus English law has made a complete transition from the common law mortgage to what is, in essence, a hypothec conferring the same rights and powers (above, 3.7). For Jersey now to make the opposite move, in the absence of any cogent reason for doing so, would be perverse.
- 11.3 We are in no doubt that hypothecation should continue to be the method of obtaining security on immovable property in Jersey. However, despite the new provisions introduced in 2000 with regard to *hypothèques judiciaires*, it is clear that more fundamental changes are necessary to bring this area of Jersey law fully into line with present-day requirements. The rights and obligations of both debtor and creditor must be more clearly defined, and a means provided by which creditors can realize their security without recourse to insolvency proceedings. The concept of a widow’s *hypothèque légale* for her dower needs revision in the light of legislative and other changes since 1880. Measures are also needed to amend or clarify various specific provisions of the law and to remove anomalies. For reasons explained in section 20, we consider that these changes should be implemented by the enactment of a new statute rather than by subjecting the 1880 law to further amendment.
- 11.4 Looking further ahead, we see no reason in principle why this new law should not be used in the future to provide for the hypothecation of moveable as well as immovable property. However, this will require detailed consideration which is outside the scope of the present paper (see below at 15.7).
- 11.5 The areas requiring change at the present time are examined in the next eight sections. We shall take first the question of the *hypothèque légale*, which involves discussion at

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<sup>41</sup> *Samuel v. Jarrah &c. Corporation Ltd* [1904] A.C.323 at 326.

<sup>42</sup> Maitland’s *Equity* (2<sup>nd</sup> edn., 1936), p.182.

length of a somewhat recondite area of the law, before moving on to matters more central to our remit.

## 12 The *hypothèque légale*: widows, widowers and the creditors of an estate

- 12.1 At the time when the law of 1880 was enacted, a right of dower existed either actually or potentially in the immovable succession of every man whose wife survived him. Whether or not there were children of the marriage and whether or not the widow later remarried, Jersey law gave her what was, in effect, the right to enjoyment for life of one third of the immovables left by her husband at his death.<sup>43</sup> Alternatively she could opt to take her Norman customary dower, limited to the immovables that he owned at the time of the marriage or inherited in direct line of succession afterwards. This option involved renouncing all claim on his moveable estate apart from items of personal usage, but it freed the widow from liability in respect of the mobiliary debts. It was possible, though rare, for a couple to make an agreement fixing the wife's future dower at less (not more) than her legal entitlement, but a husband could not oust his wife of her dower by will. If the share of his immovable estate that he devised to her was less than her dower entitlement, she could claim the balance of her dower on the rest of the immovables; and if a will that made adequate provision for her was for any reason set aside by the Court, her customary right of dower on the estate was revived. In fact, once a marriage was consummated, the bride's right of dower was virtually secure: she only lost it if she was deemed *indigne* – if, for example, she deserted her husband without what the law of those days considered just cause.
- 12.2 The right of a surviving husband, called *droit de viduité* or *franc veuvage*, was different. It only arose if there had been live-born issue of the marriage. If there had not, the widower had no claim on his wife's immovable estate; but if she had borne

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<sup>43</sup> The exact definition of Jersey customary dower is debatable (see Matthews & Nicolle, *Jersey Law of Property* at 8.89-91), but the finer points do not directly concern us here. As established by the Royal Court in the estate of Bailiff Helier de Carteret in 1563, Jersey dower was stated to embrace all the property owned by the husband at the time of the marriage and all that he acquired afterwards (Le Gros, *Droit Coutumier*, p.43). Poingdestre, a century later, gives more or less the same definition (*Lois et Coutumes*, p.328); but the fact that the 1880 law gave the widow an *hypothèque légale* from the date of her marriage if she opted to take her Norman dower, and from the date of her husband's death otherwise, seems to support the view that custom by then had limited Jersey dower to property owned by the husband when he died.

him any live children<sup>44</sup> – regardless of whether or not they were still alive when she died – her husband had a life-enjoyment of the whole of her immovable estate, which he lost if he remarried. This discrimination has its roots in Norman customary law and may, like the unequal division between the heirs in a *partage*,<sup>45</sup> have had more justification originally than is obvious to modern eyes. At a time when comparatively few people lived beyond working age and many women died in childbirth, *viduité* was probably not thought of as a widower's natural right to the enjoyment of his wife's property but as a custodial right enabling him to protect her children's inheritance by working the farm until they came of age.

- 12.3 These customary rights have been profoundly affected by the legislation of the 1990s. Norman dower, with its potential for collusive use by debtors and their wives to shield property from creditors, was abolished by the Bankruptcy (*Désastre*) Law 1990, so that the *hypothèque légale de douaire* under Article 7 of the 1880 law can now only date from the husband's death (see above, 7.3). The Wills and Successions Law of 1993 goes much further. Under Article 6 of that law, neither dower nor *viduité* can now arise in an intestate succession. Instead, if a person dies intestate as to immovable estate leaving a surviving spouse but no issue, the spouse is entitled to the whole of the immovable estate; if the deceased leaves issue, the surviving spouse and the children (or their issue *per stirpes*) share the estate equally, and the spouse also has the life-enjoyment of the matrimonial home under Article 5.
- 12.4 Since dower and *viduité* are not otherwise redefined by the 1993 law, we are left to infer that they still exist in their customary form but only arise in testate successions where the will does not make equivalent provision for the surviving spouse. It is regrettable that the law does not spell this out, but, if it is correct, a widow can presumably claim her Jersey customary dower on any part of her husband's estate of which his will does not leave her at least the life-enjoyment; and *viduité* can be claimed by a widower if his wife, having borne live children of their marriage (whether or not they or their issue are still living), devises to him anything less than the life-enjoyment of her entire immovable estate until he remarries.

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<sup>44</sup> According to some authorities it was enough for her to have carried a living foetus in her womb even if the child was born dead (Le Gros, pp.52-3).

<sup>45</sup> Which was designed to keep at least the nucleus of the family farm intact. For centuries it was thought that allowing estates to be divided between heirs at all, rather than giving everything to the eldest son, was to blame for impoverishing the island by splitting farms into units too small to be economically viable.

12.5 Plainly, the purpose of Article 7 of the 1880 law in securing a wife's dower with a hypothec complete with *droit de suite* was to protect her rights if any of the immoveables subject to her dower were sold off. Three ways are apparent in which this protection worked in practice, or might have done; the first of them is partly spelt out in the law itself.

- (a) Once the marriage was consummated, the hypothec effectively secured the wife's contingent dower rights on all the immoveables owned by her husband at the time of the marriage or inherited in direct line of succession afterwards, even if he sold them before he died. Assuming the usual modern definition of Jersey customary dower to be correct (see above, footnote to 12.1), those he sold would only be subject to Norman and not to Jersey dower; but it could not be certain until after his death which dower his widow would choose, and, if she chose the Norman, her *hypothèque légale* would date back to the marriage. So all of the husband's immoveable property on which Norman dower could arise had, in effect, been hypothecated for that dower throughout the marriage.
- (b) Though a widow's right of dower was firmly enshrined in law, she had to take active steps to claim it after her husband died. Sometimes a dower settlement was made by private agreement, but the customary legal procedure was for her to action the principal heir before the Royal Court to deliver her dower, whereupon the Court sent the parties to arbitration before the Greffier. The heir produced a statement of the property on which the dower was due; the widow, or her lawyer, took this away to examine and divided the property into three portions; the heir was then granted a delay to examine the apportionment and, if he approved it, he chose two of the portions and left the third to the widow for her dower. All this was attended by various legal formalities and the whole process might take some time, during which the widow's *hypothèque légale* protected her rights against the possibility of any of the property being sold off by the heir.
- (c) Not every widow took her dower in possession. The 1880 law obliged her in certain circumstances to accept instead an equivalent annuity in money, known as a *franc douaire*; Article 9 also envisages this being done voluntarily,

and it had become the most usual way for a widow to take her dower by the time Le Gros wrote in 1943.<sup>46</sup> A *franc douaire* required the continuing protection of a hypothec on the whole of the estate, comparable to the *hypothèque foncière* by which a *rente viagère* was secured (see above, 7.17).

