THE ORIGINS AND DEVELOPMENT OF THE *DÉSASTRE* SYSTEM IN GUERNSEY

Simon Howitt

Désastre is the system, in Guernsey law, whereby, if the proceeds of enforcement of one or more judgments against the movable property of a debtor are insufficient to meet all known claims, those proceeds are shared between creditors. This article explores the origins of the system, which lie in a 19th century statute, and then goes on to analyse how the system has developed up to the present.

Introduction

1 The system of *désastre* in Guernsey is a method whereby the proceeds of the movable[1] property of a debtor are, if those proceeds are insufficient to pay all of the debtor's creditors, and once preferred claims,[2] secured claims[3] and the costs of those creditors who have obtained judgments against the debtor have been met[4], distributed on a *pari passu* basis.

2 In 1983, the Royal Court established a Committee[5] to examine the existing procedure in relation to *désastre* and to recommend improvements. The Committee produced a report dated 21 June 1984, which included a number of recommendations as to improvements which could be made to the system. None of these has been formally adopted, although the substance of some of them has come into effect

---

[1] The invariable practice in Guernsey is to translate the words "*meubles*" and "*immeubles*" as "personal" and "real" property. These are, however, not strictly accurate translations, so the author has chosen to refer to "movable" and "immovable" property throughout this article.

[2] See the Preferred Debts (Guernsey) Law, 1983, as amended.

[3] Secured claims are, in practice, rare in the context of a *désastre*. Typically, any security would be created using one of the methods for creating security over movables enabled by the Security Interests (Guernsey) Law, 1983.

[4] In *Re Pagliarone* (*Plaids de Meubles*, 21 July 1983) it was contended that only the costs of the creditor who has instigated the *désastre* process should be preferred, but the court found that the costs of all judgment creditors were preferred.

[5] The members of the Committee were Jurats CH Hodder and LW Sarre and Advocates GR Rowland and NT Carey.

by means of changes in practice.[6] These changes apart, the *désastre* system has remained largely unchanged since the Committee produced its report.

The current *désastre* system

3 To commence with a description of the current *désastre* procedure, it is, according to the Royal Court Committee's report, "a quasi-judicial procedure, limited in scope, whereby the proceeds of an arrest[7] are distributed among judgment creditors". A creditor who has obtained judgment against a debtor, unless he or she chooses to enforce immediately against the immovable property of the debtor,[8] hands the act of court which records the judgment to HM Sheriff who arrests the movable property of the debtor which he or she is able to identify. The creditor applies to the court to confirm the arrest of the property and for permission to sell it.

4 Assuming that the application is granted, the property is sold. The arresting creditor actions HM Sheriff, as judicial sequestrator of the proceeds of sale, to pay those proceeds (or, if they exceed the amount of the creditor's debt, sufficient of them to satisfy the debt) over to the creditor. If the Sheriff is aware that the proceeds of sale are insufficient to meet the judgment debt in respect of which they were arrested and other claims of which the Sheriff has been made aware, he or she informs the court of this fact. The court appoints a Commissioner.[9]

---

[6] One issue which the Committee identified as needing to be resolved was that there was doubt as to whether there could be a *désastre* unless more than one judgment had been obtained against the debtor. It now appears to be beyond doubt (in the sense that no-one has argued for it in many years) that this is not a requirement. Another issue identified was that there could be no *désastre* unless HM Sheriff was summoned as judicial sequestrator of the movable property of the debtor, as where a balance to the credit of an account of the defendant debtor with a bank has been arrested and the bank (rather than HM Sheriff) is summoned to declare what it owes the defendant debtor and pay over the sum in question to the arresting creditor. The practice in this respect has changed. This is dealt with in greater detail below (see para 41).

[7] The Royal Court Committee's report nowhere expressly states that *désastre* is a process relating only to movable property. However, as an arrest can only occur in relation to movable property, it is self-evident.

[8] Where the creditor chooses to proceed immediately against immovable property, the *saisie* procedure is followed.

[9] The description of the process whereby the movable property of a debtor is realised to satisfy a debt in this and the preceding paragraph is somewhat simplified, but adequate for the purposes of this article. For a more detailed

5 The next stage of the *désastre* process is described by Dawes:

> ". . . the Court will order the arresting creditor, the debtor and other creditors to appear before a Jurat appointed by the Court to act as Commissioner for the purposes of establishing the claims of debtors and any preferences. There follows an initial meeting between the arresting creditor, the Sheriff and the Commissioner at which the Sheriff will confirm to the Commissioner that the proceeds realised by the Sheriff are insufficient to satisfy the debtor of which he is aware. The Commissioner will then declare the debtor to be 'en désastre' and will fix the place, date and time when he will examine the claims and preferences of creditors and declare what dividend is to be paid from the monies in the passion of the Sheriff; ie the creditors' meeting proper. There is no longer any strict requirement or any requirement at all to summons the debtor to the initial meeting . . ."

6 This first meeting is of interest, because there is, in the context of the *désastre* proceedings themselves, no obvious reason for it. If the proceeds of realisation of the debtor's movable property are insufficient to satisfy all the debts of known creditors, then that fact is invariably obvious when the Sheriff is summoned to pay the proceeds of the realisation of the debtor's movable property to the arresting creditor, and there appears to be no need for a subsequent meeting simply to confirm it. This meeting has, on occasions, not taken place,[10] but simply been replaced by an informal meeting, or telephone call, between the advocate acting for the arresting creditor and the Commissioner appointed by the court to arrange the next meeting. It has been held that

---

description, see G Dawes, *The Laws of Guernsey* (Hart Publishing, 2003), at 220–221.

[10] Given the lack of public records of the *désastre* process after the appointment of the Commissioner, it is not clear how often, in practice, this meeting takes place. In 1984, when the Royal Court Committee produced its report, this meeting was not held. The report refers to the arresting creditor applying "informally to the Commissioner to declare the debtor *en désastre*". The report recommended that this first meeting be reinstated, that the debtor should be summoned to it and that the Commissioner should have power to require the debtor to disclose his or her assets and liabilities. However, no such power has been given to the Commissioner. In Deputy Bailiff Dorey's summing up in the case of *Rotshuizen v Lok* (in the Ordinary Court, 13 January 1988), he expressed the view that the then current practice was that the court, once HM Sheriff had confirmed that there was an insufficiency of funds available to pay all known creditors, declared the debtor *en désastre*, rather than the Commissioner appointed by the court.

the failure to hold this meeting does not invalidate a *désastre.*[11] We will return to this meeting later in this article.

7 Whilst this first meeting appears to serve little or no purpose in the context of a *désastre* itself, it is nevertheless important that it is held. A number of statutes refer to this meeting, typically where a power is created to remove an individual from office. Should the provisions of such a statute be relevant in any particular case, confusion will arise if the first meeting is not held. For example,[12] in the Guernsey Bar (Bailiwick of Guernsey) Law, 2007, a ground for removal of a member of a Chambre de Discipline panel is that the individual has become "bankrupt".[13] The word "bankrupt" is defined to include an individual "whose affairs have been declared in a state of '*désastre*' by his arresting creditors at a meeting held before a Commissioner of the Royal Court . . ."[14]

8 This can only be a reference to the first meeting following the appointment of the Commissioner. If this meeting never happens, it is questionable whether the relevant provisions have effect. Of course, a court may be prepared to interpret such a provision as referring to any case where an individual is clearly *en désastre*, whether or not the first meeting has occurred. The difficulty with this is that a number of the statutes in question are relatively modern, and from long after the time of the 1984 Royal Court report when the first meeting was stated no longer to be held in practice. It would be difficult to sustain any argument, in the case of these more modern statutes, that they should be interpreted in the context of the practice having changed since they

---

[11] *Re Fresh Taste Bakery Ltd* (*Plaids de Meubles*, 11 April 1984).

[12] Other examples are the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979, the Partnership (Guernsey) Law, 1995, the Trusts (Guernsey) Law, 2007, the Police Complaints (Guernsey) Law, 2007, the Foundations (Guernsey) Law, 2012, the Aviation Registry (Guernsey) Law, 2013 and the Arbitration (Guernsey) Law, 2016. The wording used to describe the first meeting, and the process of a person being declared *en désastre* is not uniform. In the example, of the Guernsey Bar (Bailiwick of Guernsey) Law, 2007 given above, the reference is to a meeting before a Commissioner at which a person is declared *en désastre by* his arresting creditors. In a number of other statutes the wording used is "that his affairs have been declared to be in a state of '*désastre*' at a meeting of his arresting creditors held before a Commissioner of the Royal Court". For the reasons given in the discussion at para 58 below, it is submitted that the latter wording, omitting any reference to the debtor being declared *en désastre* by creditors, is preferable.

