JUSTITIA

HONG KONG UNIVERSITY LAW ASSOCIATION

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HONG KONG

APOLOGY NOTE

"Messrs. P.W. Ling & Co." on P.93 should read "Messrs. D.W. Ling & Co.".

The Editorial Board apologizes for the misprint.

JUSTITIA

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EDITORIAL BOARD

FOREWORD

It is always a pleasure and a source of pride for me to witness the appearance of another number of *Justitia.* This new volume is the eighth since the inception of the series and it once again bears witness to the continuing intellectual liveliness and health of the law students of the University of Hong Kong. It is a credit both to those who have contributed articles to and to those who have edited, designed and produced it.

In particular, I welcome the editorial contribution on a statistical approach to divorce in Hong Kong. Law students might be forgiven for imagining that the only important law in Hong Kong is that which has to do with money and business. It is not. People count, both as individuals and as members of society and our budding lawyers must always remember that. Personal relationships are defined by and need the protection of the law. In much the same way, our relationships to the state (or 'Government' as we so often call it in Hong Kong) are similarly defined and we should be ever jealous over their protection. Though Hong Kong still has the dependent status of a Crown Colony, the Rule of Law still rules and we should appreciate that, that status notwithstanding, Hong Kong is one of the most free states in Asia. We must be on our guard against arbitrariness in both our laws themselves and in their administration. We should be thankful that we have an independent judiciary who are fully conscious of the role that only they can play on our behalf and must ourselves be fearless in identifying and speaking out on public issues which affect the freedom of the individual.

I would like to take this opportunity once again of extending my best wishes to all of our students.

Dafydd Evans

PREFACE

The 1981-82 issue of Justitia, as usual, consists of two parts: Part I contains some of the well-written dissertations of the third year students during the academic year 1980-81 and Part II consists of a research article produced through the team effort of the Editorial Board. The dissertations cover wide-ranging areas of law and a new column on commentaries of the present legislations. We hope this part of the publication will provide some interesting and stimulating thoughts for legislative reform.

As far as the Editorial Board is concerned, the most exciting part of this issue of Justitia is the research article. The article concerns a statistical survey on the characteristics of petitioners and nature of actions in the divorce suits as petitioned at the Hong Kong District Court for the past decade since the enactment of the Matrimonial Causes Ordinance in 1971. It is the first attempt of Justitia to utilize computer in the computation and tabulation of the data gathered from the legal records. As the sample under study covered over 1,000 divorce petitions filed with Court, the task of data collection involved a great deal of time and effort, not to mention the difficulties encountered in the application of computer. Lacking the appropriate expertise and experience in the computer science had been the major obstacle. The trial-and-error approach was inevitable. Problems were experienced in phrasing questions which would be acceptable to the computer language; many trial runs of the data on the computer had been made before some useful and meaningful results could be obtained; and interpreting results from the computer printout had not been without problem. Assistance had been sought from the lecturers of the Computer Science Department and the staff at the Computer Centre at the University and their contribution has been highly appreciated. We are especially grateful to Dr. Ng, Mr. Pang and Mrs. Tam of the Computer Science Department for their advice and assistance. We are also grateful to the fellow students who have given us their hands in this project by assisting in data collection.

We are greatly indebted to the Judiciary and the staff at the Victoria District Court Registry for allowing us to conduct the data collection at the Court premises and for their unfailing assistance.

We would also like to thank Mr. Yu of the Architectural Office for his kind assistance in the preparation of the cover.

Editorial Board

BAILIFFS IN HONG KONG (LAW AND PRACTICE)

by Judianna Barnes

One Chief Bailiff, three Assistant Chief Bailiffs, two Senior Bailiffs and twenty-three bailiffs represent the total strength of the Bailiffs' Office at present in Hong Kong.

Duties

The duties of the Bailiffs include the service of process (which includes the writ of summons, juror summons, indictments and charge sheets); the arrest of judgment debtors; seizure of property under the Writ of Execution, Preparation of inventories of property, valuation of property and duties in connection with the sale thereof; execution of distress warrant and undertaking eviction with a view to obtaining vacant possession of premises; execution of Magistrate's warrants, committal warrants, injunction orders and the arrest of ships under Admiralty jurisdiction.[1]

The purpose of this article is to examine the law and practice regarding the levying of execution by the bailiffs, in particular the seizure and sale of property and their relevant consequences. Special attention will, however, be given to the execution of the writ of Fi Fa and distress for rent.

The Writ

A writ is a document under the seal of the Crown commanding the person to whom it is addressed to do or forbear from doing some act.[2] It should bear the date of the day of issue, the name and address of the party issuing it and the name and address of the person against whom it is issued.[3] It is then delivered to the bailiff who should indorse upon the back thereof the hour, day, month and year when he received it. This must be done without charge (Section 28(1), Sale of Goods Ordinance, (Cap. 26, L.H.K. 1977 ed.)).

A writ of execution, according to Rules of

1 See the Civil Service Branch Circular (Vacancies) No. 5/80 paragraph 4.

2 Jointt, the Dictionary of Law.

3 See R.S.C. Order 46 r.6.

Supreme Court Order 46 Rule 1, includes a writ of Fi Fa, possession, delivery, sequestration and any further writ in aid of any of them.

The Writ of Fi Fa

The Writ of Fi Fa (Fieri Facias) is the mode for the enforcement of a money judgment by the seizure and sale of the debtor's goods and chattels sufficient to satisfy the judgment debt and the costs of the execution. It is expressed in a form of a royal direction to the bailiff of the Court to seize such goods, chattels and other property of the debtor as may be sufficient to satisfy the amount of debt together with interest and costs of execution. The bailiff is further directed to pay the amount levied to the plaintiff and to indorse on the writ a statement of the manner of execution immediately and send a copy of such statement to the plaintiff.

The Effect of The Writ of Fi Fa

The effect of the writ, under section 28(1) of the Sale of Goods Ordinance (Cap. 26, L.H.K. 1977 ed.) is to bind the property in the goods of the execution debtor as from the time when the writ is delivered to the bailiff to be executed. The property in the goods remains in the debtor until sale but the bailiff has a special property in them. Until sale, the debtor can give a good title to a purchaser, but any disposition is subject to the bailiff's right to follow and seize the goods except against: –

(a) a purchaser who buys in good faith and without notice of any defect or want of title on the part of the seller from a shop or a market in its ordinary course of business (Section 24(1) Sale of Good Ordinance (Cap. 26, L.H.K. 1977 ed.));

(b) a bona fide purchaser for value, unless he had, when he bought them, notice that any writ making the seller's goods seizable was in the hands of the bailiffs unexecuted (Proviso of section 2£(1), Sale of Goods Ordinance (Cap. 26, L.H.K. 1977 ed.));

(c) the liquidator of a debtor company, unless the execution was complete before the commencement of the winding-up (Section 269, Companies Ordinance (Cap. 32, L.H.K. 1975 ed.));

(d) the trustee in bankruptcy of the debtor, unless the execution was complete before the receiving order; (Section 45, Bankruptcy Ordinance (Cap. 6, L.H.K. 1977 ed.)); and

(e) the Crown (No provision of such statutory authority).

Duties of Bailiff Under Writ

The bailiff's duties under the writ are threefold:[4] (1) to the judgment creditor, to obey the writ and any lawful instructions that have been given him; (2) to the judgment debtor, not to do any act not authorised by the writ; and (3) to the court, to make a return to the writ, if required to do so. In execution, the bailiff must, as far as his duty allows, have regard to the interests and instructions of the execution creditor.[5]

Goods Seizable Under Writ of Fi Fa

Under common law, only goods and chattels belonging to the debtor are seizable. Where goods are owned by the judgment debtor and a third-party as co-owners, the bailiff can still seize and sell the property without the other's consent as each owner is entitled to possession. However, the bailiff should then interplead so that the proceeds of sale may be divided between the judgment debtor and the claimant. Where the judgment debtor dies and the other becomes sole owner by survivorship before delivery of the writ, the bailiff may not seize such goods. Where the co-owners have separate interest in a chattel (e.g. a charge), it may be seized if the debtor is entitled to possession, but only his interest may be sold.

Goods Belonging to The Debtor's Wife or Husband

In the case of husband and wife, a gift by the husband to the wife may be seized if the gift continues to be in the husband's order and disposition or reputed ownership (Section 12(a), Married Persons Status Ordinance (Cap. 182, L.H.K. 1972 ed.)). The same applies to a gift by the wife to the husband when she is the debtor (Section 12(b) Married Persons Status Ordinance (Cap. 182, L.H.K. 1972 ed.)). If the chattels are claimed by the wife under an unregistered bill of sale, they may be seized if they are in the husband's possession or apparent possession

4 Halsbury, the Law of England, 4th ed. para. 429.

5 See *Re Cook* (1894) 63 L.J.Q.B. 756.

(Section 7(b), Bills of Sale Ordinance (Cap. 20, L.H.K. 1979 ed.)). A problem here is that it is extremely difficult to say whether the household chattels are in the husband's or the wife's apparent possession. In *Ramsay* v. *Margaret*[6] per Lord Esher "When the possession is doubtful, it is attached by law to the title." Thus, the fact that they live together does not mean that the bailiff can seize the wife's personal chattels[7] when executing against the husband or vise versa.

