Jersey & Guernsey Law Review – October 2012

ARRESTED AND CHARGED

FG Hemisphere and the proprietary effect of the *arrêt entre mains*

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Jersey's "arrêt entre mains" procedure arrests a debtor's property which is in the hands of a third party. FG Hemisphere Assoc LLC v DR Congo[1] *is the first modern case to shed clear light on the way in which the procedure operates as a method of execution in Jersey. The Royal Court and Court of Appeal have held that it has a proprietary effect, drawing on Pothier's description of Orléans' saisie-arrêt, which they found sufficiently analogous to the arrêt entre mains to provide guidance. In this article, Pothier's account of the saisie-arrêt (and related procedures) is considered further, in particular in light of his Treatise on Obligations. It considers that in substance, Pothier's saisie-arrêt reflects his account of assignment. As a result, the saisie-arrêt equated to assignment or delivery of the thing arrested to the arresting creditor pending satisfaction of the debt. It can therefore be explained as a charge. Jersey authority holds that a hypotec of movables requires possession. Consequently, it is concluded that the courts were correct and that the arrêt entre mains has proprietary effect, operating to charge the thing arrested.*

This article also considers that the Court of Appeal's view that the arrêt entre mains may apply to future debts which have yet to fall due under existing contracts is amply supported by both Pothier and customary law.

Introduction

1 The *arrêt entre mains* is a remedy available to a plaintiff creditor in Jersey to satisfy a judgment in execution, or as an interim measure pending judgment as an *arrêt entre mains provisoire*. It is a court order giving that plaintiff rights in respect of his debtor's moveable property which is currently in the hands of a third party. The aim is of course for that plaintiff to obtain satisfaction of his debt by cutting out the

[1] 2010 JLR 524; [2011] JRC 141; both noted at (2011) 15 J&G Law Rev 368.

active involvement of his unwilling or incapable debtor. It can be effected against corporeal and incorporeal property in the hands of the third party. In the case of the latter (such as a debt) there are therefore three parties and two debts: the arresting plaintiff (the "principal creditor") who is owed money (the "principal debt") by his debtor (the "principal debtor"), which principal debtor is in turn owed money (the "subsidiary debt") by a third party (the "subsidiary debtor"). Prior to the *arrêt*, the principal creditor is a stranger to the subsidiary debt: the *arrêt entre mains* gives him rights in respect of it so that he can obtain payment of the principal debt from the subsidiary debtor.[2]

2 As with many customary law remedies, the existence of the *arrêt entre mains* was clear but detail of its precise operation obscure. However, in *FG Hemisphere Assoc LLC v DR Congo* the Royal Court and Court of Appeal have recently clarified its effect.

The courts' decisions in *FG Hemisphere*

3 The case concerned attempts by FG Hemisphere LLC ("Hemisphere") to enforce arbitration awards made against the Democratic Republic of Congo. There were two aspects to these attempts. First, Hemisphere sought to enforce against a Congolese company, Gécamines, which it contended was an organ of the Congolese state. Secondly, Hemisphere sought an *arrêt entre mains* against a Jersey corporation, "GTL", in respect of shares and payments which GTL owed to Gécamines. It is this second aspect which is considered in this article.

4 The relevant payments which Hemisphere sought to arrest arose under a contract between Gécamines and GTL. Under this contract, GTL agreed to buy mineral rich slag at Gécamines' site in the Congo, for which GTL paid money to Gécamines (the "slag sales payments"). The contract did not provide where these slag sales payments should be made, and the contract was expressed to be subject to Belgian law.

5 The Royal Court and Court of Appeal confirmed the *arrêt entre mains* in respect of the slag sales payments. In so doing, the courts held that, in respect of an *arrêt entre mains*—

[2] An *arrêt entre mains* may also be effected in respect of corporeal property and is not restricted to debts as obligations to pay money. In such cases, the terminology "principal debtor" etc. may also apply *mutatis mutandis*, with "debt" referring to the obligation on the third party, subsidiary debtor to return or give the corporeal property to the defendant, principal debtor.

(a) it operates *in rem* against the thing arrested, rather than simply *in personam* against the person in whose hands the thing arrested happens to be;

(b) it can be made in respect of debts or *choses in action* payable in future, provided they are sufficiently capable of precise identification at the time of the arrest;

(c) the *situs* of an incorporeal movable, such as a debt, is determined by where it can be enforced, which means where the person in whose hands it is currently resides; and

(d) the court will not order an *arrêt entre mains* in respect of an incorporeal movable, such as a debt, where payment of the debt pursuant to the *arrêt* would not be recognised as validly discharging the debt by its *lex situs*.

6 In so holding, the courts drew mainly on two analogous procedures for guidance on the *arrêt entre mains*. The first was the "*saisie-arrêt*", the equivalent customary procedure formerly available in Orléans, as described by Pothier. The second was the English garnishee or third party debt order, in particular as explained by the House of Lords in *Société Eram Ltd v Cie International*.[3] As noted in *Eram*, this latter order is primarily statutory in origin.

An arrêt entre mains operates in rem

7 In respect of the first point above, the Royal Court and Court of Appeal were satisfied that the *arrêt entre mains* operates *in rem*. The Royal Court referred to the writings of Pothier[4] in respect of Orléans' "*saisie-arrêt*" which they accepted functioned similarly to the English garnishee/third party debt order as described in the House of Lords' decision in *Eram*. The Court of Appeal also referred to Pothier,[5] noting also descriptions by Terrien[6] and Routier[7] of similar Norman procedures.

8 The Royal Court[8] and Court of Appeal[9] particularly noted Pothier's observation that the *saisie-arrêt* precluded the principal debtor from

[3] [2004] 1 AC 260.
[4] *Traités de la Procédure Civile et Criminelle.*
[5] *Traité de la Procédure Civile.*
[6] Terrien, *Droit Civil* (1574), at [2011] JCA 141, para 144.
[7] Routier, *Principaux Generaux du droit civile et coutumier de la province de Normandie* (1742) 2nd ed. Book VIII, sect VI "*Des Saisies & Arrêts*", at [2011] JCA 141, para 149.
[8] [2010] JRC 195; 2010 JLR 524, at para 148(ii).
[9] [2011] JCA 141, para 152.

discharging the subsidiary debtor to the prejudice of the arresting, principal creditor:[10] from this, the Court of Appeal concluded that the *saisie-arrêt* was, and therefore the *arrêt entre mains* is, an act affecting the debt itself. Otherwise, the court noted, the subsidiary creditor would have separate personal liabilities to the principal creditor and the principal debtor.[11] The Court of Appeal therefore considered "logic and justice . . . demand that the arrestment have effect on the debt itself", noting further that the customary writers indicated that the thing arrested was subjected to the control of the court.[12]

9 In *Eram*, the House of Lords made clear that the English third party debt order is not an order *in personam* but *in rem*. Such an order is granted in two related stages in a single application. The first, provisional order nisi acts as a charge over the thing subjected so giving priority to the arresting principal creditor as against the world. The final order absolute executes that charge and so realises the property subject to the order,[13] with the result that payment to the principal creditor under the order *pro tanto* discharges the subsidiary debtor towards the principal debtor. The Royal Court accepted that the English and Jersey procedures are sufficiently closely analogous for these principles to apply in respect of the *arrêt entre mains*.[14]

10 For the Lords in *Eram*, the English order's proprietary effect as charge on the subsidiary debt attached with a corresponding, *pro tanto* discharge of the subsidiary debt when the subsidiary debtor pays the charging, principal creditor was the very essence of the order.[15] So essential was this to the order's operation that it survived a change in the English statutory language from the court ordering the thing garnished's being "attached" pursuant to the Judgments Act 1838 (which first introduced the procedure into English law) to making an "order to pay" under the Civil Procedure Rules currently in force[16] (and indeed the English RSC Ord 49 in force prior to the CPR[17]).

An arrêt entre mains is capable of arresting future movables

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[10] At Pothier *Traité de la Procédure Civile* Partie IV Ch II sIII, IV, pp 342–343.
[11] [2011] JCA 141, para 153.
[12] [2011] JCA 141, para 153.
[13] *Société Eram Ld v Cie International* [2004] 1 AC 260, paras 82, 88, at [2010] JRC 195; 2010 JLR 524, at paras 148(iv) and 149.
[14] [2010] JRC 195; 2010 JLR 524, at paras 148(iv), 149, 175; [2011] JCA 141, paras 156, 161.
[15] *Société Eram Ld v Cie International* [2004] 1 AC 260, para 24 (Lord Bingham).
[16] CPR Pt 72.
[17] *Eg* reproduced in *Société Eram Ld v Cie International* [2004] 1 AC 260, para 11.

11 In *FG Hemisphere*, the Court of Appeal rejected an argument that the *arrêt entre mains* could not be effected or effective in respect of slag sales payments which had not yet fallen due. In doing so, it drew on Pothier in two respects. First, his statement that in Orléans the sergeant declared arrested and put into the hand of justice "*tout ce qu'il peut devoir et devra*"[18]: that is "all he [the subsidiary debtor] can owe and will owe in the course of time".[19] Secondly, his observation that a *saisie-arrêt* prevented the principal debtor prejudicing the principal creditor by annulling a lease for the future which would discharge the subsidiary creditor from his future obligations.[20] The court further drew on Terrien and Routier noting that the procedure they described required the debt arrested to be identified and declared. Overall, therefore, the Court of Appeal was satisfied on these authorities that an *arrêt entre mains* can be effected in respect of future debts provided that such debts are capable of identification and declaration – *ie* precise identification on oath[21].

"*Foreign debts*" *and situs*

12 The Royal Court accepted English conflict of law rules, as described in Dicey, Morris and Collins, also reflect Jersey law to the effect that a debt is situate where it is enforceable; that, in turn, is where the defendant principal debtor against whom it will be enforced is resident.[22] So, as GTL was incorporated in Jersey, the Royal Court and Court of Appeal held that it was resident in Jersey sufficiently to be served, and hence sued, in Jersey.[23] Consequently, as the slag sales payments were situate in Jersey, they were therefore capable of being arrested by the Viscount.