[13] Section 18(4)(b)(iii).

[14] Section 41(1).

came into force. Even where, if the first meeting has not occurred, and one of these statutory provisions is relevant, the court is prepared to find that the provision has effect even though the first meeting has not occurred, there will inevitably be confusion as to when the *désastre* commenced.

9 Moreover, where the first meeting is not held, there may be an unsatisfactory lack of clarify as to when a *désastre* has commenced in the context of documentation where reference is made to it. Trust documents frequently refer to a trustee, protector or enforcer ceasing to hold office automatically upon being declared *en désastre*. Loan documentation is frequently drafted on the basis that the borrower being declared *en désastre* constitutes an event of default entitling the lender to call for early payment of the whole of the borrower's debt. It is clearly important in both of these contexts that it should be possible to ascertain the precise date on which someone is declared *en désastre* and, without the first meeting being held, that may not be possible, at least without a declaration from the court on the issue.

10 The lack of clarity in this context can be avoided with appropriate drafting. For example, one might, rather than simply refer to a party being declared *en désastre* as giving rise to a particular legal effect, refer to "a Commissioner being appointed in connection with or for the purpose of [X] being declared '*en désastre*'".

11 The next meeting is a meeting of all creditors who choose to attend. Notice of it is given in *La Gazette Officielle*. Put briefly, the creditors make their claims which, unless disputed by the other creditors, are admitted.[15] A report of the Commissioner is prepared, with preferred and secured claims, and claims for costs, being given appropriate priority, and any balance of the proceeds being divided between the ordinary creditors *pro rata* their claims. The Sheriff then pays out the money he has in hand to the advocate acting for the arresting creditor. He or she then distributes it in accordance with the terms of the Commissioner's report.

12 *Désastre* proceedings, once a Commissioner has been appointed, are not publicly recorded. It is impossible, for that reason, to undertake a study of such proceedings through the ages by research at the Greffe. All that is recorded is the fact that a Commissioner has been appointed, and the process from there is lost to history. Only if the court becomes seized of the matter again (for example, if a claim of one creditor is disputed by other creditors, and the Commissioner refers the matter

[15] If a claim is not admitted, and the person making the claim wishes to proceed with it, the matter is referred back to the Royal Court for a decision.

back to the court for a decision as to whether the claim should be admitted) is there any public record.

13 The purpose of the *désastre* system, as described above, is simply to provide for a fair[16] and ordered distribution of the proceeds of realisation of the movable property of a debtor in circumstances where those proceeds are insufficient to meet the debtor's debts in full. It does not operate to relieve the debtor of any liability to pay those debts which are not fully paid from the proceeds of realisation, or any other debts which have not been claimed as part of the *désastre* process. There is a process, contained in the Law relating to Debtors and Renunciation, 1929 and dealt with in greater detail later in this article, whereby a debtor can be discharged from his or her debts, but it is used extremely rarely.[17]

Origins

14 The general perception amongst Guernsey practitioners is that the *désastre* system is a customary law system the origins of which are lost in the mists of time. However, if one looks at the works of 19th century, and earlier, writers, one finds no mention of it. The 19th century, and particularly the first half of it, might be said to have been something of a Golden Age in the study of Guernsey law.[18] A number of writers published books on the subject,[19] and a number of works from previous

---

[16] That is, subject to the rights of preferred and secured creditors, on a *pari passu* basis.

[17] The Royal Court Committee's report states that, as at the time of its preparation, this procedure had not been used since 1937. The author is not aware of whether it has been used since the date of the Committee's report, but if it has it has been used very rarely. In the case of *Rotshuizen v Lok* (which was heard by the Ordinary Court in January 1988, but was not the subject of any written judgment), the plaintiff, the Dutch trustee in bankruptcy (or equivalent) of the defendant, successfully sought an order from the court that the defendant was *en désastre*, entirely bypassing the usual process, with a view, thereafter, to obtaining a declaration of insolvency under Part II of the 1929 Law. It is not known whether such an order was ever obtained.

[18] By contrast, the 20th century might be said to have been something of a Dark Age. Until commencement of publication of the *Guernsey Law Journal* in 1985 almost nothing was published during that century on Guernsey law, and no book of any substance on the subject of Guernsey law was published after 1889 until *Laws of Guernsey* by G Dawes in 2004.

[19] In particular, "Traité sur la Saisie Mobilière et la Renonciation" by J Jeremie (1815), "Traité de la Rononciation par Loi Outrée et de la Garantie" by J Gallienne (1845) and "An Essay on the Laws of Real Property in Guernsey,

centuries which had previously existed only in manuscript were published.[20] None of them contains any reference to *désastre*. There also appears to be[21] nothing on the subject in any of the works of commentators on Norman customary law.

15 Good case records exist from the 19th century. A number of advocates maintained thorough indexes of decided cases and statutes. Amongst the best of these is that kept by Theophile de Moulpied (which was acquired by the Royal Court following his death and now forms part of the Royal Court library[22]). It makes no mention of *désastre*. However, a notebook maintained by successive Greffiers (also in the Royal Court library) contains one reference, to the case of *Gallichan v Barbenson*, decided by the Royal Court on 2 June 1852, where it was found that a transfer of property by a debtor who was *en désastre* within the fifteen days preceding the *désastre* should not be treated as null and void unless fraud, or some other "*cause de nullité*", could be shown by those attacking the transfer.[23]

16 An interesting, and often overlooked, source for Guernsey civil law as it stood in the early part of the 19th century is the report of a Royal Commission of 1815 appointed to examine the laws relating to debtors and creditors in Guernsey (following complaints of discrimination from non-native residents of the Island) and the observations of the Royal Court on that report. In the context of insolvency, we find no mention of *désastre*, either in the report itself or in the Royal Court's comments. However, it is helpful to give a brief overview of the insolvency processes described in the report, in order then to explain how the *désastre* process appears to have come into

---

and Commentary on the present Laws of Inheritance and Wills" by P Jeremie (1841, with revised edition entitled "On the Law of Real Property in Guernsey" in 1866).

[20] For example, "Remarques et animadversions sur l'approbation des lois et coustumier de Normandie usitées es jurisdictions de Guernezé, et particulièrement *en* la Cour Royale de la ditte isle" by T Le Marchant (written in the 17th century, and published in 1826), "Essai sur les Institutions, Lois et Coutûmes de l'Île de Guernesey", by L Carey (written in the 18th century, and published in 1889) and "Ébauche du Style de Procéder Devant la Cour Royale de l'Ile de Guernesey" by J Le Marchant (written in the 18th century and published in 1804).

[21] The author cannot claim to have undertaken a thorough search of all of them.

[22] The court's library is held by the Island Archive Service at the former St Barnabas Church.

[23] The author is indebted to Dr Darryl Ogier, the Island Archivist, for this information.

being. There were two such processes: *cession* and *renonciation volontaire*. *Cession* was a process whereby a debtor could be freed from imprisonment for debt, and it is not relevant for the purposes of this article.[24] *Renonciation volontaire* (as opposed to *renonciation par loi outrée*, which is an alternative name for *saisie*, the process whereby a debtor is dispossessed of his or her immovable property) was a process by which—

> "the debtor against whom an action is bought, without awaiting the judgment of the Court, but at any earlier stage of the proceedings he pleases, voluntarily renounces to all his goods, chattels, and estates (a tous ses biens, meubles et heritages), in favour of his creditors generally, or of any one creditor whom he chooses to prefer; by which act he is entirely exonerated, not only from the particular debt or debts which are the subject of the suit, but from every other debt he may have contract at that time."

17 Both *cession* and *renonciation volontaire* were processes which could only be invoked by the debtor. The Royal Commissioners did not like the idea of *renonciation volontaire*, as they believed that it made it too easy for creditors to avoid their debts. They proposed its abolition. Their report was subject to much toing and froing between the Royal Court and the Privy Council, with the court making numerous comments, over a long period of time, on the proposals contained the report. Of particular interest in the context of this article is the court's observations[25] on the proposal to abolish *renonciation volontaire*:

> "A creditor, availing himself of our maxim of law, 'La Loi subvient au Diligent,' may at any time attach the goods and register on the estate of his debtor, and if the attachment or registry be sanctioned by a single act of Court he secures a preference to the full amount of his claim and to the exclusion, as far as that amount goes, of other creditors more indulgent and less active; or absent from the island, and having no means of knowing what is going on in time to provide for their own security. In such a case it is in the power alone of the debtor to prevent an undue

[24] *Cession* was not abolished until the coming into force of the Law relating to Debtors and Renunciation, 1929. Running to three words ("Cession is abolished"), Article V of the 1929 may hold the record as the shortest ever legislative provision. It is clear that *cession* in Guernsey was a descendant of the Roman law *cessio bonorum* whereby a debtor could, by surrendering his or her goods to creditors, avoid personal arrest. As in Guernsey, it did not amount to a discharge from the debtor's debts unless the value of the property surrendered was sufficient for them to be paid in full.