- 12.6 None of these considerations applied to a widower. By customary law his wife had ceased to be *sui juris* on her marriage, so he was already in possession of her property during her lifetime and merely continued in possession of it after her death. Even if the couple had obtained *séparation quant aux biens* under the law of 1878 – which, by virtue of the *Loi étendant les droits de la femme mariée*, became the position of all couples married after 1925 – the husband did not have to make a claim for his *droit de viduité* when his wife died: he was entitled *à titre de franc veuvage* to possession of her estate from the moment of her death without any formality. Clearly there was nothing here that a hypothec could protect, since the essence of a hypothec is that its holder does not have possession of the thing hypothecated.
- 12.7 Since 1993 the position has been different in that both dower and *viduité* now only arise in a situation that requires them to be claimed adversarially from the devisees to a will. In these circumstances a widow needs her *hypothèque légale* on the estate as much as she ever did, to prevent the devisee from selling the property and taking the proceeds out of the jurisdiction before her claim is met; but a widower, too, is now exposed to the same risk and should logically be given the same protection.
- 12.8 Even in the limited circumstances in which dower and *viduité* now apply, we feel that the survival of different customary rights for a widow and a widower in the twenty-first century is anomalous and unjust. Also, the whole question of these rights has to be viewed in the context of the Commission's proposals for the abolition of *légitime* in moveable successions to give people the same powers of testamentary disposal over moveable and immoveable property.
- 12.9 In a letter to the Legislation Committee dated 5<sup>th</sup> March 2001, in response to a consultation document on succession rights presented by the Committee to the States on 2<sup>nd</sup> January 2001, the Law Commission expressed its view that the *légitime* rules remaining in existence with regard to moveable estate should be abolished and that

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<sup>46</sup> Le Gros, *Droit Coutumier*, p.44.

there should be introduced instead the ‘judicial discretion’ method of testamentary restriction as provided in England and Wales by the Inheritance (Provision for Family and Dependents) Act 1975, as amended by section 2 of the Law Reform (Succession) Act 1995. The Commission further opined that the new law should apply equally to moveable and immoveable property and that its definition of a cohabitant should be framed to include partners of the same sex.<sup>47</sup>

- 12.10 Should these suggestions be adopted, it could be argued that any person asking the Court for provision out of a testate immoveable succession under the new law would have the same need of a legal hypothec on the estate *pendente lite* as a widow has at present for her dower and, logically, a widower since 1993 ought to have for his *droit de viduité* (above, 12.7). Clearly this would require the abolition of the customary rights of dower and *viduité* and the substitution of a statutory legal hypothec for any person bringing a claim under the new law irrespective of their relationship to, or with, the deceased.
- 12.11 Alternatively, if the abolition of *légitime* is rejected or deferred, dower and *viduité* should be redefined as identical rights claimable by a surviving spouse in a testate immoveable succession and secured by a legal hypothec on all the immoveables of the succession from the date of the testator’s death. The right would consist of the life-enjoyment of either the whole or a defined share of the immoveables by value; it would not be contingent on there being children of the marriage and would not cease on remarriage. The law should spell out the procedure for claiming the right against the devisees, with a time limit for claiming the right following the registration of the will.
- 12.12 It has been suggested that the legal hypothec of a surviving spouse should be further extended to cover the rights of usufructuary devisees under a will. We can see no justification for this. Roman law gave all testamentary devisees a hypothec on the estate of the deceased in the hands of the heir at law (see above, 3.5), and French law still does;<sup>48</sup> but this has never been mooted in Jersey and there is no reason for an

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<sup>47</sup> In England, section 2(3) of the Law Reform (Succession) Act 1995 defines a cohabitant as a person living “as the husband or wife of the deceased”. Until recently English case law excluded a homosexual couple from this definition (*Fitzpatrick v. Sterling Hunting Association* [1999] 3 WER 1113), but this has now been negated by the Civil Partnership Act 2004.

<sup>48</sup> *Code Civil Français*, arts. 1017, 2400.

*usufruitier* to be treated differently in this regard from any other devisee. Once the will is registered the *usufruitier* enters into possession, which is a right that a hypothec cannot usefully protect (above, 12.6).

- 12.13 Finally there is the legal hypothec obtainable by the unsecured creditors of a person who has died. Article 11 of the 1880 law operates this hypothec against the *biens-fonds* of the estate in favour of (a) any such creditor who sues the estate within a year of the death (or within eighteen months of the granting of *bénéfice d'inventaire*) and registers his judgment in the Public Registry; or (b) all the unsecured creditors if a *dégrévement* of the estate is ordered within the same time limits (above, 7.2). The first of these cases appears to us reasonable, but expressing it by reference to the 1862 *Loi sur les successions ouvertes* is no longer satisfactory: it needs to be spelt out clearly in the law itself. As to the hypothec given to all unsecured creditors by the ordering of a *dégrévement* on the estate, this will become obsolete once *dégrévement* is abolished, unless the Commission's earlier proposal to allow an estate to be declared *en désastre* if it includes immovable property renounced by all heirs or devisees (above, 10.15-16) is maintained: in that case this version of the legal hypothec under Article 11 should remain in place with *désastre* substituted for *dégrévement*.

### **13 Hypothecary rights: the *droit de suite***

- 13.1 We move on now to consider the broader practical issues of hypothecation, beginning with the *droit de suite*. Some of the recommendations in this part of the paper reiterate, and others modify, those made in the Commission's 2003 report on the Jersey law of real property.
- 13.2 Under Article 2 of the 1880 law, a creditor secured by hypothec has the right to follow the whole or any part of the *fonds* of his hypothec into the hands of a third party and compel that party either to pay off the debt or to relinquish the property. However, this right is only exercisable in the event of insufficiency of the assets of the principal debtor. Article 26 of the law states unequivocally that, unless the third party has been expressly charged with payment of the secured debt by his contract of

acquisition, the creditor cannot proceed against him until the assets of the principal debtor have been exhausted.<sup>49</sup>

- 13.3 It follows that a hypothec, as at present defined, does not give the creditor an immediate interest in the property on which it is charged. There are some circumstances in which this could leave creditors dangerously exposed. In theory, the owner of a property on which a loan is charged could sell it without the knowledge or consent of the mortgagee and without repaying the loan. If he managed in time-honoured fashion to flee to South America with the proceeds of sale before the trick was discovered, the mortgagee would be powerless to recover his money: Article 26 would bar him from exercising his *droit de suite* against the purchaser of the property as long as there were funds in the hands of the original debtor, even though the funds were inaccessible.
- 13.4 In practice, the legal profession guards against this eventuality by requiring an undertaking from the law firm acting for a vendor that they will pay off any existing charges from the proceeds of sale. This is admirable, but we think that safeguards should be written into the law itself. Accordingly we make the following recommendations.
- (a) The definition of a hypothec should be extended to give the creditor priority over the proceeds of sale of all or any part of the property on which the hypothec is charged. Though obviously this would not give him access to funds beyond reach as in the case outlined above, it would prevent the situation from arising in the first place by placing lawyers under a legal duty to take the precautions that they now take as a matter of practice. The proper procedure for paying over the funds and discharging the hypothec would need to be discussed and agreed with practitioners and spelt out either in the law or in regulations made under it.
  - (b) As a further safeguard, the Court should have a discretionary power to authorize a creditor to proceed against his security in the hands of a third party notwithstanding that the debtor's assets have not been fully exhausted, on the

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<sup>49</sup> In French law this only applies if the hypothec is a general one: if it is charged specifically on the property in question, the creditor can follow the property into the hands of the *tiers détenteur* immediately (C.C.F., arts. 2465-6). We see no obvious advantage in introducing a similar provision here.



grounds that the remaining assets are inaccessible or that the creditor has pursued every remedy against the debtor that he can reasonably be expected to take without undue trouble or expense. This power would be exercised by an order of the Court for which the creditor would have to apply. It would need to be balanced carefully against the rights of *bona fide* purchasers for value, who might well feel hard done by if they were deprived of their property without recompense while the principal debtor sat on his untouchable spoils in some sunny overseas jurisdiction; the purchaser should at least have the right to be heard before the order is made.