13 Where a debt is situate abroad, the court will not make an order unless the principal creditor clearly establishes that the foreign court would regard the debt as automatically discharged by payment pursuant to the order. The Royal Court stressed that this was an

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[18] Pothier *Traité de la Procédure Civile* Partie IV Ch II sIII, III, pp 339–340 (see below, at para 38).
[19] As translated at [2011] JCA 141, para 163; see paras 165, 173–175 (and see below, at paras 40, 79).
[20] Pothier *Traité de la Procédure Civile* Partie IV Ch II sIII, IV, pp 342–343; [2011] JCA 141, paras 170–171.
[21] [2011] JCA 141, para 175
[22] [2010] JRC 195; 2010 JLR 524, para 152, ref. Dicey, Morris and Collins, *The Conflict of Laws*, 14th ed. (2006) vol II p 126, rule 120, in *New York Life Assur Co v Public Trustee* [1924] 2 Ch 101 (CA) and *Kwok v Estate Commr* [1988] 1 WLR 1035 (PC).
[23] [2010] JRC 195; 2010 JLR 524 paras 154–160; [2011] JCA 141, paras 181–190.

inquiry into where the debt is situated, not the risk of being compelled to pay twice.[24] However, it also accepted that the risk of a foreign court compelling a second payment is a matter for it to consider in its discretion. Obviously, this risk weighs against the making of the order, even where the foreign court is exercising an exorbitant jurisdiction.[25]

14 Again, in this the Jersey courts followed the approach set out in *Eram* in respect of English garnishee/third party debt orders. In *Eram*, it was the reciprocity of the payment and discharge essential to the nature of the order that resulted in this approach.[26] Where the *situs* of the debt was abroad, in a place where the relevant courts would not recognise payment under the order as discharging that debt, it necessarily followed that the order would not work.[27] This is the case even where the foreign court is exercising a jurisdiction considered exorbitant (even scandalously so):[28] the lack of discharge meant that an order could not be granted: could not, rather than should not, as the question in this respect was one of principle and jurisdiction, rather than discretion.[29]

Pothier's *saisies, exécutions* and *arrêts* in Orléans

15 When deciding the above, the courts in *FG Hemisphere* were referred to and relied on the writings of Pothier. In his *Traité de la Procédure Civile*, Pothier describes three procedures available to a creditor in Orléans in respect of movable property: the *saisie-exécution*, *saisie-arrêt*, and the simple *arrêt*. Of these, respectively—

(a) The *saisie-exécution* seized the principal debtor's corporeal moveables for sale in satisfaction of the principal creditor's debt.

(b) The *saisie-arrêt* seized and arrested the principal debtor's incorporeal movables and made them over to the principal creditor in satisfaction of the principal debt: procedurally, it

[24] [2010] JRC 195; 2010 JLR 524, para 181.
[25] [2010] JRC 195; 2010 JLR 524, para 181.
[26] *Société Eram Ltd v Cie International* [2004] 1 AC 260, *per* Lord Bingham at paras 24–25; Lord Hoffmann at paras 62–63; Lord Millett at paras 86–88.
[27] *Société Eram Ld v Cie International* [2004] 1 AC 260 *per* Lord Bingham at paras 24–26 and Lord Hoffmann at paras 67–68 (Lord Nicholls concurring); Lord Millett at paras 80–81, 98, 107–109; Lord Hobhouse at para 75 preferred the view that double jeopardy went to discretion, rather than jurisdiction or principle.
[28] As in *Deutsche Shactbau-und Tiefbohrgessellshaft mbH v Shell International Petroleum Co Ltd* [1990] 1 AC 295.
[29] See note 27 above.

required service of process on both the principal and subsidiary debtors as parties.

(c) The simple *arrêt* could arrest both the principal debtor's corporeal and incorporeal moveables in the hands of a third party such as a subsidiary debtor: it was effected only against that third party/subsidiary debtor, and so process was only served on him.

16 Pothier also describes a fourth procedure, *saisie-gagerie*, which is contained within the *coutumier* of Paris and comprised the arrest of movables by the sergeant on behalf of the lessor of urban premises until he could obtain an order for their sale from a judge.

17 The three procedures of Orléans are considered in more detail below. In *FG Hemisphere*, the courts found that Orléans' *saisie-arrêt* most closely corresponds to Jersey's *arrêt entre mains*, at least in respect of arresting incorporeal moveables owed by the third party, subsidiary debtor to the principal debtor. The purpose of examining all three of Orléans' procedures, therefore, is to understand how they worked to test the closeness of the analogy and how, if they are equivalent to Jersey procedures, they can assist in informing how those Jersey procedures work.

Saisie-exécution

18 The *saisie-exécution* was available to a creditor having executory title in respect of a certain, liquidated sum of moneys or other fungibles such as wheat or wine.[30] Its culmination was the sale of the things seized: it is therefore equivalent to the Jersey *arrêt* (*simpliciter*, arresting the principal debtor's property in his own hands, as opposed to *entre mains* arresting his property in others').

19 Pothier begins his description of *saisie-exécution* by observing that it—

> "*. . . diffère de la saisie et arrêt de meubles, en ce que l'une tend à les vendre, l'autre à empêcher les détournements*."[31]
>
> [. . . differs from *saisie-arrêt*, in that the one [execution] tends to their sale, the other [arrest] to impede misappropriations.]

20 Without more, this distinction could be thought to mean that the *saisie-arrêt* acted *in personam* to prevent misappropriations by

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[30] Executory title ("*titre executoire*") essentially meant judgments incapable of further appeal or expressly declared executory, and notarised acts/deeds: *eg* Pothier *Traité de la Procédure Civile* Partie IV Ch II sII, art I ii, p 289; VI p 295.

[31] Pothier *Traité de la Procédure Civile* Partie IV Ch II sII, art.1, I p 288.

prohibiting the diversion of funds to the wrong party. As examined below, however, there is much more substantive discussion of the *saisie-arrêt* which tends to defeat this view. Further, to the extent that failure to pay the debt arrested to the arresting, principal creditor constitutes a misappropriation of that payment, it equally reflects the principal creditor's having a proprietary interest in it.

21 Pothier makes a further potentially interesting observation regarding multiple *saisie-exécution*s, indicating their extent over the goods of the principal debtor—

> "*Saisie sur saisie ne vaut.*
>
> *Cette règle a lieu, soit à l'égard du premier saisissant, soit à l'égard de différents saisissants: 1 À l'égard du premier saisissant, celui qui a saisi les effets de son débiteur ne peut faire une seconde saisie, à moins que la première n'ait été auparavant terminée, ou qu'il en ait donné main-levée. Coutûme d'Orléans, art 453.*
>
> *Mais si la première saisie ne comprend pas tous les effets du débiteur, le créancier peut saisir incontinent les autre effets qui n'y étoient pas compris, et cette saisie n'est regardée que comme une continuation de la première, et non comme une seconde saisie; elle n'est point par conséquent contraire à la règle. Voyez mes notes sur l'art 453 qui vient d'être cité. Il sembleroit, aux termes de cet article, qu'il seroit nécessaire qu'il fut exprimé par le procés-verbal que la saisie se fait en continueant la première; mais l'usage a établi que ces termes dévoient se sous-entendre, quand même ils ne seroient pas exprimés.*"[32]
>
> [*Saisie* on *saisie* is invalid.
>
> This rule applies, whether in respect of the first seizing creditor alone, or whether in respect of different seizing creditors: first, in respect of the first seizing creditor alone, he who has seized the effects of his debtor cannot effect a second *saisie*, unless the first has previously finished, or it has been withdrawn. *Coutume d'Orléans*, art 453.
>
> But if the first *saisie* does not include all the effects of the debtor, the creditor may unrestrainedly seize the other effects which were not included in it, and this *saisie* is simply regarded as a continuation of the first, and not as a second seizure, it is therefore not contrary to the rule. See my notes on art 453 which have just been referred to. It would seem necessary, according to

[32] Pothier *Traité de la Procédure Civile* Partie IV Ch II sII, art VII, pp 323–324.

> this article, that the proceeding should expressly order that the [second] seizure is carried out in continuation of the first, but usage has established that these terms should be understood implicitly, even should they not be expressed.]

22 This passage is interesting for two points, which may have an important bearing elsewhere in respect of the *saisie-arrêt*. First, the distinction between "*saisie*" and "*exécution*"; second, the practice regarding the extent of a *saisie-exécution* over the debtor's goods.

23 As to the first point, this passage suggests that the distinction between "*saisie*" and "*exécution*" is that the "*saisie*" is the seizure or taking of possession; implying therefore that the execution is the subsequent realisation of funds in satisfaction of the debt by the sale of those goods seized. This particular interpretation is considered further below (see paras 73–74), and follows from the second point arising from this passage, that the extent of a single *saisie-exécution* allows unrestrained, multiple seizures of goods. Pothier writes that once an order was made, the practice of Orléans (the terms of its *Coutûme* notwithstanding) was to allow multiple seizures of goods under that order, with no need for a subsequent order to justify a second visit to take possession of further goods.

24 The points give rise to two questions; first whether the different terms "*saisie-arrêt*" and "*saisie-exécution*" indicate that the "*arrêt*" of incorporeal movables differs from the "*exécution*" of corporeal ones; and secondly, does the multiple seizure of goods under a single order of *saisie-exécution* cast any light on the extent of an order for a *saisie-arrêt*? On the one hand this might suggest that future returns to take goods implies the taking of future-acquired goods. On the other, however, there is no indication that this is the case, and the goods subsequently taken may be those which were present or owned at the time of the first attendance or when the *saisie-exécution* took effect.

Saisie-arrêt and the simple arrêt: a comparison and distinction

25 Both the *saisie-arrêt* and the simple *arrêt* were methods of arresting the principal debtor's movables. As noted above, the *saisie-arrêt* arrested only incorporeal movables, but the simple *arrêt* could arrest both his corporeal and incorporeal movables. Both procedures were effective against third parties in whose hands the relevant movables were found: but whereas the *saisie-arrêt* was effected against both principal and subsidiary debtor, the simple *arrêt* needed only be effected against the third party or subsidiary debtor alone.

26 Of the *saisie-arrêt*, Pothier wrote—

> "*On peut définir la saisie-arrêt, un acte judicaire fait par le ministère d'un huissier, par lequel un créancier met sous la main*

> *de justice les créances qui appartiennent à son débiteur, avec assignation aux débiteurs de son débiteur, pour déclarer ce qu'ils doivent, et être condamnés à en faire délivrance à l' arrêtant, jusqu'à concurrence de ce que lui est dû et assignation au débiteur de l'arrêtant pour consentir l'arrêt.*
>
> *Ces assignations données au débiteur arrêté, et débiteur pour le fait duquel se fait l'arrêt, et qui est le créancier du débiteur, distinguent la saisie-arrêt du simple arrêt.*"[33]
>
> [The *saisie-arrêt* can be defined as a judicial act effected by the ministry of a bailiff, by which a [principal] creditor puts under the hand of justice the credits which belong to his [principal] debtor, by summons to the [subsidiary] debtors of his debtor, to declare that which they owe, and are ordered to deliver such debts to the arresting [principal creditor] up to the amount corresponding to that which is due to him, and a summons to the [principal] debtor of the arresting [principal] creditor to consent to the arrest.
>
> These summons served on the [subsidiary] debtor arrested, and the [principal] debtor by reason of whom the arrest is performed and who is the subsidiary creditor of the subsidiary debtor, distinguish the *saisie-arrêt* from the simple *arrêt.*[34]]

27 In contrast to the *saisie-arrêt* just described, the simple *arrêt* therefore did not require the principal debtor to be served, but only the subsidiary debtor:

> "*C'est un simple arrêt, lorsque le créancier se contente de signifier au débiteur de son débiteur qu'il a arrêté tout ce qu'il doit à son débiteur, sans assignation pour faire la déclaration de ce qu'il doit, en faire délivrance entre les mains des créanciers opposants.*
>
> *Cet acte tend à dépouiller entièrement celui pour le fait duquel se font les arrêts.*"[35]
>
> [It is a simple *arrêt* when the [principal] creditor signifies to the [subsidiary] debtor of his [principal] debtor that he has arrested all he owes to the [principal] debtor, without a summons, and thereby removing its availability from rival creditors.