[25] 19 February 1825.

> preference by coming forward with a general renonciation before the Act of Court be obtained which would secure that preference: and there is therefore every reason why encouragement and facility should be afforded to a debtor in bad circumstances, who thus comes forward; and why the full benefit of the Renonciation Volontaire should be continued to such a debtor, not only for the sake of equal justice, and because his early renonciation places all the creditors on an equal footing, but because the sooner it is made the less involved will the debtor's affairs generally prove."

18 In other words, unless the debtor chose to follow the process of *renonciation volontaire* (and it should be recalled that, at that time, it was only the debtor who could invoke that process), if a number of judgments were obtained against the debtor, and enforced against his or her movable property (the circumstances in which there would now be a *désastre* if the proceeds of the debtor's arrested movable property were insufficient to meet all claims in full) they were met in the order in which the first act of court in each such case was obtained, rather than on a *pari passu* basis. There can have been no *désastre* procedure at this time. The whole purpose of the *désastre* procedure, as we know it today, is (subject to the rights of preferred and secured creditors) to share the proceeds of the arrest of a debtor's movable property *pari passu* between his or her creditors.

19 In passing, it is worth noting the innate desire of the Royal Court in 1825 to preserve the then current law notwithstanding its unfairness, which they conceded. The system of *renonciation volontaire* was under attack from the Royal Commissioners. It is clear from the passage above that, where a debtor applied for *renonciation volontaire* before any act of court was obtained in proceedings against him, the creditors were dealt with "on an equal footing" (that is, presumably, the debts due to them were met on a *pari passu* basis) but that, where the debtor didn't make such an application (that is, in the circumstance where there would now be a *désastre*), a creditor obtained a preference according to the date of the first act of court in proceedings brought by that creditor against the debtor. The court conceded that such a preference was "undue" but, rather than suggesting any change, proposed retaining the system of *renonciation volontaire* notwithstanding its other defects because where it was invoked (which was entirely within the control of the debtor) it produced a fair result.

20 The idea of having one system of distribution which applied in one case (where there was, at the instance of the debtor, *renonciation volontaire*) and an entirely different system in another (where there was no *renonciation volontaire*) seems odd now. Doubtless it seemed odd, and irrational, to the Royal Commissioners. On occasions, in *désastre* proceedings, reference has been made to statutes which refer to

renonciation volontaire and *cession*, but not to *désastre*, and the assumption has been made that the rules in those statutes can be applied in the context of a *désastre*. For example, in *Re Fresh Taste Bakery Ltd (en désastre)*[26] reference was made to *L'Ordonnonce Relative aux Saisies et Partage des Biens-Meubles, 1827*.[27] That Ordinance creates rules which apply where there has been a *renonciation volontaire* or *cession*. It seems extremely doubtful whether those rules apply in the context of a *désastre*, given that it is clear that, at the time when this Ordinance was passed, there was no system of *désastre*, and the rules as to distribution where there was no *renonciation volontaire* or *cession* were entirely different from those where there was.

21 Whilst the idea of priority being created for unsecured creditors in the order in which they have commenced proceedings (and obtained a first act of court) appears strange to the modern eye in the context of movable property, it is perhaps not so surprising when one considers that this was,[28] and remains, the rule in relation to immovable property. In order to achieve priority in respect of immovable property, the creditor seeking to secure his or her position has to register an act of court[29] in the *Livre des Hypothèques, Actes de Cour et Obligations*.[30] However, the principle that the commencement of proceedings[31]

---

[26] *Plaids de Meubles*, 11 April 1984.

[27] *Recuil d'Ordonnances*, Vol II, p 339.

[28] The reference in the court's observations above to a creditor being able to "attach the goods" of his debtor is clearly a reference to movable property, and the reference to the creditor being able to "register on the estate of his debtor" is to immovable property.

[29] Typically, the first act of court obtained, either adjourning the matter or placing it on the pleading list (the list of proceedings where an intention to defend has been intimated), will be registered and, provided that judgment is subsequently obtained, the plaintiff will have priority, in respect of the defendant's immovable property, from the date of registration of the earlier act of court, rather than the date on which judgment is obtained. By s 6 of the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987, the leave of the court is now required to register an interlocutory act of court.

[30] The *Livre des Hypothèques, Actes de Cour et Obligations* is a sub-division of the *Livre des Contrats*. The subdivision was created by *the Ordonnance relative a l'enregistrement de contrats et autres documents, 1924*.

[31] The principle that an interlocutory act of court created a hypothec appears originally to have been restricted, so that that was the case only where the action related to a "cedule" (which translates, very loosely, as "promissory note"). The only case in which the statutes relating to the registration system have been the subject of any great scrutiny is *Jubilee Scheme 3 Ltd v Capita Symonds Ltd* (2011–12 GLR 25). In that case, the plaintiff in proceedings had

created a hypothec in respect of the immovable property of the defendant in those proceedings, and therefore priority over other creditors (except those with prior ranking interests) is a customary law principle which pre-dates the system of registration of documents relating to immovable property.[32] The system of registration was created by an Ordinance of 11 October 1631, which was amended by an Ordinance of 13 April 1724.[33] Whilst a study of the system of registration of documents relating to immovable property is outside the scope of this article, the substance of the 1631 and 1724 Ordinances, taken together, is that if a document which would otherwise have had effect against third parties (such as a document creating a hypothec, which is a real right[34]) is not registered, it does not take effect against third parties until the day on which it is. There is nothing in the wording of these Ordinances which suggests that registration can create any right

---

registered, with the court's consent, an interlocutory act of court in respect of proceedings for damages for breach of a construction contract. Counsel for the defendant argued, among other things, that, because the action did not relate to a "cedule", the registration was of no effect and should be set aside. The Court of Appeal found that, if the customary law had ever been such that a hypothec was only created by an interlocutory act of court where the claim related to a "cedule", it had developed so as not to be restricted in this way. The passage from the Royal Courts observations quoted in para 17 above was not cited in the *Jubilee* case, but confirms the finding in that case, in the sense that the Royal Court referred to a "registry . . . sanctioned by a single act of Court" creating priority, without making any reference to there being any need for the case to involve a "cedule".

[32] See "*Remarques et animadversions sur l'approbation des lois et coustumier de Normandie usitées es jurisdictions de Guernezé, et particulièrement en la Cour Royale de la ditte isle*" by T Le Marchant (Tome 1, Chapitre IV, Remarque 6, at 246). Le Marchant was writing in the late 17th century, after the system of registration was introduced, but his commentary relates entirely to the customary law, and he makes no mention of registration.

[33] The only effect of the amending Ordinance of 1724 was to reduce the time within which registration must be effected in order for the document registered not to have the effect which it would have had in the absence of the registration requirement. The 1631 Ordinance provided for registration within 40 days. The 1724 Ordinance reduced this so that, in effect, unless a document which creates rights as against third parties is registered on the day it is created (in which case it has immediate effect as from its creation) it does not take effect as against third parties until the date on which it is registered.

[34] That is, a right in respect of property (movable or immovable) as opposed to a personal right, which is a right against a person. In Roman law, a real right is a right "*in rem*", and in French law a "*droit réel.*"

which would not have existed in the absence of the system of registration. If the customary law was that obtaining a first act of court could create a hypothec in relation to immovable property, it is perhaps not as surprising as might at first appear that obtaining a first act of court could create a preference for the plaintiff in proceedings in respect of the defendant's movable property.

The 1836 Ordinance

22 So, we know that, in 1825, there was no *désastre* procedure but that, by 1852, when the case of *Gallichan v Barbenson* was decided, the procedure existed. What happened in the meantime? The answer is to be found in an article written by an anonymous author, referred to only as "B", in the *Guernsey and Jersey Magazine* in 1836[35] on the subject of the law of debtor and creditor:

> "Until very recently, a creditor attaching the goods of his debtor, and obtaining a single act of court recording such attachment, acquired a preference upon such goods to the full amount of his claim, over all the other creditors, even though such attachment should so shake the debtor's credit as to involve him in bankruptcy. This custom—which in many cases proved a flagrant injustice to creditors absent from the island, who, having no means of knowing what was going on here, could not provide for their own security—is said to have been founded upon a maxim of the Norman law: 'La loi subvient au diligent,'—a maxim which, however, favouring as it often did the most relentless creditor to the prejudice not only of the indulgent, but of those who, through absence from the island, were incapable of helping themselves, might with greater propriety have been rendered: 'La loi subvient a l'implacale, et erase l'indulgent et l'impuissant'. The class of creditors who in general suffered most from its effect, were those which the law should have been most solicitous to protect, namely

[35] Pages 252–255. B was the author of a number of articles on legal subjects in the *Guernsey and Jersey Magazine* which provide a useful overview, in English, of the state of Guernsey law in the 1830s. In the 1861 "Report of the Commissioners appointed to inquire into the Civil, Municipal and Ecclesiastical Laws of the Island of Jersey", Advocate Peter Jeremie, giving evidence as to Guernsey law, identifies B as having been James Barbet, HM Sargeant (see paras 14,410-14,412). Jeremie refers to Barbet's "several very able contributions to a monthly magazine, which was formerly published in Guernsey and Jersey." The author is indebted to Dr Darryl Ogier for drawing this reference to his attention.