In actual practice, the bailiff goes along to the premises stated in the writ and asks for the debtor. He then asks the debtor to point out his goods and chattels, informing him that if he fails to do so he [the bailiff] will exercise his power of arrest – a power conferred on the bailiff by the writ itself. In almost every case the debtor will point out such property when he faces the "horror" of being taken to jail. If anyone disputes the debtor's ownership later, the bailiff is then able to say that it was reasonable for him to believe the property belonged to the debtor since the debtor pointed it out. Although at common law, an honest mistake did not relieve a bailiff from liability in conversion, however, where no substantial grievance is done, he is protected by the inter-pleader proceedings. This point is elaborated on later in this paper. However, if anyone claims that the goods do not belong to the debtor at the premises, the bailiff asks for documentary evidence to support the claim, e.g. a receipt, a hire-purchase agreement, a bill of sale etc. The bailiffs in fact have a direction from the Registrar of the Supreme Court not to seize any goods subject to a bill of sale or a hire-purchase agreement in the execution of the writ of Fi Fa. Generally speaking, the bailiffs do not accept any claims unsupported by documentary evidence and would seize the goods where the only indication that they may not be the debtor's is an oral assertion to that effect.

This, however, does not mean that a person whose goods are seized in such circumstances is without remedy. He can make a claim and a notice of such must be given to the bailiff charged with the execution of the process (Rules of the Supreme Court Order 17 Rule 2) and the bailiff in turn notifies the judgment creditor who has to indicate to the bailiff whether he admits or disputes such a claim within four days of such notice. Whether the creditor disputes or admits the claim, the bailiff concerned is still entitled to apply to the court for relief by way of interpleaders. The bailiff, however, must withdraw from possession where the creditor has admitted the claim.

In fact, the bailiff does not worry about the concept of possession or apparent possession. He simply asks the judgment debtor to point out his goods and chattels. The difficulties which arise in cases like *Ramsay* v. *Margaret*[8] are seen by the bailiff as interesting for judges and academics: in the practical world of the bailiff they are non-existent.

For the execution of a writ of Fi Fa against a company, the bailiff has instructions from the Registrar of the Supreme Court not to seize any goods subject to a bill of sale or a debenture. The bailiff will, in practice, go to the premises written on the writ and check the signboard to see if the name is that of the defendant company. Then he will check the business registration to see if that address is the registered place of business of the defendant company. If the defendant company is the only company at the premises, he will take anything there which might be enough to satisfy the debt. If there are other signboards which indicate there might be other companies trading at the same premises, the bailiff will ask the defendant company (in fact, the person responsible) to point out its goods. Anyone who disputes ownership has to produce a business registration to show that he is carrying on business at that address before the bailiff will refrain from seizure. In that event the creditor or his solicitor has to provide the bailiff with a letter of indemnity before the bailiff will seize such goods. In the event that such person cannot produce documentary evidence to support his claim at the scene, the bailiff will still seize the goods and the claimant can make a claim to the court. The procedure is the same as the execution against a judgment debtor.

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6 [1894] 2 K.B. 18, 25.

7 For that matter, anyone who lives under the same roof with the debtor. See *Young* v. *Young* [1940] 1 All E.R. 349; *Koppel* v. *Koppel* [1966] 1 W.L.R. 802.

8 Op. cit.

Manner of Seizure

Seizure is done by the taking of an inventory of the property and the placing of a watchman at the premises. (There will be three watchmen in each case, each for a shift of eight hours) However, no watchman is placed at the premises where the goods are valuable because they are then removed from the premises and lodged with the Treasury or the Judiciary Accountant. The property is not normally taken away physically by the bailiff for this reason: if, after the seizure of goods and before sale, the debtor pays up the full amount, he is entitled to have the goods back. If the bailiff has removed such property, he will have to return it. Difficulty would arise as to who should reimburse the bailiff for the expenditure incurred.

Forcible Entry

The bailiff is not entitled to break open any outer door of a dwelling house. If a judgment debtor refuses to open the door or nobody answers the door, the bailiff cannot forcibly enter the premises by breaking open the door. The creditor, in such case, may request an arrest and the bailiff would effect that by either going to the debtor's office or waiting for him to come out of his dwelling place.

There is, however, no such restriction regarding commercial premises. In practice, the bailiff would not bear the costs of such forcible entry and he will only levy execution after a first attempt when the creditor or his solicitor provides manpower and a locksmith to do so. Hong Kong bailiff, unlike his counterpart in England, will not use false pretences to gain entry.

Walking Possession

In England, it is possible for the sheriff to retain possession without leaving a man on the premises. This is done by obtaining a written undertaking from the debtor not to remove the goods and not to permit the removal by anyone else after the formal seizure and inventory taking. The advantage of this practice is that the debtor is relieved of the annoyance of the constant attendance of the sheriff.[9] This, however, creates two problems. Firstly, it might be held that the sheriff has, by so doing, abandoned possession (which would create a problem if there are other creditors lurking behind the scene) and secondly, the liability of the sheriff if the debtor removes the property.

Whether or not the sheriff has abandoned goods is always a question of fact: *Lloydds & Scottish Finance* v. *Modern Cars.*[10] It is not necessary to have the debtor's signature on the agreement. A valid agreement may be signed by a responsible person at the premises even if the debtor himself objected to it: *National Commercial Bank of Scotland* v. *Arcam.*[11]

The sheriff's liability when the debtor removes the property after entering into such an agreement depends upon whether he has exercised due care in the circumstances.

This concept of "walking possession" does not have its counterpart in Hong Kong – at least, not in the field of execution under a writ of Fi Fa.[11a] The bailiffs here will not enter into any such agreement (knowing well that if they did, the property would certainly vanish within a couple of hours!). As mentioned earlier, a watchman is left at the scene in all cases except where the goods are taken to the Treasury or the Judiciary Accountant.

As the concept of walking possession is not recognised in this field in Hong Kong the question of whether a bailiff has abandoned possession will probably never exercise the minds of judges or academics here.

Sale

There is no statutory provision as to when the sale should take place after seizure. The usual practice is to wait for five days (as in the case of distress for rent[12]) in case there is a claim. In England, there is

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9 See Mathers on Sheriff p. 116.

10 [1964] 2 All E.R. 732.

11 [1966] 2 Q.B. 593.

11a As from 1st December 1980, court bailiffs enforcing distress warrants outside office hours in fixed penalty cases will not be accompanied by watchmen. The defaulter will be given 3 days to settle the debt and he is not to remove his goods which are regarded as seized during this period. This is the first form of "walking possession" in Hong Kong.

12 Section 93(1), Part III, Landlord & Tenant (Consolidation) Ordinance (Cap. 7, L.H.K. 1979 ed.).

statutory provision[13] that where the amount to be realized exceeds £20, the sale must be by public auction. Such provision, however, does not apply to Hong Kong[14] and the governing provision here is Rules of the Supreme Court Order 47 Rule 7(2):–

> "Every sale in execution of a judgment shall be made under the direction of the Registrar and shall be conducted according to such orders, if any, as the court may make on the application of any party concerned and shall be made by public auction: Provided that the court may in any case authorise the sale to be made in such other manner as it may deem advisable."

There is no specification as to the amount to be realised before public auction shall be conducted. In practice nearly every sale is by public auction. A private sale is occasionally ordered where the creditor can satisfy the court that a much higher price can be obtained by such means.

There is no reserve price at the public auction and the goods must be sold to the highest bidder even if his bid is below the actual value of the goods.

The bailiff cannot sell more than necessary to satisfy the judgment debt: *Stead* v. *Gascoigne,*[15] *per* Dallas, C.J. "A sheriff has no right to sell more than necessary." If he does, he is liable in conversion in respect of the excess *(Bachelor* v. *Uyse).*[16]

Wrongful and Irregular Execution

An execution is wrongful where it is not authorised or justified by the writ or judgment;[17] or the writ is issued maliciously and unreasonably;[18] or unfair means are used to enable the bailiff to enter the debtor's premises;[19] or the writ directs the bailiff to levy at the wrong address or upon the wrong person;[20] or where the whole sum due has been paid; or a stay has been ordered by the Court or agreed upon between the parties;[21] or the writ has been deliberately altered and wrongly used;[22] or it is executed on a Sunday;[23] or executed after notice from the creditor not to proceed and to withdraw from possession;[24] or when it is issued against someone with personal immunity.

A wrongful execution is not necessarily void but the bailiff and/or the creditor may be sued for trespass.

An execution is irregular where any of the court rules or practice have not been complied with, and in such a case the proceedings may be set aside or amended or otherwise dealt with in such manner and upon such term as the court thinks fit.[24a] An application to set aside an execution for irregularity must be made by summons or motion in which the grounds of objection must be stated, and must be made within a reasonable time.[24b] Generally, the execution will be set aside unless the irregularity can be cured by amendment or is waived. When it is set aside, any goods levied have to be restored. Until the execution is set aside, the creditor or his solicitor is still protected, and the bailiff is still protected when it is set aside.