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[33] Pothier *Traité de la Procédure Civile* Partie IV Ch II sIII, I, pp 336–337.

[34] "*Créance*" is here translated as "credit" rather than the more idiomatic English "debt" to keep with the original text and maintain the sense of being the creditor entitled to receive the thing owed pursuant to the debt/obligation, rather than the obligation on the debtor to satisfy the debt by paying/making over that thing.

[35] Pothier *Traité de la Procédure Civile* Partie IV Ch II sIII, I, pp 336–337.

> This act tends to deprive entirely him for whose act of the arrests are made.]

28 This last phrase "*Cet acte tend à dépouiller entièrement celui pour le fait duquel se font les arrêts*" could be understood in a couple of ways. "*Celui pour le fait duquel*" could mean "that for the fact by which". That would indicate that Pothier considered the simple *arrêt* to be of limited use. Alternatively, it could mean "him by the fact of whom", or even be rendered "by the act of whom" by relating "*fait*" to *faire*.

29 The better translation seems to be this latter one, so that Pothier was writing as translated above to mean that the simple *arrêt* deprived the subsidiary debtor of the subject matter arrested. Although he could have more simply referred to "*le débiteur*" or somesuch instead, Pothier elsewhere refers to the principal debtor as "*lui pour le fait duquel*" the arrest is made.[36] Further, Pothier subsequently describes the simple *arrêt* in more substantive detail. Effectively, it operated as an order to the subsidiary debtor not to pay or perform his obligation to the principal creditor; by preventing the subsidiary creditor/third party from doing so, it therefore deprived the principal debtor of the benefit of the subsidiary debt or thing arrested—

> "*Le simple arrêt est un acte judiciaire par lequel un créancier, pour sa sûreté, met sous la main de justice les choses appartenentes à son débiteur, pour l'empêcher en disposer. Il est bien différent de la saisie-exécution et de la saisie-arrêt; car l'exécution de fiat a l'effet de vendre les meubles exécutés, et la saisie-arrêt aux fins de faire vider, au débiteur arrêté, les mains en celles de l'arrêtant, au lieu que le simple arrêt se fait seulement pour conserver les choses arrêtées, et empêcher que le débiteur n'en dispose*."[37]
>
> [The simple *arrêt* is a judicial act by which a creditor, for his protection, puts under the hand of justice the things belonging to his debtor, to prevent him disposing of them. It is very different from the *saisie-exécution* and the *saisie-arrêt*; for the *execution de fiat* has the effect of selling the moveable executed, and the *saisie-arrêt* the aim of emptying the hands of the debtor arrested in favour of the arresting party, and the simple *arrêt* is effected

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[36] *Eg* Pothier *Traité de la Procédure Civile* Partie IV Ch II at sIII, I, pp 336–337 (see para 26 above), sIII, III, pp 339–340 (see para 38 below); sIII, IV, pp 342–343 (see para 40 below); *Traité des Obligations* Partie II Ch III art IV, para 594 p 84 (see para 41 below).

[37] Pothier *Traité de la Procédure Civile* Partie IV Ch II sIV, I p 348.

only to preserve the things arrested, and preventing the debtor from disposing of them.]

30 This simple *arrêt* was nonetheless effected by judicial act and the court's officers—

"*On arrêt, ou des meubles corporels, en les faisant arrêter par un sergent qui y établit un gardien, ou des créances en significant au débiteur, par un sergent, un acte par lequel il lui déclare qu'on arrête ce qu'il doit et pourra devoir á un tel, avec defenses de lui payer.*

L'exploit d'arrêt doit etre revêtue des mêmes formalités que les autres exploits.

Il y a cette différence entre les exécutions et les simples arrêts, qu'on ne peut procéder aux exécutions que pour des créances liquides et exigibles, pour lesquelles le créancier a un titre éxécutoire, au lieu qu'on peut en plusieurs cas procéder par voie de simple arrêt, sans être fondé sur un titre éxécutoire, ou en vertue de la loi, ou en vertu d'une permission du juge."[38]

[One [simply] arrests either corporeal movables, by causing them to be arrested by a sergeant who appoints a custodian of them, or credits by serving the debtor, by a sergeant, with an act by which the sergeant declares to the debtor that that which he owes and could owe to such debtor is arrested, and forbids payment to him.

This method of arrest is subject to the same formalities as the other methods.

There is this difference between *exécutions* and simple *arrêts*, that one can only proceed to *exécutions* for liquidated and demandable debts, for which the [principal] creditor has executory title, whereas one can in several cases proceed by means of a simple *arrêt* without it being founded on an executory title, or by virtue of the law, or with the permission of the judge.]

31 From this, it seems that the simple *arrêt* was simply a conservatory method, distinctly to the *saisie-arrêt*, which was executory, and indeed, Pothier subsequently so describes it.[39] He notes that while an execution required a prior "*commandement*" to the debtor requiring payment, this was not a necessary preliminary to a simple *arrêt* which aimed only to conserve, rather than deprive, as did an execution.[40]

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[38] Pothier *Traité de la Procédure Civile* Partie IV Ch II sIV, I, pp 348–349.
[39] Pothier *Traité de la Procédure Civile* Partie IV Ch II sIV, I p 351.
[40] Such a prior "*commandement*" was and is unnecessary in Jersey: Le Geyt II Ch III *Des Executions sur Les Meubles*, p 14.

Subsequently, however, the simple *arrêt* could be converted into an execution on obtaining judgment for payment.[41] It did not give the principal, arresting creditor any rights as such in the movables arrested. Rather, it caused them to be removed from the reach of the principal debtor. In the case of corporeal movables, this was done by sequestrating them into the keep of a custodian. In the case of incorporeal immovables, this was done by the sergeant arresting them and forbidding the subsidiary debtor from paying out to the principal debtor. Effectively, it seems, the sergeant took walking possession of them.

32 Pothier writes that simple *arrêt* tended to deprive the principal debtor whose property was arrested. It appears that it did tend to deprive him of the benefit of his property in the subsidiary debtor's hands, *pro tem* at least, as that subsidiary debtor could not render that property to him while it was in custody or under seizure by the sergeant. The *saisie-arrêt* also deprived the principal debtor of the benefit of the property in the hands of the subsidiary debtor. However, in the case of the *saisie-arrêt* this does appear more positively to be because not only was the subsidiary debtor prevented from rendering the property to the principal debtor, but that property was rendered instead to the principal creditor. In that case, the deprivation is permanent.

33 Returning to the point made above regarding the terms "*saisie-exécution*" and "*saisie-arrêt*", this passage is also potentially interesting linguistically as Pothier distinguishes the simple *arrêt* from "*exécutions*". When using the term "*exécutions*", it does not appear that he is limiting the term to mean only *saisie-exécution*s of the principal debtor's corporeal movables. From the reference to executory title, which was a necessary pre-requisite to both *saisies-exécutions* and *saisie*s*-arrêts*,[42] it appears that he meant "*exécutions*" to refer to both these methods. Both are methods of execution, which distinguished them from the simple *arrêt*, since both culminated in the conversion of the initial seizure into the payment of the principal creditor in satisfaction of the principal debt. On the other hand, the simple *arrêt* had no such culmination: it was simply the prevention of the debtor's receiving the thing arrested, presumably so that it was preserved for the time being so that the principal creditor knew he had preserved some means of ensuring his principal debt would be satisfied once he had obtained judgment (and hence executory title).

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[41] Pothier *Traité de la Procédure Civile* Partie IV Ch II sIV, I p 351.
[42] See note 30 above.

34 This interpretation of "*exécution*" in this passage is fortified by Pothier's observations on the Parisian *saisie-gagerie*. This involved the seizure by the sergeant of movable property in cases of non-payment of rent, which required a subsequent order of the court before such movables could be sold. He therefore considered it to be "more by way of arrest than execution"[43] because it gave the seizing party no rights of itself but required a second, further order.[44] Similarly the simple *arrêt* was simply an arrest, rather than execution, and did not therefore require special, executory title as a pre-requisite. It is also noteworthy that despite its Parisian name of "*saisie-gagerie*", in Orléans Pothier emphasised not that it was more by way of seizure (*saisie*) than execution, but by way of arrest (*arrêt*) rather than execution.

35 By contrast to the non-executory simple *arrêt*, the *saisie-arrêt* was available to a principal creditor with executory title—

> "*Le créancier de quelqu'un qui a obtenu contre lui un jugement de condamnation d'une somme certaine et liquide qui a passé en force de chose jugée, ou qui est de nature á s'exécuter par provision, ou celui qui est créancier en vertue de quelque autre acte exécutoire, peut contraindre son débiteur au paiement de tous ses biens, de quelque espèce qu'ils soient, et par conséquent il peut, non seulement prendre par exécutions ses meubles, mais il peut aussi faire saisir et arrêter les créances de son débiteur*."[45]
>
> [The [principal] creditor of someone who has obtained against him a judgment ordering him to pay a certain and liquid sum which has passed into force of *chose jugée* or is otherwise provided to be executory, or he who is a creditor by virtue of some other executory act, can constrain his [principal] debtor to payment of all his goods, of whatever type they may be, and so he may not only take by way of execution his movables, but he may also cause to be seized and arrested the [subsidiary] credits of his [principal] debtor.]