> English houses furnishing Guernsey tradesmen with manufactured and other goods. They were indeed so unprotected, that it was no uncommon circumstance, when a bankruptcy took place, for some of them to have the mortification of seeing the produce of goods which they had furnished, but had not been paid for, applied to liquidate the claims of favoured creditors to the exclusion of their own.
>
> A case of this nature, which occurred in 1834, led to a change in the law. It presented itself under the palpable and aggravated form of a fraudulent attempt to shut out a body of English creditors, whose claims amounted to upwards of £5,000, from all participation in the produce of a linen draper's stock which they themselves had furnished. A most determined opposition, however, manifested itself on the part of these creditors, who forthwith issued a commission against the debtor in the English bankruptcy court, under which commission they appointed assignees who, step by step, opposed here the proceedings of the parties who claimed preference, and expressed their decided resolution to carry the question before his Majesty in council, rather than submit to what they very properly held to be a flagrant perversion both of law and justice. The affair exciting considerable indignation in the British metropolis, the whole trading part of the community here were so awakened to a sense of the danger that threatened their credit in the English market if the law remained unchanged, as to induce our chamber of commerce to remonstrate against it; and the court, after having judicially rejected the claim of preference in the particular case referred to, ruled legislatively at the chief pleas held on the 18th January, 1836, that from thenceforth no registry against real property, nor act of court recording or confirming an attachment against personal property, acquired within a fortnight antecedently to an insolvency, should entitle the creditor to any preference on such property,—the date of such insolvency to be subsequently decided upon by the court, according to the circumstances of each case."

23 The legislation to which B refers is an Ordinance[36] of the Royal Court[37]:

> "The Court, having almost daily before its eyes striking examples of the grave inconvenience and injustice of the custom in force in

---

[36] *Recueil d'Ordonnances*, Vol II, p 469. The Ordinance is indexed under the heading "*Préférences en cas de Faillites*".

[37] The Ordinance uses a number of different expressions to denote insolvency. Each expression is shown in brackets in the following translation.

this Island, on the subject of preferences accorded, notwithstanding a subsequent insolvency ('Faillite'), to creditors arresting the movable property of a debtor; in recognising the necessity to pass in the future an Ordinance of more extended effect, and of which the provisions encompass all cases of insolvency ('Faillite') or bankruptcy ('Banqueroute'), but knowing the extent to which the preparation of such legislation in a manner which accords with the spirit of our Institutions presents difficulties, which cannot be avoided without the benefit of experience and mature reflection, and, in the meantime, being desirous of bringing forward an immediate remedy to the inconveniences which are most keenly felt, HAS ORDAINED AND ORDAINS provisionally, having heard the conclusions of the Officers of the Crown:

1. That each Act or registration, for debt previously due, obtained in the fifteen days which proceed an insolvency ('désastre'), shall not create any preference or hypothec in favour of the creditor who has obtained them, over the movable or immovable property of the debtor, except for his costs (literally the 'expense of his diligence') which shall be payable in full.

2. That the date of insolvency ('désastre') shall be fixed by the Court, according to the circumstances, and shall be a date when there shall have been Acts or registrations, for debt previously due, obtained against the debtor, in respect of actions to obtain the confirmation of arrests for sums sufficiently large, in proportion to the debtor's assets, to produce a reasonable assumption that his affairs were then in such a disastrous state that he could not meet the demands of his creditors.

3. That any creditor, whether he has made an arrest or not, who wishes insolvency (désastre) to be declared, shall for this purpose either oppose the sale of the effects of the debtor, or present himself before the Commissioner of the Court before whom the creditors shall have been sent to establish their respective debts and preferences, or demand to intervene in the action of someone who has obtained an arrest against a third party in the hands of whom an arrest has been made, to declare that which he owes or is holding which belongs to the debtor."[38]

[38] "*LA COUR, ayant presque journellement devant les yeux des exemples frappants des inconvénients graves et de l'injustice de la coutume en force en*

24 This Ordinance appears to be the first occasion in a Guernsey legal context where the word "*désastre*" is used, and to be the origin of the *désastre* system as it exists in Guernsey today.

25 The preamble to the Ordinance makes it clear that the court was legislating in a hurry, to create an immediate remedy to what was, all of a sudden, an urgent issue. Presumably, this was the potential loss of credit from English suppliers to Guernsey businesses if the current system continued which is identified in the article referred to above. The plan was to make more thorough legislative provision in relation to insolvency in the future and, presumably for that reason, the Ordinance was expressed as being provisional, at a time when it did not have to

---

cette Isle, au sujet de Préférences accordées, malgré une Faillite subséquente, aux Créanciers arrêtants des Meubles d'un Debiteur; tout en reconnaissant la nécessité de passer par la suite une Ordonnance d'un effet plus étendu, et don't les dispositions embrasseraient tous les cas de Faillite ou de Banqueroute, mais sentant combien la rédaction de ces Réglements d'une manière qui s'accorderait avec l'esprit de nos Institutions présente de difficultés, auxquelles on ne peut obvier qu'à l'aide d'expérience et de mûre réflection, et, en attendant, désirant apporter un remède immédiat aux inconvénients qui se font le plus vivement sentir, A ORDONNÉ ET ORDONNE provisoirement, ouïes les conclusions des Officiers de la Roi:-

1. *Que tout Acte ou Enregistrement, pour Dette précédemment due, obtenu dans les Quinze Jours qui précéderont un Désastre, n'opérera aucune Préférence ni Hypothèque en faveur du Créancier qui l'aura obtenu, sur les Meubles ou Immeubles du Débiteur, excepté pur les dépens de ses diligences, lesquels lui seront payés en entier.*
2. *Que l'époque du Désastre sera fixée par la Cour, suivant aux circonstances, et sera datée d'un jour où Il y aura eu des Actes ou Enregistrements, pour Dette précédemment due, obtenus contre le Débiteur, sur des actions pour obtenir la confirmation des Arrêts pour des sommes assez considérables, à proportion de l'avoir du Débiteur, pour fournir une présomption raisonnable que ses affaires étaient alors dans un état si désastreux qu'il ne pouvait subvenir aux demandes de ses Créanciers.*
3. *Que tout Créancier, soit qu'il ait fait un Arrêt our non, qui voudra fair déclarer le Désastre, devra pour cet effet, soit oppose à la vente des effets du Débiteur, soit se présenter devant le Commis de la Cour devant lequel les Créanciers auront été envoyés pour faire conster de leurs Dettes et Préférences respectives, soit demander d'intervenir en Cause sur une action de la part d'un arrêtant contre un tiers entre les mains duquel on aurait fait Arrêt, à déclarer ce qu'il pourra devoir ou avoir entre mains appartenant au Débiteur.*"

be.[39] It appears that the intention was that it should cease to have effect once the intended more thorough provision in relation to insolvency had been made. The Ordinance was included, as then currently extant legislation, in Volume II of the *Recueil d'Ordonnonces* published in 1856. It has not since been expressly amended or repealed. It is strongly arguable that the event which would put an end to its provisional effect, the making of "an Ordinance of more extended effect, and of which the provisions encompass all cases of insolvency" has not occurred, and that the 1836 Ordinance remains in force.

26 An obvious issue is the *vires* of the 1836 Ordinance. The Royal Court undoubtedly had power to legislate by Ordinance.[40] The extent of that power has never been properly defined. What everyone agrees on, however, is that an Ordinance, made using the court's inherent power, could not alter the customary law.[41] The 1836 Ordinance itself, in its preamble, states that the rules as to preferences afforded to creditors arresting the movable property of a debtor are part of the "*coutume en force en cette Isle*".

27 What is unclear is how deeply enshrined in the customary law something had to be for the court to have had no power, in reliance on its inherent Ordinance making power, to change it.