Effect of Sale

Rules of the Supreme Court Order 47 Rule 7(3) provides: –

> "Where any goods in the possession of an execution debtor at the time of seizure by the bailiff or other officer charged with the enforcement of a writ, warrant or other process of execution are sold by such bailiff or other officer without any claim having been made to the same, the purchaser of the goods so sold shall acquire a good title to the goods so sold and no person shall be entitled to recover against the bailiff or other officer, or anyone lawfully acting

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13 Section 145 Bankruptcy Act 1883 (the 1914 Act did not repeal this part of the 1883 Act).
14 The Bankruptcy Act 1883 does not apply to Hong Kong by virtue of section 4 of the Application of England Law Ordinance (Cap. 88, 1971 ed.) since it is not in the schedule.
15 (1818) 8 Taunt 527, 528.
16 (1834) 4 M. & Scott 552.
17 See *Moore* v. *Lambeth County Court Registrar* (No. 2) [1970] 1 Q.B. 560, [1970] 1 All E.R. 980 C.A.
18 See *Bartlett* v. *Stinton* (1866) L.R. 1 C.P. 483.
19 See *Anon* (1758) 2 Kery 372.
20 See *Morris* v. *Salberg* (1889) 22 Q.B.D. 614 C.A.
21 See *Bikker* v. *Beeston* (1860) 29 L.J. Ex. 121.
22 See *Hale* v. *Castleman* (1746) 1 Wm. Bl. 2.
23 See R.S.C. Order 65 r.10.
24 See *Walker* v. *Hunter* (1845) 2 C.B. 324.
24a See R.S.C. Order 2 r.1(1), (2).
24b See R.S.C. Order 2 r.2(1), (2).

> under the authority of either of them, except as provided by section 46 of the Bankruptcy Ordinance for any sale of such goods or for paying over the proceeds thereof prior to the receipt of a claim to the said goods, unless it is proved that the person from whom recovery is sought had notice or might by making reasonable inquiry have ascertained that the goods were not the property of the execution debtor: Provided that nothing in this rule contained shall affect the right of any claimant who may prove that at the time of sale he had a title to any goods so seized and sold to any remedy to which he may be entitled against any person other than such bailiff or other officer or purchaser as aforesaid."

The effect of this is that a purchaser gets a good title even though the goods do not belong to the judgment debtor so long as the goods are in the debtor's possession and no claim is made unless the bailiff has notice, either actual or constructive, that the goods are not the property of the execution debtor.[25]

In the case of a wrongful execution, unless the writ was absolutely void (e.g. issued under a fraudulent judgment), a bona fide purchaser from the bailiff will be able to keep the goods. In the case of an irregular execution, a purchaser in good faith will have a good title unless the sale was altogether void or the goods belong to a stranger and the true owner can recover. In *Bushell* v. *Timson,*[26] it was held that an application to the court for leave to issue execution against the goods of the party in default was a condition precedent to execution to enforce an award, and in default of such an application a sale of goods seized in execution for the purpose of satisfying the award is void and the purchaser has no title thereto.

Generally speaking, an innocent bona fide purchaser for value is well protected and an aggrieved party can take action either against the creditor or the bailiff.

Protection of Bailiffs

The writ is an absolute justification to the bailiff for what is done in pursuance of it. Even though the judgment may be wrong, the bailiff is not liable in an action for damages. If the bailiff is misled by a wrongful indorsement and seizes goods of a wrong person the judgment creditor will be liable in trespass *(Morris* v. *Salberg).*[27]

Even if the bailiff seizes goods from the wrong person, he is protected from liability in interpleader proceedings provided no substantial grievance has been done.[28] Under Rules of the Supreme Court Order 17 Rule 1(4), when the execution creditor has admitted the claim,

> "..... the bailiff shall withdraw from possession of the money, goods or chattels claimed and may apply to the Court for relief under this Order of the following kind, that is to say, an order restraining the bringing of an action against him for or in respect of his having taken possession of that money or those goods or chattels."

Birkett, L.J. in *Cave* v. *Capel*[28a] explained the function of this interpleader proceedings. He said at page 432 that the order was designed to protect a sheriff in an ordinary or almost inevitable circumstances which were bound to arise in the course of the sheriff's duty, namely, seizing goods which ultimately turned out to belong to some claimants. He read out Order 57 Rule 16(A) (which is equivalent to our Order 17 Rule 1(4)) and continued:

> "I understand that to mean that when a sheriff has, in fact, seized goods in the name of the judgment creditor which in truth belong to the claimant, there would, in the ordinary way, be a cause of action against him at least for nominal damages. The design of this rule, in my view, is to say: 'In these circumstances we think it right and proper that the sheriff should

25 See *Dyal Singh* v. *Kenya Insurance Ltd.* [1954] 1 All E.R. 84; *Curtis* v. *Maloney* [1951] 1 K.B. 736 C.A.
26 [1934] 2 K.B. 79.
27 Op. cit.
28 See *Decoppatt* v. *Barnett* [1901] 17 7CR 273; *White* v. *Morris* (1852) 11 C.B. 1015; *Cave* v. *Capel* [1954] 1 Q.B. 367.
28a [1954] 1 Q.B. 367.

be protected.' But it was clear from *Smith* v. *Critchfield*[28b] that Sir William Brett M.R. was saying that it was not in every case that the judge will protect the sheriff. It would depend on the facts of the particular case." Further on, he says: –

"In my view, Order 57 Rule 16(A), was intended to apply to a case where there was admittedly a cause of action because of a mistaken seizure by the sheriff, a cause of action in which nominal damages could be awarded, and in such a case the rule provides protection, but where, as in this case, there was a substantial grievance, I do not think this rule applies."

Therefore, where a bailiff seizes goods from a wrong person, he has committed the tort of trespass in common law, however, he is given statutory protection where there is no substantial grievance. He is also protected by Rules of the Supreme Court Order 47 Rule 7(3) unless he has notice, actual or constructive, that the goods do not belong to the debtor.

Action may be taken against a named bailiff who exceeds the authority given by the writ. However, proceeding should never be instituted against the office of Chief Bailiff as such action against a person named "The Chief Bailiff" is misconceived.[29] Such an action should be against the Attorney General as the bailiff is a crown servant (Section 13(1) Crown Proceedings Ordinance (Cap. 300, L.H.K. 1964 ed.)).

Injunction

Incidentally, in England it is possible to obtain an injunction against a sheriff from keeping and/or selling goods which do not belong to the debtor (although the court was of the opinion that a person aggrieved should wait for the outcome of the inter-pleader proceedings first before taking such action: *Hilliard* v. *Hanson*[30]).

However, since the bailiffs are crown servants here, an injunctive relief against them is ruled out by the provisions of section 16 of the Crown Proceedings Ordinance.

Action for Trespass

Although it is possible to bring an action for trespass against a named bailiff in some circumstances, it appears that no such action has ever been taken in Hong Kong.

Nature of Distress

The right of the landlord to distrain arises at common law. It enables the landlord to secure the payment of rent by seizing goods and chattels found upon the premises in respect of which the rent is due.

The procedure for obtaining and executing a warrant is prescribed by provisions of Part III of the Landlord & Tenant (Consolidation) Ordinance. Under those provisions jurisdiction in respect of distress for rent is vested exclusively in the District Court irrespective of the value of the premises and of the amount of the arrears of rent.

Warrant of Distress

In accordance with those provisions the warrant for distress is addressed to the Bailiff by the Registrar of the Court directing him to distrain goods and chattels on the premises and in the apparent possession of the debtor but not to proceed to distrain before a demand for the payment of the amount endorsed on the warrant is made.

Goods Seizable

Under section 87 of the Ordinance, the bailiff is under a duty to seize the movable property in the apparent possession of the debtor. This power of seizure conferred on the bailiff is much greater than that conferred when levying execution under the writ of Fi Fa. In distress for rent cases the bailiff is not concerned about ownership. Any movable property found on the premises may be seized even if someone other than the debtor claims ownership at the scene so long as the property appears to the bailiff to be in the apparent possession of the tenant: *Hong Kong Land Investment & Agency Co* v. *Athena Studio & Eastern Bazaar.*[31]

28b (1885) 14 Q.B.D. 873 (C.A.).

29 Per Rhind J. in *Fung Man-ying, Doris* v. *Chief Bailiff* (1980) H.C.A. 2048/80.

30 (1882) 21 Ch. D. 69 (C.A.).

31 (1933) 26 H.K.L.R. 39.

Goods of A Subtenant

In *Hong Kong Fire & Insurance Co. Ltd.* v. *Kan Chak & Wong Hon Sing,*[32] a claim was made by a subtenant and it was held that on the true construction of the words "in the apparent possession" the goods of a subtenant were not distrainable.

Goods Belonging to Debtor's Husband or Wife

In *Wilkie Lam* v. *Simpson & Simpson,*[33] the separate property of the wife was held seizable as they were in the apparent possession of the husband. However, problem may arise in a domestic situation where it is difficult to decide whether the property is in the husband's or the wife's apparent possession. Apparently, there is no decided case on this point. In *Lam Wai Fong* v. *Ho Yin Sheung*[34] where the wife claimed that some furniture seized belonged to her, she agreed that the goods claimed were in the apparent possession of her husband (the debtor) in answering certain questions put by the court. Thus the question as to whether the goods were in her apparent possession as well did not arise.

