7 pages.

ROYAL COURT
(Samedi Division) 13.

27th January, 1994

Before: The Deputy Bailiff, and Jurats Blampied and Orchard

BETWEEN A **Plaintiff**

AND B **Defendant**

Application by the Defendant for discharge from the Debtors' Prison, in which he was confined for failure to pay arrears of maintenance.

Advocate A.D. Hoy for the Defendant
Advocate A.P. Begg for the Plaintiff

JUDGMENT

THE DEPUTY BAILIFF: The Defendant, B has issued a summons against his former wife, A, asking the Court "to exercise its discretion to release the Defendant from incarceration for debts notwithstanding the Defendant's failure to meet the Plaintiff's claim".

The brief history behind the application is that the Plaintiff and the Defendant were divorced in Scotland in 1984 with the custody of their child, C, being awarded to the Plaintiff. At the same time the Defendant was ordered to pay maintenance for the child at a rate of £40 per week. There is some doubt as to exactly when the Defendant became aware of the Order of the Scottish Court but it is beyond doubt that substantial arrears of maintenance have built up. There have been proceedings in this Court about those arrears and we are concerned with only one Order of the Court, made on the 14th February, 1992, when the Court ordered, in the presence of the Defendant, that the Plaintiff was authorised: *"to require the Officer of the Court to take the Defendant into custody and incarcerate him in prison, à main if need be, in default of payment by the Defendant of a) the sum of nine thousand three hundred and sixty three pounds and sixteen pence being the aggregate of the sums which the Defendant was condemned to pay in the action brought against him by the Plaintiff as appears by Act of the Royal Court dated 6th April,*

1990 as amended on 24th August, 1990, and b) the sum of One thousand four hundred and four pounds being the taxed costs of the action."

We have before us copies of the correspondence passing between Mr. Begg and Mr. Hoy, and indeed the Defendant. It is clear that on several occasions since then the Defendant has failed to comply with an arrangement which he made to pay £50 per week, being £30 for current maintenance and £20 for arrears, and that he was warned that the Order of 14th February, 1992, would be sent to the Viscount for execution. In the event the Viscount was instructed towards the end of December, 1993, and on 4th January, 1994, the Defendant was arrested. Since that date he has been incarcerated in the Debtors' Prison.

Mr. Hoy asks us to exercise our discretion to release the Defendant on the grounds that he has now been in custody for 24 days, that he has no hidden assets, and that it is in no one's interest that he should be prevented from earning a living and attempting to pay off his debts.

Mr. Begg opposes the application on two grounds. Firstly, he argues that the Court has no power to order the release in the absence of an application for *cession*. Secondly, he argues that even if the Court does have power to order the release, it should not in the exercise of its discretion do so.

The first ground of opposition raises a short but interesting point of law: does the Court have jurisdiction, once an Act *à peine de prison* has been made authorising the incarceration of a debtor at the instance of a creditor, to order the release of the debtor notwithstanding that the debtor continues to be in default of payment of the judgment debt?

We might have wished to hear more detailed argument than was possible in the very limited time available. Nonetheless, a number of authorities have been placed before us and the Court has itself drawn its attention to others.

It seems that until very recently the Court did not exercise such a jurisdiction. Poingdestre in his "Les Lois et Coutûmes de l'Ile de Jersey" (1928) under the section headed "Des Emprisonnements pour Debte Civile at page 247 says this:

> ***"Et c'est la pratique uniuerselle de France a present, de s'addresser premierement aux meubles, & puis en deffaut de meubles, aux Immeubles & aux choses censées pour Immeubles. Et si tout cela ne suffist ou peut auoir la personne du Debteur lequel on ne relasche point, sans Plege ou Caution suffisante de payer, jusques a ce qu'il ait satisfait ou qu'il ait fait Cession de tout ce qu'il a & qu'il ait juré qu'il n'en retient ny cele rien du tout,***

