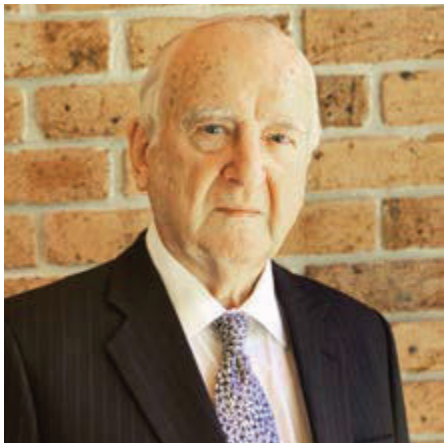
Debtors' Prison and the Rules of the Prison

By The Honourable John P Bryson QC



In 1834 judgment debtors who were in prison in Sydney for not paying their debts could take up lodgings in Prince Street, a few streets away from the Gaol. On 1 March 1834 the Judges of the Supreme Court made a Rule which defined limits of the Public Gaol in Sydney. This Rule was part of a large and complex array of laws now vanished which dealt with imprisonment of debtors. Parts of this complexity were law and practices which allowed debtors to live within the Rules while notionally in prison. The Rule said '… it is expedient to enlarge the limits of the said prison, by appointing fit and suitable places in the vicinity thereof, to be within the rules of the same.' The bounds were: '… all that part of George-street, exclusive of the houses on each side thereof, which lies in front of this prison, and leads to Essex-street; so much of Essex street, exclusive of the houses on each side thereof as leads to Prince street; all that part of Prince street which lies between Argyle street at the one end and the space leading to Charlotte Place, at the other end thereof, together with so much of the open space, called Charlotte Place as leads to St Philip's Church and the Scots Church, and also all the houses (excepting public houses) on each side of Prince-street, and the said respective Churches.' The Rule went on to exclude ' … all tavern and victualling houses, and ale houses licensed to sell spirituous liquors, or of public entertainment …' Other provisions make clear that the prisoners referred to were prisoners in civil proceedings, not prisoners serving sentences or awaiting trial for crime. The Rule of 1 March 1834 became rules 15 and 16 of the Rules and Orders for the Regulation of the Sheriff's Office made later in 1834.

The meaning of 'Rules' as Rules of Court made by the Judges was familiar in 1834 as it is now, but 'Rules' had other meanings as well. The Rules were the places where debtors who were nominally in prison would walk abroad, and live in lodgings if they could find the means to do so. 'Rule' was also the formal name for a final order of the Full Court of the Supreme Court: this usage continued until 1972. Perhaps the word 'Rules' came to mean the limits within which prisoners could live because a Rule defined where each prisoner could live, or the terms on which prisoners could live there.

The area of the Rules has been greatly changed since 1834 by building the southern approaches to Sydney Harbour Bridge, and later the Cahill Expressway. There has also been some street-straightening, and Charlotte Place has been renamed Grosvenor Street. In 1834 the Public Gaol stood in George Street in a large tract owned by the Government bounded on the south by Charlotte Place, intersected by Essex Street and bounded on the west by Harrington Street. As well as the gaol there were several buildings used for the guard house and police activities. The Four Seasons Hotel, formerly the Regent Hotel now stands in this tract more or less where the gaol was; and some of this land was used to straighten George Street. The gaol was built in 1800 and was then described as a 'handsome and commodious stone Gaol … with separate apartments for the debtors, and six strong and secure cells for condemned felons.' Six cells for prisoners awaiting execution seem remarkably ample at that early stage. By 1833, when the population of the colony was many times that of 1800, the gaol was entirely inadequate, and Governor Bourke recommended the erection of a new gaol because of its ruinous state. He said '… the Gaol in its present crowded state, without classification or labour, is a moral pestilence …' and went on to speak of the likelihood of disease. There was no precipitancy but that gaol was closed in 1841 when a new gaol was available at Darlinghurst.

The debtors who did not live in the Rules were moved out to a Debtors' Prison at Carter's Barracks, Brickfields in December 1835, and their numbers were reduced when arrest on mesne process was abolished in 1839. Carter's Barracks were located south of Campbell Street roughly where the Capitol Theatre now stands. The Barracks stood between the cattle market and the burial grounds and had earlier been a reformatory for convict boys; and cannot have been a pleasant place. The Rules of Court did not deal with Carter's Barracks or establish Rules around them. It seems that Prince Street was still available for debtors to live in.

