

THE JERSEY LAW COMMISSION



REPORT

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.

The Commissioners are:-

Mr David Lyons, English Solicitor, *Chairman*

Advocate Alan Binnington

Mr Clive Chaplin, Solicitor

Advocate Kerry Lawrence

Advocate John Kelleher

Mr Peter Hargreaves, Chartered Accountant

The address of the Jersey Law Commission is PO Box 404, Whiteley Chambers, Don Street, St Helier, Jersey JE4 9WG and its internet pages are within the Jersey government's website www.lawcomm.gov.je

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To the Chief Minister of the States of Jersey

Part I Introduction

- 1 Following the publication in May 2006 of its Consultation Paper No.8 on Security on Immoveable Property, the Commission received comments in writing from only two persons. Both of these were mainly complimentary and general verbal comment has also been favourable.
- 2 The only matter arising from the written comments is a point concerning the power of sale with which it is proposed to replace the current *dégrévement* procedure. This is discussed below in Part III, where we conclude that it does not call for change to the proposals set out in the Consultation Paper.
- 3 Nor have we made any other substantial amendments to the proposals in the Consultation Paper except for one point that we have reconsidered in the light of political developments since the Paper was published (see below at 8).

Part II Overview of the Commission's proposals

- 4 After conducting a comparative historical review of the English common law mortgage and the civil law system of hypothecation, the Commission is in no doubt that hypothecation should continue to be the method of obtaining security on immoveable property in Jersey. However, there are many aspects of existing Jersey law in this area that need clarifying, codifying and updating to meet present-day requirements.
- 5 One of the chief defects of the present law is that a creditor secured on immoveable property has no means of proceeding against his security except through some form of bankruptcy process. Usually this is either a *désastre*, the scope of which was extended to immoveable property by the Bankruptcy (Désastre) (Jersey) Law 1990, or a *dégrévement*, a process introduced in its present form by the *Loi sur la Propriété Foncière* of 1880 but having its roots in the ancient customary system of *décret*. The Commission, in its Report No.2 on Dégrévement published in 1999, proposed that *dégrévement* be abolished. This proposal was repeated in the current Consultation Paper and it was further proposed that all existing and future secured creditors be given instead a power of sale modelled on that provided for intangible moveable security interests by the Security Interests (Jersey) Law 1983.

- 6 Under the present law a widow's customary right of dower is secured by a legal hypothec on her husband's immovable estate dating from his death. A widower's *droit de viduité* should logically now have the protection of a similar hypothec, as it seems from the Wills and Successions (Jersey) Law 1993 that both dower and *viduité* now only arise in situations where they have to be claimed adversarially from the legatees to a testate succession. More broadly, it seems to us unjust that different rights for widows and widowers should survive in the twenty-first century. We propose that the Wills and Successions Law be amended to redefine dower and *viduité* as identical rights claimable by a surviving spouse in a testate immovable succession failing comparable provision in the will, and secured by a legal hypothec on the estate. Should *légitime* in moveable successions be replaced in the future by the 'judicial discretion' method of testamentary restriction adopted in England and Wales, applying to both moveable and immovable property, dower and *viduité* could be abolished entirely and their ancillary legal hypothec given instead to any person applying to the Court for discretionary provision out of a testate immovable succession.
- 7 In chapter 14 of the Consultation Paper we recommended that it should be possible to hypothecate undivided shares in the types of immovable property that are themselves hypothecable, but we did not recommend measures to allow hypothecation of the individual contingent interests of persons holding a property jointly and for the survivor. The idea of charges for third party liability (whereby the owner of a property charges it to secure the debt of another person without being party to the debt itself) was also rejected as it conflicts with the principle that a hypothec is inseparable from the debt it secures; the need it would address seems to us to be adequately met by the established procedures for registering guarantees and for making co-owners jointly and severally liable for their individual debts. At paragraph 14.10 we also considered 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 was that some shared equity schemes operate on that basis in the UK and that it should be available in Jersey to facilitate the introduction of such schemes here. At the time we were not convinced of the need for this either, but in view of recent moves in the political sphere for the introduction of shared equity schemes we have now decided that the law should make provision for hypothecs of this type.
- 8 We have also added special provisions for registering orders of the Family Division of the Royal Court, to enable orders for periodic payments to be registered as well as those for payment of a single sum.
- 9 In its 1999 Report on *Dégrévement* the Commission recommended that the proposals made in that report should be implemented by further amending the *Loi (1880) sur la Propriété Foncière*. The proposals now being put forward are much more extensive and we recommend that the 1880 law and its various amendments be repealed and replaced by a new statute drafted in English. To ensure that its provisions are compatible with the principles of this specialized area of Jersey law, we further recommend that a qualified Jersey advocate or

solicitor with knowledge of conveyancing practice should be appointed as consultant to the law drafting process.