> ***outre ce que la Loy permet a un Cessiionnaire de retenir; ascauoir ses habits, necessaires à couurir sa nudité, & les outils de son mestier, pour gaigner sa vie. Mais en nostre Isle, il semble que ny le Crediteur ny la Cour mesme n'ont aucun pouuoir sur les Immeubles ou heritages d'un homme, sans son consentement; Car je ne me souuiens point de l'auoir veu pratiquer autrement sinon que le Vicomte en Absence de partie, peut estre constitué son Procureur d'office, & apprez condamnation, & les autres formes Renoncer ou faire Cession en son nom, qui est maniere de proceder en cas de Contumace. Voila pourquoy toutes nos poursuites visent principallement a la capture de la personne du Debteur, affin de le forcer a payer ou a renoncer."***

Le Gros, in his "Traité du Droit Coutûmier De Jersey" (1943), at page 297 says this:

> ***"La Cession de biens, ou cession judiciare, est l'acte par lequel un débiteur malheureux et de bonne foi, incarcéré pour dettes, se fait libérer de prison, et s'affranchit de ses dettes, en abandonnant tous ses biens-meubles et héritages à ses créanciers."***

Le Gros then goes on to lay down the conditions for making *cession*.

These passages suggest that unless the debtor applied to make *cession* and was permitted to do so he would remain incarcerated until satisfaction of the debt.

The rigours of the customary law were mitigated by statute in 1886. By the Loi (1886) sur l'Emprisonnement pour Dettes, it was provided that no person could be held in prison for debt for more than one year, whatever the amount of his debts or the number of his creditors.

It appears further that the Court has been prepared on occasions to release a debtor upon application for *cession* even when the application for *cession* was refused. More recently the Court has assumed jurisdiction, even in the absence of an application for *cession*, to order the release of a debtor if it seemed just to do so.

The matter might have been settled by Porteous -v- Porteous (8th April, 1992) Jersey Unreported, C of A. However, the Court of Appeal found it unnecessary to decide the point. Sir David Calcutt, the President, in the course of his judgment, said this at page 8:

"Accordingly, as it appears to us, the basis for the cession has - at least for the time being - gone. There may be again in the future a basis for a fresh cession when and if the suspension is lifted, or if further immediately payable arrears accrue. But, that being so, it appears to us that the present saisie lapses and the orders made under it go with it. Accordingly, the subsidiary questions which would have arisen, namely whether in the absence of an application for cession the Court has jurisdiction to grant an application for the release from imprisonment, and if so, whether the Court ought to exercise that jurisdiction, do not arise in the present case for our determination."

In Dick -v- Dick, (21st December, 1993) Jersey Unreported, the Court released the debtor on compassionate grounds. The debtor was a sick man and on that ground the Court ordered his release subject to a number of conditions.

According to the Greffier's note, recording the Court's decision in the case of Wall-v- Adams, heard in 1993, the Court released the debtor under certain conditions.

To authorise a creditor to require an Officer of the Court to incarcerate a debtor at his discretion is an draconian remedy. Indeed we think that the legislature might properly give consideration to whether the remedy should remain available other than where the debtor has acted dishonestly or contumaciously. But, in the meantime, in applying the remedy we are entitled, in our judgment, to take judicial notice of changing social conditions and of the greater importance which society now attaches to rights to liberty as opposed to mere rights to property. If we were not to do so it is not difficult to imagine circumstances where injustice could be caused. Let us take an extreme example which is, of course, not the case here. Suppose a creditor, out of malice and knowing that his debtor had no assets at all, obtained an Act *à peine de prison* and committed the debtor to prison. The debtor, having no realisable assets, would not be able to apply for a *declaration en désastre* nor would a *remise de bien* be available to him. If he did not wish, for proper reasons, to apply for a *cession*, the Court could not oblige him to make such an application and would then be powerless to prevent his continued incarceration. That would be unconscionable.