28 It is difficult to ascertain what the Norman customary law in the context of insolvency was. The author can find nothing to suggest that there was an equivalent of the current *désastre* procedure whereby, if there was an insufficiency of arrestable movable property to meet all debts, the proceeds of the arrest were shared between all creditors (subject to the interests of preferred and secured creditors) *pro rata*. That might suggest that, simply by reason of the lack of such a process, a creditor could gain an effective preference by being the first to enforce against the movable property of his or her debtor. However, the

---

[39]The power of the Royal Court to legislate by Ordinance was the subject of much debate during the 19th century. As a result of a resolution of the States of Deliberation of 18 August 1848, the court's power was restricted so that it could only thereafter make provisional Ordinances, having effect for one year, without the approval of the States (see "An Island Assembly—The Development of the States of Guernsey 1700–1949" by R Hocart, pp 58–59).

[40] The court's power to legislate by Ordinance was transferred to the States of Deliberation by art 63 of the Reform (Guernsey) Law, 1948, although the court retained the power to make rules of procedure. Whilst most modern Ordinances are made pursuant to specific powers given to the States by Orders in Council, the inherent power which was vested in the court and transferred to the States by art 63 remains in use for matters such as liquor licensing legislation.

[41] See *The Government and Law of Guernsey* by D Ogier, 2nd edn, p 64.

Guernsey "custom", as described in the Royal Court's comments in 1825, went some way beyond that. If A brought proceedings against C, which were adjourned, and then B brought proceedings against C, in respect of which he or she obtained judgment by default, with A then subsequently obtaining judgment, it did not matter which of A and B handed his or her act of court to the Sheriff first. Even if C's movable property was arrested at the instance of B, who obtained the first judgment, A's claim was preferred because A had obtained the first act of court (the act adjourning the proceedings).

29 There is nothing to suggest that this was part of the customary law of Normandy. It was something which the Guernsey court itself had made up. How long this practice had been in force before the Royal Court referred to in its comments in 1825 is unknown, although the practice of affording priority to certain claims in the context of immovable property with effect from the date of the first act of court clearly existed at the time when Le Marchant was writing, in the late 17th century.[42] The justification for the practice (which the Royal Court in 1825 conceded gave A, in the example above, an "undue" preference) was the maxim "*La loi subvient au diligent*" which might be expressed in modern parlance as "You snooze, you lose". Despite the fact that B refers to this as "a maxim of the Norman law", the author can find no reference to it in any work on Norman customary law or any work on the customary law of any other region.[43]

30 What we have then is a situation where the court considered that the principle that a preference arose in certain circumstances, which it was seeking to negate in certain circumstances by the 1836 Ordinance, was part of Guernsey's customary law, but it does not appear to have been a deeply enshrined part of the customary law in the sense of its having formed part of the Norman customary law, or of the customary law of any other region of France. That gives rise to the question of how deeply enshrined in law did a principle have to be before changing it by Ordinance was outside the power of the court? Clearly, the court had no power to change something which was a fundamental part of the customary law,[44] but did it have power to alter a principle of law which it had made up itself? Presumably, there existed a line somewhere between deeply enshrined principles of customary law and recent inventions on one side of which the court did not have power to change

---

[42] See footnote 32.

[43] The only results of an internet search for these words, in this exact form, are the two passages, one from the Royal Court's comments in 1825 and the other from B's article in the *Guernsey and Jersey Magazine*, set out above.

[44] For example, the principle that "*le mort saisit le vif*".

them by Ordinance and on the other side of which it did. On which side of that line the principle which the 1836 Ordinance sought, in some circumstances, to negate lay can only be conjecture but, for what it is worth, the author's tentative view is that the principle that a preference was created in the order in which acts of court were obtained was insufficiently deeply enshrined in the customary law to be incapable of being changed by Ordinance of the court, so that the 1836 Ordinance is *intra vires*.

31 The 1836 Ordinance shows signs of having been drafted in a hurry, with the urgency to which both B's article in the *Guernsey and Jersey Magazine* and the Ordinance's own preamble refer, with the result that it is not well drafted. For example, the issue with which it is expressed in its preamble as dealing is "preferences afforded . . . to creditors arresting the movable property of a debtor". The fact that priority is afforded to creditors in respect of immovable property, in order of the date of registration of acts of court in the *Livre des Contrats*, is not addressed in the preamble. However, art 1 of the Ordinance itself states not only that an act of court (obtained within the fifteen days preceding a *désastre*) gives rise to no preference in relation to movable property, but that the registration of an act of court (obtained within that period) gives rise to no hypothec.

32 The 1836 Ordinance presents a system which is very different from the *désastre* system which we know today. The author has never heard it suggested, in the context of a modern *désastre*, that distribution of the proceeds of the debtor's movable property should (once secured and statutorily preferred debts have been dealt with) be other than on a *pari passu* basis, irrespective of when the actions of judgment creditors were commenced. However, the 1836 Ordinance does not seek to set aside all preferences, and hypothecs, obtained by judgment creditors, but only those obtained in the fifteen days preceding a *désastre*. One might assume that the intention was that that acts of court obtained after the *désastre* should also be included within the ambit of art 1, as otherwise the odd result would be produced that acts of court obtained in the fifteen days before the *désastre* would have no effect (in terms of creating a preference in the context of movable property or a hypothec in the context of immovable property) but acts of court obtained after the date found to be the date of the *désastre* would continue to be preferred in accordance with the "custom" referred to in the preamble to the Ordinance. The omission of a reference in art 1 to the period after the date of the *désastre* is perhaps another example of the sloppiness of drafting resulting from the rush in which the Ordinance was drafted. Because art 1 would make little sense otherwise, it should, in the author's view, be read as referring both to acts of court obtained in the fifteen days before a *désastre* and to those obtained after the *désastre*.

33 In the modern practice, because of the *pari passu* distribution between all creditors (once secured and preferred debts have been dealt with) the date of a *désastre* is in most cases irrelevant, at least in the context of the *désastre* proceedings themselves, and sometimes difficult to ascertain.

34 Because the 1836 Ordinance envisaged that only certain acts of court would be affected by a finding that a *désastre* had occurred, the precise date on which it had occurred was relevant. Article 2 of the 1836 Ordinance provides for the court to undertake an investigation to find a date, inevitably prior to the hearing at which the investigation took place, when the "*désastre*" occurred, based on the test set out in art 2. Once that date had been ascertained, acts of court obtained in the fifteen days before that date (and, in the author's submission, after that date) would create no preference in respect of the movable property of the debtor and, if registered, would create no hypothec in respect of his or her immovable property.

35 The test for whether a debtor is *en désastre* and, if so, when that event occurred, set out in art 2 ("a date when there shall have been Acts or registrations, for debt previously due, obtained against the debtor, in respect of actions to obtain the confirmation of arrests for sums sufficiently large, in proportion to the debtor's assets, to produce a reasonable assumption that his affairs were then in such a disastrous state that he could not meet the demands of his creditors") is convoluted. The substance of the test is that the court is seeking to ascertain the earliest date at which the debtor was unable to pay his or her debts as they fell due,[45] but it must also be a date by which there had been acts of court or registrations in respect of actions to obtain the confirmation of arrests.

36 The way in which the *désastre* process set out in the 1836 Ordinance was invoked is nothing like that which we see today. The practice now is that the process is invoked by the court, upon the receipt of information from HM Sheriff that he is aware of debts in excess of the amount of the proceeds of realisation of the movable property of the debtor which the Sheriff has managed to track down. Article 3 of the Ordinance envisages its being invoked by one of the creditors of the debtor, whose debt would otherwise be deferred to that of another creditor, at one of a number of specified stages during the process whereby the debtor's property is realised and distributed.

37 The first opportunity given by art 3 to a creditor to seek a declaration of *désastre* is to oppose the sale of the debtor's tangible

[45] In modern parlance, the "cashflow test" for insolvency.

movable property. The arresting creditor will[46] need to seek confirmation of the arrest and permission to sell the property arrested, and art 3 envisages that another creditor may, at that hearing, seek to invoke the process outlines in the 1836 Ordinance. The obvious issue with this is that there is, and has never been, a requirement to summon the other creditor to the hearing or to give public notice of it, so whether the other creditor became aware of it, so as to enable him or her to intervene, would be a matter of chance.