- 10 Finally, looking ahead beyond our present topic, we see no reason in principle why the new law should not be adapted in the future to provide for the hypothecation of moveable as well as immovable property should the legislature wish to follow some other jurisdictions in bringing both classes of property within a single system of hypothecation.

Part III Power of sale: rights of spouse and dependants

- 11 In paragraph 19.3 of the Consultation Paper we proposed (see 5 above) that all hypothecary creditors be given a statutory power of sale modelled on that provided by Article 8 of the Security Interests (Jersey) Law 1983. The power of sale will be exercisable only on the authority of an order of the Royal Court, whose duties and powers will be based on Article 8(4) of the Security Interests Law (see paragraph 19.6). In paragraph 19.11 we did not recommend that special provision be made for a spouse or dependant of the mortgagor/debtor similar to that contained in Article 12 of the Bankruptcy (Désastre) (Jersey) Law 1990.

- 12 It was suggested by one commentator that the interests of a spouse and dependants ought to be given such specific protection or alternatively that this could be achieved by giving to the Royal Court, in ordering a power of sale, a broad general discretion to balance the interests of the family equitably with those of secured creditors.

- 13 Whilst we continue to be of the view that the rights of the spouse or dependants of the mortgagor/debtor should not be specifically protected, we have no objection to achieving this by judicial discretion. We believe that the wording of a provision modelled on Article 8(4) of the Security Interests Law would give to the Royal Court a broad discretion to grant or refuse or impose conditions upon an order for sale. We have taken this view after consulting the Law Commission for England and Wales who conducted a review of the wording and judicial interpretation of Section 91(2) of the Law of Property Act 1925 of the United Kingdom. Section 91(2) provides “in any action ... for sale ... the court, on the request of the mortgagee, or any person interested ... and notwithstanding that

(a) any other person dissents; or

(b) the mortgagor or any person so interested does not appear in the action;
...

may direct a sale of the mortgaged property on such terms as it sees fit ...”

- 14 Article 8(4) of the Security Interests Law provides that the Royal Court may grant an order of sale “... upon such conditions as the Court thinks fit”. Since the wording of this Article is similar to the wording of Section 91(2) of the

Law of Property Act 1925, we felt it useful to refer to the aforementioned review of the operation of Section 91(2).

- 15 The English Law Commission's view (and our own) of the operation of Section 91(2) and the interpretation of the words "on such terms as it thinks fit" confirms that these words give to the court the wide discretion sought by the commentator. The English courts have exercised their discretion in such a way that no party suffers disproportionately. It appears that the duty of the court in considering an application for an order of sale is to balance the interests of all parties. The wording of the law authorising the Royal Court to order a sale should follow the United Kingdom model which makes it clear that the court may order the sale "on such terms as it thinks fit" notwithstanding the dissent of any person (including the mortgagee) or that the mortgagee or other interested party, for example a spouse, does not appear in the proceedings.
- 16 There are numerous cases on the interpretation of Section 91(2). In *Polonski v. Lloyds Bank Mortgages Limited* [1998] 1 FCR 282, the court followed the leading case of *Palk & another v. Mortgage Service Funding plc* [1993] 2 All ER 481. *Palk* concerned a mortgagor in negative equity who wanted the court to order a sale notwithstanding that there would be a considerable shortfall between the proceeds and the mortgage debt. The mortgagee opposed the sale. It wished to wait until house prices recovered in the hope that the debt would be covered. The court ordered the sale and commented: "Section 91(2) gives the Court a discretion in wide terms. The discretion is unfettered. It can be exercised at any time. Self-evidently, in exercising that power the Court will have due regard to the interests of all concerned. The Court will act judicially." In *Polonski* itself the mortgagor, a single widow with two small children, wished to move to an area with better schooling and job prospects. She had negotiated a sale to a housing association but the proceeds would not pay off the mortgage debt. The mortgagee bank opposed the sale. It, too, wished to wait until house prices recovered. Jacob J pointed out that the mortgagee bank would be able to buy the property if it wished to gamble on house prices. He also noted that instead of behaving responsibly the mortgagor could have handed back the house keys to the bank and moved away. Counsel for the bank argued that *Palk* is authority for the proposition that the Court can only take account of financial matters in exercising its discretion. Jacob J said "I do not read what [the judge said in *Palk*] as limiting the Court's discretion to purely financial matters. I think that the Court can take into account social matters and can look at all the reasons given by the [mortgagor] for wanting a sale."
- 17 It will be seen from these cases that the United Kingdom legislation allows a mortgagor, as well as a mortgagee, to apply for an order for sale and the Court has discretion not only on the terms of the order for sale but also as to who should have the conduct of the sale. Where the proceeds are likely to exceed the mortgage debt, the mortgagor may be the best person to conduct the sale on the basis that he has a keener interest than the mortgagee in obtaining the best price. We think the Jersey legislation should follow the same principles and we recommend that not only the mortgagee but also the mortgagor and

any other interested party should have the right to apply to the Royal Court for an order for the sale of a hypothecated property. Accordingly, to give the Royal Court a discretion similar to that of the English courts, we propose that the law should incorporate provisions based on Section 91(2) of the Law of Property Act 1925 (see below at 27.4) to amplify the wording of the power of sale for Jersey which we have recommended should be modelled on Article 8 of the Security Interests Law.