- 13.5 Next we come to the prescription of the *droit de suite* by lapse of time. Article 29 of the law provides that a judicial hypothec, and the legal hypothec of the creditors of an estate, lose their *droit de suite* by prescription after ten years. A widow's *hypothèque légale de douaire* cannot be prescribed, the *droit de suite* ceasing only on her death. Prescription in respect of simple conventional hypothecs, originally thirty years, was abolished in 1922 (see above, 7.18).
- 13.6 With regard to the legal hypothec under Article 11 we see no reason to change the ten-year prescription period, but for judicial hypothecs it is clearly too short. If a loan secured on a property remains outstanding after ten years, it has to be re-registered to conserve the *droit de suite*; this may cause problems if in the meantime a second charge has been registered against the property and its holder refuses to reinstate the original order of priority (see below, section 17). We recommend that the prescription period in respect of judicial hypothecs be increased from ten to 25 years.
- 13.7 Paragraphs 13.5 and 13.6 refer, of course, to prescription in respect of the *droit de suite* inherent in the hypothec itself, its term running from the date of creation of the hypothec. It has been suggested that the exercise of the right following the transfer of the property by the debtor should also be subject to a short prescription period of perhaps two or three years, to protect *bona fide* purchasers. Since good conveyancing practice makes the *droit de suite* almost entirely a preventive right (see above, 13.4), the concern here is presumably to cover cases where a charge was overlooked at the time of the sale and the creditor, improbably, failed to notice. Neither the *Code Civil Français*, whose provisions as to *droit de suite* are much fuller and more detailed than

ours,<sup>50</sup> nor the code of Quebec, which does not treat it as a separate right from the creditor's power of sale,<sup>51</sup> appears to limit its exercise by prescription in this way. Nevertheless, we see the point and make the recommendation.

#### **14 Definition of *biens-fonds*; undivided shares, third party liabilities, etc.**

- 14.1 The 1880 law does not define *biens-fonds* but relies on the simple customary definition (“*le sol et ce qui y est adhérent*”) given by Marett in his *Lettre Explicative* of 1878. In the new statute that we are proposing (see section 20 below) this definition needs to be codified, with reference to the exceptions created by the laws of 1991 and 1996 as to flying freeholds and leaseholds for terms above nine years. It should perhaps be made clear that a hypothec created or constituted on land will extend to any building subsequently erected on that land.<sup>52</sup>
- 14.2 There are also questions to be addressed as to the charging of undivided shares in a *bien-fonds* or the contingent rights of a joint tenant, i.e. a person holding with another jointly and for the survivor.
- 14.3 In the case of joint tenancy, the rights of the individual co-owners are not separately hypothecable under the present law. A ruling by the Royal Court in 1971, on the representation of the Judicial Greffier in a *dégrévement* of the jointly owned property of a married couple,<sup>53</sup> removed whatever doubt on this point may have existed before. Two provisions of the 1880 law provided grounds for the judgment. By Article 18, an *hypothèque conventionnelle* can only be created by a person capable of alienating the *fonds* on which it is secured, which a joint tenant cannot unilaterally do; and, more broadly, a joint tenant's interest in the property is contingent on survivorship and is thus a ‘*bien futur ou à venir*’, the hypothecation of which is prohibited in all circumstances by Article 3.

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<sup>50</sup> C.C.F., arts. 2461-2474.

<sup>51</sup> *Code Civil du Québec*, arts. 2660, 2751.

<sup>52</sup> In France a person may have a ‘*droit actuel*’ to erect a building on another person's land and may hypothecate it independently of that land (C.C.F., art. 2420), but this concept is not known in Jersey, where the only buildings that can be owned separately from their site are temporary structures not classed as immovable property. On the other hand, the French code goes to the length of providing that an *hypothèque conventionnelle* extends to all improvements made to the property while the hypothec is charged on it (art. 2397).

<sup>53</sup> *Re dégrévement Bonn* (1971) 1 J.J.1771 at 1783-6.

- 14.4 The position as to undivided shares of property held in common is less clear. Such shares are freely alienable; they are not *biens futurs*; and, because Jersey customary law gives any co-owner of property the right to bring the *indivision* to an end by forcing a sale, a creditor taking over an undivided share in a *dégrévement* can realize his security without difficulty. There are some cases in which common sense argues that undivided shares must be hypothecable – for example, where ownership of a house carries with it a share of an estate road or of a communal yard or garden not necessarily contiguous with the house. At least two *dégrévements* were conducted in the twentieth century on undivided shares of property,<sup>54</sup> with the usual wording of the record of proceedings carefully adapted to avoid calling the share a *corps de bien-fonds*. Nevertheless, Matthews and Nicolle are unconvinced: “it is very doubtful that an owner in common can hypothecate his *part indivise*, although there is no authority on the point”.<sup>55</sup>
- 14.5 We can see no reason why it should not be possible to hypothecate undivided shares in the types of immovable property that are themselves hypothecable. A share of a *bien-fonds* should be no different in this respect from the *bien-fonds* itself: specifically chargeable by consent of the debtor and creditor, and covered by the general charge of a legal hypothec or of a judicial hypothec that is not specific. We recommend that the law be clarified to this effect.
- 14.6 Hypothecation of the individual contingent interests of joint owners would be less straightforward but not impossible. At the time of the judgment in *Bonn*, the legal barrier that used to exist between joint tenancy and tenancy in common had already been dented by the ruling in *Le Sueur v. Le Sueur* (1968) that either form of co-ownership is an *indivision* liable to be ended by a forced sale.<sup>56</sup> The barrier has since been decisively breached by Article 11(4) of the Bankruptcy (*Désastre*) Law 1990, which provides that the declaration of a *désastre* converts the tenure of any immovable property of which the debtor is a joint owner into a tenancy in common in equal shares. By extension of this principle, a joint owner’s contingent interest could be made hypothecable by providing that any steps taken by the creditor to enforce his rights against the security would convert the tenure in the same way,

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<sup>54</sup> The most recent instance was the *dégrévement* of K.W.England (1970).

<sup>55</sup> Matthews & Nicolle, *The Jersey Law of Property*, 1.19.

<sup>56</sup> *Le Sueur v. Le Sueur* (1968) 1 J.J. 889 at 890.

giving the creditor an alienable undivided share to dispose of. If the debtor died and was survived by his co-owner, there would have to be a limited period during which the creditor could still bring this about with retrospective effect from immediately before the debtor's death; alternatively the surviving co-owner could elect to accept liability for the debt as a charge on the whole property.