38 The second opportunity which a creditor has under art 3 to invoke the *désastre* procedure in the 1836 Ordinance is to "present himself before the Commissioner of the Court before whom the creditors shall have been sent to establish their respective debts and preferences". This appears to refer to the stage of *saisie* proceedings which, when that process was undertaken in French, was known as "*opposition de droits*" but, since the anglicisation of the process[47] has been called the "marshalling of claims". That would be consistent with the aim of the 1836 Ordinance of setting aside preferences in relation to immovable, as well as movable, property. The other opportunities to invoke the *désastre* process referred to in art 3 only occur in the context of proceedings relating to movable property. It is also possible that there may have been an existing process in the context of movable property whereby creditors were sent before a Commissioner to establish debts and preferences, and that art 3 is referring to that process, as well as to the marshalling of claims in a *saisie*. In circumstances where the pre-1836 Law was that preferences in respect of movable property were created in the order in which first acts of court were obtained (as opposed to the order in which creditors handed acts of court authorising an arrest to HM Sheriff) it seems likely that there was some process whereby the order of preferences was formally certified by a Commissioner appointed by the court.

39 The last opportunity given by art 3 to a creditor to invoke the process envisaged by the 1836 Ordinance is "to intervene in the action of someone who has obtained an arrest against a third party in the hands of whom an arrest has been made, to declare that which he owes or is holding which belongs to the debtor". This process has not changed materially since 1836,[48] and is similar in effect to garnishee proceedings

---

[46] This process is materially the same now as it was in 1836.

[47] By the Saisie Procedure (Simplification) (Bailiwick) Order, 1952.

[48] The author is aware that this procedure is now little used because a practice has developed whereby, if the Sheriff arrests a bank account, he or she simply requests the bank to pay over the balance standing to the credit of the account, rather than waiting to be summoned by the arresting creditor to declare what it

in English law. The Sheriff may arrest in the hands of a third party anything which he or she holds on behalf of a judgment debtor or, more commonly, any debt due by the third party to the debtor. The third party is typically a bank with which the debtor holds an account which is in credit. The third party is summoned by the arresting creditor to declare what is owed to the judgment debtor and to pay that sum over to the arresting creditor. The 1836 Ordinance stipulates that, at the hearing when a third party responds to such a summons, another creditor may intervene and seek to invoke the *désastre* procedure as envisaged by the 1836 Ordinance.

40 One of the defects of the modern *désastre* system identified in the Royal Court Committee's report of 1985 was that, as matters stood at that time, debts due by third parties to judgment creditors were outside the ambit of the *désastre* process, which could only then be invoked where HM Sheriff was summoned as sequestrator (having arrested and sold a judgment debtor's tangible movable property). Since then, however, the practice has changed. Where a third party is summoned to declare and pay over, the Sheriff[49] will inform the court if he or she is aware of other claims against the same judgment debtor and the court then orders the third party to pay over the sum due by the third party to the Sheriff, and appoint a Commissioner for the purpose of there being a *désastre*.[50]

41 Modern *désastre* proceedings concern only movable property. However, art 1 of the 1836 Ordinance makes it clear that both movable and immovable property were intended to be dealt with by the terms of the Ordinance. The "customary" principle that preferences were created in the order in which first acts of court were obtained applied equally to movable and immovable property (although, in the case of immovable property, there was, and remains, a requirement for an act of court to be registered) and the court's intention, in making the 1836 Ordinance, was to negate that principle both in relation to movable and immovable property. Thus, by art 1, an act of court registered in the fifteen days prior to the date found to be the date on which the debtor had been in a

---

owes to the judgment debtor and pay the sum in question over to the arresting creditor, and banks normally accede to such requests. As this new practice has not been challenged, it remains to be seen whether a voluntary payment by a bank in response to a request from HM Sheriff operates to discharge the bank from its indebtedness to the judgment debtor.

[49] Either the Sheriff or a Deputy Sheriff will inevitably be present in court.

[50] On the author's copy of the 1984 report, he has made a manuscript note detailing this revised process. The note is dated 25 January 1994, so the practice must have changed on or before that date.

state of *désastre* (and, in the author's submission, after that date) creates no hypothec in favour of the registering creditor.

42 A hypothec has two effects. First, it gives the creditor a right of priority, in *saisie* proceedings, as against other creditors (other than those with prior ranking hypothecs). Second, it creates a *droit de suite*, the right to follow the property which is the subject of the hypothec into the hands of third parties, so that the property is available for the purpose of realising the creditor's debt even though it no longer belongs to the debtor. This is referred to in Guernsey law as the right of "*appel en garantie*".[51]

43 It is understandable that the court, in making the 1836 Ordinance, intended that registration of an act of court affected by a finding that a *désastre* had occurred should give rise to no priority in respect of the debtor's immovable property as against other creditors. However, in saying that registration creates no hypothec at all, art 1 goes beyond that. On the face of it, at least, it means that the debtor can dispose of his or her immovable property without the purchaser needing to be concerned to see that the registration of a relevant act of court has been cancelled, because the registration will have created no hypothec, and so can be ignored. It must be wondered whether this is what was intended. It may be another example of an unintended consequence arising from the Ordinance having been drafted in a hurry.

---

[51] The author is not aware of any case, since the anglicisation, and simplification, of the *saisie* procedure in 1952, where the right of *appel en garantie* has been called upon, presumably because it is extremely rare for a hypothec to remain in place when property changes hands. Presumably, the right had not had to be relied on for some time before the Saisie (Simplification) (Bailiwick) Order, 1952 came into force, as the author of that legislation did not feel it was worthwhile to provide an English version of the expression "*appel en garantie*", as he did with a number of other French expressions associated with *saisie* proceedings. Care should be taken not to confuse this right, simply because it contains the word "*garantie*", with the contractual law of guarantee. The right of "*appel en garantie*" gives the creditor no direct right of action against the current owner of the property which is the subject of the hypothec giving rise to the right. The right can only be enforced in *saisie* proceedings against the original creditor. A full description of the, potentially very complex, process of enforcing the right of *appel en garantie* is outside the scope of this article but, by way of a very brief and incomplete description, as part of those proceedings, the current owner of property which is the subject of a hypothec securing payment of a debt due by the defendant in the *saisie* proceedings is offered the opportunity to pay the secured debt. If he or she declines to do so, he or she loses the property.

44 Having, thus far, unmercifully criticised the drafting of the 1836 Ordinance, it must be said that there is one aspect of it which is rather clever. By referring to "each Act or registration" the wording of the Ordinance is sufficiently wide that its provisions could be used to set aside (in the sense that, whilst the debt itself would not be affected, the intended security would not be effective) consensual security (in modern parlance, a "bond") given by a debtor in favour of a creditor. Clearly, it would not be desirable if the security granted by a new lender to a prospectively insolvent debtor was able to be set aside if it transpired that it had been given within the fifteen days preceding the date subsequently found to be that of the debtor's *désastre*. For that reason, art 1 provides that it is only acts or registrations relating to "debt previously due" which may be affected by the provisions of the 1836 Ordinance.

The 1928 report and the Law relating to Debtors and Renunciation, 1929

45 The next time one gets a view of the *désastre* process is some 92 years after the passing of the 1836 Ordinance, in a report of 1928 to the States of Deliberation from the Royal Court.[52]

46 Following on from the visit of the Royal Commissioners in 1815, various changes were made to the law on voluntary renunciation, in particular to eliminate the manner in which it discriminated between natives of the Island and non-natives (or "strangers"). However, by the late 19th century, it was clear that the law in this respect was unsatisfactory. A committee of the States was appointed to consider the matter but, having met only once in over twenty years, it was eventually disbanded and the matter was referred to the Royal Court.[53] The court dealt with the issue rather more rapidly than the committee had and produced a report the following year.[54] A *Projet de Loi* which, when enacted, became the Law Relating to Debtors and Renunciation, 1929, was drafted to accompany it.

47 The 1929 Law abolished *cession* and reformed the law relating to voluntary renunciation. More importantly, for the first time, it brought into force a bankruptcy-style process which could be invoked by one or

---

[52] The author of the report was the then Bailiff, Sir Havilland de Sausmarez. It should be noted that, whilst he was an English Barrister and had had a number of distinguished judicial appointments during a career as a colonial judge, de Sausmarez had not practised law in Guernsey. He retired to Guernsey in 1920 and was appointed as Bailiff in 1922.

[53] States' resolution of 20 July 1927.

[54] *Billet d'État* XIV of 1928, p 243.

more of a debtor's creditors. It will be recalled that, up to this time, a debtor could opt for voluntary renunciation, but if he or she chose not to, there was no option to the creditor to invoke any formal process where, for example, the debtor could be obliged to disclose what assets he or she had, and preferences given by the debtor to a particular creditor could be set aside.