36 Notably, Pothier here describes its purpose as being to constrain his debtor to payment. Of itself, "constraint" could refer to an *in personam* compulsion requiring payment. It is clear, however, from the words following that the reference constrains the debtor to make payment of his goods: he is constrained to use those goods to effect the

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[43] "*Plutôt de la nature de l'arrêt que l'exécution*": Pothier *Traité de la Procédure Civile* Partie IV Ch II 1er Appendice p 352.
[44] Pothier *Traité de la Procédure Civile* Partie IV Ch II 1er Appendice p 352.
[45] Pothier *Traité de la Procédure Civile* Partie IV Ch II s.III, I p 336.

payment due. Pothier is here making the point that such goods can be corporeal or incorporeal. The rendering of such goods in discharge of the debt is the extent to which the procedure is executory, following from the requirement for executory title.

37 Further, in this passage Pothier maintains a distinction between the *saisie-arrêt* of incorporeal property and the "*exécution*" of "*meubles*" (the execution of movables). In this passage, the "movables" referred to are clearly tangible, corporeal goods. Although, as discussed above, the *saisie-arrêt* can be seen as executory in that it resulted in payment whereas the simple *arrêt* did not, this suggests it was less executory than the seizure of goods and their sale under a *saisie-exécution*.

Saisie-arrêt continued: procedure and effect

38 To obtain a *saisie-arrêt*, the principal creditor caused the sergeant to arrest the movable in the hands of the subsidiary debtor, similar to the simple *arrêt*. Signally different from the simple *arrêt*, however, the *saisie-arrêt* was also served on the principal debtor—

> "*Le sergent, à la requête du créancier arrêtant, déclare au débiteur arrêté, par un acte qui lui est signifié à sa personne ou à domicile, qu'il saisit, arrête, et met sous la main de justice, tout ce qu'il peut devoir et devra par la suite à celui pour le fait duquel l' arrêt se fait; pour sureté de cette somme due à l'arrêtant, l'huissier lui fait défense de payer à d'autres, l'assigne devant le juge du débiteur, pour le fait duquel l' arrêt est fait, pour faire la déclaration de ce qu'il doit, et pour en faire le paiement à l' arrêtant, jusqu'à concurrence de ce que lui est dû.*
>
> *Le créancier arrêtant dénonce ensuite, par le ministère du sergent, cette saisie arrêt à son débiteur, et l'assigne pour consentir l' arrêt, et voir ordonner la délivrance des sommes arrêtées entre les mains de l'arrêtant.*
>
> *Cette assignation forme une instance qui se poursuit comme les autres*."[46]
>
> [The sergeant, at the request of the arresting [principal] creditor, declares to the arrested [subsidiary] debtor, by an order which is notified to his person or at his address, that he seizes, arrests, and puts in the hand of justice, all that he may owe and will owe subsequently to he by whose act the arrest is effected; to secure that sum due to the arresting [principal] creditor, the bailiff

[46] Pothier *Traité de la Procédure Civile* Partie IV Ch II sIII, III, pp 339–340.

> forbids him from paying it to others, summons him before the judge of the [principal] debtor, to declare what he owes, and to make payment of it to the [principal] arresting creditor, corresponding up to the sum which is due to him.
>
> The arresting [principal] creditor then announces, by the ministry of the sergeant, this *saisie-arrêt* to his [principal] debtor, and summons him to consent to the arrest and see ordered the delivery of the sums arrested into the hands of the arresting [principal] creditor.
>
> This summons forms a proceeding pursued as any other.]

39 The requirement to serve on the principal debtor is justified as required "to summon him to consent". It may be presumed that his actual consent was not a necessary pre-requisite to the *saisie-arrêt*, which was equally presumably only necessary because of his recalcitrance to pay. The consent must therefore have been a deemed consent: in effect, unless the principal debtor could raise valid grounds against the ordering of the *saisie-arrêt* the court would order it, his consent therefore being inferred by his failure to raise a valid ground of objection.[47] Nonetheless, even this forced and fictitious consent must have had some purpose, as it was not a requirement of the non-executory simple *arrêt*. It is therefore most likely that the consent was required because the *saisie-arrêt* effected a transfer of rights, and so supports the view that the *saisie-arrêt* was executory and had proprietary effect.

40 As to the effect of the *saisie-arrêt*, Pothier wrote—

> "*L'effet de la saisie-arrêt est que, dès qu'elle est faite, la créance arrêtée étant mise sous la main de justice, celui à qui elle appartient, et pour le fait duquel elle est arrêtée, n'en peut plus disposer; il ne peut donc pas la transporter au préjudice du droit de l'arrêtant, il ne peut la recevoir, et l'arrêté qui, au préjudice de l'arrêt, paieroit à son créancier, seroit à la vérité bien libéré envers son créancier, mais il ne le seroit pas envers l'arrêtant, qui peut le faire condamner à lui faire déliverance de la somme qu'il devoir lors de l'arrêt, sans avoir égard au paiement qu'il a fait depuis, sauf son recours en répétition, contre son créancier, à qui il a mal-à-propos payé depuis l'arrêt.*
>
> *Par la même raison, le créancier, pour le fait duquel l'arrêt est fait, ne peut pas, au préjudice des arrêtants, décharge son débiteur arrêté de son obligation; d'où il suit que, si un créancier*

[47] Compare Pothier *Traité de la Procédure Civile* Partie IV Ch II sIII, IV p 342.

> *a arrêté les loyers échus et a écheoir, sur les locataires de son débiteur, ce débiteur ne peut pas au préjudice de l'arrêtant, annuler le bail pour l'avenir, par une convention entre lui et son débiteur, car ce seroit décharger les locataires de leurs obligations pour les années à écheoir, et ces années étant arrêtées, il ne peut, au préjudice de l'arrêtant en disposer*.[48]
>
> [The effect of the *saisie-arrêt* is that, from its being effected, the credit arrested being put under the hand of justice, he to whom it belongs, and by the fact of whom it is arrested, can no longer dispose of it; he therefore cannot transfer it to the prejudice to the right of the arresting party, it may not receive it, and the arrested party, who, to the prejudice of the arrest, would pay it to his creditor, would be in truth well discharged as regards his creditor, but he would not be towards the arresting party, who can have him ordered to deliver to him the sum he owes pursuant to the arrest, without regard to the payment he has made since, except his recourse, against his creditor, to whom he has wrongly paid since the arrest.
>
> For the same reasons, the creditor, for whose act the arrest is made, cannot, to the prejudice of the arresting parties, discharge his arrested debtor from his obligation; from which it follows that, if a creditor has arrested rents fallen due and to fall due, against the tenants of his debtor, this debtor may not to the prejudice of the arresting party, cancel the lease for the future, by a contract between him and his debtor, because this would discharge his tenants from their obligations for the years to fall due, and these years being arrested, he cannot, to the prejudice of the arresting principal creditor, dispose of them.]

41 Pothier also distinguished the effect of the *saisie-arrêt* from a novation. He wrote that to effect a novation substituting new obligations for old, an expressly declared intention to this effect was required: for example, an acceptance of payment by Jacques, in place of the original debtor Pierre, which the creditor records himself as accepting as such.[49] Having given this last example to make the point generally in respect of novations, he repeated it expressly in respect of a *saisie-arrêt*—

> "*Mais, a moins qu'il ne paroisse évidemment que le créancier a eu intention de faire novation, la novation se présume pas. C'est pourquoi si, dans la même espèce, ayant fait une saisie et arrêt*

[48] Pothier *Traité de la Procédure Civile* Partie IV Ch II sIII, IV, pp 342–343.
[49] Pothier *Traité des Obligations* Partie II Ch III art IV, para 594, pp 82–83.

> *sur Jacques, pour le fait de Pierre mon débiteur, Jacques s'est obligé envers moi pûrement et simplement, par un acte, à me payer la somme de mille livres qui m'est due par Pierre, et pour laquelle j'ai fait arrêt, sans qu'il étoit ajouter, comme dans l'espèce ci-dessus, que j'ai bien voulu, pour faire plaisir à Pierre, me contenter de l'obligation de Jacques, ou quelque autre chose semblable, qui feroit connoître évidemment que j'ai voulu décharger Pierre je ne serai point censé avoir fait de novation, et Jacques sera censé avoir accédé a l'obligation de Pierre, qui demeure mon obligé*."[50]
>
> [But, at least if it does not seem obvious that the creditor had the intention to effect a novation, the novation is not presumed. That is why if, in the same example, having effected a *saisie-arrêt* against Jacques, by reason of the act of Pierre my debtor, Jacques is obliged towards me purely and simply, by order, to pay to me the sum of one thousand pounds which is due to me from Pierre, and for which I have arrested, without my having added, as in the example above, that I really wanted, to please Pierre, to content myself with Jacques' obligation, or some other such thing, which would make clearly known that I wanted to discharge Pierre I would not be taken to have novated, and Jacques will be deemed to have acceded to Pierre's obligation, who remains obliged to me.]

42 So, in ordinary course, the *saisie-arrêt* was not of itself a novation. As a result, the principal debtor remained bound to the principal creditor, notwithstanding the *saisie-arrêt*. The *saisie-arrêt* only caused the discharge of the principal debtor by the subsidiary debtor's paying the principal creditor.

43 The final aspect of the *saisie-arrêt* as described by Pothier which indicates how he considered it to work concerns the rules of priority applicable where the principal debtor has assigned the subsidiary debt.[51] This is considered below (at paras 61–62).

44 From the above, two observations can be made so far regarding the executory effect of the *saisie-exécution* and the *saisie-arrêt* in distinction to the simple *arrêt*. First, the *saisie-arrêt* was different from the simple *arrêt* in that the former had executory effect, the latter was merely conservatory. Pothier plainly described these differing effects when describing the simple *arrêt*. It is further reflected in the *saisie-*

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[50] Pothier *Traité des Obligations* Partie II Ch III art IV, para 594 p 84.

[51] Pothier *Traité de la Procédure Civile* Partie IV Ch II sIII, VI p 346: "*De la préférence entre les créanciers arrêtants, et ceux par transport***".**

arrêt's requiring executory title as a pre-requisite. The *saisie-arrêt* was executory because it bit against rights to convert them into paying the subsidiary creditor what he was owed.

45 Secondly, there are nonetheless linguistic grounds for qualifying the precise executory effect of the *saisie-arrêt* as being different from that of the *saisie-exécution*. This was potentially the case because of their different subject matter. The *saisie-exécution* was effected in respect of corporeal moveables which could be removed and then sold. The proceeds of sale were paid to the principal creditor. In that case, the execution against those goods was direct, in the sense that it consisted of taking the goods of another, the principal debtor, and liquidating them into funds to pay to the principal creditor in discharge of the debt owed to him by that principal debtor. Although this sale could be seen as a separate action, it was nonetheless direct in that it was composite in the order which in terms ordered the seizure and execution of the goods (and hence it was "*execution de fiat*" in the passage noted at para 29 above). The *saisie-arrêt* was executory in that it converted the rights of others into payment to the principal creditor, but it was a step removed from the direct execution of the *saisie-exécution*. In the case of the *saisie-arrêt*, the execution bit against the right of the principal debtor and converted it into a right to the creditor. However, that conversion of the right only resulted in payment to the principal creditor when the subsidiary debtor paid the sums owed pursuant to the subsidiary debt. Prior to that, the arresting, principal creditor became entitled to that payment, but the *saisie-arrêt* did not directly convert the subsidiary debtor's funds into payment to the principal creditor. This is self-evident, and appears also from Pothier's account of obligations which is considered further below (at para 49 *et seq*.).