One possible solution is to draw an analogy with the situation in *Ramsay* v. *Margaret*[35] where possession is doubtful, possession follows title. It is, however, submitted that the principle in *Ramsay* v. *Margaret* should not be followed here. One has to remember that the landlord's power to distrain is both an ancient and powerful remedy. It enables him to take goods on the premises of the tenant even though they do not belong to the tenant. As mentioned earlier, an innocent third-party owner will not be able to restrain the bailiff from distraining the goods. It would be both strange and illogical if the debtor's wife (or husband, for that matter) should have better protection than an innocent third-party owner. Moreover, one can visualize the following situation where fraud can easily be committed. A husband takes out a tenancy in his name and he transfers all the movable property in the flat to his wife under an unregistered bill of sale and does not pay any rent. If *Ramsay* v. *Margaret* applies, the landlord will not be able to seize the goods as possession follows title where possession is doubtful! In almost all cases concerning domestic premises, it will be doubtful if the property is in the husband's or the wife's apparent possession (and indeed their children's if any!). The whole purpose of the remedy of distress will be defeated if one follows *Ramsay* v. *Margaret.* It is submitted that the position of the wife (or husband) in this situation should not be superior to that of an innocent third-party owner.

In actual practice, the bailiff is not concerned about whether goods are in the tenant's or the tenant's spouse's apparent possession. After receiving confirmation that the occupant is the person named on the warrant, he will proceed to distrain any movable property on the premises, enough to satisfy the amount due. If anyone claims to be the owner of any chattels, he has to satisfy the bailiff that he is a subtenant by tendering documentary evidence (such as a rent receipt) before the bailiff will refrain from seizure.

Under section 88(e) a bailiff is under a duty not to seize the debtor's "necessary" wearing apparel. In practice, a bailiff does not seize anything on the debtor's person (even though he/she may be wearing several diamond rings!) nor does he seize any items of clothing not on the debtor's person although he might consider seizing a mink coat from a wardrobe at the height of summer!!

When a bailiff is directed by the warrant to distrain goods of a tenant in a certain cubicle at a certain address which suggests that there are other tenants sharing the same premises, he will not seize anything outside that cubicle. But, from inside that particular cubicle he will seize property even though the subtenant of another cubicle at that same address produces documentary evidence of ownership of property in the cubicle named in the warrant. The bailiffs' practice in so acting is a strict compliance with the direction given by section 87 and recited in the warrant, namely, to seize all movable property (with certain exceptions) in the apparent possession of the defaulting tenant. In the former case the property in the cubicle not the subject of the warrant is *not seen to be* in the possession of the defaulting tenant. In the latter case the property is in the *apparent possession* of the defaulting tenant. Evidence that another tenant *owns* the property does

32 (1938) 30 H.K.L.R. 37.
33 (1926) 21 H.K.L.R. 16.
34 [1958] D.C.L.R. 247.
35 Op. cit.

not negate the evidence of the presence of the property on the premises of the defaulting tenant, that is, it does not contradict the evidence before the bailiff's *own eyes* that the property is in the apparent possession of the defaulting tenant.[36]

Manner of Seizure

Under section 89, the bailiff must make an inventory on seizure. As in the case of the execution of the writ of Fi Fa, the goods are not physically taken away and the bailiff will simply take an inventory and post watchmen at the premises.

Forcible Entry

A bailiff is entitled to make forcible entry under section 91. In practice, a bailiff will make three attempts before applying to the court for such order. It is quite usual for the bailiffs to have to resort to this means as they can only execute the warrant "after sunrise and before sunset" (section 86) the period of the day when most tenants are not at home.

Sale

Section 99(1) governs the mode of sale which should be at such time and place and by such auctioneer or bailiff as the Registrar may direct. Section 99(2) provides that the proceeds of such sale shall be used firstly to pay the costs of the distress and then to satisfy the debt. Any surplus after that has to be returned to the debtor.

Wrongful Distress

There are three kinds of wrongful distress: (1) illegal, where there is no right of distress at all or where a wrongful act has been committed at the beginning of the levy; (2) irregular, where a wrongful act is committed at some stage of the proceedings subsequent to seizure; and (3) excessive, where more goods are seized than are reasonably necessary to satisfy the debt.

An interesting point arises on illegal distress in Hong Kong for section 83 provides that a warrant may be issued by a judge or, in the absence of any judge from the court house, by the Registrar. In actual practice, all distress warrants are issued by the Deputy Registrar (who, presumably, has the authority delegated to him by the Registrar). It is submitted that "in the absence of 'any' judge" does not mean in the absence of *one* of the judges but in the absence of *all* of the judges. Since it would be the exception rather than the rule for either the Victoria District Court premises or the Kowloon District Court premises to have no judge at all within the precincts so it ought to be the exception rather than the rule for a warrant of distress to be issued by the Deputy Registrar. If a Deputy Registrar issues a warrant at a time when there is a judge present in the court house is the resultant distress illegal?

Effect on Purchaser's Title

An illegal distress is wrongful at the outset and the distrainor is a trespasser ab initio who cannot confer a good title upon a purchaser of the goods wrongfully seized. However, a person who purchases goods under a distress which is either irregular or excessive acquires a good title and the only remedy for the aggrieved tenant is to institute proceedings against the landlord.

Remedies

Remedies are provided under both sections 93 and 95 of the Ordinance. Section 93(1): –

> "The debtor, or any other person alleging himself to be the owner of any property seized under this Part, may, at any time within five days from such seizure, apply to the court to discharge or suspend the warrant or to release a restrained article; and the court may discharge or suspend the warrant or release the article, on such terms as it may think just."

Section 95: –

> "If any claim is made to or in respect of any property seized under a warrant, or in respect of the proceeds or value thereof, by any person not being the debtor, the Registrar, on the application of the bailiff who seized the property, may issue a summons calling before the court the claimant and the person who

36 See *Hong Kong Land Investment & Agency Co.* v. *Athena Studio & Eastern Bazaar* (1933) 26 H.K.L.R. 39, 41.

> obtained the warrant, and thereupon any action which may have been brought in respect of such claim shall be stayed, and the court, on proof of the services of such summons and that the property was so distrained, may order the plaintiff to pay the costs of all proceedings in such action after the service of such summons."

However, the debtor can only apply under section 93 for the discharge or suspension of the warrant or the release of the article as he is expressly excluded from section 95.

Section 93 refers to the "owner" and section 95 to "any person not being the debtor". What is the difference between the two sections? Huggins D.J. (as he then was) suggested in the case of *Lam Wai Fong* v. *Ho Yin Sheung*[37] that the purpose of these two sections was not clear and that people had been using both sections indiscriminately in the past. He also suggested that section 93 was in fact the old action of replevin whereas section 95 was available in all cases of wrongful distress.

One may argue that both section 93 and section 95 are available to the "owner" of the goods. Under section 93, an owner can have the goods back by tendering payment to court in the case of a lawful distress – he is then relieved of the trouble of having to bid at the public auction. Section 95 applies where (as the marginal note suggests) the distress is wrongful and the owner can apply under this section.

However, section 97 expressly provides that compensation may be ordered by the court for claims under either section. This seems to suggest that section 93 does not deal with lawful distress exclusively: an owner can apply under section 93 alleging a wrongful distress and obtain compensation. Since the 'owner' may apply under section 93 for sufficient remedy, what is the purpose of section 95 then? If it also applies to an "owner", it is redundant.

It is submitted that section 95 is only available for any person *"other than the owner"* who may have an interest (such as a lien) on the goods. This section enables him to have a speedy hearing (by summons) and discourages him from taking a separate action for the same purpose as the registrar may order him to pay the costs of such action.

Section 97 provides for compensation for the wrongful distress and the claimant, whether successful on the claim or not, is barred from any action in respect of the same injury: section 97(2).

Conclusion

From April 79 –March 80, the total number of executions by the bailiffs was 11,738 and the number of distraint actions on both sides of the harbour was, up to October 1980, 1,541. Potentially, the bailiffs have a great power that can be rather easily abused since the statutory provisions defining their powers are always rather vague. A bailiff is left to exercise his own judgment most of the time. Although it seems that no one has ever instituted an action for trespass against a bailiff successfully, it certainly does not mean that there is no such abuse of power. Most of the people in Hong Kong are ignorant of any matters regarding the law and the extent of the powers of law enforcement agencies so it is not surprising that an injured party may not even know that he has been wronged. However, abuse of power on the part of the bailiffs is unlikely to occur in practice as they rarely act outside the terms endorsed on the writ or warrant. If, however, the proper construction of section 83 of the Ordinance is as suggested above then the bailiffs may often be seizing goods in compliance with directions in a document which appears to be a warrant of distress regularly issued but which is actually not a warrant at all because the conditions precedent laid down by the law for the valid exercise of the power to issue a warrant by the Deputy Registrar had not been fulfilled. Although the bailiffs in so have might be held to be acting reasonably in that they should be entitled to expect that the Deputy Registrar has acted within the scope of his authority nevertheless the seizure itself would be unlawful because it would not have been lawfully authorised. There could therefore well be cases where not only does the injured party not know that he has been wronged but the instrument of the wrongdoing is unaware of it as well.

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37 Op. cit. at p. 252.

THE PUBLIC ORDER (AMENDMENT) ORDINANCE 1980

by Johannes M.M. Chan

(I) THE PUBLIC ORDER (AMENDMENT) ORDINANCE 1980

> "It is unrealistic to expect a government that supports an Ordinance controlling free assembly to support a community movement advocating its amendment."[1]

The principal change made by the Amendment affects public meetings which may take place subject to a notification procedure instead of the system of licensing which has applied before. This new requirement does not, however, apply to small groups of 30 persons or less, or small meetings (i.e. not more than 200 persons) in private premises, or assemblies in schools, colleges, universities and other educational establishments which are organized with the consent of the governing body of the establishment concerned, whether or not the public or any section of the public are permitted to attend.