- 14.7 Whether such a measure is called for is another matter. If there is a need for contingent interests in a joint tenancy to be unilaterally chargeable in this way, it probably has more to do with the registration of judgment debts than with mortgaging; even there, we doubt whether the need is sufficient to justify the interference with the survivorship principle that the measures outlined in the last paragraph would involve. They are put forward for consideration as a way in which the object could be achieved if necessary, but we stop short of recommending their implementation.
- 14.8 As to the consensual charging of a jointly owned property by its co-owners to secure a debt incurred by one of them, this is achieved in the U.K. by means of a legal mortgage for a third party liability, whereby the owner of a property can charge it to secure the debt of another person without being party to the debt itself. Thus, for example, if a husband and wife own their house jointly but the husband has a business in his sole name, the bank from which he obtains an overdraft facility for the business can secure it by taking a charge over the jointly owned home. Similarly parents, by consenting to a charge over their property, can provide security for a loan to one of their children without being party to an account or giving a guarantee.
- 14.9 Any move to introduce a similar provision in Jersey would bring us up against the cardinal principle that a hypothec is inseparable from the obligation that it secures. Charges for third party liability are not easy to reconcile with that principle.<sup>57</sup> An attempt to do so might be justified if there was clear evidence of a demand for such charges as an alternative to the established procedures for registering guarantees and for making co-owners jointly and severally liable for a debt; but we have seen no real evidence that such a demand exists.

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<sup>57</sup> The law of Quebec states that a conventional hypothec may be granted either by the debtor of the obligation secured or by a third person (*C.C.Q.*, art.2681), but it is not clear to us whether this refers to third party obligations as distinct from guarantees.

14.10 Nor do we endorse the suggestion that it should be possible to register a hypothec for a percentage of the value of a property as an alternative to a specific capital sum. The argument for this is that some shared equity schemes operate on this basis in the U.K. and that it should be available in Jersey to facilitate the introduction of such schemes here. The developer sells a property to a purchaser, who obtains say a 75% mortgage secured as a first charge on the whole property; the developer then takes a second charge for 25% of the purchase price or 25% of the value of the property, whichever is the higher from time to time. It is argued that the mortgage provider gets better security from this arrangement than from a hypothec on the purchaser's three-fourths undivided share in the property. Whether this is true or not, we do not think it justifies creating an exception to the principle that hypothecs in respect of a capital obligation must be created for a fixed sum.

## **15 Judicial and conventional hypothecs**

15.1 In the twentieth century, both the *hypothèque judiciaire* and the *hypothèque conventionnelle simple* were widely used for securing home loans. Though the former, with its ten-year prescription period, was better suited to mortgages for short than for long terms, lenders did not choose between the two methods of hypothecation case by case according to the anticipated length of the term: they favoured one or the other consistently. The States adopted the simple conventional hypothec for their long-term loans under the *Loi pour faciliter la construction de maisons ouvrières* of 1934 and its successor, the Building Loans (Jersey) Law 1950. The U.K. clearing banks traditionally preferred to obtain a judicial hypothec by registering a note of hand, re-registering it if necessary after ten years to preserve their *droit de suite*. Other corporate mortgage providers and private lenders favoured the two forms of hypothec about equally. In the late 1950s there was a rush by wealthy U.K. residents to place money on mortgage in Jersey following the discovery of a tax loophole exempting foreign real property (such as a Jersey *hypothèque conventionnelle simple*) from estate duty. Even after this loophole was closed by an unkind Chancellor of the Exchequer, some local private lenders continued for a time to prefer the conventional hypothec; this may have been partly because, being immoveable property, it could be freely disposed by will without having to take account of *légitime* shares of moveable estate (see below, 16.1).

- 15.2 Until recently, the judicial hypothec had the advantage of being cheaper. Though the stamp duty payable on the two types of hypothec was the same, the lawyers' fees were charged on a different basis. For a simple conventional hypothec, a scale fee was payable by both the borrower and the lender on the capital amount of the borrowing; for a judicial hypothec there was no scale fee and therefore the cost used to be much lower. In later years this advantage became less clear-cut as different law firms adopted different charging policies, and the recent abolition of scale fees for conveyancing has now left the field entirely open. Some firms continue, as in the past, to charge a modest fee for registering a judicial hypothec, but others charge a fee approaching or (so one hears) even exceeding the scale fee that would have been payable on a simple conventional hypothec.
- 15.3 The simple conventional hypothec continued to be used until the end of the century, one of the clearing banks even converting to it for a while from the judicial hypothec, but its popularity was waning. Private lenders by this time had abandoned it completely, except for the occasional *hypothèque consentie* in respect of part of the consideration for a sale (see above, 7.16). The States, whose home loans were (and still are) required by Article 5 of the Building Loans (Jersey) Law 1950 to be secured by simple conventional hypothec, were rapidly being ousted by changing market conditions from their role as a mortgage provider; for their loans to farmers under the Agriculture (Loans and Guarantees) (Jersey) Law 1974, they had switched to the judicial hypothec. Though *hypothèques consenties* are still seen from time to time (at least three were created in 2005), the simple conventional hypothec created by a separate contract has almost entirely disappeared within the last few years, leaving the judicial hypothec in sole possession of the field.
- 15.4 In 2003, in its report on the Jersey law of real property, the Law Commission recommended that the creation of *rentes* and simple conventional hypothecs should be prohibited after a specified date and that all subsequent charges on immovable property, including annuities and deferred payment of part considerations, should be created by judicial hypothec only.<sup>58</sup> This attracted criticism in some of the submissions received in response to the Consultation Paper, the main objections being as follows.

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<sup>58</sup> Jersey Law Commission Topic Report No.6, *The Jersey Law of Real Property* (July 2003), p.7.

- (a) The fact that the *hypothèque conventionnelle* is immoveable property may be an advantage for some personal lenders as it gives them full testamentary power over the hypothec without having to take account of *légitime* shares in the estate (above, 15.1, and below, 16.1).
- (b) For securing part considerations, an *hypothèque consentie* within the contract of sale is more convenient and more natural than the separate registration of a bond. In particular, as the Law Society's conveyancing sub-committee pointed out in its submission, consenting a simple conventional hypothec within the contract allows the terms of the lending to be set out in full; this may be important if they are tied up with another part of the transaction,<sup>59</sup> or if there are special terms that charge the property and are enforceable against third parties.
- (c) A judicial hypothec can at present only be created in respect of a fixed capital sum, and would have to be fundamentally redefined to enable it to secure an annuity. The objections under sub-paragraph 2 also apply to annuities as these, too, are often linked to an associated transaction such as the reserving of a life-enjoyment.

15.5 The Commission's view was that these arguments were outweighed by the advantages of having a single standard procedure. Any benefits, testamentary or otherwise, that mortgage lenders may once have got from choosing the simple conventional hypothec must now be regarded as notional, since lenders have in fact ceased to choose it; in any case, the Commission is in favour of abolishing *légitime* altogether and allowing both moveable and immoveable property to be disposed of in the same way (see above, 12.8-9). As to part considerations and annuities, it was felt that there was no reason why any relevant terms of the contract should not refer as necessary to a bond acknowledged and registered on the same day.

15.6 Following the review of practice in Jersey and elsewhere that has been conducted for the present paper, we are minded to reconsider this decision. We accept that there is some merit in the arguments for the use of the *hypothèque consentie* for part

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<sup>59</sup> For example the reserving of a life-enjoyment: there was a textbook instance of this in a contract passed in the summer of 2005.

considerations and annuities, and we also note that the civil codes of France and Quebec retain the conventional hypothec alongside that obtained by registration of a court judgment. The latest revision of the French code devotes eleven articles to the *hypothèque conventionnelle* and only one to the *hypothèque judiciaire*: it is clear that the former is intended to be used for mortgaging and the latter, at least mainly, for securing judgment debts.<sup>60</sup> This also seems to be the case in Quebec, where there is no separate category of *hypothèques judiciaires*, judgment debts being one of four types of claim that may give rise to a legal hypothec.<sup>61</sup> As in France, the law seems to envisage the voluntary charging of property being done by conventional hypothec.<sup>62</sup>

- 15.7 The position in Quebec may have particular relevance to Jersey should we decide in the future to follow that jurisdiction in bringing immovable and moveable property within a single system of hypothecation. On a preliminary look at the Quebec code, we believe that there is no reason in principle why our proposed new law (see below, 20.3) cannot be used to provide for the hypothecation of all property, moveable and immovable, present and future; but we have deferred a detailed study until we consider hypothecation of moveable property in detail. We appreciate that intangible moveable property may present particular difficulties but – again in principle – we cannot see why a general law of hypothecation cannot subsist side by side with a particular law dealing with the hypothecation of intangible moveables.
- 15.8 In view of all this, we accept that our 2003 proposal to abolish conventional hypothecs was unduly precipitate. We therefore withdraw it and substitute a recommendation that the judicial and conventional modes of hypothecation should both continue to be available as at present, subject to the following provisos:
- (a) The tariff of legal fees should set a moderate standard fee that will apply equally to judicial and conventional hypothecs, so that there will be no difference of cost between the two.
  - (b) Except in the case of an *hypothèque consentie* for a part consideration in a contract of sale, we think the deed of creation of a simple conventional

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<sup>60</sup> C.C.F., arts. 2412-2424.