There must have been some practice or procedure by which a judgment debtor satisfied the sheriff or the Court that he should be allowed to leave the prison walls and live in the Rules: but nothing in the Rules of Court established what he had to do and there is no practice book for that period. Surely the prisoner must have been required give some security, or to give his parole in some way that he would not abscond: but what happened in detail is not known.

In 1834 as now Essex Street ran up-hill past Harrington Street and Gloucester Street. Essex Street then took a crooked course up hill and has since been straightened. Essex Street intersected Cumberland Street, which has since been greatly altered; its then southern end has become the northern end of York Street. York Street was extended northwards from Barrack Lane after 1834 by cutting through the site of the Wynyard Barracks on a path which had been part of the Barracks. Essex Street then met Prince Street, which began at Charlotte Place a little to the south and ran northwards along the ridge towards Dawes Point. Prince Street has vanished completely, covered by the southern approaches to the Harbour Bridge. It was a beautiful place to live, with splendid outlooks west, north and east over the Harbour. By 1834 it was probably

already a pleasant place to find lodgings, a great improvement on the pestilential gaol in George Street. Later in the 19th century Prince Street became the relatively grand and salubrious part of The Rocks, surrounded by sordor: poverty-stricken and unwholesome streets sometimes infested with bubonic plague. Argyle Street is still where it was but at a much lower elevation after the Argyle Cut was excavated, using much time and at great expense, over many years till 1868.

The name Prince Street has been variously and inaccurately rendered as Princes Street and Princess Street. Prince Street is said to have been named after the Prince Regent, and nearby streets were named after his brothers, Dukes of York, Clarence, Kent, Cumberland, Sussex and Cambridge and his sister Duchess of Gloucester. Charlotte Place was named after his mother, George III's Queen Consort; and then there is George Street. Charlotte Place was renamed Grosvenor Street later in the 19th century, when the Grosvenor Hotel had stronger claims than a deceased Queen Consort. '… the open space leading to…' Charlotte Place seems to have been the open space now Lang Park, where Grosvenor Street now meets York Street.

A debtor who could take advantage of the Rules could leave the gaol, walk south along George Street for a few steps to Essex Street, walk up the hill to Prince Street, then turn north and find himself lodgings, but only in Prince Street, avoiding taverns, victualling houses and ale houses, and also avoiding places of public entertainment if there were any. He could divert himself by walking up and down these streets or strolling in the open space at Charlotte Place, and he could seek spiritual consolation at Saint Philip's Church Hill which then stood on land now part of Lang Park, or in the Scots Kirk accessible from Charlotte Place. St Patrick's Church further down Charlotte Place was not constructed until 1840.

Arrest on mesne process had been part of the procedure of Common Law Courts for as long as the Common Law had existed, and reflected a perceived need to compel the defendant actually to appear before the Court if the Court were to determine the claim against him. If the defendant did not appear after being served with a writ the Court did not proceed to hear the case in his absence, but required the plaintiff to go to great lengths, sometimes extraordinarily elaborate, to compel the defendant to come to Court, arresting him if he could be found and following detailed process to outlaw him if he could not. Simple measures of hearing and determining the claim ex parte if the defendant had not entered an appearance, and of giving judgment by default in claims for money debts, were not adopted by legislation until the 19th century although they had been suggested hundreds of years earlier.

There came to be many classes of case where proceedings could be commenced by a judicial writ called capias ad respondendum known as Ca Re, which directed the sheriff to arrest the defendant for the purpose of entering an appearance. In untraceable strange ways practices arose which made the capias the first step in the litigation, and if anyone objected the record of the Court was written up to show that the defendant

had earlier been served with an original writ and failed to appear, although those events had never happened and the original writ was not issued until after the objection was taken. In claims for debt it became quite usual that litigation was commenced by a capias and the first the defendant knew of the claim was that he was arrested and taken to prison. The sheriff who made the arrest was answerable for damages if he did not bring the defendant to Court to enter an appearance, and would take bail for enough money to cover the sheriff's possible liability for damages for the plaintiff's not being able to enforce his claim; potentially the sheriff was liable for the whole amount of the claim, so he wanted security for that amount. A condition of granting bail was that the defendant enter an appearance. A defendant who could not raise bail would remain in custody until the sheriff took him to Court for the hearing.

