

ORDRES PROVISOIRES: A RETROSPECT

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The author examines the history of the provisional order (ordre provisoire) issued by judges of the Royal Court of Jersey under customary law.

1 For centuries, the provisional order (*ordre provisoire*) authorising a creditor to effect a provisional¹ distraint (*arrêt provisoire*) on his debtor's movable assets or the provisional arrest (*saisie provisoire*) of his debtor's person has been a familiar feature of debt enforcement in Jersey, used, and at times abused, on a regular basis. Theoretically, both the *arrêt provisoire* and the *saisie provisoire* are still available, but it is difficult not to agree with the conclusions in Wilkins and Dessain, that—"in practice the ability to imprison for non-payment of debt (the failure to fulfil a contractual obligation) must be regarded as very exceptional, if not defunct".² The purpose of this article is not, however, to explore the extent to which the remedy may or may not be compliant with present-day developments in law on other fronts such as human rights, but to look back at its history.

2 Poingdestre, in his *Commentaires sur l'Ancienne Coutume de Normandie* (not published until 1907, but written some time during the latter part of the seventeenth century), asserted, at 11, that, *inter alia*, "toutes exécutions, saisies, arrêts, namptissements, sequestrations" were founded on the *Chapitre de Justicement* of the *Ancienne Coutume*.³ He went on to explain that *justicement*—"se fait pour trois causes", the first of which was "pour avoir passé terme à faire ce qu'on doit". This he clarified by saying that—

"On passe terme de deux manières, l'une quand on ne vient pas au terme prefix ce qui s'appelle défaut, l'autre quand on ne paye la rente au terme escheu"

¹ Provisional in the sense that it required confirmation by a court of competent jurisdiction.

² *Insolvency and Asset Tracking*, 4th ed, section 2.6.2, at footnote 18.

³ *Première Partie, Première Distinction, Chap. VI*, W. Le De Gruchy ed, at 18.

[One passes the deadline in two ways, one when one does not appear at an appointed time, which is called default, the other when one does not pay a *rente* when it falls due]

and concluded by saying that “*On fait Justice par le Meuble pour Terme passé*” [one has legal recourse against movable property for a failure to meet a deadline].

3 The debtor’s movable property was thus available to the creditor if the debt or *rente* was not paid when it fell due. However, at this point Poingdestre launched into the main thrust of his commentary on this article, which was that Jersey had so departed from Norman customary law that neither deeds passed before court nor *rentes* were treated as *exécutoires sans procès*, that is, as enforceable by an *arrêt* or *saisie* without a court order—

*“Nostre coustume est celle de Normandie mais je ne scay par quel malheur il est arrivé, que cette matière de saisies & executions a été tellement brouillée que nous n’y reconnaissons plus guère de trace de l’ancienne coutume. Car premièrement en notre Isle nous ne pourrions à present faire arrêts ou saisies en vertu d’un instrument passé par devant le Baillif & Jurets, ni en vertu d’une rente foncière ou hypothèque mais faudrait prendre un long tour de procès et obtenir deux défauts sur la partie, s’il ne comparaisait à la première semonce, là où par la coutume de Normandie, sitost que le Terme de payer est echeu le Prévost ou sergent du Fief ou Sergent Royal, sans autre fondement de Justice, suffit à saisir les namps du redevable.”*⁴

[Our custom is that of Normandy but I do not know by what ill fortune it has come about, that this matter of arrests and executions has been so muddled that we scarcely recognise any trace of the old customary law in it. For firstly in our Island we cannot at present carry out distrains or arrests by virtue of a deed passed before the Bailiff and Jurats, nor by virtue of a *rente* or hypothec secured on immovable property but it is necessary to take a long series of court proceedings and to obtain two defaults against the other party, if he does not appear when first summoned, whereas by the customary law of Normandy as soon as the time for paying has arrived the Prevost or sergeant of the Fief or Royal Sergeant, without any other legal authority [*i.e.*, without any other sort of court order or authority] had power to seize the movables of the debtor.]

⁴ *Op cit*, at 14.