<sup>61</sup> C.C.Q., art.2724. The others are: claims of the state under fiscal or other laws; claims of persons who have taken part in the construction or renovation of a building; and the claim of a syndicate of co-owners for payment of common expenses and contributions to the emergency fund.



hypothec should be signed by the parties and brought to the Public Registry for registration instead of being passed before the Royal Court as at present.

- (c) The requirements of Article 21 of the 1880 law as to the description of the *fonds* of a simple conventional hypothec are over-prescriptive and should be simplified.
- (d) Following repayment of the debt secured by a simple conventional hypothec, the debtor should have the same right to compel the creditor to discharge the hypothec in the Public Registry as Article 16 of the 1880 law gives him in the case of a judicial hypothec. If the creditor fails to comply with an order of the Royal Court to sign and register a deed of extinction, the Viscount should be appointed to do so on his behalf and at his expense. If the hypothec has long since been repaid and the creditor is dead or infirm or cannot be traced, the owner of the property should have the right to make a representation *ex parte* supported by proof that the debt has been repaid, whereupon the Court will make an act declaring the hypothec extinguished and will order registration of this act in the Public Registry.

## **16 Status of the judicial hypothec as moveable property**

16.1 Sums of money secured by judicial hypothec are moveable property of the creditor; those secured by simple conventional hypothec are immoveables by virtue of Article 27 of the 1880 law. Thus private lenders have full power of testamentary disposition over a simple conventional hypothec, whereas a bequest of a judicial hypothec has to take account of the *légitime* shares in the creditor's moveable estate. Historically this may have been one of the reasons why private lenders tended to prefer the conventional hypothec (see above, 15.1). If so, it no longer deters such lenders from using the judicial hypothec (above, 15.5), but the latter's status as moveable property has two other consequences which need to be considered.

16.2 The first of these is the situation that can arise if the debtor dies before the debt is repaid. In 1908 the Royal Court held that, because a debt secured by judicial hypothec is a *dette mobilière*, a claim for repayment of the capital is a charge in the first

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<sup>62</sup> C.C.Q., arts.2681 *et seq.*

instance on the moveable and not the immoveable estate; in the case then at issue, this meant that the plaintiffs had no right of recourse against the debtor's Jersey immoveables until they had exhausted his personal estate in England (above, 7.15). With the judicial hypothec now in universal use for home loans, this cannot be considered a satisfactory position.

- 16.3 One way of remedying it would be to make the judicial hypothec immoveable property of the creditor, as the conventional hypothec is. The legal hypothec of the creditors of an estate would have to be changed in the same way to avoid creating an unwanted difference of status between it and the judicial hypothec. Conceptually, the change would pose no problem. In Quebec, hypothecs are moveable or immoveable depending not on how they are created but on whether the property on which they are charged is moveable or immoveable;<sup>63</sup> by that token, all hypothecs in Jersey would be immoveable. However, since a hypothec is inseparable from the debt it secures, making judicial hypothecs immoveable property would mean that the act of registering a judgment as a charge on the defendant's immoveables would convert the underlying debt from moveable to immoveable property in the creditor's hands. This might not matter to corporate creditors but there may be circumstances in which it would be inconvenient for private individuals.
- 16.4 We think it better not to tinker with the status of the secured debt itself but simply to recommend abolishing the rule laid down by the Court in 1908 and establishing a clear position that would apply equally to conventional and judicial hypothecs. In either case, a claim for repayment of the secured debt after the death of the debtor would follow the property on which the debt was secured: it would be pursued in the first instance against the person or persons who had become entitled to the property, and only secondarily against the debtor's moveable estate. Whether the debt secured by a judicial hypothec was a *dette mobilière* would become academic, and any doubt now existing as to the position in respect of conventional hypothecs would be removed.
- 16.5 The other difference between the two kinds of hypothec that results from their being respectively moveable and immoveable property concerns their transfer by the creditor to a third party. While the transfer of a conventional hypothec *inter vivos* has

to be effected by contract passed before Court and registered in the Public Registry, the assignment of a judicial hypothec is a private transaction of which, at present, there is no official record. In its 2003 report on the law of real property, the Commission recommended that the benefit of a judicial hypothec should be assignable by a form of transfer executed before a prescribed witness and registered at the Public Registry.<sup>64</sup> We maintain this recommendation, with the rider that consultation should take place both with practitioners and with the Registrar of Deeds before the details of the procedure are finalized. It might for instance be useful for the assignments to be indexed under the debtors' names, as the hypothecs themselves are, as well as under the names of the transferors and transferees.

- 16.6 We further reiterate the recommendation in our 2003 report that the stamp duty payable on the transfer of a judicial hypothec should be nominal and not a percentage of the debt assigned. Most assignments of judicial hypothecs today take place when one bank buys the mortgage book of another, and an *ad valorem* stamp duty in such cases could be prohibitive. The States will, of course, have received full stamp duty on each of the assigned charges at the time of its original registration.

## **17 Priority of charges**

- 17.1 Charges rank in priority strictly according to their date of registration. The law makes no provision for creditors to contract out of this and agree to reverse the order of their charges. In practice it is often done, either by contract passed before Court or, more usually, by making the holder of an existing charge party to a subsequent registration to agree that his charge will be subordinated to the new one. However, it is not certain what the effect of the agreement would be in a *dégrévement* (see above, 10.8) or, for that matter, in a *désastre*.
- 17.2 Also seen from time to time are similar agreements to protect lessees of a property that has a charge on it. The creditor, usually a bank, is made party to the lease to declare that in the event of a *dégrévement* of the owner of the building, the bank will be called before the lessee and will take the property subject to the lease. If the Greffier will not allow this and the lessee has to renounce the lease before the bank

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<sup>63</sup> C.C.Q., art.2665.

<sup>64</sup> Jersey Law Commission Topic Report No.6, *The Jersey Law of Real Property* (July 2003), p.7.

can take the property, the bank will honour the agreement and grant the lessee a new lease on the same terms.