As the centuries passed, a maze of legislation and King's bench practice arose which regulated the circumstances in which arrest of the defendant was available, the amount for which bail was required and whether special bail with sureties additional to the defendant himself was required for the whole amount claimed, or common bail was sufficient, given only by the defendant and sometimes in a small amount. Questions of what kind of bail was appropriate and for how much occupied significant time for judges, tiresome arguments on obscure law and ancient practices, contributing nothing to decision on the merits. A known contrivance was for the defendant to bring some true or invented claim against the plaintiff and have him held to bail, in the hope of an agreement in which each gave common bail in a small amount and was released.

By the beginning of the 19th century and probably much earlier it was widely recognised that arrest on mesne process was oppressive and open to abuses, in conflict with basic liberties and much more trouble than it was worth, and there were recurring attempts to get Parliament to reform or abolish it. First it was reformed: in 1827 in England, the Act 7 & 8 Geo 4 c 71 (Imprisonment for Debt Act 1827) allowed arrest only where the claim was over £20, and simplified processes including processes for bail. The application for a warrant had to be signed by an attorney, so that plaintiffs in person could not have people arrested. This Act was adopted in New South Wales by the *Arrest for Debt Act* 9 Geo 4 No. 2, 1828. Complexities remained. The *Debt Imprisonment Act* 3 Vic No. 15, 1839 followed an English reform of 1838 and abolished arrest on mesne process except on a judge's order based on proved intention to leave New South Wales or abscond to remote parts. After this, arrests on mesne process were rare.

Arrest on mesne process was a severe oppression and an extreme nuisance, but arrest for enforcement of judgment debts was far worse. It seems that in the time of Edward I Common Law judgments were enforced by writs of fieri facias known as Fi Fa which required the sheriff to seize and sell the judgment debtor's goods, and levari facias requiring the sheriff to take the profits of the debtor's land until the debt was paid. There was no process for seizing and selling the debtor's land which in feudal theory was not alienable, but a statute in 1285 authorised the writ of Elegit by which the creditor could occupy half of the debtor's land until the debt was paid. In England land could not be sold to enforce payment of judgment debts until 1838. Another statute of Edward I required a debtor to be imprisoned for statute merchant debts which had been acknowledged in an especially formal way, and the writ devised for enforcing those debts came to be used for enforcing all judgment debts. This was the judicial writ capias ad satisfaciendum, known as Ca Sa.

For centuries the usual and most effective method of enforcing judgment debts was to arrest the debtor and leave him in prison until he satisfied the debt. If he had resources he could arrange his affairs, sell assets and raise money to pay his debt and be released, but until he did, or unless he could, his creditor could keep him in prison for the rest of his days. He sat in prison until he remembered where he had left his money. If he had no resources he lived on charity or starved to death.

In late Stuart times legislation began to require the judgment creditor to pay maintenance at a very low rate for impecunious debtors whom they kept in prison for more than a few months. This was spoken of as the debtor's 'groats.' In 1729 this was fixed at two shillings and three pence per week, a little less than four pence or one groat per day. There was room for conflicts of wills in which a debtor might sit for days, months or years in prison waiting for his creditor to tire of paying his groats, while the creditor was convinced that the debtor could organise his affairs and pay the debt if he wanted to.

A judgment creditor who had arrested his debtor had no other remedies, and if he relented and allowed the debtor to be released all means and all hopes of enforcement were gone. The Common Law had no remedies which gave the judgment creditor access to choses in action such as debts due to the debtor, bank notes or money in bank accounts, income from trusts, government bonds or interest on government bonds: a judgment debtor who had assets like these could stay in prison and support himself there, perhaps at a high standard, for as long as he cared to. A prisoner who had means and an obstinate disposition could live with his family in lodgings outside the prison wall but within the Rules, attended by servants and with free access by his stewards and agents, and continue to do so indefinitely. It was a strange world where people chose to pay to live in lodgings in a confined area rather than pay their debts, but many did. On the other hand a debtor with no resources could be kept in prison for as long as his creditor chose to pay his groats; and this often happened, contributing some of the more maudlin passages in Charles Dickens' more maudlin novels. The process was on the whole futile in that it deprived most judgment debtors of the means of earning money: not always, as portraitists and authors could sometimes pursue profitable activities while living within the Rules, and cobblers could make shoes.