Part IV The Commission’s proposals in detail

- 18 In this part of the Report we set out fully the provisions that we think the new law should contain, including those brought forward (mostly with amendments) from the law of 1880. Explanatory notes are contained within square brackets.
- 19 **Definitions**
- 19.1 Except where the context otherwise requires, the following definitions apply in this part of the Report.
- 19.2 ‘Hypothec’ means the real right (*jus in re*) attached to a debt by which the debt is secured as a charge on immoveable property owned by the debtor. In respect of judicial and conventional hypothecs, ‘debt’ includes a fluctuating liability [e.g. a bank overdraft] or a guarantee: see below at 22.1 and 23.4.
- 19.3 ‘*Droit de suite*’ means the right of a secured creditor to follow any part of the hypothecated property into the hands of a third party to whom it has been conveyed without the creditor’s consent (see below at 20.6(c) and 26.2-26.4).
- 19.4 ‘Immoveable property’ comprises –
- (a) land;
 - (b) leases of land for a term of not less than nine years, created by contract passed before the Royal Court;
 - (c) perpetual rentes;
 - (d) simple conventional hypothecs and the moneys secured by them;
 - (e) fiefs; and
 - (f) any other property deemed to be immoveable by the customary law of the Island.
- 19.5 ‘Land’ includes buildings, parts of buildings, and shares (*lots*) constituted within a building by a co-ownership declaration under Article 3 of the *Loi (1991) sur la copropriété des immeubles bâtis*.
- 19.6 ‘Corpus fundi’ means an area of land complete and undivided in the hands of its owner or transferor, whether acquired by one or several titles.

- 19.7 'Lease', 'lessor' and 'lessee' include an under-lease, under-lessor and under-lessee; 'lessor' and 'lessee' further include successors in title to the original lessor and lessee.
- 19.8 All references to immovable property of any sort include undivided shares in property of that sort [so that such shares will be hypothecable in the same way as the property itself].
- 19.9 'Court', in relation to the registration of its acts or judgments to obtain a legal or judicial hypothec, means any court having civil jurisdiction in the Island.
- 19.10 'Greffier' means the Judicial Greffier [in practice, the Registrar of Deeds].

20 **Hypothecation in general**

- 20.1 No debt may be secured against immovable property except by hypothecation in accordance with the terms of the new law. Nothing in the law shall be interpreted as permitting a debt to be secured on moveable property other than as provided by the Security Interests (Jersey) Law 1983.
- 20.2 No immovable property can be hypothecated unless the debtor has legal title to it at the date when the hypothec comes into force. Future assets, including contingent interests in property held with another person jointly and for the survivor, are not hypothecable in any circumstances. The fact that a third party has a right of usufruct of a property does not prevent the owner of the *nue-propriété* from hypothecating it, but the rights of the secured creditor in that case cannot prejudice those of the usufructuary.
- 20.3 Any instrument whereby an owner of property purports to charge it to secure the debt of another person, without being party (either as guarantor or through joint and several liability) to the debt itself, will be void.
- 20.4 Except where otherwise provided, the only classes of immovable property capable of being hypothecated are –
- (a) land; and
 - (b) leases which are susceptible of hypothecation under Article 2(1) of the *Loi (1996) sur l'hypothèque des biens-fonds incorporels*.
- 20.5 A hypothec charged on land will extend to any building subsequently erected on that land while the hypothec is in existence.
- 20.6 A creditor secured by hypothec, whether before or after the coming into force of the law, will have the following rights in place of those that he had or would have had before:
- (a) Power to realise his security by sale (see below at 27).
 - (b) Preference according to the priority of his hypothec on the proceeds of any sale, in a *désastre* or otherwise, of the property on which the hypothec is charged (see below at 26.1).

- (c) If the debtor's assets are insufficient to satisfy the secured claim, the right to follow any part of the hypothecated property into the hands of a third party to whom it has been conveyed without the creditor's consent (see below at 26.2-26.4).

20.7 Hypothecs are of three kinds:

- (a) legal hypothecs, arising by operation of law;
- (b) judicial hypothecs, resulting from the registration of court judgments;
- (c) conventional hypothecs, created voluntarily by contract between the debtor and creditor.