46 Overall, from Pothier's account, the *saisie-arrêt* therefore had the following characteristics—

(a) The arrest was effected by the sergeant notifying the subsidiary debtor that he "seizes, arrests, and puts under the hand of justice all that he can owe and may owe afterwards" to the principal creditor.

(b) The effect of the arrest was that the principal debtor could not transfer, affect or discharge the credit arrested to the prejudice of the principal creditor following the arrest.

(c) The subsidiary debt remained extant as between the subsidiary and principal debtor, but became additionally owed to the principal creditor. The subsidiary debtor could only be discharged of the subsidiary debt by paying the sum owed to the principal creditor.

(d) The principal debt also remained extant as between principal debtor and principal creditor, notwithstanding the effect of the arrest.

(e) The principal debtor was summoned to consent to that arrest.

47 Of these characteristics, the following observations can be made at this stage—

(a) Arguably, to the extent that the *saisie-arrêt* captured future property it may be more likely to have operated *in personam*. This is because it seems unlikely that an obligation *in rem* could be created when there is no *res* in existence for it to attach to. Against that, the obligation *in rem* could be created contingently, taking effect when the relevant *res*, the obligation, comes into being.

(b) The effect of the *saisie-arrêt* was prevention and direction. It prevented the subsidiary debtor paying the principal debtor, and directed him to pay the principal creditor instead. The sergeant so enjoined the subsidiary debtor when he effected the arrest. Pothier repeats this as being the effect of the arrest when the relevant obligation is put in the hands of justice. On the one hand, the language of prevention and direction could be said to support the order's being *in personam*. On the other hand, it can equally validly describe the consequences of the transfer of a right *in rem*.

(c) So far, however, the continued existence of the subsidiary debt as between the subsidiary and principal debtor suggests that there was not a transfer of it, so suggesting further that the arrest takes effect *in personam*.

(d) Equally, however, the particular reason why the principal debtor had to be joined to consent to the arrest remains unclear. Whether *in personam* or *in rem*, it could be presumed that the court's coercive power would be sufficient to override the need for consent.

48 To develop these observations and find answers to the questions they raise, it is necessary to read further into Pothier's works. In particular, since the arrest effects obligations, his account of these is considered next below.

Pothier's analysis of obligations

The effect of obligations to give or pay something

49 Pothier divides obligations into obligations to give (*à donner*) and obligations to do (*à faire*). Plainly, a debt was an obligation to give

money in the sum indebted, and was thus an obligation to give. An obligation to give required the debtor to give the thing at a convenient time and place to the creditor (or to someone who has the power or quality to receive it on the creditor's behalf;[52] correspondingly, it gave the creditor the right to pursue the debtor with legal proceedings to obtain the rendering of that which was contained in the obligation.

> "*Le droit que cette obligation donne au créancier de poursuivre le paiement de la chose que le débiteur s'est obligé de lui donner, n'est pas de droit qu'elle lui donne dans cette chose, jus in re, ce n'est qu'un droit contre la personne du débiteur pour le faire condamnera donner cette chose; jus ad rem*."[53]
>
> [The right which this obligation gives to the creditor, to pursue the rendering of the thing which the debtor is obliged to give him, is not a right that he [the debtor] gives him in that thing, *jus in re*, it is only a right against the person of the debtor by which he can be ordered to give that thing, *jus ad rem*.]

50 The thing the debtor was obliged to give continued to belong to him, and the creditor could only become proprietor of it by actual or implied delivery[54] (absent which, he had to sue for that delivery to be made).

51 It follows that the debtor made payment by giving and transferring[55] that which he was obliged to give.[56] Equally, it follows that the effect of such payment was to extinguish the obligation and so discharge the debtor.[57] Pothier notes that payment of an obligation could extinguish several obligations where the thing given in discharge of one obligation was the same thing which was the object of another obligation.[58] Further, this rule was effective even as between different creditors.[59] Equally, payment of one obligation could extinguish the obligations of other debtors which had the same object as the obligation paid.[60]

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[52] Pothier *Traité des Obligations* Tome II Partie 1 Ch II art 1, para 141 p 121.
[53] Pothier *Traité des Obligations* Tome II Partie 1 Ch II art 1 paras 150–151, pp 127–128.
[54] Pothier *Traité des Obligations* Tome II Partie 1 Ch II art II paras 151–152, pp 128–129.
[55] "*donation et translation*"; Pothier *Traité des Obligations* Tome III Partie III Ch I art 1, para 494 p 2**.**
[56] Pothier *Traité des Obligations* Tome III Partie III Ch I art 1, para 494 p 2.
[57] Pothier *Traité des Obligations* Tome III Partie III Ch I art I, para 551 p 41.
[58] Pothier *Traité des Obligations* Tome III Partie III Ch I art I, para 552 p 41.
[59] Pothier *Traité des Obligations* Tome III Partie III Ch I art I, para 553 pp1–42.
[60] Pothier *Traité des Obligations* Tome III Partie III Ch I art I, para 554 p 42.

Person making payment: consent of proprietor of thing transferred

52 To count as valid payment, the giving and transfer[61] of the thing paid over had to be by the owner of that thing or with his consent, as the consent of the owner was an essential pre-requisite to the transmission of property in the thing paid.[62] This may be thought to go towards explaining why the presence of the principal debtor in court was necessary for it to order a *saisie-arrêt*. However, it was not necessary for the debtor or even his appointee to effect the payment: valid payment such to discharge the obligation could be made by anyone, even without the power or authorisation of the debtor, provided the person making payment was capable of transferring property in the thing paid and made the payment in the name of the debtor, even without that debtor's consent.[63] So, in the case of the *saisie-arrêt*, the summoned principal debtor's consent was not a pre-requisite for the subsidiary debtor to make a payment to the principal creditor which had the effect of discharging both the principal and subsidiary debts. It is the subsidiary debtor's consent to a transfer of the thing he pays which was necessary for that: he can do so against the will of the principal debtor, provided he does it in the principal debtor's name. That only leaves the principal debtor's title to the subsidiary debt itself in respect of which his consent might have been required.

To whom payment made: creditor or his agents including the sergeant

53 For it validly to constitute payment in discharge of an obligation, the payment had to be made to the creditor, or to someone who had his power or the quality to receive (in which latter case the payment was considered to be made to the creditor himself).[64] Notably, Pothier expressly considers the executing sergeant (and hence the sergeant carrying out a *saisie-arrêt* as discussed above) to have had the power of the creditor to receive—

> "*Le titre exécutoire dont est porteur le sergent qui va de la part du créancier pour le mettre à exécution, équipolle à un pouvoir de recevoir la dette contenue en ce titre: et la quittance qu'il donne au débiteur est aussi valable que si elle eut été donnée par le créancier.*"[65]

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[61] "*dation et translation*".
[62] Pothier *Traité des Obligations* Tome III Partie III Ch I art I, para 495 p 3.
[63] Pothier *Traité des Obligations* Tome III Partie III Ch I art 1, para 499 p 5.
[64] Pothier *Traité des Obligations* Tome III Partie III Ch I art I, para 501 p 8.
[65] Pothier *Traité des Obligations* Tome III Partie III Ch I art I, para 513 p 16: see also n27 para 17 above.

> [The executory title of which the sergeant is bearer which comes from the part of the creditor to put it into execution, equates to a power to receive the debt contained in that title; and the discharge he gives to the debtor is as valid as if it were given by the creditor.]

54 In his account of obligations, Pothier again specifically noted that payment by an arrested, subsidiary debtor to his creditor, the principal debtor, was a valid payment of his subsidiary debt to that principal debtor *vis-à-vis* that principal debtor. However, it was invalid in respect of the arresting creditors who could still enforce the subsidiary-debt subject to the *saisie-arrêt* and thereby receive payment of that debt.

> "*Le paiement que fait le débiteur à son créancier au préjudice d'une saisie-arrêt faite entre ses mains par les créanciers de son créancier, est bien valable vis-à-vis de son créancier: mais il n'est pas valable vis-à-vis des créanciers arrêtants, qui peuvent obliger ce débiteur a payer une seconde fois, s'il est jugé que les arrêts soient valables; sauf son recours contre son créancier, a qui il a paye au préjudice de l'arrêt . . .*"[66]
>
> [The payment that a [subsidiary] debtor makes to his creditor to the prejudice of a *saisie-arrêt* effected in his hands by the [principal] creditors of his creditor is certainly valid *vis-à-vis* his creditor, but it is not valid *vis-à-vis* the arresting [principal] creditors, who can oblige this [subsidiary] debtor to pay a second time, if it is adjudged that the arrests are valid, save for his recourse against his, whom he has paid to the prejudice of the arrest . . .]

55 So far, therefore, Pothier's account of obligations and payment tells us four things about the *saisie-arrêt*—

(a) First, payment to the arresting sergeant was good payment to the arresting, principal creditor.

(b) Second, that payment discharged both the principal debtor's debt and the subsidiary debtor's debt towards him, *pro tanto*.

(c) Third, the principal debtor's consent was not required for this dual, *pro tanto* discharge to be effective.

(d) Fourth, payment by the subsidiary debtor to the principal debtor following an arrest did not have this dual effect and was only good payment as regards the principal debtor, the

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[66] Pothier *Traité des Obligations* Tome III Partie III Ch I art I, para 505 p 12.

> subsidiary debtor remaining liable to the principal creditor to pay the sum arrested.

56 The second and third of these points flow from the general nature of obligations and the principle that payment of one obligation can constitute payment of more than one debt. The first may well seem self-evident from the purpose of the arrest, as may the fourth. However, the fourth point means that the subsidiary debt remained an obligation in force as between the subsidiary debtor and the principal debtor, notwithstanding the *saisie-arrêt*, with the result that the principal debtor could give good discharge of it, as between themselves. The *saisie-arrêt*, however, imposed a superior and parallel obligation to pay the arresting principal creditor: superior in that only he could give good discharge of the obligation *in toto*, as against both him and the principal debtor.