Imprisonment for debt gave people countervailing compounding perverse motivations. The absence of any detailed recourse against assets impelled the judgment creditor towards holding the debtor to ransom, a harsh thing to do and not a path to popularity. A creditor who could not pay his own debts was at risk of finding himself in prison. Imprisonment deprived the debtor of employment and earnings, the primary means of raising money. If the debtor needed maintenance the creditor had to pay his groats. The debtor who lacked common honesty and really had resources could mitigate his loss of liberty by living largely in the Rules, which watered the force of the remedy and enhanced the creditor's rage. The debtor who really had no resources was left in vile imprisonment which he had no way of ending. Some creditors gave up in despair and some gave up through mere humanity, but many became more determined or vengeful as time passed. The remedy created agony, bad feeling and hardship, and the countervailing advantages did not adequately correspond with these disadvantages. In the first forty years of the 19th century Parliament found its strength, approached reform with a new mentality and put justice and efficiency before custom and practice; the gale blew the old practices away and replaced them in ways which had long been obvious.

In 1824 Forbes CJ and the new Supreme Court inherited all this law when the reforms were beginning. At this time debtors were allowed to live in an area around the Marshalsea Prison in Southwark, South London, the prison of the Court of King's

Bench and its Marshall. This area had long been known as the Rules of the King's Bench Prison. Forbes' main guide for Common Law practice was the practice of the King's Bench, although he made some enlightened simplifications. Under his Rules of Court all Common Law cases were commenced by a simple form of summons, served by the sheriff or his bailiff, and the plaintiff had to obtain an order of the judge on issuing the summons if the defendant were to be arrested. However in claims for debts and in many other claims plaintiffs had a legal right to such an order. There were many such summonses: over a period of a few months when someone took out the figures they were issued at the rate of about one a day. What usually happened, probably in most cases, was that the sheriff's bailiff arrived to serve the summons and the defendant immediately paid the debt, so that he was not arrested and the litigation ended there. The proportion of lawsuits in which plaintiffs sought arrest on mesne process appears to have been much higher in Sydney than in London. Commercial morality in Sydney was so low that some people just waited for the sheriff before paying debts.

Legislation precursory to modern Bankruptcy Acts began in Tudor times, but only for the benefit of creditors of traders. The legislation was only incidentally directed at relieving traders who were insolvent and was more concerned with fair distribution of assets among creditors. Under early bankruptcy laws bankrupts could be handled quite severely, could be stood in the pillory or have their ears sawn off if they were truly recalcitrant, and could be hanged for concealing assets. In the wars of the 18th century temporary Acts enabled debtors to be discharged from prison if they enlisted in the army.

In the early 19th century parliamentary pressures for reform in the interests of creditors and debtors produced more readily available bankruptcy and insolvency and tended to make it possible for cooperative debtors to be released from prison after a few months and to be discharged from their debts, with exceptions for debts which were discreditable to them. There were great improvements in the enforcement of judgment debts. A surprising early improvement came in 1812 when the British Parliament enacted a law reform for New South Wales so that land here could be sold in execution in the same way as movable property. This was almost the only legislation of the British Parliament which had anything to do with Australia between 1786 and 1819, and the same reform was not made for England until 1838.