Section 2 of the amendment Ordinance amends section 2 of the principal Ordinance by substituting a new definition of "meeting" and introducing definitions of "designated public area" and "procession". The new definition of "meeting" is restricted to discussion of issues or matters of interest or concern to the general public or a section thereof, or for the purpose of the expression of views on such issues or matters. It does not embrace gatherings for purposes which are purely social, educational, religious or the like, or a conference or seminar bona fide intended for the discussion of topics of a social, recreational or the like.

Section 3 of the amendment Ordinance repeals and replaces Part 3 of the principal Ordinance. The new requirements for public meetings are that every such meeting (except meetings of small groups or those held in schools etc as mentioned above) must be notified, with particulars, seven working days in

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1 Professor John Jones, Chinese University of Hong Kong. *Hong Kong Standard,* April 28, 1979.

advance to the Commissioner of Police; shorter notice may be accepted in exceptional circumstances. Unless the Commissioner prohibits the holding of the meeting within 4 days (or at least 24 hours before the meeting if shorter notice is accepted) the meeting may go ahead as notified (ss.7, 8, and 9). In addition, the Governor is empowered to make orders designating certain public areas for the purpose of holding meetings and the Governor in Council may prescribe general conditions applicable to all public meetings (ss.10 and 11). The Commissioner of Police may add to those general conditions in particular cases (s.11(2)).

As regards public procession, the existing licensing procedure is retained but ceases to apply to (a) processions which do not take place on a public highway or thoroughfare or in a public part; (b) processions formed of 20 persons or less and (c) other processions as specified by the Commissioner of Police by notice in the Gazette (ss.13 to 16 inclusive). The remaining control provisions under the existing law are retained subject to consequential amendments in line with the changes mentioned above (ss.17 to 17F). Any obligations imposed by the provisions of Part 3 are to be without prejudice to obligations imposed by other laws (s.17G).

(II) COMMENTS

"It's a long way to freedom, it's winding steep and high . . ."

1. Licence and Notification

(1) Procession

(a) Licence is required for a public procession unless (a) it is held not on a public highway or thoroughfare or in a public park or (b) it consists of not more than 20 persons[2].

(b) A highway is a way over which all members of the public are entitled to pass and repass; and, conversely, every piece of land which is subject to that public right of passage is a highway or part of a highway[3]. It is difficult to see where a public procession can be held other than on highway, thoroughfare or public park. In other words, the first exception is merely illusory.

(c) It has been commented that the requirement of twenty people is both impractical and unreasonable[4]. It is submitted that this number is merely arbitrary and serves the purpose of convenience. Once it is accepted that the licence is necessary, a point has to be drawn somewhere. It is submitted that twenty is a convenient number[5].

(d) However, a more fundamental question is: is licence necessary?

(e) The law relating to the user of the highway is clear that in the absence of special licence from the appropriate owner of the highway, no person can claim that he and his fellow-men in unison can exercise their right of passing and repassing along the highway by standing still and making a speech or listening to speeches as the case may be. It is an offence to obstruct the passage of any footway or other highway. Nor is it any defence to show that the obstruction only affects part of the highway and leaves clear a way of passage[6]. As a result, every unlicensed public meeting can be regarded as a trespass against the person or body in whom the surface of the highway is vested, since the highway can only be used for the purpose for which it has been dedicated. Any other unlicensed use, however desirable it may be from other standpoints, is legally wrongful[7].

(f) On the other hand, as distinct from a meeting, a procession is prima facie lawful, though even in the case of a procession the right is not an absolute one and depends upon the facts of each particular case as to whether the highway is being used in a

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2 S.13(2).
3 *Halsbury's Laws of England*, Vol 19, p. 12.
4 Hong Kong Observers, *Ming Pao*, October 20, 1980.
5 For public meeting, the number is thirty, see: s.7(2)(a).
6 *Homer* v. *Cadman* (1886) 16 Cox 420.
7 The argument is succintly put by Professor Goodhart in "Public Meetings and Processions" (1937) 6 C.L.J. 161. But see Browhlie, *The Law Relating to Public Order*, Butterworths 1968, pp. 140, 166.

reasonable manner[8]. The distinction rests upon the basis that a procession is passing and repassing, which is an admitted right of members of the public, whereas a meeting is necessarily stationary and therefore constitutes a trespass[9].

(g) In order to serve the ends of preservation of peace, some kinds of control are necessary. It is submitted that advance notice of procession is sufficient instead of the licensing procedure. Provisions in the local legislation requiring advance notice are at present in effect in some one hundred and seven local authority areas in England and Wales, and some three areas in Scotland, and such a requirement is a feature of Northern Ireland legislation as well as of that of many Western European countries. The recent report on the Review of the Public Order Act 1936 and Related Legislation in England also recommended advance notice of procession[10]. The chief advantages of a notice requirement, as pointed out in the report, are that it might help to ensure the police receive advance warning of an event so that it may give the police more time to take action designed to prevent disorder than they might otherwise have. In particular it might serve as the formal trigger for discussions between the police and organisers designed to agree on the ground rules for a march. These might subsequently be embodied in formal conditions. It might in turn help to encourage organisers to assume more responsibility for policing their own people. And it would serve to emphasise that those who wish to process down the street should have regard to the rest of the community. It is submitted that Hong Kong should adopt the same procedure, viz., advance notice instead of licence.

(h) It is emphasized by the report, and the writer humbly concurs, that advance notice of processions would not be the same as introducing a requirement to have a permit to march. Everyone would still be free to march as they wished. But they would be required to give a reasonable notice of their intention to the police[11].

(i) Under s.13(3), the required licence for public procession should be applied for seven days in advance. But it is not stated when the licence has to be issued[12]. Thus the Commissioner of Police may issue a licence at the very last moment before the public procession takes place. It is submitted that the licence must be issued within reasonable time.

(j) Under s.13(3) the Commissioner of Police may attach to the licence conditions relating to the forming, conduct, route, times of passing and dispersal of the procession. It is not even required that those conditions should be reasonable!

(2) Meetings

The former licensing procedure is replaced by the requirement of notification. But is there any effective change at all?

All former grounds for refusal to grant a licence are now grouped under s.9(1), e.g. prejudice the maintenance of public order or be used for any unlawful purpose (former s.7(2), now s.9(1)(c)), prior advertisement (former s.7(4)(b), now s.9(1)(b)). There is a new ground for refusal under s.9(1)(a):

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8 Therefore the test is whether in all the circumstances such a procession is a reasonable user of the highway, and not merely whether it causes an obstruction. See Professor Goodhart, "Public Meetings and Processions", op. cit.

9 Dicey made the following argument in *An Introduction to the Study of the Law of the Constitution* (10 ed): A has a right to walk down the High Street or to go on to a common. B has the same right. C, D and all their friends have the same right to go there also. In other words, A, B, C, and D and ten thousands such have a right to hold a *public meeting*. It is submitted that this argument erred in overlooking the legal distinction between public meeting and public procession. See Professor Goodhart, "Public Meetings and Processions" (1937) 6 C.L.J. 161; E.S.C. Wade "The Law of Public Meeting" (1938) 11 M.L.R. 177.

10 Cmnd. 7891, p. 20, para 71.

11 Para. 72, ibid.

12 For public meeting, notice of prohibition should be given within four days from the date on which the public meeting is so notified. s.9(3).

failure to comply with statutory requirement for notice. It is submitted that the law is basically the same as that before amendment. Any allegation of relaxation is only relaxation in disguise! Perhaps the only significant change is that notice of prohibition must be given within four days from the date on which the public meeting is notified. (s.9(3))[13].

2. Definition

(1) Procession:

A definition of "procession" is included, which means a procession organized for a common purpose. Under the former law, any gathering of people can amount to procession. Now the prosecution has to establish the existence of a common purpose, whether lawful or unlawful. In other words, before the participants of an unlawful procession can be convicted, the prosecution has to show that the participants intend to take part in the procession in pursuit of a common purpose. Ignorance of the common purpose would then be a defence.

(2) Meeting[14]

The new definition of "meeting" confines to one "organized for the purpose of the discussion of issues or matters of interest or concern to the general public or a section thereof, or for the purpose of the expression of views on such issues or matters". This seems to be an elaboration of the phrase "public interest", which appeared in the bill and was queried and criticised by the general public when it was first published. The elaboration is merely a re-written form of the phrase "public interest". Its exact scope and meaning are not at all clear. There are some English authorities on this point: yet again they are not particularly helpful and all of them are only of persuasive authority[15].

A matter of public interest "does not mean that which is interesting as gratifying curiosity or a love of information or amusement; but that in which a class of the community has a pecuniary interest, or some interest by which their legal rights or liabilities are affected"[16]. Further, it is not necessary to be in the interests of every part of the public. Therefore, for the refusal of a landowner to permit telephone lines to pass over his land to be contrary to "public interest" it is not necessary to show that a district or a large number of persons would be thereby deprived of the telephone[17]. It has in fact been held contrary to "public interest" to deprive two farmers in a remote area of telephone services[18]. After all, as Morris L.J. put it, "One feature . . . of public interest is that justice should always be done and should be seen to be done[19]". On the other hand, "public meeting" is one *organised* for discussion of matters of interest or concern to the general public or a section thereof. Therefore if it is *not organised* for such purposes yet matters of interest to the general public are raised and discussed in the course of the meeting, it is submitted that such meeting will fall outside the scope of the definition.