- 17.3 We think the law should provide that all existing and future agreements of this kind will be accepted as valid in subsequent bankruptcy or other proceedings, provided the agreement has been effected either by contract between the debtor and all creditors or other parties affected by the change of priority, or by making the holder of an existing charge party to a subsequent registration to agree that the new charge shall rank first.
- 17.4 Under the present system, the registration of all mortgage loans (except the deferred registration of those previously acknowledged *seulement*) takes place on the Friday of each week, with no one but the parties themselves having any prior notice of them. In theory at least, there is a risk of fraud here. A devious house owner or buyer could seek to borrow funds from two different sources, say a bank and a finance company, giving each to understand that it would have a sole charge on the property. He would have to take care not to choose two lenders for whom the same law firm acted; but, if his ruse was successful, the first that either mortgagee would know of the other's charge was after both had been registered with equal priority on the same day, probably charging the property far beyond its value.
- 17.5 To obviate this risk, it has been suggested that there should be some form of advance notice procedure whereby a lender planning to register a charge could file with the Public Registry a notice of his intention to do so. This would not only alert other potential lenders but would ensure priority for the notified charge, provided the *billet* was registered within a statutory period of time after the notice was filed. This period would have to be short, probably not more than ten days (which in practice would extend, at most, to the Friday of the week following that in which the notice was filed); if it was any longer, other creditors wishing to secure on the property would have to be given the right to apply to the Court to have the notice raised.
- 17.6 Such a procedure would give considerable extra work both to conveyancers and to the staff of the Public Registry, and we do not believe that the risk of 'double charging' is sufficient to justify it. No actual case is known to have occurred, and the risk is largely obviated by the practice whereby the lawyer acting for the borrower provides the lending bank or finance company with a certificate of title. The contingency is

slightly less remote if finance companies bypass the borrower's lawyer by taking a signed *billet* from the borrower himself and getting their own lawyer to register it; but not many companies do this, and we think the problem would be better addressed by moves within the legal profession to end this practice than by creating yet another register for the Judicial Greffe to maintain and for conveyancers to check.

- 17.7 Sometimes, when a creditor sues for repayment of a mortgage or other secured debt, the judgment condemning the debtor to repay is itself registered in the Public Registry at the creditor's instance. Presumably the reason for doing this is to secure the accrued interest, but it seems likely (the point does not appear to have been judicially tested) that registering the judgment has the effect of destroying the hypothec obtained by the original registration. Article 13 of the 1880 law, as originally enacted, provided that if two or more acts or judgments "*rendus dans la même procédure*" were registered, the hypothec took the date of the latest registration. Though this provision was omitted from the article as amended in 2000, it survives by implication in Article 16 which still requires a registration to be cancelled when superseded in this way. It might be debated academically whether the action to acknowledge the debt and the subsequent action for its repayment are part of the same *procédure*, but it seems unnatural that a creditor should have two hypothecs against his debtor in respect of the same debt. With the securing of arrears of interest covered specifically in the new law (below, 19.9), there will be no reason for the creditor to register his judgment for repayment and we think the law should make clear that to do so will destroy the hypothec obtained by the original registration.
- 17.8 Lastly, there is the question of priority that might arise if a court judgment fixing a quantum of damages was registered as a judicial hypothec and the quantum was subsequently varied on appeal. At present, there is no obvious statutory basis on which the secured amount could be amended without losing the date of the hypothec. Judgments of the Court of Appeal are generally considered to be registrable by virtue of Article 12(3) of the Court of Appeal (Jersey) Law 1961, which gives the Court of Appeal the same power and jurisdiction as the Royal Court "for all purposes of and incidental to the hearing and determination of any appeal, and the amendment,

execution and enforcement of any judgment or order made thereon”.<sup>65</sup> But the effect of registering an appellate judgment of the Superior Number of the Royal Court before 1961 would presumably have been to create a new hypothec with a new date by virtue of Article 13 of the 1880 law. Arguably, therefore, a secured judgment creditor whose award has been varied on appeal could find his charge relegated in priority below another charge registered in the meantime.

- 17.9 This position is obviously unacceptable and, to remove all doubt, the law should provide that appellate judgments are registrable as judicial hypothecs whether or not the judgment of the court of first instance has been registered, and that, if it has, the registration of the appellate judgment will have the effect of substituting the new amount without affecting the date of the charge.

## **18 Protection against loss or depreciation of security**

- 18.1 There are two existing statutory provisions in this area. Under Article 25 of the 1880 law, if a conventional hypothec becomes wholly or partly *sans fonds*, the creditor has the right to demand immediate repayment of the secured debt (see above, 9.3). An exception to this in respect of flying freeholds is created by Article 12 of the *Loi (1991) sur la copropriété des immeubles bâtis*. If the co-owned building (or any part of it) is destroyed, the Royal Court has the power to make such order as it thinks fit to safeguard the hypothecary rights of any creditor who was secured on a destroyed flying freehold within the building, including, if the building is reconstructed or replaced, the power to transfer the hypothec to one or more shares in the new building.

- 18.2 The provision in the 1991 law does not require comment, but Article 25 of the 1880 law needs updating. It could be argued that the law no longer needs to provide for loss of security at all, as this matter is now usually covered by a contractual default provision in the loan documentation. However, we see no harm in having a statutory provision that will apply in any case where there is no contractual agreement. We

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<sup>65</sup> Even this is not entirely satisfactory. Strictly speaking, the registration of acts or judgments of the Royal Court to obtain a judicial hypothec under Article 13 of the 1880 law is not a power or jurisdiction of the Court but a right of the plaintiff once he has obtained judgment. In practice the Court has long since ordered registration of its own acts on the application of the plaintiff *séance tenante* (see above, 7.10), and so the Court of Appeal can presumably do the same by virtue of the 1961 law; but it remains

think this provision should be that if a property charged with a hypothec (whether judicial or conventional) is destroyed or has so depreciated in value as no longer to provide adequate security, or if the debtor loses his title to it as discussed above in section 9, the debtor should have the right to provide alternative security without prejudicing the creditor's right to sue for repayment if necessary.<sup>66</sup>

- 18.3 Beyond this, we are not in favour of additional statutory provisions to protect creditors' security. Measures such as a right to insure the property against fire at the debtor's expense, as in England, would be unenforceable in the case of registered judgment debts and, in the case of mortgages, we think they are better left for the parties to contract between themselves.

## 19 Realization of security

- 19.1 If the debtor of a secured debt fails to meet his obligations, there is a clear need for the creditor to be able to realize his security without having to resort to bankruptcy proceedings. In England there are several ways of doing this (see above, 2.12); the lack of any way of doing it in Jersey is perhaps the biggest single defect of the present law.
- 19.2 The resulting anomaly is particularly conspicuous in relation to apartments within buildings. Many of these are bought and sold by the process known as 'share transfer', which was the nearest that could be got to ownership of a flat in Jersey before the *copropriété* law of 1991 and is still in widespread use. The freehold of the building is owned by a holding company; the share capital of the company is divided into blocks of shares, and the ownership of each block entitles the shareholder to exclusive possession of a designated apartment within the building. The flat can thus be 'mortgaged' by charging the block of shares by way of a security interest under the Security Interests (Jersey) Law 1983, and the remedy available to the lender, should he need to enforce his security, is the power of sale provided by Article 8 of that law. By contrast, in the case of a flying freehold under the law of 1991, a mortgagee can only enforce his security through a *dégrévement* or a *désastre*.

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uncertain whether judgments of the Court of Appeal can be remitted for registration afterwards in the way the 1880 law originally meant those of the Royal Court to be registered.

<sup>66</sup> This is based on the position in France, but without the right to pledge future immoveable property (*C.C.F.*, art. 2420).

19.3 To remedy this situation, we propose that all existing and future hypothecary creditors be given a statutory power of sale modelled on that provided for moveable security interests by Article 8 of the Security Interests law. This power will arise on the happening of any event of default by the debtor which entitles the creditor to demand immediate repayment of the capital under the terms of the bond or mortgage deed; but it will not be exercisable until –

- (a) the creditor has served on the debtor a notice specifying the default complained of and requiring the debtor to remedy it; and
- (b) the debtor has failed to remedy the default within a certain period after receiving the notice. This period will need to be considerably longer than the 14 days provided under the Security Interests law. We suggest two months, which is the present period of notice given by the Viscount for a *dégrévement* (see above, 10.3) and corresponds to the sixty-day period given in Quebec.<sup>67</sup>

19.4 Under the Quebec law the notice must include a call on the debtor to surrender the property to the creditor, and to do so is one of the three ways in which the debtor may actively respond to the notice, the other two being to remedy the default or to pay off the debt.<sup>68</sup> In Jersey, surrendering the property and repaying the debt are the two options of a third party against whom a creditor exercises his *droit de suite* (see above, 6.1.2); so, at first sight, it would seem logical to give the debtor the same options in response to a notice of sale. But there are two objections to this. It gives the creditor the benefit of any equity in the property, which is one of the main objections to *dégrévement* under the existing law; and it creates problems if there are other creditors with charges on the property lower in rank. The Quebec law gives such creditors the right to force a sale,<sup>69</sup> but the process is cumbersome and we think it better to avoid the situation altogether by giving the pursuing creditor a power of sale only.