4 Thus, whereas in Normandy *rentes* and certain other types of obligation were *exécutoires sans procès* [executory without legal proceedings], in Jersey a practice had apparently grown up of obtaining what Poingdestre referred to as a *mandement du juge* [judge's order] authorising the proper officer to distrain upon the goods of debtors. This is the first description of a procedure similar to the subsequent *ordre provisoire*. It was, however, clearly not used in all the circumstances which later came to be recognised as appropriate for using an *ordre provisoire*, but for the recovery of *rentes* which were formerly *exécutoires* without a court order, as Poingdestre's disapproving remarks show—

“Ceux qui s'estiment les plus fins prennent un mandement du Juge adressant à l'officier, par lequel il leur est permis de saisir les biens de leurs redevables à la concurrence des dettes, qui est une invention superflue; car si lesdites rentes ne sont pas exécutoires d'avance, il est certain que tel mandement n'est suffisant à les rendre exécutoire; et si elles le sont, quel besoing de mandement pour exécuter?”⁵

[Those who think themselves the smartest obtain a judge's order addressed to the officer, by which they are permitted to seize the goods of their debtors to the amount of the debts, which is a superfluous invention; for if the said *rentes* are not already executory, it is certain that such an order is not sufficient to make them executor; and if they are, what need is there for an order for the purpose of carrying out a distraint?]

5 By an Act of 19 February 1695, subsequently confirmed by Order in Council, the States resolved upon a number of articles “*pour remédier à des abus dans la procédure*”, third among which was the following—

“Quetoutes Rentes reconnües avoir esté payées dix ans durant, ou qui auront esté constitués depuis dix ans par droit, Ou assignations hereditalles, come aussy toutes Cedulles et Obligations munies du Signe de deux tesmoigns, ou escrites et signés par le debteur, soyont Executoires san figure de procès, et sans Contredit, sauf qu'en cas dopposition loffr. assignera Jour aux parties a la prochaine cour du Billet de laquelle opposition l'opposant sera debouté s'il fait deft.”

[That all *rentes* acknowledged to have been paid during a period of ten years, or which shall have been lawfully constituted within the preceding ten years, or hereditary assignations, as well as all

⁵ *Op cit*, at 15.

notes of hand or bonds which have the signature of two witnesses, or written and signed by the debtor, shall be executory without any sort of process, and without dispute, save that in the case of a challenge the officer shall assign the parties a day at the next (sitting of) the *Cour de Billet*, from which challenge the debtor shall be debarred if he is in default.]

6 Le Geyt, who succeeded Poingdestre as Lieutenant Bailiff in 1676, dealt with the remedies available to enforce payment of *rentes* and certain other obligations in a passage which follows closely the wording of the 1696 Order in Council—

*“Toutes rentes reconnuës avoir esté payées dix ans, ou qui auroient esté constituées depuis dix ans, come aussy toutes cedules & obligations munies du seing ou de la marque de l’obligé & de deux tesmoins, ou escrites & signées de la main propre du debiteur, sont executoires sans forme ni figure de procès, sauf qu’en cas d’opposition l’Officier doit surseoir & assigner Jour à la prochaine Cour competente, de laquelle opposition le defendeur est debouté s’il ne trouve pas qu’elle soit juste ou fait défaut.”*⁶

[All *rentes* acknowledged to have been paid for ten years, or which shall have been constituted within the preceding ten years, as well as all notes of hand and bonds which have the signature or the mark of the person undertaking the obligation and of two witnesses, or written and signed by the debtor’s own hand, are executory without any manner or sort of process, save that in the case of a challenge the officer shall suspend (execution) and assign the parties a day at the next (sitting of) a competent Court, from which challenge the debtor shall be debarred if he does not make it good or is in default.]

7 This is clearly dealing only with those debts or obligations which were *exécutoires sans procès*. However, in the same work, Le Geyt described a procedure not given in Poingdestre which is substantially the *ordre provisoire* as it came to be: the property and persons of strangers, the property of insolvent local inhabitants, and the property and persons of local inhabitants if there was a likelihood of their leaving the Island, could all be arrested as security for a debt by virtue of a *bref du juge*—

“Les meubles, marchandises, navires, dettes actives & personnes des Estrangers de l’Isle, peuvent, par un bref du Juge, estre arrestez pour assurance du payement de ce qu’ils doivent, sauf à

⁶ Le Geyt, *Privilèges, Loix et Coustumes*, Livre IV, Titre VI, art 5.