21 Legal hypothecs

21.1 If an unsecured creditor of a deceased person either –

- (a) has obtained judgment in the debtor's lifetime for payment of the debt, and registers the judgment in the Public Registry within a year and a day of the debtor's death (or within eighteen months of an act of the Royal Court granting the heirs *bénéfice d'inventaire* to establish whether the estate is solvent); or
- (b) actions the estate within the same period and then, having obtained judgment for payment of the debt, registers it in the Public Registry within fifteen days inclusive of the date of the judgment;

– the registration will give the creditor a legal hypothec, as from the date of death, against all land and hypothecable leases to which the debtor was entitled when he died.

21.2 Should the amount of the judgment debt be varied on appeal, the hypothec will stand in the altered amount provided the judgment of the court of first instance was registered as provided under 21.1.

21.3 When the debt is repaid, the creditor must attend before the Greffier to cancel the registration in the same way as provided for judicial hypothecs (see below at 22.7-22.8).

21.4 In all cases, the *droit de suite* attached to this type of legal hypothec will be extinguished by prescription after ten years from the debtor's death.

[*Note.* – It might be argued that this hypothec, requiring a judicial action to bring it into existence, should be classed as a judicial hypothec rather than a legal one. However, as it differs from other judicial hypothecs in being retrospective and not embracing contingent liabilities or guarantees, we think it better to treat it as a legal hypothec (as in the 1880 law) than to complicate the definitions of a judicial hypothec to accommodate it.]

21.5 A widow's right of dower and a widower's *droit de viduité* will both be secured by a legal hypothec on all the immoveable property owned by the

deceased spouse at his or her death. The date of the hypothec will be the date of death of the spouse. [Note that this is the only hypothec that bears on all immoveable property and not only on land and leases.]

- 21.6 The provisions of the Wills and Successions (Jersey) Law 1993 should be amended to make clear that dower and *viduité* can now only arise in testate successions where the will does not make equivalent provision for the surviving spouse. Dower and *viduité* themselves should also be redefined and made identical. We think a fair definition would be the life-enjoyment of (a) the matrimonial home and (b) a fixed share of any other immoveables in the succession: one third share would correspond to a widow's existing dower entitlement, but this should perhaps be reconsidered in the light of recent pronouncements by the Family Division of the Royal Court on the division of family property in divorce cases. However defined, the right would not be contingent on there being children of the marriage and it would not cease on remarriage. A procedure should be spelt out in the law for claiming the right against the devisees, with a time limit of one year for claiming it following registration of the will.
- 21.7 If the recommendation in 21.6 is accepted, the *droit de suite* attached to the hypothec for both dower and *viduité* will continue until the death of the widow or widower. If the recommendation is not accepted and dower and *viduité* are left in their present form, a widow's *droit de suite* will continue until her death and a widower's until his remarriage.

22 **Judicial hypothecs**

- 22.1 Subject to the provisions of the law, any act or judgment of court for the payment or acknowledgment of a debt, guarantee or other obligation, actual or contingent, or fixing the amount of an award for damages, may be registered in the Register of Obligations at the Public Registry and such registration will give the plaintiff a judicial hypothec on all land and hypothecable leases to which the debtor has title at the time of registration, or on such one or more of them (or any part thereof) as the act of court may specify.
- 22.2 If the act is registered by order of the court at the request of the plaintiff, or if, in the case of a judgment obtained adversarially, it is remitted for registration by the plaintiff within fifteen days of the date of the act, the hypothec will take the date of the act. In all other cases, the hypothec will take the date on which the act is remitted for registration. The Greffier will be responsible for noting on all acts remitted for registration the date when they have been so remitted, and this date must appear on the record in the Register of Obligations.

[*Note.* – This arrangement will continue to give judgment creditors their existing 15-day period in which to register their judgments, but in the case of mortgage loans it will allow two or more loans acknowledged on a property on the same day to be registered in order of priority by date without the need to wait fifteen days before the second charge can be secured.]

- 22.3 A judicial hypothec may be obtained either –

- (a) for a capital amount adjudged by the court or acknowledged by the defendant to be owed by him (or, in the case of a guarantee or other contingent liability, potentially owed by him) to the plaintiff, being one or more sums, with or without interest; or
- (b) if the hypothec is charged on a specific property, for a fixed percentage of either the purchase price or the market value of the property, or of whichever of the two is higher from time to time; or
- (c) for any payment or series of payments ordered by the Family Division of the Royal Court to be made under any provision of the Matrimonial Causes (Jersey) Law 1949 or the Children (Jersey) Law 2002.