57 This effect of the *saisie-arrêt* suggests there was some other reason why the subsidiary debtor had to pay. Given that the principal debtor's consent was required (even fictitiously) to an apparently coercive process, it is possible that some proprietary right in the subsidiary debt was transferred. Such a transfer does not appear to be absolute, as the principal debtor was still owed the debt. However, this factor is nonetheless consistent with the debt's having been assigned in some way according to Pothier's account of assignments, which is considered next below.

Pothier's account of assignment: an agency to receive

58 According to Pothier, the subtlety of the law meant that a credit, the right to receive an obligation,[67] was not capable of transfer or sale to another person because it was personal to the debtor. Because the debtor was obliged to a certain person, the creditor, he could not be obliged to another, third person.[68] However, circumventing itself with self-same subtlety, the law provided an alternative means by which the creditor could transfer his obligation to a third party. The creditor could appoint the third party his agent to enforce his rights against the debtor.[69] In order to effect an absolute transfer, the agency would be on terms that the assignee-agent enforce the debt against the debtor at his own risk, such that if the debtor were insolvent, the assignee-agent had no recourse against the assignor creditor. In the case of an outright assignment, such an agency was a "*transport-cession*", in reality a transfer of the assignee-creditor's rights absolutely, albeit disguised as an agency.[70] Alternatively, there could also be a "*transport de simple délégation*" where a debtor assigned the right to collect his debt to his creditor. So, where I am the principal debtor and owe money to my principal creditor, I can pay him by transferring my subsidiary debt to him—

> "*. . . en lui donnant pouvoir d'exiger de lui, en mon nom, ce qu'il me doit, pour être par lui reçu en déduction de ce que je lui dois. Par cette délegation, je demeure toujours propriéteur de a créance par moi déléguée, jusqu'à qu'elle soit éteinte par le paiement . . .*"[71]
>
> [. . . by giving him power to demand of him, in my name, that which he owes me, to be received by him in reduction of that which I owe him. By this delegation, I always remain proprietor of the credit delegated by me, until it is extinguished by payment . . .]

59 In order to effect a transfer of a credit, notice had to be given to the subsidiary debtor—

> "*tant que le cessionnaire n'a point fait signifier au débiteur le transport qui lui a été fait, le cédant n'est point dessaisi de la*

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[67] See n34 above.
[68] Pothier, *Traité du Contrat de Vente* Tome III Ch IV art I, para 551 p 418.
[69] Pothier, Tome III Vente Ch IV art I, para 551 p 418–419.
[70] Pothier, Tome III Vente Ch IV art I, para 552 p 419.
[71] Pothier, Tome III Vente Ch IV art I, para 552 p 419.

> *créance qu'il a transportée . . . Un simple transport ne saisit point, et faut signifier le transport à la partie*".[72]
>
> [to the extent that the assignee has not caused to be notified to the debtor the transfer which has been made to him, the assignor is not disseised of the credit which he has transferred . . . A simple transfer does not seise, and it is necessary to notify the transfer to the party.][73]

60 When giving this above description in his treatise on sale, Pothier goes on to compare the notification to delivery of a corporeal movable.[74] He also gives this rationale behind it in his treatise on civil procedure when describing the *saisie-arrêt*.[75] The notification takes the place of physical delivery which is required to convey property in a corporeal moveable.

61 Three things followed from the requirement to notify in order to perfect an assignment—

(a) First, if it were not done, it followed that payment by the debtor to the assignor prior to that notification would constitute valid payment to the assignor who was his creditor; correspondingly, the assignee would have no action against the debtor.[76]

(b) Secondly, if there were more than one assignee of the same thing, their rights to that thing ranked in priority according to the timing of their notifications (as distinct from the underlying assignment).[77]

(c) Thirdly, and significantly, the relevant thing remained liable to execution by the assignor's creditors until notification were given of its assignment—

> "*les créanciers peuvent saisir et arrêter ce qui est dû par le débiteur dont la dette a été cédé, et ils sont préférées au cessionnaire*".[78]
>
> [The creditors can seize and arrest that which is due from the debtor of whom the debt has been assigned, and they will be preferred to the assignee.]

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[72] Pothier, Tome III Vente Ch IV art II, para 555 p 421.
[73] See further para 74 below regarding the translation of "*saisir*".
[74] Pothier, Tome III Vente Ch IV art II, para 555 p 421.
[75] Pothier, *Traité de la Procédure Civile* Tome III Partie IV Ch II, VI, p 346.
[76] Pothier, Tome III Vente Ch IV art II, para 556 p 421.
[77] Pothier, *Traité de la Procédure Civile* Tome III Partie IV CH II, VI, p 348.
[78] Pothier, Tome III Vente Ch IV art II, para 557 p 422.

62 In other words, in terms of ranking priorities, a *saisie-arrêt* was qualitatively equivalent to the notification of an assignment, priority determined only by sequence. This would follow if the *saisie-arrêt* is taken to be a transfer of the principal debtor's rights to the relevant movable, in which case it is qualitatively equivalent to an assignment. From this, it further follows that the *saisie-arrêt* effected a transfer *in rem*, being equivalent to both the transfer to the assignee and its notification to the debtor. It would therefore be equivalent to transfer and delivery of the moveable thing.

Assignor's entitlement despite assignment

63 Notwithstanding the view that notification was equivalent to delivery of title to the movable, indeed in apparent contradiction to it, even after the notification the assignor remained proprietor of the obligation to him.

64 In this respect, the transfer was distinct from a novation, which resulted in the substitution of the old debt personal to the principal debtor and subsidiary creditor, by a new one from and personal to the subsidiary debtor towards the principal creditor.[79] This is because the debt purportedly transferred by assignment remained the old debt due to the assignor, rather than substituted with a new debt.[80] As this was the case with both the purportedly absolute *transport-cession*, then *a fortiori* it must have been with the more openly dual *transport de simple délégation*.

Assignment of future rights

65 A final aspect of assignment observed by Pothier was the position regarding attempts to assign future debts.[81] This may obviously have an important bearing on what is capable of being arrested at the time of the arrest. If the arrest acts *in personam*, it may be thought more likely that it is able to capture property not yet in existence. This does not necessarily follow, however, since Pothier considers that where an assignment of future property is otherwise perfect, it takes effect when there is property in existence to feed the formalities previously completed. However, the examples he gives of such future property are notable in that they all refer to instalments falling due in the future as the result of relationships apparently already in existence. For example, a lease, on foot now and connoting an ongoing relationship

[79] Pothier, Tome III Vente Ch IV art I, para 553 p 420.
[80] Pothier, Tome III Vente Ch IV art I, para 553 p 420.
[81] Which the Court of Appeal noted at [2011] JRC 141, para 171: see paras 65–66 above.

which will continue into the future and give rise to the payment of rent in the future. Conceptually, such rent *will* fall due, by reason of the continuing lease. In this passage, Pothier does not appear to comprehend property which conceptually *might* fall due, such as a rent due under a lease which the owner of the land may (but may not) grant. Presumably, however, the same principle is capable of applying: the assignee would only come into possession when there is property in existence which is capable of being possessed.

66 Following from the above, the assignment was not effective until the future date, and so the assignee competed with arresting creditors. The nature of this competition was "*au marc la livre*", a French proverbial expression meaning "*pro rata*". Until future property became available, in Pothier's view, the rights of the assignee therefore equated to those of an arresting creditor. As Pothier considered that there could be no possession of future interests, this comparison implies that an arrest was something different from a right of possession.

Conclusion: *l'effet de la saisie-arrêt Pothière*

67 Tying together Pothier's accounts of the *saisie-exécution*, *saisie-arrêt* and simple *arrêt*, obligations and assignment gives a full picture of the *saisie-arrêt*'s particular operation. Qualitatively, it operated equivalently to an assignment of the debt in question. The starting point is that a subsidiary debtor could pay to the principal creditor the sum owed by him under the subsidiary debt without the compulsion of a *saisie-arrêt* or other court order. Provided he did so in the name of the debtor, his payment would be good to discharge both his subsidiary debt to the principal debtor, and his debt to the principal creditor (*pro tanto*). It begs the question, why was it necessary to effect a *saisie-arrêt* at all?

68 The obvious answers to that point are that: first, the subsidiary debtor had to be made aware of the principal debt; secondly, he may not have been inclined to pay directly to the principal creditor. The court order thus compelled him to do so. However, as such payment in dual discharge could be made without the principal debtor's consent, it could be made without the principal debtor's being a party to court proceedings (even if it were practical and sensible to inform him of them). So, why was the principal debtor's presence required in court to consent to the *saisie-arrêt*?

69 The requirement for consent suggests a transfer, as a proprietor's consent is required to effect a transfer. It cannot be a transfer of the money which the subsidiary debtor will pay over to the principal creditor, for that is the subsidiary debtor's, not the principal debtor's. This was so even taking into account the subsidiary debt, which

entitled the principal debtor only to payment from the subsidiary creditor, *ie* an entitlement to payment or delivery of the thing owed. It was not entitlement to the thing owed: a right *ad rem*, not *in rem*.

70 The only transfer to which the consent can be relevant is therefore a transfer of the principal debtor's rights in respect of the subsidiary debt. The effect and consequences of the *saisie-arrêt* as such mirror exactly the effect and consequences of an assignment (and Pothier's description of assignments summarised above frequently assumes that the assignor is debtor to the assignee). Their common characteristics are that—

(a) Both gave the assignee/arresting, principal creditor the right to be paid by the subsidiary debtor.

(b) Both constituted the assignee/principal creditor the assignor/principal debtor's agent to receive payment from the subsidiary debtor.

(c) Neither extinguished the subsidiary debt as between the assignee/principal debtor and the subsidiary debtor. This could therefore be extinguished as between the assignor/principal debtor and subsidiary debtor alone by payment by the subsidiary debtor. However, such payment was not effective as regards the principal creditor/assignee who remained entitled to payment from the subsidiary debtor.

71 The principal substantive difference between assignment and the *saisie-arrêt* is that assignment required notification, the *arrêt* did not. However, the arrest was effected by the sergeant attending and serving the subsidiary debtor. Since by that act the subsidiary debtor was made aware of his duty to pay the principal creditor (via the sergeant) instead of the principal debtor, he was thus notified of any transfer of rights.

72 Further, it is here that the linguistic difference between "*saisie*", "*exécution*", "*arrêt*", "*saisie-exécution*" and "*saisie-arrêt*" may apply. As noted above, both the *saisie-exécution* and the *saisie-arrêt* constituted "*exécution*", in that both compelled the property of the principal debtor's being used to effect payment of the principal debt. The *saisie-exécution* was more direct in this respect: the sergeant seized the goods, which were then sold and the proceeds were credited to the principal creditor. Hence the name: there was a seizure and an execution.