*donner Caution. Les mesmes effets peuvent pareillement estre arrestez contre Habitans insolvables, & leur personne le peut estre aussi quand, outre leur insolvabilité, leur absence est à craindre.*⁷

[The movables, merchandise, ships, debts owing and the persons of strangers to the Island can, by a judge's order, be arrested for assurance of the payment of what they owe, unless they give surety. The same effects can likewise be arrested against insolvent residents, and their person can be as well when, in addition to their insolvency, their absence is to be feared.]

8 Pipon and Durell, writing in 1789, described first the procedure for debts which were *exécutoires sans procès*—

“Actions of debt, if the right issues from a bond or obligation or any other covenant committed to writing, and creating a speciality, execution or distress may be made of the obligor's goods for satisfaction of the debt, which proceedings are sanctioned by an order in Council of the 30th April 1696, and the same obtains also for arrears of rent⁸ due upon lands or hereditaments; and upon this mode of execution or distraining, the debtor may oppose the same, in which case the Viscount or Denunciators the only officers having power to that end, are to assign the defendant a day to make good such opposition before the Court, who is evicted if he makes default, and the officer then proceeds in the execution without allowing of contradiction.”⁹

9 They added that this method had fallen into desuetude –

“but this immediate execution is seldom practised, most persons preferring to begin by calling upon the obligor before the Court in order to the obtaining judgment against him, and thereby barring all opposition to the subsequent execution of his goods.”¹⁰

10 Pipon and Durell also described the mode of proceeding by *ordre provisoire* against strangers and certain local inhabitants (the latter class had altered from those who were *insolvables* to “such . . . as have no freehold”)—

⁷ Le Geyt, *op cit*, *loc cit*, art 1.

⁸ That is, a *rente*, or periodic payment secured on land, not a rent owed by a tenant to a landlord.

⁹ Pipon and Durell, *A Statement of the Mode of Proceeding, and of Going to Trial, in the Royal Court of Jersey*, at 39.

¹⁰ *Op cit*, at 39.

“There is also a mode not yet remarked for proceeding upon any demand against persons not inhabitants, or against such inhabitants, as have no freehold, which is by writ called provisoire provisionary, issued by the chief Magistrate, authorising the proper Officer of Justice, and in his default the constable or one of the centeniers of a parish, to distrain the goods and effects of debtors of the above mentioned description, and more particularly upon the premises whence the debt may be issuing; and likewise to arrest them in person unless they give security to make satisfaction for their debts bonds or other engagements: this writ serves to bring such debtors before the Court to answer to the suit, and to oblige them to give security to ensure payment of their debts; if thereupon the person arrested does not put in bail to answer to the judgment, such person may be put in prison till presented to the Court to answer the demand, when if cast in such demand, he is committed by the Court unless security is given to satisfy.”¹¹

11 Hemery and Dumaresq, co-authors of the contemporaneous report on methods of proceeding, do not mention the possibility of proceeding to immediate execution under the Order in Council of 1696. They do, however, describe the *ordre provisoire* procedure—

“Another mode of commencing a personal action is by a Writ: of which there are two kinds: one may be called general, the other, special. Both of them issue from, and are signed by, the Chief Magistrate;¹² but their operations, and the process upon them are very different. The first, properly called ‘*un Bref de Justice*’, is obtained provisionally, for the purpose of recovering some debt, by securing the effects or the person of a debtor. It is generally made use of against strangers, or such as do not reside in the island. This Writ continues in force for one year, and may be repeatedly used during that space of time, by the person in whose name it is made out. By virtue of this Writ, the *Vicomte* or one of the two Denunciators (Officers having nearly the same part to act as the *Vicomte*) is authorised to distrain the goods, and even to arrest the person of any one, whether he be a stranger, or an inhabitant who has no real property in the island. The Officer ought, in this case (but this is not always attended to) to have with him the plaintiff’s demand in writing, and to leave a copy of it with the adverse party. It is his duty also to attach, in the first place, the goods of the debtor, if they be sufficient to discharge

¹¹ *Op cit*, at 41.

¹² That is, the (Lieutenant) Bailiff

the debt; if they be not, to secure his person and bring him before the Court; unless sufficient security be given; in which case, the matter takes the usual course, and is brought on by means of a bill.”¹³

12 The example of an *Ordre Provisoire* given by Hemery and Dumaresq is as follows (at 56)—

“No. 2.

Form of a general Writ.