[Note to sub-paragraph (c). – Though orders of the Family Division in divorce cases can in theory already be registered under Article 29(1)(d) of the Matrimonial Causes (Jersey) Law 1949, the constraints of the 1880 law mean that this is only practicable if the order is for payment of a lump sum. In general we do not favour allowing periodic payments to be secured by judicial hypothec, but after consultation with the Family Division Registrar we are satisfied that an exception should be made in respect of orders under the Matrimonial Causes Law and the Children Law so that, for example, a divorced woman who is owed up to five years’ arrears (see 27.9) of maintenance by her ex-husband will have security dating from the registration of the maintenance order, thus ranking above creditors who have since registered their claims on his property. We think it best to treat Family Division orders as a special category with a self-contained procedure for their registration and cancellation (see below at 22.4 and 22.9). The provisions set out here are intended to supersede those in Article 29(1)(d) of the Matrimonial Causes Law.]

- 22.4 An order of the Family Division may only be registered at the instance of the court [i.e. cannot be remitted for registration by the party to whom payment is to be made]. In the case of periodic payments, if their amount is varied by a subsequent order, that order must also be registered and the new amount will be substituted for the old without altering the date of the hypothec.
- 22.5 If the amount of any judgment debt that has been registered is subsequently varied by a superior court on appeal, the registration of the appellate judgment within fifteen days inclusive of its date will have the effect of substituting the new amount for the original amount without altering the date of the hypothec. If the appellate judgment is not registered within fifteen days, the hypothec resulting from registration of the original judgment will automatically be extinguished and the hypothec resulting from any subsequent registration of the appellate judgment will take the date of that registration.
- 22.6 In any other case, once an act or judgment has been registered, the registration of a further act relating to the same debt (including a judgment for repayment of a debt whose acknowledgment has previously been registered) will destroy the hypothec resulting from the original registration.

- 22.7 Except as provided under 22.9, when a debt secured by judicial hypothec has been repaid or the hypothec has been extinguished by virtue of any provision of the law, the creditor must attend before the Greffier to cancel the registration. [Procedure to be provided by rules.] A creditor neglecting to do this within one month may be condemned to do so on a simple action before the Royal Court (or the Petty Debts Court if the registered judgment is of that court) at the instance of the debtor, without prejudice to any claim that the debtor may make for damages suffered by reason of the creditor's negligence. If the creditor cannot be traced, proceedings may be served on the lawyer who acted for the creditor at the time of registration. All that need be demonstrated to obtain an order for cancellation is that the debt secured by the hypothec has been repaid or extinguished.
- 22.8 If a registration has not been cancelled within one month of an order of the court under 22.7, the court may make a further act declaring the hypothec extinguished and will order registration of this act in the Public Registry to discharge it. Where a hypothec has long since been repaid and the creditor is dead or infirm or cannot be traced, a similar act may be made on an *ex parte* representation by the owner of the property.
- 22.9 Registration of an order of the Family Division of the Royal Court may only be cancelled by a further order of that court.
- 22.10 The *droit de suite* attached to a judicial hypothec will be extinguished by prescription after twenty-five years from the date of the hypothec. This provision will be retrospective in regard to existing judicial hypothecs whose *droit de suite* is still active on the day the law comes into force, but it will not revive any *droit de suite* that has previously lapsed. [For the time limit within which the right must be exercised following a transfer of the property, see below at 26.2.]
- 22.11 Though judicial hypothecs and the debts secured by them will continue, as at present, to be moveable property of the creditor, the rule that a claim for repayment after the debtor's death must be pursued in the first instance against the debtor's moveable estate is abolished. [See further below at 26.5.]
- 22.12 All assignments of judicial hypothecs by the creditor to a third party must in future be effected by a form of transfer executed before a prescribed witness and registered in the Public Registry. [Procedure to be provided by rules, after consultation with practitioners and with the Judicial Greffe.]

23 **Conventional hypothecs**

- 23.1 A conventional hypothec may be created either –
- (a) in a contract of sale of land or of assignment of a lease, as the whole or part of the consideration for the sale or assignment; or
 - (b) as an independent transaction between a debtor and creditor.

[The distinction of the two under the 1880 law as *hypothèques consenties* and *hypothèques créées* is abandoned as it no longer serves any useful purpose.]