73 The *saisie-arrêt* was less direct: the sergeant seized and arrested the subsidiary debt. However, without more, there was no satisfaction to the principal creditor who had to wait until payment by the subsidiary debtor. Nonetheless, it was more effective than the non-

executory, simple *arrêt* which seized goods, including incorporeal ones, only in the sense of sequestrating them beyond reach. The non-executory simple *arrêt* comprised only a simple arrest to take custody of the thing, to put it to one side. The executory *saisie-arrêt* was more emphatically a seizure and an arrest. The difference between the "*saisie*' and "*arrêt*" within a *saisie-arrêt* may therefore be that the "*arrêt*" placed the movable beyond reach (as in the simple *arrêt*), but the "*saisie*" went further to seise the arresting, principal creditor with the thing arrested. Thus also the "*saisie*" under a *saisie-exécution* would similarly seise the arresting creditor with sufficient possession and title to the goods to execute them by sale. "*Saisir*" in this sense could be rendered in English by both "*seize*" (as it generally has been above) but also "*seise*", in the sense of putting into possession. For instance, Pothier uses "*saisir*" when describing notification of an assignment as akin to delivery: the notification is necessary because "*un simple transport ne saisit point*" [a simple transfer does not seise].[82] This is further borne out by the impossibility of being seised of future property, thus an assignment of such future property being effective only as an arrest of it: "*il n'est pas possible . . . d'etre saisi de ce qui n'existe pas encore*" thus notification or acceptance of assignment of a future debt "*n'équipolle . . . qu'à un arrêt*" [It is not possible . . . to be seised of that which does not exist yet thus notification or acceptance of a future debt equates only to an arrest].[83]

74 The *saisie-arrêt* thus equated to notification not simply because it informed the subsidiary creditor, but it was equivalent to a (forced) delivery by the principal debtor to the principal creditor. The result is that the principal creditor became seised of and possessed the principal debtor's title to the debt. It was an arrest in that the sergeant took control of the thing, putting it under the hand of justice, as he did in the case of the simple *arrêt*,[84] and payment was to be made by the subsidiary debtor to the sergeant as the principal creditor's agent to receive. It was also an arrest, rather than an execution, in that the taking of the thing in this way did not of itself provide a means of realising money but further performance by the subsidiary debtor in making payment was necessary. However, when that payment was made to the sergeant it was received on behalf of the principal creditor, who was vested with rights to receive that payment up to the point where the principal debt was satisfied. So, the *saisie-arrêt* was a "seising arrest": the sergeant arrested the thing and took custody of it

[82] At paras 59 and 60 above: see also para 65 above.
[83] See paras 65 and 66 above.
[84] See para 26 above in respect of the *saisie-arrêt* and para 29 in respect of the simple *arrêt.*

on behalf of the principal creditor and in so doing seised that principal creditor with title to receive the thing obliged of the subsidiary debtor pursuant to the subsidiary debt.

75 However, the *saisie-arrêt* was not a novation, so the principal debtor remained liable to the principal creditor. It would presumably not have been a contempt of court for him to pay the principal creditor himself, to discharge the debt directly. If so, it would follow that the subsidiary debtor would be freed or entitled to be freed from the *saisie-arrêt* and the obligation to pay the subsidiary debt to the principal creditor. Of course, if the principal debtor did not do so, the principal creditor stood in his shoes *vis-à-vis* the subsidiary debtor to whose performance he was entitled (and could enforce according to the tenor of the subsidiary debt).

76 The sergeant's taking possession by *saisie-arrêt* would therefore equate to its possession on terms entitling the principal creditor to enjoy entitlement to the payment obliged by the subsidiary debt until he was paid. Given the above similarities with an assignment, *saisie-arrêt* therefore appears to have taken effect as an assignment defeasible on payment of a sum equal to the principal debt. On this sum being reached, entitlement to any further payment of the subsidiary debt reverts to the principal debtor. As this follows should the subsidiary debtor' pay up to that level, there seems no reason against its operating should the principal debtor himself have made that payment (or indeed, for that matter should a further, fourth party have paid in his name).

77 To this extent, the *saisie-arrêt* appears not only to have operated as an assignment, but also as a security, such as a charge. It therefore appears to have taken effect as a charge in the same way that delivery of a corporeal movable into the possession of another would: it is to achieve such possession that the rules of assignment, to which arrest equated, developed. It would also explain the difference between the *saisie-arrêt* and the simple *arrêt*, both linguistically and in terms of the requirement for the principal debtor's consent.

78 Finally, the question remains whether and to what extent the *saisie-arrêt* was effective against future debts. Such debts can be considered of two types: debts which are payable in future under currently extant obligations, and debts which will only exist under obligations which themselves will only come into being in future. Pothier does not analyse this question in directly or in detail. However, the indications are that the first category of extant debts, not yet payable were arrestable, and the second of truly future debts were not. This would accord more with Pothier's apparent views when he considered attempts to assign future debts. Although, conceptually, the assignment or *saisie-arrêt* could remain fallow until that future time

when property came into being against which they could bite, Pothier's examples only consider future instances of an extant obligation or relationship.

79 This may be reflected in the language used at the time of the different arrests. When the sergeant attended the subsidiary debtor to effect a *saisie-arrêt*, he arrested "*tout c qu'il peut devoir et devra*." In the Royal Court hearing of the *FG Hemisphere* case this was translated as "all that he can owe and will owe in the course of time".[85] The Court of Appeal accepted "all that he may owe" as a reasonable translation of the first part, and recognised that "*peut*" does not naturally attach to "*devra*" in the second part.[86] This seems correct. Pothier's original French clearly uses the present indicative of *pouvoir* (to be able) in the first part of this excerpt and the future indicative of *devoir* (to owe) in the second part. As the English "may owe" could still arguably include things only owed in the future, a better translation might therefore be "all that he presently may owe and will owe". This contrasts with the sergeant's words when he attended to effect a simple *arrêt* against the subsidiary debtor to arrest "*tout ce qu'il doit et pourra devoir*" [all that he owes and may in future owe]. Here, the present indicative of *devoir* is used in the first part and the future indicative of *pouvoir* in the second. Although Pothier supplies no express reasons for this difference in language, the reason may follow from the executory and conservatory roles of the *saisie-arrêt* and simple *arrêt*.

80 The executory *saisie-arrêt* was aimed at quantifying and getting in debts in satisfaction of the principal debt, but as the Court of Appeal noted, was effected before the true value of the debt might be known, hence the subsidiary debtor's being required to declare it.[87] Therefore, it seised the arresting creditor of the credits, albeit their value (and hence how much was owed) may presently have been unknown. Conversely, the conservatory simple *arrêt* was less concerned at the quantification of any debt, which could take place later, but merely to prevent any dealing with the debt (whatever its value) to the prejudice of the arresting, primary creditor while respective entitlements were argued over. It therefore appears more concerned to arrest whatever was owed currently, or which may in future be owed; and Pothier expressly notes the simple *arrêt* did not require the subsidiary debtor to be summoned to declare the value of the subsidiary debt.[88] It would make more sense for the simple *arrêt*'s *in terrorem* conservatory

[85] [2010] JRC 195; 2010 JLR 524, para 147.
[86] [2011] JRC 141 paras 165, 173.
[87] [2011] JRC 141, paras 173, 175.
[88] See para 27 above.

custody to extend to unknown and unascertainable truly future debts which it did nothing further to vest, than the *saisie-arrêt*'s granting of possession in execution. The *saisie-arrêt's* execution is concerned to achieve payment now, the simple *arrêt's* conservation with the preservation of such means as may be available between now and the future when the right to payment out of those means may be established.

Norman and Jersey custom

81 As noted above, the relevance of considering Pothier's description of Orléans' practice as a guide arises from there being a paucity of detail regarding the *arrêt entre mains* in the *coutumiers*, related writings and generally in Jersey law. Nonetheless, what little there is supports the Orléans procedure as analysed above and also the English procedure as explained in *Eram* as being suitable analogues.

82 Chapter 6 of the *Ancien Coutumier* describes "*Justicement*" or distraint, being the means by which a person can be constrained. The chapter is not exclusively concerned with disobedience to judicial orders or obtaining satisfaction of a judgment. It gives a brief description of the various circumstances in which differing distraints against land, movables and the person were available in feudal Normandy, and does not describe their respective operation in great detail. Nonetheless, Poingdestre considered this chapter to be "the most excellent and universal there may be in all the *coutumier*".[89] His point was that to be effective, a court must be able to back its decisions with coercive orders. From this springs the jurisdiction to order execution including *saisie*s, *arrêts* and "putting in the hands of justice". In essence, Poingdestre was stating that the jurisdiction to make such orders sprang from the inherent jurisdiction of the court, they being necessary in order to enforce the court's decisions.

83 Routier describes *Saisies et Arrêts in nominibus debitorum* as—

> "*saisie & arrest que le créancier fait sur les deniers dûs à son débiteur, mais comme tout arrêt équipole à la saisie & exécution, il ne peut être fait qu'en vertu d'un titre en bonne forme ou piece exécutoire, ou du moins sans Mandement de Justice*".[90]
>
> [*Saisie* and arrest which the [principal] creditor effects against monies due to his [principal] debtor, but as all arrests equate to

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[89] Poingdestre *Les Commentaires sur L'Ancienne Coutumier de Normandie* (1907) p 11.

[90] Routier *Principes Généraux du Droit Civile et Coutumier de la Province de Normandie* 2nd edition, 1748, at p 394.

saisie-exécution, it can only be done by virtue of executory title, or at least with an order of justice]

84 He then goes on to describe two types: the "*simple*" effected by the sergeant on the basis of executory documents without summons;[91] and the "*judiciaire*" [judicial] in respect of sums in the hands of a subsidiary debtor.[92] This latter judicial *saisie* and arrest summoned the subsidiary creditor to confirm the amount owed to the principal debtor.[93] As noted by the Court of Appeal, the *saisie* and arrest *judiciaire* lasted for 30 years, during which time the subsidiary debtor was forbidden from making payment to anyone other than the principal creditor.[94]

85 Although Routier's description of the *saisie* and arrest *judiciaire* is brief, the similarity of his language and the characteristics he describes to Pothier's *saisie-arrêt* seem to justify the court's finding that they described the same or very closely equivalent procedures.[95] Certainly, Pothier's and Routier's procedures cannot be said to be obviously distinct from one another.