Provisions of the New South Wales Act 1823, 4 Geo 4 c 96, widened the means available for enforcing debts, including attachment of debts due to the debtor and a regime for administration of assets of insolvent persons which could lead to the insolvent being discharged from prison. In New South Wales the *Insolvency Act 1830*, 11 Geo 4 No.7, provided another regime for insolvency possibly ending in the release of the debtor (but not from all claims.) This was replaced by the *Debtors Relief Act 1832*, 2 Wm 4 No 11, with provision for release of a debtor who had been imprisoned for three months or more. This temporary Act was continued several times. Some kinds of debt could not be released under insolvency legislation: debts to the Crown, damages for malicious injury and damages for defamation. A larger reform was the *Creditors Remedies Act 1839*, 3 Vic No 18, which followed English legislation of 1838 and enabled the sheriff to realise assets such as bank notes, cheques, promissory notes and negotiable instruments, and enabled Court orders charging stocks and shares in companies. Imprisonment for debt was still an available remedy.

Provisions closer to modern bankruptcy Acts began with the *Insolvent Act 1841*, 5 Vic No 17, which enabled debtors who were not guilty of fraud or dishonesty to be protected from arrest or continued detention. Then the *Insolvent Act 1843*, 7 Vic No 19, stated that it abolished imprisonment for debt; the Bill was reserved by the governor and was given royal assent only after considerable hesitation and study by the Colonial Office. Section 26 enacted that no person should be arrested or imprisoned on any civil process in law or in equity in proceedings instituted for the recovery of money due under contract or for non-performance of contract: but the exceptions were extremely wide and the effect seems to have been that there was no imprisonment for debt but Ca Sa was available for damages. Section 28 authorised arrests under a judge's warrant on evidence of conduct directed at evading enforcement, and by section 30 a defendant who was arrested could be bailed, and could be released if he placed himself in insolvency.

The exceptions were so wide that the Act of 1843 can have done little good, and it was soon amended, and then repealed by the *Imprisonment for Debt Abolition Act 1846*, 10 Vic No 7. By section 3 no person was to be arrested on any writ of Ca Sa out of the Supreme Court: but a judge could order such a writ on evidence of fraudulent concealment or intention to leave the Colony. However abolition did not extend to actions for breach of promise of marriage, libel, slander, seduction, criminal conversation with the plaintiff's wife or any malicious injury. The *Judgment Creditors Remedies Act 1901* No 8 replaced the Act of 1846 with similar provisions limiting Ca Sa to damages for breach of promise of marriage, libel, slander, seduction or malicious injury. These provisions continued in force until repealed by the *Supreme Court Act 1970* with effect on 1 July 1972.

It seems that there were some imprisoned debtors later in the 19th century or even in the 20th, as prisons made provision for them: but there cannot have been more than a few. The attorney who issued the Ca Sa was at risk of being sued for damages for false arrest himself if the writ were for some reason not valid, and this must have been a discouraging element as practical experience of what was necessary receded into the past. The writer did not ever encounter any case in which a judgment debtor was arrested under a Ca Sa. At least in theory, damages for defamation could be enforced by imprisonment until 1972, but there was little room for this to have practical effect, especially after the Bankruptcy Act 1924 (Cth) section 63 gave a Court in bankruptcy power to discharge a debtor from imprisonment.

Dowling's Select Cases, drawn from the years 1828 to 1844, are scattered with reports of cases about Ca Sas and Fi Fas, insolvency and actions against the sheriff: some of these cases turn on very small points and fine details indeed. Debtors who complied with insolvency legislation seem to have been discharged from prison fairly readily. *Bensley v Stroud* (1829) NSW Sel. Cas. (Dowling) 734 was a hard-fought claim for damages for malicious arrest where the person arrested on a Ca Re had spent almost seven weeks in custody before the action against her came on for trial: her defence to that action was successful, but she lost her claim for damages because the person who had sued her had not acted maliciously but had acted on spectacularly wrong advice from his attorney. There is no reference in these reports to the Rules or to judgment debtors living in the Rules. In *In re Wilson v Still* (1830) NSW Sel. Cas. (Dowling) 463 a debtor who was ill and dying was released to his own house, to return to prison when recovered. Perhaps there were no Rules for judgment debtors to live in before the Order of 1 March 1834: or perhaps there was a Rule or Order dealing only with each debtor who was able to leave the prison and specifying where he was to live.

As you drive over the Harbour Bridge or visit the Four Seasons Hotel or the Capitol Theatre, give a thought to the judgment debtors of the distant past. Your thought need not be sympathetic. Some were overtaken by misfortune, but some were rascals. BN