The Act *à peine de prison* is itself given in the exercise of the Court's inherent jurisdiction. We see no reason why the Court should not, in a proper case, invoke its inherent jurisdiction to terminate or circumscribe the authority of a creditor by ordering the release of a debtor from prison.

We accordingly reject the first contention put forward by Mr. Begg and find that we have jurisdiction in a proper case to order the release from prison of a debtor.

We now turn to the second question, which is whether we should, in the exercise of our discretion, order the release of the Defendant from prison.

The judgment debt remains outstanding. The Defendant does not wish to apply for *cession*. In the affidavit that he has made before us he explained why in the following terms:-

> *"I have been advised by my lawyer that the normal procedure for obtaining a release from the debtor's prison is to make an application for cession. My legal adviser has explained this procedure to me and, as I understand it, the consequences of a successful application for cession will result in my release from my debts.*
>
> *I have considered this advice carefully and do not wish to make an application for cession. Were I successful in such an application I do not think the consequences would be fair on my creditors. I have been able over the years to reduce my debts considerably. My creditors have shown me goodwill in the past and I do not wish to compromise this goodwill by making an application such as cession."*

We think that that is a proper reason for not wishing to apply for *cession*.

The affidavit also makes it clear that the Defendant is in a parlous financial position. He has substantial debts. He has remarried and has adopted a child for whom he also has responsibilities. He deposes that he has no hidden assets and that is accepted by Mr. Begg for the Plaintiff.

It appears to us that in the early years after his divorce in 1984, he did not take the care that he should have taken to ascertain what were his liabilities in respect of the child of his first marriage. It is largely because of that carelessness that these considerable arrears have built up. Since the judgment was obtained against him in February 1992, it is true that his payments have not been faultless, but he did pay fairly regularly in 1992. In 1993 some confusion arose as to whether the Scottish Court had remitted the arrears but he has made a number of payments in that year. He has explained that the building industry is in a recession and that that has affected his earning capacity. He is a self-employed tiler by trade and he has said that work has been difficult to obtain. We find no evidence of dishonesty or stubborn disobedience to the Order of the Court.

Our impression is of a man struggling against difficult odds to meet his many financial obligations.

He has now spent 24 days in prison and we see no purpose in continuing his incarceration which appears to us to be in the interests of neither party. The Plaintiff is put to the expense of maintaining him in prison while the Defendant is unable to seek work in order to earn money to meet his continuing obligations.

In our judgment this is a proper case to exercise our jurisdiction to order the release of the Defendant from prison.

We have considered, Mr. Begg, whether we should attach conditions to the order which we propose to make and we have decided that we should not do so.

Nonetheless, the Court expects the Defendant to do his best to pay £50 per week regularly or at least £30 per week which is his continuing obligation. If he is unable to do so we expect the Defendant to give an explanation, in writing, to Mr. Begg from time to time so that the Plaintiff can be kept informed.

We accordingly grant the application, Mr. Hoy, and we order the release of the Defendant from prison and the termination of the authority of the Plaintiff pursuant to the Act of 14th February, 1992, to incarcerate him. We make no order as to costs.

Authorities

Bianchi -v- Gentili; (12th July, 1990) Jersey Unreported.

Pelido (C.I.) Ltd. -v- Leighton (20th February, 1991) Jersey Unreported.

Porteous (née Perrée) -v- Porteous (28th February, 1992) Jersey Unreported.

Porteous -v- Porteous (née Perrée) (8th April, 1992) Jersey Unreported C.of.A.

Norman (1961) Ltd. -v- Notariani (1969) 257 Ex.578.

Falles' Hire Cars Ltd. -v- McAllister (1975) 262 Ex. 304.

Dick -v- Dick (21st December, 1993) Jersey Unreported.

re Barker (1985 - 86) J.L.R. 120.

Poingdestre: "Les Lois et Coutûmes de l'Ile de Jersey" (1928): p.247.

Le Gros: "Traité du Droit Coutûmier de Jersey (1943): p.297.