19.5 Provision ought to be made, however, for the case where the debtor tries to sell the property during the notice period. The Quebec law stipulates that such a sale does not discharge the debtor unless either (a) the purchaser assumes liability for the debt or

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<sup>67</sup> C.C.Q., art. 2758.

<sup>68</sup> C.C.Q., arts. 2758, 2761, 2764.

<sup>69</sup> C.C.Q., arts. 2779-83.



(b) a sum is deposited sufficient to cover the amount of the debt with interest and costs, both alternatives requiring the consent of the creditor.<sup>70</sup> In Jersey the situation would be covered under the existing law by the creditor's *droit de suite*, but we think the new law should go further and provide that a sale during the notice period without the creditor's consent is void *ab initio*. This means that the notice will have to be registered in the Public Registry so that anyone checking title will be aware of it.

- 19.6 As with security interests, the power of sale will be exercisable only on the authority of an order of the Royal Court, whose duty and powers in this regard will be based on those provided by Article 8(4) of the Security Interests law. If the property is occupied by the debtor, the creditor will have to request an order granting him vacant possession; the debtor will have the right to be heard and the Court may make its order subject to any conditions it thinks fit. Alternatively, if the property is let or in any other way requires management, the Court will be able (either of its own motion or on the application of the creditor) to order the appointment of a receiver to manage the property and receive any income from it. Possibly the law should require the receiver to be a suitably qualified professional person such as an advocate or solicitor of the Royal Court, an English solicitor practising in Jersey, or an accountant.
- 19.7 The law will need to provide that the order of the Court authorizing the sale confers on the creditor or receiver full power, on the debtor's behalf, to give the purchaser good title to the property free of all encumbrances.
- 19.8 The conduct of the sale and the distribution of the proceeds afterwards will be essentially as under Article 8(6) of the Security Interests law, with references to hypothecs substituted for those to security interests. Thus, on completion of the sale and after paying off the secured debt or debts together with interest and costs, any remaining balance will be repayable to the debtor – or, if in the meantime his property has been declared *en désastre* or subjected to any other insolvency process, to the Viscount or other proper officer. In addition to these provisions we propose that, if the proceeds of sale of the property are insufficient to pay off the secured debt in full, the creditor will have a preferential claim on any income received from the property between the date of the order authorizing the sale and the date of the sale.

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<sup>70</sup> C.C.Q., art. 2760.

19.9 The law needs to make provision as to the securing of arrears of interest. At present, under Article 101 of the 1880 law, a *tenant après dégrèvement* who takes over a property subject to a prior charge is only responsible for three years' arrears of interest on the charge in addition to the capital. We think this period is too short, and recommend that a secured creditor should be entitled to a maximum of five years' arrears of interest when his security is realized.

19.10 It has been suggested that the protection afforded in a *désastre* to the debtor's spouse in respect of the matrimonial home should be similarly given where there is no general insolvency and a creditor is merely proceeding against his security. Article 12 of the Bankruptcy (*Désastre*) (Jersey) Law 1990 gives the Royal Court, on the application of the debtor's spouse within three months of the declaration, the power to order –

- (a) that the property, or the debtor's share of it, be vested in the applicant, subject to any existing charge on it and, if the Court thinks fit, to payment of an appropriate sum by the applicant to the Viscount for the benefit of the creditors; or
- (b) that a usufruct of the property, or of the debtor's share of it, be vested in the applicant; or
- (c) that the property be sold and the proceeds, or the debtor's share of them, be distributed to such persons and in such proportions as the Court thinks fit.

Application for such an order (usually called 'an Article 12 application') may be made regardless of whether or not the spouse is joint owner of the matrimonial home, and the order itself is made on such terms and conditions as the Court thinks fit.

19.11 In exercising these powers, the Court has a duty "to give first consideration to the desirability of reserving the matrimonial home for the occupation of the spouse and any dependants of the debtor having regard to all the circumstances of the *désastre* including the interests of creditors." In particular, it must have regard to the financial situation of the spouse and the age and financial position of the dependants.

- 19.12 Though these provisions may make sense in a bankruptcy, their relevance to the recovery of mortgage debts seems limited. They rest on the premise that the debtor and the spouse are different persons with different interests, but nearly all matrimonial homes now are jointly owned and the husband and wife are joint debtors of the mortgage loan. Presumably therefore the protection would only apply to the relatively few cases where the matrimonial home is held in the sole name of one spouse, and the effect of the provision would be to make the property impossible to mortgage, since the mortgage provider would know that any future attempt to realize the security could be blocked by the other spouse applying to the Court for an order under this provision. This is not a suggestion that we feel able to endorse.
- 19.13 Moreover, we are concerned that the debtor may be tempted to shield his matrimonial home from a mortgagee's power of sale by declaring his property *en désastre* with the object of enabling his (or her) spouse to make an Article 12 application. To prevent this completely is impracticable as it would mean exempting all hypothecated property from the Article 12 provisions and thus rendering them ineffective. Our proposal is that if a *désastre* is declared after a secured creditor has applied to the Court for an order for sale, the Court shall be barred from granting an Article 12 application by the debtor's spouse unless and until the application for a sale order is dismissed. An order for sale should not be affected by a subsequent declaration of *désastre* except in that any surplus moneys in hand after the sale is completed are handed over to the Viscount instead of being returned to the debtor (see above, 19.8). Thus the rights of the secured creditor will be protected without interfering with the rights of other creditors against the debtor's other assets.
- 19.14 The introduction of the power of sale proposed here will enable *dégrévement* and its associated procedures to be abolished as proposed in our 1999 report on that topic (see above, 10.15-16). With regard to the abolition of *cession*, a new law will be needed to curb the customary right of imprisonment for debt in line with Article 11 of the International Covenant on Civil and Political Rights: a proposal for a short law to that effect has in fact been submitted by the Attorney General to the Legislation

Committee. *Remise de biens* will be retained as recommended in our *dégrévement* report,<sup>71</sup> though the power of sale may be expected to lessen the need for it.

19.15 It might have been preferred by some that we had proposed a power of sale modelled more closely on that of an English mortgagee. This would have meant giving the creditor freedom to sell the property or appoint a receiver by himself without judicial supervision; defining meticulously and at length the limits of his powers and obligations in relation to the debtor; and restricting the Court's involvement in the process to the granting of an order for vacant possession in the case of the debtor's home. We feel that the approach taken here is better, for two reasons. It harmonizes the procedure for immoveable property with that already existing under the Security Interests law, and it keeps this important area of Jersey law in its present place within the sphere of influence of the French-based civilian codes.

## **20 A new statute to replace the 1880 law**

20.1 Though the *Loi sur la Propriété Foncière* was one of the great legal reforms of the nineteenth century, it is now 125 years old and was designed for the needs of a society very different from that of today. Many of its provisions take for granted a knowledge of the pre-existing customary law which practitioners no longer have. The generation of lawyers and conveyancers brought up to regard it as a sacred text is passing, and its sanctity has been compromised in recent years by amendments that do not always match the quality of Marett's original draftsmanship.