Assignment, possession and security

86 That said, one apparent point for potential difference is that while Routier observed (unsurprisingly) that competing arresting principal creditors ranked in priority chronologically, in Normandy the relevant chronology was their debts (and so apparently not their arrests).[96]

87 Despite this statement of Routier's, there is Jersey authority that *arrêt entre mains* does act as a charge to give priority. According to Le Gros, an unsecured creditor who obtains an *arrêt confirmé* thereby obtains priority over other, unsecured creditors because the *arrêt confirmé* hypotecs all the goods arrested in favour of the creditor.[97] To this can be added the requirement that to be effective, a hypotec of movables requires possession.[98] Although there is no analysis beyond these bare statements, to this extent, an the *arrêt entre mains* can be seen to operate consistently with the analysis of Pothier's *saisie-arrêt* above, as the granting of a charge by entering possession akin to an

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[91] *Ibid*, at 394.
[92] *Ibid*, at 395.
[93] *Ibid*, at 395
[94] *Ibid*, at 395.
[95] [2011] JCA 141, paras 151.
[96] *Ibid*, at 396.
[97] Le Gros *Traite du Droit Coutumier de L'Ile de Jersey* p 347.
[98] *Hayley v Bartlett* (1861) 14 Moo PCC 251 (PC).

assignee's entering possession of a chose in action by giving notification of the assignment.

Le Geyt and extent of order: current and future debts?

88 Le Geyt's account of the *arrêt entre mains* is principally concerned with dismissing as fallacious the view that it was more injurious to the reputation than the ordinary *arrêt* of corporeal movables. It is in this context that he makes an observation that the *arrêt entre mains* gave the least assurance to the principal creditor. In *FG Hemisphere*, that was used to support a submission that the *arrêt entre mains* must therefore be conservatory only. Rightly, the court rejected this submission.[99] The statement is incidental in the context and flow of Le Geyt's account. As the Court of Appeal observed, Le Geyt merely described the obvious points that the value of the debt may not be apparent, and may even be subject to defences which the subsidiary debtor could have raised against the principal debtor. However, Le Geyt's account then flows into a subsequent observation regarding the impossibility of the Viscount's knowing about all debts existing in the Island, such that—

> "*De sorte qu'on va présentement exécuter tout de grand, sauf à faire doit sur la saisie. On cède au torrent jusqu'à ce qu'il y soit autrement pourveu.*"[100]
>
> [Therefore, nowadays one is going to execute at large, except to debit a *saisie*. One yields to the torrent up to that which may otherwise be provided.]

89 This passage is not altogether easy to understand or translate, but having made the point immediately before it that the Viscount cannot know all debts, it thus seems to say that the *arrêt* is effective against all of them, except those which have already been arrested (or seized, at least) or otherwise provided for against which there can be no debit by the current arresting principal creditor. In other words, *arrêt sur arrêt ne vaut*.

90 In this short passage, there is therefore potential to refer back to the rules of priority of Pothier discussed above, in respect of *arrêts* at least. The first in time should prevail, which is commonsensical, but moreover arguably it should prevail because it has an effect against the property arrested, removing it from the pool of assets available for arrest.

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[99] [2011] JCA 141, para 147.
[100] Le Geyt II Ch III p 14.

91 If so, there is another consideration hidden within the passage. Although Le Geyt writes that the arrest takes effect "at large",[101] it reaches its limit when it comes up against an asset already arrested. However, presumably, that previous arrest would itself have taken effect at large. It would therefore have arrested all property not then subject to arrest, which begs the question how there can be any property remaining for a second arrest to take effect against. The only explanation is that such property has been acquired since the arrest and was not caught by it, so by implication an *arrêt* can only take effect against property currently in existence in the hands of the party against whom it is effected.

92 There is authority to suggest that this is the case. In *Falle v Pocock*[102] in response to an *arrêt entre mains* the subsidiary debtor claimed not to have anything in his hands at the time of the arrest; the court granted an injunction against him forbidding him from divesting himself of any money which he may in future owe to the principal debtor under certain contracts between them.[103]

93 This (admittedly limited) authority therefore suggests that the *arrêt entre mains* can only arrest property currently in existence. It also suggests that the *arrêt* does take effect *in rem*: where there is no property for it to take effect against, the principal creditor should obtain an injunction against the subsidiary creditor preventing him disposing of any property coming into his hands in future.

94 In the case of payments due in future under a contract in existence, it is arguable that the payments due are not species of property which do not come into existence until that future date, but rather they exist with the contract, albeit the extant obligation does not require any current performance from the party obliged. So, where the principal creditor arrests payments due under a contract (such as the slag sales payments in *FG Hemisphere*) the obligations to make those payments are extant, even if (for example) their precise quantification depends on some future unknown.

95 This does put the principal creditor at the mercy of the construction of the individual contract. For instance, the construction of the contract may oblige the parties to place orders and pay for them, even if the amount and value of such orders remains uncertain. In such a case, there is a present obligation against which the *arrêt* can bite, but its value remains unclear until subsequently determined. The arresting

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[101] "*tout de grand*".
[102] (1949) 244 Ex 351.
[103] "*de ne pas dessaisir d'aucun argent qu'il pourra devoir aux défendeurs en vertu de certain accords entre les parties*".

principal creditor could still arrest such an obligation: he would simply have to take it according to its tenor and await the order to trigger its valuation and subsequent payment under the obligation. Alternatively, the construction of the contract may mean that there is not a current obligation: for instance, if the subsidiary debtor is not obliged but merely has an option to place orders. In such a case, his doing so and the corresponding obligation to pay remains speculative, and not in existence. In such circumstances, there would be nothing for the *arrêt* to bite against.

96 As an alternative to requiring an extant obligation, an *arrêt entre mains* could be granted against future obligations on the basis that it only bites *in rem* and therefore arrests those obligations on their coming into existence. Pothier considered this happened in respect of assignments of debts not currently due (as noted above that passage concerned payments not yet fallen due under a lease or contract currently in existence; it is conceptually inevitable that such payments will fall due). However, there is nothing inherently illogical in extending that principle more widely to all debts arising only in future. There are also policy arguments in favour of all debts owed by the subsidiary debtor to the principal debtor being arrested whenever arising, until the principal debt is paid.

97 The Court of Appeal appeared to prefer the first view that an extant obligation, even if not yet due, was sufficient. First, it held that the obligation sought to be arrested must be capable of some definition. It noted that Orléans' and Norman *saisie-arrêts* required the subsidiary debtor to declare what he owed.[104] The debt in question must therefore have been capable of some definition sufficient to be declared—"without knowledge of the transaction and the debt arising, there could be no declaration".[105] Equally, that requirement can be directed towards the applying principal creditor. He needs to frame his application with sufficient particularity to specify the order he seeks. An application to arrest property at large, without some statement as to the nature of the subsidiary debtor's obligation of which arrest is sought, is unlikely to succeed and may be struck out as being embarrassing.

98 Knowledge of the transaction tends to suggest that there has been one. The Court of Appeal noted the availability in Jersey of arrest of wages, and considered the arrest of rent as it fell due. It concluded that an ongoing contractual relationship was sufficient.[106] The slag sales

[104] [2011] JCA 141, para 176.
[105] [2011] JCA 141, para 175.
[106] [2011] JCA 141, para 176.

payments fell due under a contract which obliged the subsidiary creditor to make them. It was therefore a contract of the first type considered above: it contains current obligations, even if they were not due.[107]

99 The court's decision is therefore that an ongoing contractual relationship which extends into the future and which contains obligations that will fall due as long as the contractual relationship subsists is sufficient to found an *arrêt entre mains*. From a practical perspective, this is unsurprising: the *arrêt*'s real value will often be in respect of such contracts. Strictly, therefore, the court's decision does not quite extend to obligations which are conceptually possible, but not yet actually extant. For example, a contract where options make the requirement to pay more speculative, or possibly a contract which has not yet but is on the verge of being signed. The court considered that provided such obligations are capable of declaration, they are sufficient. However, if there is no obligation, it could not be declared, beyond its possibility of coming to fruition. Theoretically the court could arrest potential obligations which would take effect at the time the obligations come into being. However, by reference to the ability to declare the existence and extent of the obligation, the more restrictive approach is the better view.

Conclusions

100 As concluded above, Orléans' *saisie-arrêt* as described by Pothier equated to an assignment by which the principal creditor (by the sergeant) took possession of the debt arrested in the hands of the subsidiary debtor. Such possession and assignment was defeasible by payment of the subsidiary debt up to the level of the principal debt, in effect thereby creating a charge of the debt arrested.

101 To this extent, despite their (apparently) different customary and statutory law origins, it therefore follows that the Orléans *saisie-arrêt* and the English garnishee/third party debt order are analogous as to their substance and underlying principles. Albeit the Norman and Jersey descriptions of the *arrêt entre mains* are scanty, they contain nothing to exclude such an analysis and indeed rather contain indications that are consistent with it. It is therefore concluded that the Royal Court and Court of Appeal were correct to consider the *arrêt entre mains* to operate as a charge of the thing arrested, along similar principles to those described by the House of Lords in *Eram* in respect of the English procedure.

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[107] [2011] JCA 141, para 177.

102 From this, further points follow in respect of the Jersey courts' decisions. First, can the *arrêt entre mains* be effected against future debts? Theoretically an arrest could be effected totally at large in the sense of encompassing any property which may subsequently come into existence, the arrest biting when it does so. Although Pothier's writings appear to recognise this latter point, they tend against such an approach as that recognition discusses only future entitlements under arrangements already on foot (such as future rental instalments under a currently extant lease). Le Geyt also appears to discount such speculative arrests, albeit by implication, and previously the Royal Court has granted injunctions against dispersal of such potential future property pending an application for its arrest. The Court of Appeal held that the arrest is limited to things which can be identified and declared (whether by the arrested subsidiary debtor or the principal creditor seeking the arrest). Given the foregoing, it is understood that such things will be limited to legal relationships which are currently in existence at the time of the arrest (even if there is no payment currently due under such arrangements). To this extent, the decision again appears correct.

103 Finally, the question of "foreign debts". Following *Eram*, the Court of Appeal held that foreign subsidiary debts could be arrested, provided payment to the principal creditor by the subsidiary debtor is recognised as discharging the subsidiary debtor from the subsidiary debt by the relevant foreign *lex situs*. If not, the arrest will not be granted. Again, it is considered that the courts in *FG Hemisphere* and *Eram* were correct that this is a matter of jurisdiction, rather than discretion. There are several ways of analysing conflicts points and the rationale underlying them, but in the case of an arrest as an assignment by way of security or charge, if the *lex situs* (where conceptually the thing in question is located) does not recognise the arrest as effectively doing so, the thing is not sufficiently within the jurisdiction of the arresting court for it to take possession or effect a charge over the thing in question. However, this is of course not to say that the court does not also ultimately retain a subsequent and separate discretion whether to grant an arrest, over and above the primary jurisdictional considerations which must first be met.

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