48 Part II of the 1929 Law sets out the procedure for voluntary renunciation, whereby a debtor can, in some circumstances, by obtaining, first, a "declaration of insolvency" and, thereafter, applying for "the benefit of renunciation", be relieved of future liability for his or her debts. A debtor who makes an application for a declaration of insolvency must, *inter alia*, make a list of his assets and liabilities and swear to the truth of it on oath.[55] He or she must answer questions of creditors[56] and must take an oath not to leave the Island until the application for a declaration of insolvency has been dealt with.[57] Breach of such an oath is treated as perjury.[58] There is also a process for the setting aside of any preference given by the debtor to any creditor in the three months preceding the making of the application for a declaration of insolvency.[59]

49 This part of the Law largely mirrors the then existing procedure relating to voluntary renunciation, although it replaced a single application by the debtor at the start of the process (for the benefit of renunciation) with a two stage process (an application for a declaration of insolvency followed, later, by an application for the benefit of renunciation) so as to enable the court to refuse to grant renunciation (which releases the debtor from his or her debts) if it transpires during the investigatory process which follows the grant of an application for a declaration of insolvency that the debtor had not behaved properly in incurring the debts which led to his or her insolvency. This two-stage process was intended to be similar in substance to the two-stage process (grant of a receiving order and discharge of bankruptcy) found in the (United Kingdom) Bankruptcy Act, 1914. Also, various provisions of the Bankruptcy Act were incorporated into the 1929 Law. For example, art IX, which deals with the setting aside of certain preferences given by the debtor to creditors, is in almost identical terms to s 468 of the Bankruptcy Act.

---

[55] Article VII.
[56] Article VII.
[57] Article VIII.
[58] Article VIII.
[59] Article IX.

50 Clearly, it was envisaged that there would be circumstances where it would be to the advantage of a creditor to impose a declaration of insolvency, and the obligations, and ability to set aside preferences, which go with it, on a debtor. Article XVI of the 1929 Law provides that a creditor of a "debtor whose affairs have been declared in a state of '*désastre*' by his arresting creditors at a meeting held before a Jurat as Commissioner of the Court" may make an application for a declaration that the debtor is insolvent and, if that declaration is granted, the debtor is deemed to have made an application for a declaration of insolvency (and to be subject to the associated obligations to which such an application gives rise).

51 The report of the Royal Court which accompanied the draft *Projet de Loi* refers to art XVI (then in draft) as follows:

> "Up to the present time there has been no provision enabling a creditor to set the bankruptcy law in motion. Only under certain circumstances, which follow on a report by the Prévot,[60] that there are at least two judgments against a debtor and that he cannot levy on the debtor's property sufficient money to meet them, can the Court act. The Court then appoints a Commissioner who holds a meeting of creditors who can declare a debtor's affairs to be 'en désastre'. This old fashioned but known procedure it is proposed to retain, but it is now proposed that a power be given to any creditor to petition the Court to have such a person declared insolvent, when exactly the same procedure will follow as follows on [Part II of the 1929 Law]."

52 The 1929 Law therefore made no changes to the *désastre* process (described even in 1928 as "old fashioned"). It simply made the existence of a declaration of *désastre* a condition of the grant, at the instance of a creditor, of a declaration of insolvency.

53 What, then, can we see in the description of the *désastre* process in the 1928 Royal Court report which tells us how the process had by then changed from that envisaged by the 1836 Ordinance? Whilst the 1928 report contains limited detail, there appears to be little difference between the process which it describes and the process today, except that the 1928 process required that there be at least two judgments in order for the court to act, whereas the process today does not.

54 There is no suggestion in the 1928 report that the purpose of a *désastre* is to set aside, and then only to a limited extent, preferences which would otherwise arise (in the order in which first acts of court have been obtained). There is nothing to indicate that, by 1928,

---

60 "*Prévot*" is simply the French word for "Sheriff".

distribution of the proceeds of realisation of a debtor's arrestable movable property was effected (subject to any secured interest, or statutory preference) other than entirely on a *pro rata* basis. Admittedly, in describing the voluntary renunciation procedure as it existed prior to the coming into force of the 1929 Law, the report states that "From the date of the application [for the benefit of renunciation] no preference by one creditor over another can be acquired", which suggests that, absent such an application, preferences could be acquired. However, it seems likely that this reference to preferences is to those given voluntarily by the debtor to one or more particular creditors, rather than preferences arising by virtue of the order in which creditors happen to have instituted proceedings against the debtor, and obtained the first acts of court in those proceedings. In his opening remarks in the *Billet d'État* which contained the 1928 report and the draft *Projet de Loi*, Sir Havilland de Sausmarez commented that "The object of Bankruptcy law is to secure the equal division of the bankrupt's property amongst his creditors". Whilst *désastre* is not bankruptcy, if, by 1928, there had existed any remnant, in the context of movable property, of the rule that a preference could be obtained by virtue of being the first creditor to start proceedings (and obtain the first act of court in those proceedings) that would surely have been mentioned, and something would have been done about it.

55 The *désastre* process as described in the 1928 report appears to apply only to movable property, rather than both to movable and immovable property as envisaged by the 1836 Ordinance. Whilst this is nowhere specifically stated in the 1928 report, it can be inferred from the description of the court only appointing a Commissioner for the purposes of a *désastre* following a report from the Sheriff that he cannot levy on the debtor's property sufficient money to meet the judgments against the debtor. This can only refer to movable property, as the Sheriff has no role (other than an extremely peripheral one) in the enforcement of debts against immovable property, by means of *saisie* proceedings.

56 Finally, by 1928, it is clear that the *désastre* process was no longer instigated by a creditor, taking advantage of one of the three opportunities to intervene referred to in art 3 of the 1836 Ordinance, but by the court, upon being informed by the Sheriff of an insufficiency of arrested assets.

57 One unusual aspect of the 1928 report, and of the 1929 Law, is the manner in which they describe the first meeting following the appointment by the court of a Commissioner. The report refers to "a meeting of creditors who can declare a debtor's affairs to be '*en désastre*'". Article XVI of the 1929 Law refers to a "debtor whose affairs have been declared in a state of '*désastre*' by his arresting

creditors at a meeting held before a Jurat as Commissioner of the Court". Neither in the original process envisaged by the 1836 Ordinance nor in the modern process is it the creditors, or any of them, who declare a debtor to be *en désastre*. If the proper modern process is followed, and the first meeting following the appointment of the Commissioner is held, it is the Commissioner who makes such a declaration. It is never the creditors, and it is not clear why it would be in their interests to make such a declaration. Why the 1928 report and the 1929 Law describe the first meeting, and the declaration that a person is *en désastre*, in this way is something of a mystery. It is possible that this is nothing more than imprecise drafting.

The 1963 letter

58 By way of a further, and final, view of the development of the *désastre* system, there is a letter dated 15 November, 1963 from John[61] Loveridge, then HM Procureur, to Mr PW Radice, the Clerk of the Court of Alderney, presumably in response to a request from the latter for information as to the appropriate procedure to follow. The letter sets out the *désastre* process as it then existed in Guernsey in detail, and has a number of precedents attached to it. Copies of the letter were circulated to the Guernsey Bar. We need not dwell on the detail of this letter simply because the process which it describes is, apart from changes which have been made by statute and recent changes in the process which are referred to elsewhere in this article, the same as the modern process.

59 It is worth mentioning that, by way of a description of the first meeting following the appointment of a Commissioner, the letter refers to—

> "a meeting attended by the arresting creditor and the Sheriff [at which] the Commissioner declares the debtor to be '*en désastre*' (in a state of financial disaster) and fixes the place, date and time at and on which he will examine the claims and preferences of the various creditors and declare a dividend amongst them. The debtor is summoned formally to attend this meeting."

The reference to the debtor being summoned "formally", and the fact that there is no reference to the debtor attending in the description of the first meeting, suggests that, in practice, he or she wasn't expected to attend. The Royal Court Committee's 1984 report states that "The original practice whereby the debtor was summoned to this meeting before the Commissioner, attended by the arresting creditor and HM

[61] Later Sir John.

Sheriff, lapsed many years ago." Presumably the practice lapsed at some time between 1963 and 1984.