- 23.2 Conventional hypothecs are of two kinds:
- (a) foncier or ground hypothecs for the security of rentes; and
 - (b) simple hypothecs for the security of a capital sum of money.
- 23.3 A foncier hypothec may in future only be created for the security of a life rente [i.e. a pension or annuity]. The future creation of perpetual rentes of any kind is prohibited. However, all existing perpetual sterling rentes created under the 1880 law will conserve their foncier hypothec until reimbursement.
- 23.4 A simple conventional hypothec may be created in respect of either an actual capital debt or a contingent or fluctuating debt or guarantee, or for a given percentage of the purchase price or market value of the hypothecated property, in the same way as set out for judicial hypothecs at 22.1 and 22.3(a) and (b). The capital may bear interest or not and may be repaid in whole or by instalments in such manner as the deed of creation 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 deed, repayment may be made by the debtor or demanded by the creditor at any time.
- 23.5 When the creation of a conventional hypothec is an independent transaction, the deed of creation shall not be passed before the Royal Court but signed by the parties before a prescribed witness and remitted to the Public Registry for registration. The sale or other transfer *inter vivos* of a perpetual rente or a simple conventional hypothec, and the voluntary extinction of a life rente, shall be done in the same way. [Further details to be covered by rules.]
- 23.6 A deed of creation of a conventional hypothec must contain a description of the hypothecated property sufficient (but not longer than necessary) to identify it, including the debtor's title of acquisition. If more than one corpus fundi or lease is hypothecated by the same deed, the deed must apportion the total amount of the debt between them, and the creditor will only be able to exercise his *droit de suite* against each property for the portion of the debt specifically secured on it.
- 23.7 The date of a conventional hypothec created as an independent transaction will be the date on which the deed of creation is received for registration at the Public Registry. The Greffier will be responsible for noting this date on the deed and it will appear on the record in the Register of Contracts [as with acts of court remitted for registration as a judicial hypothec: see above at 22.2].
- 23.8 A conventional hypothec will remain in full force until the rente or debt which it secures is extinguished. The *droit de suite* attached to this class of hypothec will not be prescribed by lapse of time as long as the security remains in the debtor's hands. [For the time limit within which the right must be exercised following a transfer of the property see below at 26.2.]

- 23.9 Perpetual sterling rentes created under the 1880 law are reimbursable at the rate specified in the contract of creation, or, if none is specified, at the rate of £20 per £1 of rente. Irrespective of any provision in the contract of creation, they may be reimbursed by the debtor at any time on giving three months' notice. The owner of the rente may in future also demand reimbursement at six months' notice following a sale of the property on which the rente is due [as is already the case with pre-1880 rentes under the *Loi (1970) touchant le remboursement des rentes anciennes*]. If the owner of the rente refuses to accept reimbursement or the debtor refuses to reimburse, recourse may be had by the other party by simple action before the Royal Court, which will make such order as it thinks fit.
- 23.10 On repayment of the debt secured by a simple conventional hypothec, the hypothec must be discharged by registering a deed of extinction in the Public Registry. The same procedure applies when a perpetual rente is reimbursed. The deed is a form of receipt signed by the creditor before a prescribed witness [this is already provided by the *Loi (1959) sur le remboursement des rentes et l'extinction des hypothèques conventionnelles simples*, which perhaps should be repealed and its provisions incorporated in rules under this law]. If the rente or hypothec is subject to a life-enjoyment, the usufructuary must be a signatory to the deed and its registration will give him a foncier hypothec, lasting until his death, on all land and hypothecable leases belonging to the reimbursee.
- 23.11 If the creditor neglects to sign and register a deed of extinction as provided in 23.10, the debtor will have the same recourse to the Royal Court to compel him to do so as he would have in the case of a judicial hypothec under 22.7. If the creditor fails within one month to comply with an order of the court to sign and register a deed of extinction, or if the hypothec has long since been repaid and the creditor is dead or infirm or cannot be traced, the provisions set out in 4.5.8 will apply. As with judicial hypothecs, all that need be demonstrated in each case is that the debt has been extinguished.

[*Note.* – Under the present law, when a sterling rente or simple conventional hypothec is reimbursed, the Greffier is required to make a marginal note against the contract of creation. Since the introduction of the PRIDE system of document enrolment at the Public Registry this is no longer physically possible and the requirement is therefore dropped.]

24 **Priority of charges**

- 24.1 In principle, hypothecs rank in priority strictly in order of their date.
- 24.2 Creditors may nevertheless agree to alter the priority of their charges and such agreements, whether made before or after the coming into force of the law, will be held valid in subsequent bankruptcy or other proceedings provided the agreement has been effected either –
- (a) by contract passed before court between the debtor and all creditors or other parties affected by the change of priority; or

- (b) by making the holder of an existing charge party to a subsequent registration to agree that the new charge shall rank first.
- 24.3 The same provisions will apply to any agreement by which an existing secured creditor is made party to a lease to safeguard the rights of the lessee.
- 24.4 Where any agreement of the above kinds has been made before the coming into force of the new law and is framed with specific reference to the position in a *dégrévement* under the 1880 law, it shall be applied in as similar a way as possible in a *désastre* or a *remise de biens* or in any proceedings for realisation of security under the new law.