The definition does not include gathering or assembly of persons convened or organized exclusively for social, recreational or religious purposes or the like. It also excludes conference or seminar bona fide intended for the discussion of topics of a social, educational professional, business or commercial character or the like. It is difficult to see what the effect of this clause is. Would a seminar which is held for the discussion of the White Paper of Government's educational policy fall within this clause and be exempted from the notification procedure? It is submitted that this is not likely to be the case and that the clause does not add anything new to the definition.

3. Strict Liability

Any person who contravenes any condition of a licence[20] or, without the permission of any police officer on duty there, enters and remains in a public

13 Another "relaxation" is that public meetings of less than 30 persons are exempted from the notification procedure. Perhaps this is the result of social pressure because in the proposed bill the number was 20! For criticism, see para(c), p.16 ante.

14 S.2(b).

15 The following discussion is based on the submission that "issues or matters of interest or concern to the general public or a section thereof" is an elaborated form of the phrase "public interest".

16 Per Campbell L.J., *R.* v. *Bedfordshire,* (1855) 24 L.J.Q.B. 84.

17 *Postmaster-General* v. *Pearce,* [1968] 2 Q.B. 463.

18 *Cartwright* v. *Post Office,* [1969] 2 Q.B. 62.

19 *Ellis* v. *Home Office,* [1953] 2 Q.B. 135.

20 S.12(1)(b) Public Order Ordinance.

place to which access has been closed to him[21] or, without lawful authority or reasonable excuse, takes part in any unlawful assembly[22] shall be guilty of an offence. These provisions are reproduced in the amendments under s.17A(1)(b), s.17A(1)(c) and s.17A(3)(c) respectively with the addition of the word "knowingly". The word "knowingly" is apt to introduce a requirement of mens rea[23] as to all the elements of the offence though it has not invariably been held to be so[24]. In other words, the prosecutor has to prove knowledge of all the elements of actus reus on the part of the defendants in order to secure conviction.

Section 17A(4) reveals that this is not the case: the state of mind shall in the absence of proof to the contrary be presumed! The burden of proof shifts to the defendant. He is assumed guilty (or with guilty intent) until he proves the contrary! It is submitted that the presumption is not justified in any sense and the strong presumption of innocence in criminal law is being ignored!

4. Power of Police

(1) Under s.7(3) of the former Ordinance, the Commissioner may attach to a licence any condition as he may think fit. The power is more specifically defined under the amendment. Governor in Council may by order prescribe certain general conditions relating to the matters specified in s.11(1). The Commissioner of Police may impose additional conditions relating to the time a public meeting may be held and the conduct of the meeting if it is held in a place other than a designated public area[25]. In relation to public procession, the Commissioner may impose conditions relating to the forming, conduct, route, times of passing and dispersal of the procession[26]. It is submitted that such provisions should be strictly construed and any condition not relating to that prescribed in the provisions is ultra vires.

(2) Section 6 confers an even wider power to the Commissioner of Police. Under the former law he may control and direct the extent of music or human speech which are to be amplified or broadcast in public place. Yet by s.6(a)(ii) of the amendment Ordinance the power is extended to places other than public places if such music, human speech or sound is directed towards persons in public place, e.g. a private premises beside a public playground.

(3) On the whole, the power of the police remains essentially unchanged – ss.6, 9, 11(2), 14, 17 and 17(D). The repressive character of the former Ordinance has been retained.

5. Constitutional Significance

Under the former Ordinance no public meeting shall be held until a licence is granted. The Amendment provides that all public meeting may be held until it is prohibited. In other words, the Amendment recognises a right of public meeting until it is curtailed. This recognition is exciting as it has never been recognised in both local and British jurisdiction[27]!

(III) PROPOSALS

Much of the criticism raised against the former Ordinance have not been effectively dealt with. The obvious one is the prevalence of "subjective clause" which in effect rules out judicial interference. Wide powers conferred on the police have in no way been curtailed. Introduction of the word 'knowingly' in relation to unlawful assembly, as it is submitted, has only illusory effect. Perhaps the only significant point is the implied recognition of the right to public meeting. On the whole, the repressive nature of the former Ordinance is retained and further changes are to be expected. The writer humbly makes the following proposals of changes:

(1) Although the licensing requirement for public meeting is replaced by the notification procedure, it is submitted that basically there is no

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21 S.12(1)(c) ibid.
22 S.12(3)(a) ibid.
23 See *Grumont British Distributors Ltd.* v. *Henry* [1939] 2 K.B. 711.
24 *Brooks* v. *Mason* [1902] 2 K.B. 743.
25 Public Order (Amendment) Ordinance 1980, s.11(2).
26 S.13(5).
27 The writer is much indebted to Mrs. Mushkat who pointed out that this conclusion was not warranted or a little bit far-fetched. Yet it is submitted that the argument may provide a possible way out in desperate cases where the judge is eager to achieve the ends of justice.

change. Whether a public meeting can be held still lies entirely at the discretion of the Commissioner of Police[28]. The Commissioner of Police may prohibit its holding on a number of statutory grounds as provided in s.9(1). Notice of prohibition may be given either orally or in writing[29]. Yet there is no statutory requirement that the reasons of prohibition should be disclosed! This makes challenge of his decision rather difficult. It is submitted that such statutory requirement should be incorporated: reasons for prohibition be disclosed with sufficient particularity. If it reveals that any irrelevant factors have been taken into account, the decision is liable to be quashed by the judiciary.

(2) Section 16 provides that any person aggrevied by a prohibition order or whose application for a licence is refused or whose licence is cancelled or amended may appeal in writing to the Governor. The Governor may on such appeal confirm, reverse or vary the decision appealed against. However, what is the use of appealing to an executive against a decision made by another executive? Why not leave the decision to the court, which is supposed to be judicially independent[30]?

(3) "Public place" is defined as any place where the public or section of the public is entitled to access whether on payment or not. The amendment makes no change to it. A literal interpretation will include both public and private premises. So far as there is no discrimination to those who enter, a private premises can still be a public place[31]. The amendment draws no distinction between meetings held in public place from those held in private premises. It is submitted that some distinction should be drawn, especially in relation to police power to enter upon private premises.

(4) Under s.17 any police officer of or above the rank of inspector may enter any private premises to stop and disperse any public meeting if he reasonably believes the same is likely to *cause* or *lead* to a breach of peace. At first sight it may seem unreasonable to say that a police officer cannot take steps to prevent an act which, when committed, becomes a punishable offence. But it is on this distinction between prevention and punishment that freedom of speech, freedom of public meeting, and freedom of the press are founded. Here again Dicey has stated the problem in succinct form: "All that is here insisted upon is, that such checks and preventive measures are inconsistent with the *prevailing* principle of English law, that men are to be interfered with or punished, not because they may or will break the law, but only when they have committed some definite assignable legal offence[32]". To hold that the police are entitled to attend a meeting held on private premises because they believe that seditious speeches will be made or breaches of the peace will occur if they are not present does seem to be in conflict with this *prevailing* principle. If any derogation from it is required by modern circumstances, then it ought to be stated in clear and certain terms. It is not suggested that the police, who are noted for their fairness, will in the future act in an oppressive manner, but it is desirable that this exceptional power should not be left vague and undefined. Professor Goodhart suggested that a satisfactory solution would be to provide by statute that all private halls or other places in which public meetings are to be held must be licensed, the licence to contain a provision for the admission of the police to any assembly at which, in their opinion, breaches of the peace may occur[33]. This would make it clear that the police had no general right to enter upon private premises merely because they had reasonable

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28 It is argued that certain control over public meeting is desirable. Otherwise one may call a public meeting of ten thousands people at noon in Central while the police can do nothing about it until breach of peace occurs. Yet if there is no breach of peace, why should the police interfere?

29 S.9(2).

30 How far judiciary is independent in Hong Kong is a moot question. See Eric Barnes, "Independence of Judiciary in Hong Kong" (1976) 6 H.K.L.J. 7. The role of the court was discussed in the Report "Review of the Public Order Act 1936 & related legislation", April 1980, Cmnd. 7891, para. 55-57, p. 16.

31 Except that exempted by the statute.

32 Law of the Constitution, pp. 244, 245.

33 See a note in (1936) 49 Harvard L.R. 156, 157 in which the American law on this point is discussed.

grounds for believing that an offence was likely to be committed there.

(IV) CONCLUSION

If the law is so uncertain or is so framed that people may be liable to prosecution one way or the other, will they respect the law? If they are punished for doing something which people in other countries consider as their fundamental human right, will they obey the law?

After all, is there any right to public assembly?

Notwithstanding that the notification procedure offers a glimpse for argument to the contrary, it is submitted that, not only is there no right to hold public meeting as the law stands today, but every promoter of such meeting may have to face what is in effect a double trial:

(1) by an administrative official – a police officer, who can decide beforehand whether he is prepared to allow the meeting to be held. If he is willing to approve the meeting, the courts are unlikely to be troubled with a case against the promoters, though of course proceedings against both onlookers and participants may ensue if disorder breaks out. Besides, the meeting may be subject to unreasonable conditions.