60 The 1963 letter makes it clear that, by that time, any suggestion that a preference could be obtained by a creditor simply by virtue of being first in time to obtain an act of court in proceedings against the debtor had disappeared. It states that "The only claims which are preferential in Guernsey are claims for legal costs and claims for rent".[62]

Evolution of the *désastre* process

61 We have seen that the *désastre* procedure in its current form is quite different from what was envisaged in the 1836 Ordinance from which it descends. We might speculate as to how the changes occurred. First, and perhaps most importantly, how did the system change from one whereby the principle that creditors obtained preferences in the order in which they had obtained acts of court was to be set aside only in defined circumstances (where acts of court were obtained within a fixed period prior to, and presumably after, the date of the *désastre*, with that date being ascertained by the Commissioner appointed by the court) to the current system whereby the order in which acts of court, and judgments, are obtained is irrelevant and, subject to any statutorily preferred claims or secured claims, all rank equally? The most likely explanation is simply that, in all of the *désastre* proceedings for some time after the 1836 Ordinance was made, the preference which would otherwise have arisen was set aside in respect of the claims of all creditors. That is what would typically happen in most cases if one were to apply the test for *désastre* in the 1836 Ordinance. Once this had continued to happen for some time, the fact that preferences had ever been created in the order in which acts of court were obtained, and that the 1836 Ordinance only envisaged the setting aside of some of those preferences, was forgotten, so that it came to be perceived by practitioners, and by the court, that all claims ranked equally. Once all claims rank equally, the need for the Commissioner appointed by the court to decide not only that a *désastre* has occurred but when it occurred disappears.[63]

62 This is where we return to the first meeting following the appointment by the court of a Commissioner which, as we know, by the

---

[62] Further preferences have been provided for by the Preferred Debts (Guernsey) Law, 1983, as amended.

[63] Clearly, when *Gallichan v Barbenson* was decided in 1852, the fifteen-day period referred to in the 1836 Ordinance was still known about, and was still relevant, as that is the period referred to in the note of the case (see para 15 above).

time of the 1984 Royal Court Committee report was not happening. As previously mentioned, this meeting appears to have no purpose in the modern *désastre* system (although, for the reasons set out in paras 8–10 above, it should still be held). It seems likely, however, that it is a remnant of the original system envisaged by the 1836 Ordinance. Under that system, it would clearly have been important to hold a hearing before the Commissioner not simply to establish that the debtor was *en désastre* but when, at a date inevitably prior to that hearing, he went *en désastre*. It would also have been eminently sensible for the debtor to be summoned to attend that meeting, so that evidence could be heard from him or her to establish when he went *en désastre*.

63 Second, how did the process change from one whereby *désastre* could only be initiated by a creditor intervening at one of the stages of the enforcement process referred to in art 3 of the 1836 Ordinance to one whereby the procedure is initiated by the court, upon being informed by the Sheriff of an insufficiency in the proceeds of arrested assets to meet all claims? The answer, again, seems simple. In the context of movable property, the stages of the enforcement process at which a creditor had the right to intervene under the 1836 Ordinance are not stages where such a creditor will typically need to be informed formally that that particular stage is happening, so that whether a creditor knew about it, and was able to exercise his or her right to invoke the *désastre* procedure, will have been a matter of luck. Presumably, the court, seeing the unfairness in a situation where it was made aware that there were claims other than those of the arresting creditor but no other creditor came forward to intervene and apply for a declaration that the debtor was *en désastre*, started to invoke the procedure of its own motion.

64 Third, the 1836 Ordinance provides for *désastre* to apply to enforcement proceedings relating to both movable and immovable property. How did that change so that the modern perception is that they apply only to movable property? It seems likely that, for some time following the making of the 1836 Ordinance, its provisions were not invoked in *saisie* proceedings, and the fact that they could be was simply forgotten.

Modern relevance of the 1836 Ordinance

65 Is there anything in the 1836 Ordinance, or in the customary law principle which preceded it that preferences were obtained in the order in which first acts of court were obtained in proceedings against a debtor which is of modern relevance? Might a creditor be able to argue that, in some circumstances, a preference still arises from this principle? For example, A brings proceedings against B, a builder who is, at that time, fully solvent, in respect of building work which A claims B has

carried out badly. B defends the proceedings which are placed on the pleading list, thereby giving A the first act of court. The proceedings are long winded, taking several years to complete, and by the end of that process the cost of defending the proceedings has led B to become insolvent. A finally obtains judgment against B and arrests B's movable property but, on seeking to have the proceeds of the sale of that property paid over in satisfaction of A's debt, the Sheriff announces that he is aware of numerous other creditors such that there needs to be a *désastre*. Could A successfully argue that, because he commenced proceedings long before B's insolvency, his claim should be preferred in accordance with customary law?

66 Could one take this argument even further? Could it be argued that the 1836 Ordinance was *ultra vires* and, because the whole *désastre* system is founded on it, we should revert to the applicable customary law immediately before it was passed whereby, in the context of movable property, debts were given preference in the order in which the first acts of court were obtained in actions in respect of them?

67 The answer must be that there is no scope for a successful argument that, in the context of movable property, debts are dealt with other than on the basis that, statutorily preferred and secured debts aside, none of them is preferred. Whilst it is reasonably clear what the customary law was in the early 19th century, it has changed since then. The customary law is mutable, and it has mutated. The perception amongst practitioners and judges for many years past has been that, in the context of movable property, debts rank equally, and it is that perception which represents the current customary law.

68 The situation may, perhaps, be different in the context of immovable property. Clearly, it was intended by the 1836 Ordinance to abrogate, to a limited extent, the rule that, in *saisie* proceedings, priority in respect of consensual security (that is, "bonds") and judgment debts is given in the order in which the instruments or acts of court relating to claims for those debts are registered in the *Livre des Contrats*. There seems no reason in principle why, in appropriate circumstances, the provisions of the 1836 Ordinance should not still be given effect. Simply because these provisions have rarely, if ever, been applied, that does not mean that they no longer can be. It may be that there have not been circumstances where it has been in the interests of one or more of the parties to seek to have them applied.

69 For example, let's say that A owns immovable property and there are three hypothecs charged against it. The first is created by a bond in favour of B, a bank, to secure lending used to purchase the property. After making payments when due for some years, A defaults on payment of the debt due to B, which takes judgment against A and commences *saisie* proceedings. Shortly after that, two (otherwise

unsecured) creditors of A, C and D, take default judgment against A, and immediately register the acts of court recording those judgments, thereby creating the other two hypothecs. C is slightly faster out of the blocks than D, so that C's act of court is registered one week before D's. In the normal course of *saisie* proceedings (and assuming that all three creditors decide to take part in the proceedings) D would be offered A's property first, subject to paying off the claims of B and C in full. If D declined to take the property, it would be offered next to C, who could accept it subject to paying the claim of B and, if C declined to take it, the property would be vested in A.

70 In the example above, there seems no reason why D should not argue, assuming that the facts support such an argument, that, both C's judgment and D's judgment were obtained at a time when A was "*en désastre*", applying the test in art 2 of the 1836 Ordinance, or during the period of fifteen days preceding the date on which A became "*en désastre*". If D's argument was successful, the effect of art 1 of the 1836 Ordinance would be that, rather than D's debt ranking behind that of C (because of D's later registration) the two debts would rank equally.

71 Of course, nothing in art 1 would affect the security created by the bond in favour of B. Not only was it clearly consented to long before the start of the fifteen day period referred to in the 1836 Ordinance, it was consented to in respect of contemporaneous lending, to fund the purchase of A's immovable property. Whilst a bond consented to in respect of an existing debt (so as to give a preference to an existing creditor) could be stripped of its effect by the 1836 Ordinance, the bond in the example above does not relate to "debt previously due", and is therefore outside the scope of the 1836 Ordinance.

72 If the debts of C and D ranked equally, they would, in *saisie* proceedings, be offered A's property at the same time. If, say, D, but not C, chose to accept it, it would be vested in D, who would be obliged to pay the claim of B in full, but not the claim of C (who would be treated as having renounced his or her claim). If both C and D chose to accept, the property would vest in them in undivided shares *pro rata* their respective claims, and they would collectively be obliged to pay B's claim, again *pro rata* their claims.

Parallels between Guernsey and Jersey *désastre*

73 Whilst full consideration of the law of Jersey in this context is beyond the scope of this article, it is worth noting that a *désastre* process very similar to the Guernsey system (as it is now, rather than as initially envisaged by the 1836 Ordinance) was introduced in Jersey some time

before its introduction in Guernsey.[64] The Jersey system was substantially reformed, and put on a statutory footing, by the Bankruptcy (Désastre) (Jersey) Law 1990. One might surmise, by reason of the similarities between the Jersey system before that reform and the Guernsey system, that the Guernsey courts may, in developing the Guernsey system from what was originally envisaged by the 1836 Ordinance into that which we know today, have sought guidance from how things were done in Jersey.

Conclusion

74 The origins of the Guernsey *désastre* process do not lie in the customary law but in a statute. The process has, however, developed so as to be very different from that envisaged by the Royal Court in passing that statute. That development might be said to be a good example of the customary law, ever mutable, in action.

Simon Howitt has been a Guernsey Advocate since 1988. He is a Consultant with Babbé LLP, a Commissioner of the Guernsey Financial Services Commission and a member of the Editorial Board of the Jersey and Guernsey Law Review.

[64] The first Jersey *désastre* appears to have been in the late 18th or very early 19th century.