25 **Release, depreciation or loss of security**

- 25.1 Unless otherwise stipulated between the parties, a hypothec is indivisible and bears equally on all the property on which it is secured. If any part of that property is alienated by the debtor without the creditor being party to the contract to release it from the hypothec, the full amount of the debt will remain hypothecated both on what is alienated and on what is reserved.
- 25.2 A creditor may relinquish his hypothecary rights over any part of his security at any time either by contract between himself and the debtor or as a party to the registration of a subsequent charge, and such release shall be irrevocable.
- 25.3 If a property charged with a judicial or conventional hypothec is destroyed or becomes so depreciated in value as no longer to provide adequate security for the debt, or if the debtor loses his title to it, the debtor (failing provision to the contrary in the loan documentation) will have the right to seek to avoid foreclosure by providing alternative or additional security, without prejudice to the creditor's right in the last resort to sue for repayment if necessary.

[*Note.* – In the case of a lease, protection for creditors against destruction of their security by determination of the lease is provided by Articles 4 and 5 of the *Loi (1996) sur l'hypothèque des biens-fonds incorporels.*]

26 **Enforcement of security**

- 26.1 Secured creditors will have preference, in order of priority of their hypothecs, on the proceeds of sale of all or any part of the property on which their hypothecs are charged. If the sale takes place under a *désastre*, this right will operate as provided by paragraphs (4) and (5) of Article 32 of the Bankruptcy (Désastre) (Jersey) Law 1990. If the property is sold by the debtor without the creditor's consent other than in a *désastre*, the creditor will have the right to distrain on the proceeds of sale. [Further details of the procedure, if necessary, to be provided by rules.]
- 26.2 Subject as provided under 26.3, the *droit de suite* of a secured creditor against property in the hands of third parties cannot be exercised until the assets of the principal debtor have been exhausted, unless the new owner's contract of acquisition of the property specifically makes him liable for the secured debt. However, the period within which a creditor may exercise his *droit de suite*

will be limited to three years following transfer of the property out of the debtor's hands. [The purpose of this is to give a measure of protection to *bona fide* purchasers.]

- 26.3 The Royal Court will have a discretionary power to authorise a creditor to proceed against his security in the hands of a third party even though the debtor's assets have not been fully exhausted, on the grounds (a) that the remaining assets are inaccessible, (b) that the time available for exercising the *droit de suite* is running out, or (c) that the creditor has pursued every remedy against the debtor that he can reasonably be expected to take without undue trouble or expense. This discretion will be exercised by an order of the Court for which the creditor will have to apply. The owner of the property will have the right to be heard and to oppose the making of the order, and the Court will have a duty to balance the rights of a *bona fide* purchaser for value against those of the pursuing creditor.
- 26.4 A creditor's *droit de suite* will enable him to demand repayment of the secured debt or any balance thereof from the owner of the property, or to exercise his power of sale under 27. He will not, as under the present law, be able to force the owner to relinquish the property to him in satisfaction of the debt.
- 26.5 A claim for repayment of any secured debt after the death of the debtor shall in future be pursued in the first instance against the person who has become entitled to the property on which the debt is secured, and only thereafter against the debtor's moveable estate if necessary.

27 **Power of sale**

- 27.1 All existing and future hypothecary creditors will be given a power of sale based on that provided for moveable security interests by Article 8 of the Security Interests (Jersey) Law 1983. 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 be exercisable only on the authority of an order of the Royal Court. This order will not be granted 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 two months [as distinct from 14 days under the Security Interests law] after receiving the notice.
- 27.2 The notice served on the debtor must be registered in the Public Registry, and any sale of the property or any part of it during the notice period without the consent of the creditor will be void.
- 27.3 Except as provided under 27.4, the duty and powers of the court in relation to a sale order will follow 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. If the property is let, or in any other way requires management, the court may (either of its own motion or on the application of the creditor) order the appointment of a receiver to manage the property and receive any income from it.