Il est permis par Justice à A.B., en tous les noms & droits qu'il représente, de saisir, arrêter, & metre en séquestre, s'il est besoin, les plus apparens biens de tous ses redevables, en tous lieux de recouvrement, & particulièrement sur le fond, pour appliquer au payement & parvenir à l'assurance du payement de ce qui se trouvera lui être bien et justement dû. Et quant aux étrangers & personnes expatriables,¹⁴ pourra arrêter leurs biens, vaisseaux, marchandises, & effets, ou eux-mêmes en personne, s'ils ne donnent caution suffisante de fournir à leur marchés, soussignés, dettes ou promesses. Ce qui sera effectué par le Vicomte, ou l'un des Dénonciateurs, officiers de justice, ou, en leur absence, (à 'égard desdits étrangers & personnes expatriables,) par le Connétable ou par l'un des Centeniers de la paroisse: raisons sauves, Donné, à S. Hélier, le jour de 1789.

(Signé) D. Bailli.”

[It is permitted by the Court to A.B. in all the names and rights which he represents, to arrest, distrain on, and sequesterate, if need be, the most obvious property of all his debtors, in any places where they may be recovered, and particularly on the property, to apply them to the payment and to provide assurance for the payment of that which shall be found to be well and justly due to him. And as for strangers and persons who have no immovable property in the Island, he can distrain on their goods, vessels, merchandise and effects, or themselves in person, if they do not give sufficient surety to satisfy their business deals, notes of hand, debts or promises. Which shall be put into effect by the Viscount, or one of the Denunciators, officers of the court, or, in their absence (as regards the said strangers and persons without immovable property in the Island) by the Constable or by one of

¹³ Hemery and Dumaresq, *A Statement of the Mode of Proceeding, and of Going to Trial, in the Royal Court of Jersey*, at 8.

¹⁴*Expatriable*—not owning immovable property in the Island.

the Centeniers of the parish; rights reserved, given at St. Helier the day of 1789.

(Signed) D. Bailiff]

13 By 1856, when Le Quesne wrote his *A Constitutional History of Jersey*, the only summary procedure for exercising a distraint was by *ordre provisoire*, which he described in the following passage—

“The vicomte has the power of arrest on a writ from the bailiff; and on the arrest on goods being confirmed by the Court, the vicomte, or dénonciateur, who may have made the arrest, has the sale of goods, on which he charges his commission, besides the fees attending and resulting from the arrest, Persons having no real property in the Island being thus, according to the legal expression, ‘expatriables’, are liable to be imprisoned by the vicomte or dénonciateur, on a writ from the bailiff, for debts due by them unless they give security for the payment.”¹⁵

14 The system, as it had stabilised by the date of the *Report of the Civil Law Commissioners* (1861), was as follows—

“At present the practice is shortly this,—any person, upon the mere production to the executive officer of a written statement, true or false, of a debt alleged to be due to him of ten pounds or upwards, can require the officer to arrest and lodge in prison the person of the alleged debtor, unless, as above explained, such alleged debtor gives bail, or is possessed of landed property in the Island sufficient to secure the claim. No affidavit or even allegation that the debt is justly due is required from the person causing the arrest. The *ordre provisoire*, which is used on the occasion, no doubt purports to authorise the arrest; but we can only categorise this instrument as a mere empty form. In the most general terms it authorizes the holder of it to attach the goods, ships, merchandise, effects and person of all who are indebted to him, and who are not privileged from arrest. It indeed bears the signature of the Bailiff, but this signature is affixed from time to time to a number of such writs in blank, which are supplied to the arresting officers to be used by them as occasion may require. When it is intended to make use of one, it is only necessary to insert the name of the creditor and to receive from him a written particular of his demand against the debtor. This particular ought to be delivered by the arresting officer to the debtor, but we have reason to fear that in practice this rule is not always adhered to.”¹⁶

¹⁵ Le Quesne, *A Constitutional History of Jersey*, at 24.

¹⁶ *Report of the Civil Law Commissioners*, at xliii.