(2) by the courts – possibly if the promoter fails to obtain, previous police approval, certainly if he declines to accept police refusal to grant such approval. For the police can intervene not merely on account of a breach of the peace, actual or apprehended, but also may stop a meeting or procession if it can be shown that it causes an obstruction by interfering with the ordinary use of the highway.

The requirement that groups apply for approval to hold a public meeting or procession, whether by notification or licence, gives the authorities absolute power to refuse permission for such meetings or processions on any grounds they wish, without any opportunity within the legal system to challenge the denial of such a licence.

Such wide discretionary powers of the police are not necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms and others. If discussion is accepted as an essential liberty, ought the law to permit the police to hamper it as regards the place of its exercise merely on account of suspicions as to probable consequences?

After all, "conflict between the demands of ordered society and the desires and aspirations of the individual is the common theme of life's development. We find it in the family, where, first, the child is disciplined to accomodate himself to the needs of living with others, and then, as the years go by, he begins the painful process of achieving for himself relative freedom of action and a separate identity. The same is true in any organised society. The achievement of liberty is man's indispensable condition of living; yet liberty cannot exist unless it is restrained and restricted. The instrument of balancing these two conflicting factors is the law."[34]

34 Fortas Abe, 'The Limits of Civil Disobedience', The New York Times Magazine, May 12, 1968, p. 92.

SECURITY BILLS OF SALE IN HONG KONG, LAW AND PRACTICE

by Chan Ming Tak, Ricky

(I) INTRODUCTION

*1. Nature of a Bill of Sale**

At common law, a bill of sale is a written instrument of transfer given in a transaction where one person transfers to another the property he has in goods. Bills of sale are of two kinds. If the transfer is an absolute one, the document recording such a transaction is an absolute bill. If, on the other hand, it is given by way of security, such document is a security bill which is the subject matter of this article.

2. Rationale Behind the use of a Security Bill

A bill of sale is often used in relation to a loan transaction (either in the form of an instalment credit transaction or a simple chattel mortgage). The basic problem of which is security. Although in theory, it is possible for a lender to rely solely on the borrower's promise to repay (which is enforceable by a civil action for debt[1]), the lender, in practice, will rarely rely on the borrower's personal credit for fulfilment of the contractual obligations. The legal remedy against the debtor is flimsy in that it is not only time-consuming, tedious and expensive to go through long proceedings, get and execute judgment against the debtor, but hazardous and impractical, for the debtor may turn out to have insufficient (or even no) assets to cover the debt in full, let alone the possibility of the debtor having absconded out of Hong Kong. In such a case, the lender, who becomes an unsecured creditor, will have to content himself with that proportion of the loan which the debtor's available resources (if any) bears to his liability.[2] As a result, it is natural that the lender will demand some form of

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* Any reference to bills of sale in this article is, unless otherwise stated, a reference to security bills.

1 For enforcement of judgments and orders, see R.S.C. Order 42 to Order 52, *the Supreme Court Practice* (1979) para. 42 to para. 52 (pp. 657-818).

2 For problem of bad debts, see R.S.C. and Supreme Court Practice (ibid) and further reading, see John Rear, *This is the Law.* A series of boardcast (Radio H.K. Publication, 1967) pp. 16-20.

security from the borrower because, by so doing, he will be able to claim payment in priority to other creditors from the subsequent realization of the borrower's asset.

3. Forms of Security Over Goods[3]

A loan may be secured on chattels in various forms. It can be either a personal security giving the creditor a secondary contractual right against the guarantor should the debtor default, or a real security giving the creditor certain proprietary rights over the debtor's assets. Some examples of the latter include a pledge, a lien, a declaration of trust (e.g. a trust receipt), a charge over goods, and a mortgage.

4. Advantages of a Mortgage Over Other Forms of Security

A/ A mortgage compared with a personal security over goods

A chattel mortgage (i.e. mortgage of goods), which is a conveyance of chattel as security for the payment of a debt or the discharge of some obligations for which it is given,[4] is widely used nowadays. Being a kind of consensual security, it is better than a mere personal security in that it gives the creditor some proprietary rights over the debtor's goods whereas the efficacy of the latter hinges too much on the completeness in the form of document itself and on the original and continued solvency of the guarantor.

B/ A mortgage compared with a pledge

A mortgage is also better than a pledge in that it would not deprive the borrower of the continuous use and enjoyment of the object – which may be important to the borrower in financing the repayment of the loan – while the loan is outstanding. A pledgee, moreover, never being the legal owner of the property secured (though having some priority interest in that property) cannot foreclose and arrogate to himself the excess of proceeds of sale of the unredeemed property over the amount of his advance, and his only protection depends on his still remaining in possession of the goods. Once the debtor recovers the goods, he is relegated to the position of an unsecured creditor.

C/ A mortgage compared with a lien

A lien has two disadvantages too. Firstly, there is no right of foreclosure. Secondly, there is no right of security unless the goods have come into the creditor's possession.

D/ A mortgage compared with a charge

A charge also cannot confer any proprietary interest on the secured party but merely represents an equitable encumbrance attaching to the goods in the sense that the creditor has an equitable right to look to the goods for satisfaction of his debt in case of the debtor's bankruptcy. A chargee, moreover, cannot foreclose.

All in all, the principal advantage of a mortgage lies in the fact that it enables the mortgagee to satisfy himself out of certain property of the debtor in preference to other unsecured creditors.[5] A chattel mortgage, legal or equitable, may be made orally or in writing. In the latter case, it will amount to a bill of sale and, provided that certain conditions are satisfied, it may be affected by the Bills of Sale Ordinance.[6]

(II) THE BILLS OF SALE LEGISLATIONS IN HONG KONG*

1. History

The origin of the local bills of sale legislation is in Ordinance No. 5 of 1856 (Ordinance for the Amendment of Procedure in Civil and Criminal Cases). Section 2 of the 1856 Ordinance incorporated, among other English statutes listed in Schedule A to that Ordinance, the entire English Bills of Sale Act (17 & 18 Vict. c.36) with the exception of section 8

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3 For the nature of security interest, see Sykes, *The Law of Securities* (3rd ed. 1978) pp. 3-23, and also Fisher and Lightwood, *Law of Mortgage* (9th ed. 1977) p.3.

4 per Lindley M.R. in *Santley* v. *Wildle* [1899] 2 Ch. 477. For other definitions, see Coote, *Treatise on the Law of Mortgage* (1924), p. 6.

5 Rudden and Mosley, *An Outline of the Law of Mortgage* (1967) pp. 10-12.

6 Cap. 19, L.H.K. 1964 ed.

* Any subsequent reference to a statute or ordinance, unless otherwise stated, is a reference to the Bills of Sale Ordinance 1886.

of that Act.[7] Subsequently, the first local Bills of Sale Ordinance (Ordinance No. 10 of 1864) repealed section 2 of the 1856 Ordinance so much as that part related to the English Secret Bills of Sale Act.[8] The simple 1864 Ordinance, containing eight provisions only, was further revised in 1886 by Ordinance No. 12 of that year. The Bills of Sale Ordinance of 1886[9] remains the basic of the local bills of sale legislation up to the present moment despite some amendments made to it.[10]

2. *Comparisons with the English Bills of Sale Legislations*

In England, the bills of sale legislations are made up of five statutes, the two principal Acts, namely, the Bills of Sale Act 1878 (41 & 42 Vict. c.31) and the Bills of Sale Act (1878) Amendment Act 1882 (45 & 46 Vict. c.43), and together with the Bills of Sale Act 1890 (53 & 54 Vict. c.53), the Bills of Sale Act 1891 (54 & 55 Vict. c.35) and section 23 of the Administration of Justice Act 1925 (15 & 16 Geo. 5 c.28). On the whole, with the exception of section 23 of the Administration of Justice Act 1925, the other English bills of sale legislations have been partially or totally incorporated into the local Bills of Sale Ordinance.[11] With a few minor modifications, the provisions in the local statute are identical to its English counterparts, and the sequence of repeal or amendment of the local statute also corresponds roughly to that of the English bills of sale legislations. In fact, there is no material difference between the local statute and the English Acts; and the intention behind the two is the same, namely, to prevent fraud being committed upon creditors by secret assurance of chattels and to prevent needy persons from being entrapped by their creditors to sign complicated documents.[12]

3. *Operation of the Statute*

Not every chattel mortgage is caught by the Ordinance. To be within the Ordinance, there must, firstly, be a document which constitutes a bill of sale within the statutory definition[13] and relates the kind of personal chattels as defined in the statute. Secondly, the document must be an assurance of property by way of security conferring a right of seizure upon the grantee and thirdly, the grantee's right over the goods must be derived from the document.[14]

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7 *H.K. Government Gazette* (23rd March 1856).

8 ibid (10th Sept. 1864). The Bill was discussed in the Legislative Council on 15th Aug. 1804 and was passed on 5th Sept. 1864.

