

6 pages.

ROYAL COURT
(Samedi Division)

30.

1st March, 1993

Before: The Bailiff, and
Jurats Hamon and Rumfitt.

<u>Between:</u>	Telefitters (C.I.) Limited	<u>Plaintiff</u>
<u>And:</u>	Roy David Young	<u>Defendant</u>

Application by the Defendant for leave to make "cession".
The applicant was "à peine d'être détenu prisonnier pour dettes" but was not in prison.

Advocate Miss D.C. Sowden for the Defendant.
Advocate P.C. Harris for the Plaintiff.

Judgment on preliminary point of entitlement to apply for cession by debtor who is not in prison.

THE BAILIFF: On the 23rd January, 1993, Mr. Roy David Young gave notice in accordance with the requirements of the Loi (1832) sur les Décrets, that he intended to apply to the Court for an Acte of "cession générale".

The issue which has come before the Court this morning is whether the Court is entitled to receive that application, notwithstanding that the applicant is not in prison for debt.

There are a number of conflicting opinions over whether or not it is necessary for an applicant to be in prison before the

Court can entertain such an application. Article 1 of the 1832 Law which I have just mentioned is in the following terms:

"Nul ne sera admis personnellement à faire cession générale devant Justice de tous ses biens-meubles et héritages que dans l'un des deux cas suivans:-

1. **S'il a été réduit aux petits dépens.**
2. **S'il a exprimé quinze jours auparavant par un Acte de la Cour Royale, son intention de faire ladite cession générale"**

On behalf of Mr. Young, Advocate Sowden has submitted that it is not necessary for an applicant physically to be in prison before he can make the application. The Court asked if it were of the opinion that the weight of authority was against that submission, whether it was sufficient for an Act to be "in the wings", that is to say for the applicant to be threatened with imprisonment. The Court was informed that there was a Petty Debts Court Judgment which entitled the creditor to imprison Mr. Young and in fact preliminary steps had been taken to do so in January but had not been pursued.

The authority on which this Court has often placed great weight is, of course, that of Le Geyt on "La Constitution, les Lois et les Usages de cett Ile". We find in Tome II at Chapter 31 "De la Cession de Biens", which certainly was a Norman concept, developed from the Civil Law, the following sentence:

"Quand un homme veut faire cession de tous ses biens, il fault qu'il conste d'une instance contre luy".

There must be somebody pressing him, if not a Judgment obtained against him certainly a creditor in being.

The author goes on to state expressly:

"Il n'est pourtant pas nécessaire qu'il soit prisonnier, ou saisi réellement:"

According to Le Geyt, therefore, the answer to the question the Court had put is that actual incarceration is not necessary. He goes on to say:

...."c'est assès que la dette paroisse et que le créancier poursuive; quoy qu'on dise dans le bénéfice, que c'est pour libérer le corps de prison".

Although, of course, Le Geyt goes on to say that if he is in prison, he will be released.

There are, however, two contrary authorities; one is in the well-known work of the late Lieutenant Bailiff, C.S. Le Gros, "Traité du Droit Coutûmier de Jersey" in which he leaves the Court in no doubt about the requirements before an applicant can be granted an Acte of *cession générale*. At p.297 he lists the three requirements of which the third is:

"Qu'il soit detenu en prison à l'instance d'un créancier. C'est la contrainte par corps".

He repeats that in a passage further on in the work and again, by implication, at p.301, where he says: **"Le libèremment de prison a pour effet de le mettre à l'abri de tout emprisonnement pour les dettes exigibles le jour de son élargissement mais ne le libère pas de ses dettes"**. The position there, of course, is slightly different because it relates to a debtor who is not founded in real property.

There is also an unequivocally clear passage in a Judgment of this Court in the case of Re; Désastre Overseas Insurance Brokers Ltd (1966) JJ 547. In that case the Court said at p.552:

"Before the evolution of the "désastre" the only remedy open to the creditors of an insolvent debtor was to compel him to make "cession de biens". This remedy is, of course, still available but is not often used for several reasons, the most important being the following -

(1) Before a debtor can make cession he must be imprisoned for debt;"

(Further down the Court repeated that, saying):

"As a debtor cannot make "cession de biens" unless he is imprisoned for debt, it is evident that an "acte de prison" against him must have been obtained at the suit of one or more creditors. An "acte de prison" can only be obtained by a creditor who has obtained a judgment for a liquidated sum.

Such judgment can of course result from an action for an account or for unliquidated damages.

It is evident therefore that only a creditor who holds a judgment for a liquidated sum can compel his debtor to make "cession de biens"."

But that passage, it seems to the Court, relates to a compulsory form of "cession", in other words putting pressure on the debtor to make "cession". It does not say explicitly that it is not possible for a person to apply to the Court to make "cession" who is not in prison and who wishes to do it voluntarily as opposed to being under pressure by his creditors.