20.2 In our report on *dégrévement* we concluded, after a detailed study, that the law could withstand the amendments that would be necessary to implement our proposals. Accordingly we recommended that these amendments be made and the law re-enacted in its amended form, rather than that it be repealed and replaced by an entirely new statute. The amending laws of 1904 and 1915 were to be repealed as the proposed changes would make them redundant.<sup>72</sup>

20.3 The changes envisaged in the present paper are more fundamental and we feel that the time has now come to replace the 1880 law with a new statute, in English, which will

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<sup>71</sup> Jersey Law Commission Topic Report No.2, *Dégrévement* (1999), at 2.6. For the reasons, see section 2.5 of the 1998 Consultation Paper.

<sup>72</sup> Jersey Law Commission Topic Report No. 2, *Dégrévement* (1999), at 3.4 and Appendix A23.

approach the subject from first principles. Parts of it will, of course, re-enact provisions of the 1880 law in updated form, but a well-drafted modern statute will serve much better as the essential text for security on immovable property in the twenty-first century than a further amended version of the *Loi sur la Propriété Foncière*.

## 21 Summary of recommendations

- Hypothecation should remain the method of securing debts on immovable property in Jersey **(11.1-3)**.
- The customary definition of *biens-fonds* should be codified, with reference to the exceptions created by the *Loi (1991) sur la copropriété des immeubles bâtis* and the *Loi (1996) sur l'hypothèque des biens-fonds incorporels* **(14.1)**. The law should make clear that an undivided share of a *bien-fonds* may be hypothecated **(14.4-5)**
- Further discussion is needed as to whether the individual rights of the co-owners in a joint tenancy should also be made hypothecable **(14.6-7)** but we do not think a case has been made for allowing the hypothecation of third party liabilities **(14.8-9)**, nor for creating hypothecs for a percentage of the value of the security as an alternative to a fixed capital sum **(14.10)**.
- The definition of a hypothec should be extended to give the creditor a prior claim over the proceeds of any sale of the property on which the hypothec is charged. The Court should also have a discretionary power, opposable by the *tiers détenteur*, to allow a creditor to exercise his *droit de suite* even though the debtor's assets have not been fully exhausted **(13.2-4)**.
- The period within which a creditor may exercise his *droit de suite* should be limited to two or three years following a transfer of the security by the debtor **(13.7)**.
- The prescription period for the *droit de suite* itself should be increased from 10 to 25 years for judicial hypothecs, though remaining at 10 years for the legal hypothec of the creditors of a deceased debtor **(13.5-6)**.

- The legal hypothec of the creditors of a deceased debtor needs redefining **(12.13)**.
- If the Commission's proposals for the abolition of *légitime* in moveable successions are accepted, the legal hypothec for a widow's dower should be replaced by a newly defined legal hypothec, dating from the testator's death, to secure on the immoveables of a testate succession any provision claimed out of that succession by a relative or dependant of the testator under the new family provision law. Alternatively, if *légitime* is not to be abolished, dower and *viduité* should be redefined as identical rights claimable in a testate immovable succession by a surviving spouse, comprising the life-enjoyment of either the whole or a defined share of the immoveables and secured by a legal hypothec on all the immoveables of the succession, again dating from the testator's death. In either case the procedure for claiming the right against the devisees should be specified, with a time limit for making the claim **(12.9-11)**.
- The creation of conventional hypothecs should continue to be permitted as at present, notwithstanding the recommended abolition of this type of hypothec in our 2003 report on the law of real property **(15.4-8)**. However, the legal fees for creating conventional and judicial hypothecs should be fixed at a common level substantially below the scale fee previously charged for the former **(15.8.1)**. Simple conventional hypothecs (other than those consented for part considerations in a contract of sale) should be created by deed signed by the parties and remitted for registration in the Public Registry, and the formal requirements for the description of the *fonds* of a simple conventional hypothec should be simplified **(15.8.2-3)**. There should be a procedure for requiring a creditor to sign and register a deed of extinction of a conventional hypothec following reimbursement of the debt, or, where necessary, for the owner of the property to obtain an act of the Royal Court declaring the hypothec to be extinct **(15.8.4)**.
- The debt secured by a judicial hypothec should no longer be subject to the rule that a claim for its repayment after the debtor's death must be pursued in the first instance against the moveable estate. Whether the hypothec is judicial or conventional, the claim should be pursued in the first instance against the person or persons who have become entitled to the *fonds*, and only thereafter against the debtor's moveable estate **(16.2-4)**.

- Assignments or transfers of judicial hypothecs should be registered in the Public Registry, but the details of the procedure should not be finalized until consultation has taken place with conveyancing practitioners and the Registrar of Deeds. Stamp duty on registration of the assignments should be nominal only **(16.5-6)**.
- Agreements to vary the order of priority of charges, or of an existing charge relative to another transaction such as a lease, should be valid and enforceable in law provided they are effected in one of the two ways presently used in practice; this provision should be applied retrospectively to all such agreements already made **(17.1-3)**.
- The risk of fraudulent ‘double charging’ is not sufficient to warrant the introduction of an advance notice procedure for the registration of judicial hypothecs **(17.5-6)**.
- The law should make clear that appellate judgments in respect of a fixed capital sum should be registrable as judicial hypothecs and that, if the judgment of the court of first instance has previously been registered, the registration of the appellate judgment will have the effect of substituting the new amount without affecting the date of the existing charge **(17.8-9)**. In all other cases the registration of an act or judgment will destroy the hypothec obtained by the registration of any earlier judgment in respect of the same debt; this will specifically include the registration of a judgment for repayment of a debt previously secured **(17.7)**.
- Article 25 of the 1880 law should be replaced by a wider provision defining the rights of the debtor and creditor if a property charged with a hypothec (whether judicial or conventional) is destroyed or becomes so depreciated in value that it no longer provides adequate security, or if the debtor loses his title to it. Unless the parties have contracted otherwise in the loan documentation, the debtor should have the right to seek to avoid foreclosure by providing alternative or additional security, but the creditor will retain the right to sue for repayment if necessary **(18.2)**.
- All hypothecary creditors should be given a statutory power of sale based on that in the Security Interests (Jersey) Law 1983, but with a longer notice period

(perhaps two months) and with the right to have a receiver appointed if the property is let or requires management. The power will be exercisable only on the authority of an order of the Royal Court for which the creditor will have to apply. Any sale of the property by the debtor during the notice period without the creditor's consent will be void. If the proceeds of sale of the property are insufficient to pay off the secured debt in full, the creditor will have a preferential claim on any income received from the property between the date of the court order authorizing the sale and the date of the sale. Up to five years' arrears of interest will be secured **(19.3-9)**.

- The court order authorizing a creditor to exercise his power of sale will be unaffected by a subsequent declaration of the debtor's property *en désastre* except in that any surplus moneys in hand after the sale will be handed over to the Viscount. Once a creditor has applied for an order for sale, the Court will not be able to grant an application by the debtor's spouse under Article 12 of the Bankruptcy (*Désastre*) (Jersey) Law 1990 unless and until the creditor's application is dismissed **(19.13)**.
- *Cession* and *dégrévement*, with their associated procedures (though not *remise de biens*), should be abolished as proposed in our 1999 report **(19.14)**.
- The *Loi (1880) sur la Propriété Foncière* and its various amendments should be repealed and its continuing provisions re-enacted, along with the measures proposed here, in a new statute to be drafted in English **(20.3)**.



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Note that all references to the Code Civil Français are to the provisions as revised and renumbered by Ordonnance n° 2006-346 dated 23<sup>rd</sup> March 2006.

## SECURITY ON IMMOVEABLE PROPERTY

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Responses to this Consultation Paper should be made in writing, by 30 September 2006, to:

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