- 27.4 The court will further have the power to grant an order for sale, without prior notice and on such terms as it thinks fit, at the request of the debtor or any other interested party, notwithstanding the dissent of any person (including the creditor) or that the creditor or other interested party does not appear in the proceedings. [This provision is based on Section 91(2) of the UK Law of Property Act 1925: see above at 13-17.]
- 27.5 The power of the court will include full discretion as to who shall have the conduct of the sale. If this is anyone other than the owner of the property, the order authorising the sale will confer on that person full power on the debtor's behalf to give the purchaser good title to the property free of encumbrances.
- 27.6 The conduct of the sale and the distribution of the proceeds afterwards will be based on 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*, to the Viscount.
- 27.7 In addition, 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 authorising the sale and the date of the sale. Any balance remaining unpaid after this will become an ordinary unprivileged debt.
- 27.8 Where a judicial hypothec is created for a percentage of the value of a property [see above, 22.3(b)], the price for which the property is sold under the court order (before deduction of costs) shall be taken to be the value on which the amount of the charge is calculated.
- 27.9 A creditor whose security is realised will be entitled to a maximum of five years' arrears of interest on his charge in addition to the capital. In the case of a registered order of the Family Division of the Royal Court for periodic payments, a maximum of five years' arrears of such payments will be secured. These provisions will also apply in a *désastre* or a *remise de biens*.
- 27.10 Once an order for sale has been made by the court, it will not be affected by a subsequent declaration of the debtor's property *en désastre* except as provided under 27.6. In particular, property in respect of which an order for sale has been made under this law cannot thereafter be the subject of an order on the application by the debtor's spouse under Article 12 of the Bankruptcy (Désastre) Law 1990. If such an application is made after a sale order has been applied for but before it has been granted, the court may not grant the Article 12 application unless and until the application for a sale order has been dismissed.

27.11 The provisions of this part of the law will need to allow for cases where a debtor has died leaving an insolvent estate and all heirs and/or devisees entitled to claim the immoveables have renounced them. For example, a provision will be needed as to who can give title to the property in such cases (see 27.5).

DAVID LYONS, *Chairman*

ALAN BINNINGTON

CLIVE CHAPLIN

JOHN KELLEHER

KERRY LAWRENCE

PETER HARGREAVES

APPENDIX A

PERSONS WHO COMMENTED ON THE CONSULTATION PAPER

Sir Philip Bailhache, Bailiff of Jersey

Mr Michael Birt, Deputy Bailiff

APPENDIX B

ACKNOWLEDGEMENTS

The topic Commissioner for this case was David Lyons and he joins with the other Commissioners in thanking Advocate Chris Renouf and Messrs Peter Bisson and Peter Luce

APPENDIX C

RULES TO BE MADE UNDER THE LAW

There will need to be a power under the law to make either regulations or rules of court to deal with the following matters and possibly others. We strongly recommend that all details of procedure be agreed with the Greffier before being finalized.

- C1 Procedure for cancelling registration of judicial hypothecs (see 22.7). This must include a provision that if the original act of court has been lost, the defendant (as at present under the 1880 law) cannot cancel the registration on production of a copy but must produce an affidavit stating that the act has been lost and that the hypothec has not been assigned to a third party. The affidavit may be sworn before an advocate or solicitor of the Royal Court (instead of a Jurat as at present) or before a notary public.
- C2 Witnessing requirements and registration procedure for assignments of judicial hypothecs (see 22.12). Subject to the advice of conveyancers, we would suggest that these assignments be indexed in the Public Registry under the debtors' names as well as under those of the transferors and transferees.
- C3 Witnessing requirements and registration procedure for deeds of creation or transfer of a conventional hypothec (see 23.5).
- C4 Procedure for distraining on the proceeds of an unauthorised sale of the property on which a hypothec is secured (see 26.1).
- C5 The provisions of the *Loi (1959) touchant le remboursement des rentes et l'extinction des hypothèques conventionnelles simples* should perhaps be incorporated in these rules (see 23.10).

APPENDIX D

REPEALS AND AMENDMENTS

- D1 The process of customary law known as *cession de biens* to be abolished.
- D2 The following statutory provisions to be repealed:
- a) the *Loi (1832) sur les Décrets*;
 - b) the *Loi (1880) sur la Propriété Foncière* and all its subsequent amendments;
 - c) sub-paragraph (d) of Article 29(1) of the Matrimonial Causes (Jersey) Law 1949 (see note to 22.3(c));
 - d) the *Loi (1959) touchant le remboursement des rentes et l'extinction des hypothèques conventionnelles simples*, if its provisions are put into the rules to be made under the new law as suggested above (see 23.10).
- D3 Article 3 of the *Loi (1996) sur l'hypothèque des biens-fonds incorporels* to be replaced by a provision whereby, if the assets in a *désastre* include a hypothecated lease which the Viscount does not consider realisable for value, the creditors secured on it will be called in reverse order of priority of their charges and given the right to take over the lease in the same way as provided by Article 4(4) of that law. If none of them do so, the Viscount will make a representation to the Royal Court to have the lease cancelled.
- D4 All enactments containing reference to the 1880 law, to *cession* or to *dégrévement* will require consequential amendment, including Article 4(4) of the *Loi (1996) sur l'hypothèque des biens-fonds incorporels* (though we do not suggest changing the procedure in that article).
- D5 The Wills and Successions (Jersey) Law 1993 should be amended to clarify the situation in which the customary rights of dower and *viduité* now arise, and preferably also to redefine the rights themselves (see above at 21.6).