That latter point of view is supported by a statement in Matthews and Nicolle's "The Jersey Law of Property". It is to be found in chapter 7, paragraph 7.3:

"Cession de biens" is the voluntary renunciation by an embarrassed debtor of all his property, movable and immovable, for the benefit of his creditors. According to Dupré, in the Commissioners' Report at 7824, it was not referable purely to Norman custom but evidently adopted by that custom from civil law. In its very earliest stages, "cession" did not operate to discharge existing debts, but in time this position was modified, and it ultimately operated as a complete discharge of all debts existing at the time when it was made".

Paragraph 7.4 is the important one in this case:

"By the time of Le Geyt, the requirement for cession was that the debtor should be being sued by his creditors; it was no longer necessary that he should actually be imprisoned for debt...." (And they refer to the passage from Le Geyt, which I have just read).

Moreover, if one is to read Article 1 of the 1832 Law as requiring that the debtor should be in prison before he can apply for "cession", one overlooks the headnote to the Acte itself, where in paragraph three the draftsman inserted the following:

"Attendu que plusieurs personnes ont, par l'insuffisance de l'avertissement ou publications, perdu des sommes considérables, faute d'avoir inséré des contrats passés par ceux dont ils étaient devenus les héritiers ou par eux-mêmes à une époque tellement reculée qu'ils n'en avaient plus aucune connaissance."

The States then passed the Article which I have just mentioned.

It is possible to argue that Article 1 supposed that the debtor was already imprisoned and that being in prison he could apply for cession if either of two situations were applicable: either he had been reduced to *petits dépens* by his creditors, or creditor, or he had given 15 days' notice of his intention to make cession.

The alternative interpretation is that the Article allows somebody who is in prison and *réduit aux petits dépens* to give notice; but that it also allows somebody who is not in prison to give the same notice, and this interpretation is supported, as it happens, by a Court of Appeal case heard in 1981. The case is Birbeck -v- Midland Bank Ltd (1981) JJ 121 at 128. There the

Court considered the question of "cession" and at p.128 the Court said this:

"The 1988 Law was intended to reform a number of defects in the Law of real property most of which do not concern us. We shall confine ourselves to the provisions relating to insolvency. Under the earlier Law a debtor under pressure from his creditors could either seek the assistance of the Court or simply allow matters to go by default. The assistance of the Court could take one of two forms allowing him to make a cession générale or a remise de biens. To qualify for leave to make cession he had, according to Le Gros, to be malheureux, that is a victim of a commercial misfortune and acting in good faith". (I interpolate here to say that those two matters are still necessary, whether one applies in prison or out of prison). **"By Article 1 of the Loi (1832) sur les décrets he had also either to be in prison on short rations, or to have given 15 days notice of his intention to make cession".**

Under the circumstances this is a matter of Law and I rule that a debtor is not precluded from making an application, although he is not in prison at the time of the application, subject to the qualification I have just mentioned that he has to be "malheureux" and he still has to make it in good faith.

We will now receive the application and consider whether the Defendant is "malheureux" and acting in good faith.

In the present case an application of this sort has to be granted with caution. We are not satisfied with the explanations given for the apparent lack of complete openness and frankness in the affidavits, and have taken into account the purchase of the luxury items which we have been told about, particularly the satellite aerial. Even though business was going to be started a month later, there was no guarantee that it was going to succeed, and unhappily it did not.

We have some sympathy, of course, with the applicant because he finds himself in a position which originally was due to no fault of his own. But nevertheless, considering in particular that there is something like £500 coming into the household per week from joint employment of husband and wife, this is not a matter, we consider, appropriate for a "cession" and the application is refused.

We should add that, in addition to satisfying us that an applicant is "malheureux" and is acting "bona fide", he must, though not in prison, at least be at risk of going to prison for debt.

Authorities
on preliminary point

Loi (1832) sur les Décrets.

Le Geyt: La Constitution, les lois et les usages: Tome II:
p.p. 128-131: De la Cession de Biens.

Commissioners' Report: Civil Municipal and Ecclesiastical Laws:
Minutes of Evidence (1861) p.p. 358-363.

Hemery and Dumaresq: Statement of Mode of Proceeding ... in the
Royal Court of Jersey ... (1789) p.p. 27-30.

C.S. Le Gros: Traité du Droit Coutûmier de Jersey: p.p. 297-305:
De la Cession de Biens.

Matthews and Nicolle: The Jersey Law of Property: p.p. 69-72:
Chapter 7: Insolvency and Property.

Re: Désastre Overseas Insurance Brokers Ltd. (1966) JJ 547.

Norris -v- Emprunt (24th January, 1990) Jersey Unreported C.of.A.

Birbeck -v- Midland Bank Ltd (1981) JJ 121 at 128 C.of.A.