15 It had also become possible, by this date, to distrain provisionally for unliquidated damages by using the *Ordre de Justice*—

“Arrests on mesne process for unliquidated damages are made in a form somewhat different, that is, by the *ordre de justice*, which sets forth special damage, and sometimes claims specific redress, and besides damages, concludes for a nominal fine. But in substance both the right to sue and the amount of damages are in like manner without verification.”¹⁷

16 The evidence given before the Civil Law Commissioners contains much on *ordres provisoires*. The large influx of *étrangers* into the Island during the first half of the nineteenth century (the result partly of the establishment in the 1820s of regular packet-steamers between Jersey and the United Kingdom and partly the number of half-pay officers discharged from the army at the end of the Napoleonic wars who were attracted by the lower cost of living), coupled with the frequency and facility with which the newcomers could and did run up accounts with local tradesmen and then levant, led to a corresponding increase in the use of *ordres provisoires*, and increased use meant, as ever, increased chance of abuse. Although the complaints made to the Commissioners were in some measure exaggerated (the commonest was the failure to bring the debtor to court for confirmation of the arrest, a failure which on an examination of the cases frequently proved to be at the request of the debtor to avoid unwelcome publicity), the Commissioners nevertheless thought that the system as it then was needed reform—

“we must record our opinion that in the present practice of arrest on mesne process in Jersey, the personal liberty of the subject is not sufficiently respected . . .”¹⁸

17 The reforms which they proposed were as follows—

“That arrest on mesne process should be unlawful (except as below) without the order of a Judge under his hand, made on an affidavit sworn before him of debt or other demand, and of belief and reasons for believing that the defendant is about to leave the jurisdiction, and that the debt or other demand will be endangered unless such order be granted.

That the Judge should put such further questions on oath to the party making the affidavit, or to any other person, as may appear

¹⁷ *Op cit, loc cit.*

¹⁸ *Op cit, at xlv.*

to him necessary to satisfy him of the propriety of granting the application.

That he should grant it, if it appear to him that there is reasonable ground for believing—

That the applicant has cause of action to the amount of 10 l.¹⁹ and upwards,

1. That the defendant is about to leave the jurisdiction,
2. That such debt or demand will thereby be endangered.
3. Otherwise he should refuse it.²⁰

18 The twentieth century saw the disappearance of the practice criticised by the Civil Law Commissioners of the issue by judges of the Royal Court of signed, but otherwise blank, *ordres provisoires*. Instead, the creditor seeking such an order for a debt which fell within the jurisdiction of the Royal Court²¹ was required to make a written application detailing the names of both debtor and creditor and the amount of the claim, supported by evidence of the claim such as a copy of any account or invoice, or, in the case of a cheque or other *pièce signée*, the *pièce* itself or a copy of it. If the application was for the arrest of the debtor there was a further requirement of evidence of the probable quitting of the Island by the debtor, which could be provided either by affidavit or by the attendance on the Bailiff of the creditor in person.

19 At this remove it is impossible to say for certain how the *ordre provisoire* procedure came into being. One possible explanation is that the temporary cessation of the practice of summary distrains (originally the recognised method of proceeding in the case of claims which were *exécutoires sans procès*) led to, or was perhaps caused by, the creation of the expedient described by Poingdestre of obtaining, on an *ex parte* application to the Bailiff, a *mandement du juge* authorising the creditor to distrain upon the debtor's movables.

20 When the Order in Council of 1696 re-established execution *sans procès* for specified claims, the use of a *mandement du juge* for claims

¹⁹ £10.00 was at that date the upper limit of the jurisdiction of the Petty Debts Court.

²⁰ *Op cit, loc cit.*

²¹ *Ordres provisoires* for debts falling within the jurisdiction of the Petty Debts Court are issued in accordance with the provisions of the *Loi (1867) sur le Cour pour le recouvrement de menus dettes*: this article is concerned only with the issue of orders by the Royal Court under customary law.

of this class was no longer necessary. The machinery had, however, been created, and had during the seventeenth century been adopted and adapted to meet another problem, that of debtors, insolvent or otherwise, who dissipated their assets, or left the Island, before their creditors could proceed against them in the courts. Poindestre's summary of the *mandement du juge* contains words (*de saisir les biens de leurs redevables* [to seize the goods of the debtors]) which reappear in substantially the same form in Hemery and Dumaresq's example of an *ordre provisoire*. Hemery and Dumaresq's form includes the words *& particulièrement sur le fond* [and particularly on the property] which seems to have little significance in their final context, but which may well have survived from the time when one of the chief uses of the *mandement du juge* was to recover a *rente* which was charged on a particular property.

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