9 ibid (14th Aug. 1886). The Bill was published on 13th, March 1886 (Leg. Co. No. 18). The first reading and the Committee stage took place on 14th April 1886 (Leg. Co. No. 24); the third reading was on 21st April 1886. The Ordinance was subsequently published by the Governor on 14th July and the Royal Confirmation was made on 14th Aug. It is regrettable that the Government Gazette does not contain any comments (if any) on the Ordinance by the members of the Legislative Council.

10 There were five amendments in 1911, viz the Law Revision Ordinance (No. 50), the Law Amendment Ordinance (No. 51), the Law Revision (No. 2) Ordinance (No. 62), the Law Amendment (No. 2) Ordinance (No. 63), which were all incorporated generally, and the Statute Laws (New Revised Edition) Ordinance (No. 19 of 1911) which was repealed later by Ordinance No. 18 of 1923. Further amendments were in 1924 by the Bills of Sale Amendment Ordinance (No. 22 of 1924), in 1937 by the Law Revision Ordinance (No. 27 of 1937), in 1948 by the Revised Edition of the Law Ordinance (No. 20 of 1948), in 1950 by the Law Revision (Miscellaneous Amendments) Ordinance (No. 9 of 1950) and also in 1967 by the Bills of Sale Amendment Ordinance (No. 55 of 1967).

11 The 1890 Act and the 1891 Act became s. 2(b) of the Ordinance. The whole 1878 Act was incorporated with the exceptions of s.10(2), s.17, s.18, s.19, s.23, s.24, second part of s.7, and the parts relating to chattel interest in real estate and to freehold or leasehold interest in the 1878 Act. The 1882 Act was also largely incorporated into the local statute with the exceptions of s.11, s.15 and s.18 of that Act.

12 *3 Halsbury's Statute* (3rd ed.) p. 244.
The Preamble of the 1856 Ordinance reads "where important reforms have been introduced into the Laws of the United Kingdom, with a view of cheapening, simplifying, and expediting the administration of justice, it is expedient and desirable that the Colony should as far as possible have the benefits of these reforms."

13 There are three limbs to the statutory definition of a bill of sale, see *4 Halsbury's Law of England* (4th ed.) p. 247 (para 613).

14 A detailed analysis of the Laws relating to bills of sale is provided in Lyon & Redmau, *Bills of Sale* (4th ed. 1896), in Ball, *The Bankruptcy Deeds of Arrangement and Bills of Sale* (94th ed. 1934). For more recent and comprehensive works, see Professor Sir Humphrey Waldock's *Law of Mortgages* (1950) chapter 5 (pp. 75-126) and Goode, *Hire Purchase Law and Practice* (2nd ed. 1970), chapter 4 (pp. 63-93). For situation in Australia, see Sykes (op. cit.), chapter 12 Helmore's *Personal Property and Mercantile Law* (N.S.W.) (8th ed. 1979) pp. 133-145; in New Zealand, see Gray, *Law of Personal Property* (5th ed. 1968) chapter 9.

4. The Effect of the Statute on Chattel Mortgage

Bills of sale are an evolution of the common law, not a statutory creation. So the local statute is not a code replacing all the former rules of common law and equity concerning security over goods; it merely regulates certain documents by which a proprietary interest in goods is given as security for a loan. The effect of the statute is to avoid, totally or partially, certain written transfers which were valid at law and to impose some requirements (e.g. registration) and restrictions – which did not exist at law – onto those written transfers within the ambit of the statute. In other words, the statute only engrafts some statutory provisions onto the common law rules which still apply (in so far as the rights of the parties inter se are concerned) except to the extent to which it has been modified by the statute.[15]

(III) THE PRACTICAL ASPECT

1. Some Statistics

The number of bills registered each year with the Supreme Court Registry is hitherto not large. From 1947 to 1979, the average number of bills is 144. The figure for the year 1980 (from January up to September) is 80, of which 75 are security bills. Since 1967 (the peak year), the number of bills has been, by and large, decreasing (see Table 1). The average number of bills from 1947 to 1967 is about 200 whereas the average figure from 1968 to 1979 drops to about 140. On the other hand, loans and advances from banks and finance companies have been increasing throughout the period from 1967 to 1979 (see Table 2); in 1979, the amount for the former is $73,690 (million) and for the latter is $13,566 (million).[16] Furthermore, the total amount of loan secured in bills of sale never occupies a significant share in the total amount of bank loan each year. Even in mortgage transactions, bills of sale also never acquire a dominant position (Table 3). In 1980 (up to June), for example, the amount of loan secured in the bills of sale vis-a-vis the total amount of all the mortgage transactions is negligible; the amount of the former is only $12.44 (million) representing 0.6167% of the latter, which amounts to $2,048.66 (million). These statistics show that the importance of bills of sale in Hongkong is dwindling.

2. The Identity of the Parties to a Bill of Sale Transaction

A/ The Grantor

Bills of sale are foreign commercial documents alien to the Chinese before the arrival of the British merchants in 1840. In the past, and even up to the present moment, the most common methods to raise a loan, in case of an individual, is a pledge,[17] borrowing from close friends or relatives, or from private moneylenders (the "loan-sharks") or recently, from finance companies. A less popular borrowing method nowadays is to resort to a kind of Contributory Society ("Kung-Hui"), which is an aggregate of individuals acquainted with each other.[18] In case of commercial firms or factories, they usually look into their own internal sources of finance or to the public by issuing shares (if they have been incorporated), rather than to resort to chattel mortgages. Moreover, the usual practice for those incorporated firms in a loan transaction is to execute a debenture in favour of the lender with a specific charge or a floating charge over the former's assets. Therefore, bills of sale are only used by a small segment of the local mercantile community, namely, those unincorporated firms, chiefly small or medium size factories with scanty amount of capital.

B/ The Grantee

The majority of grantees are banks and finance companies (see Table 4). The remaining grantees are largely moneylenders. In 1979, there were 115 banks and 269 finance companies in Hongkong;[19] the exact number of moneylenders is unknown for only a small proportion (about 10%) of them are registered.[20] Other financial institutes such as insurance companies (the number in 1979 was 338[21]), credit unions and co-operative society, in practice, never

15 *3 Halsbury's Law of England* (3rd ed.) p.242 (para. 670).
16 *H.K. Annual Report 1980,* Appendix 12 to Chapter 4.
17 Number of pawnshops in 1976 was 144, the average loan volumn was 1,300,000. See an unpublished article by K.K. Li, "Financial Intermediaries in Hong Kong." (1976).
18 Cornullus Asgood, *The Chinese, a study of a Hong Kong Community* (Vol. 2) p. 777.
19 *H.K. Annual Report 1980,* pp. 43-44, see also Alvin Rabushka, *Hong Kong, a study in Economic Pattern* (1979) Part III, p. 80.
20 Cheng Tong Yung, *The Economy of Hong Kong* (1977) at p.243.
21 *H.K. Annual Report 1980,* pp. 34-35.

participate to any significant extent in bills of sale transactions.[22]

3. Comparison with the Situation in the U.K.

In England, the amount secured in the majority of bills is below £100, with a predominating interest rate which ranges from 40% to 50%, the most common rate being 48%. Exorbitant rate charged in the bills is not uncommon, no less than 22% of the bills had an interest rate range of 70% to 80%.[23] The use of bills of sale as a mortgage of property being purchased with the loan as opposed to the pure mortgage of property (an existing one) as security for general purposes is occasionally found. In 1970, the subject matter of 30% of such bills was cars and they were taken by money-lenders who were automobile trading specialists.[24]

The local situation is quite different. Firstly, the amount secured in the bills is large, usually in the range of $100,000 to $200,000 with an interest rate ranging between 10% to 20%, and the loans are usually short term loans (see Table 5). Secondly, as bills of sale are frequently used only among those small factories, who cannot offer other kinds of security, for the purpose of renovating their existing production capacity to cope with a new project, the bills are almost invariably taken on grantors' existing goods, usually machineries (see Table 6) and are rarely taken for the purpose of financing the acquisition of goods in contemplation, in which case, the usual method is a hire-purchase arrangement.

Despite all these differences, there is one similarity between the situation in England and that in Hong Kong, and that is the undeniable fact that bills of sale, as a device to a loan transaction, becomes less popular nowadays than in the past. Several reasons can be attributed to this. Our discussion concerning these reasons concentrates on three major aspects, namely, the change in the local economic structure, the practical difficulties facing the parties to the bills of sale and the legal problem, particularly the technicalities in the statute.

(IV) REASONS FOR THE DECLINE IN THE NUMBER OF BILLS

1. Economic Factors

A/ The growth of the economy

In the past, small industries which made up the majority of the grantors were predominating over the industrial establishments in Hong Kong. Most of them were sole-proprietorships or partnerships and very few of them were incorporated. These age-old traditional family-owned concerns usually experienced financial difficulties in setting up or in running their business.[25] While some of them resorted to their friends and relatives, a considerable number of them resorted to the banks and the only acceptable form of security they could offer was usually their machineries. In those days where sophisticated types of loan were less available to these needy small factory owners, the only way was to use bills of sale.

However, as the economy began to develop, the number of these small-size indigenous business associations decreases. This is partly a result of keen competition among themselves. More important is the fact that they are largely out-competed by those large-scale, efficiently run firms which, with sufficient capital and a sound foundation, can survive the economic crisis.[26] The corollary is that the surviving firms are those successfully run establishments which prefer to rely more on their internal source of finance, for example, undistributed profits, depreciation allowance, reserves, and so on, rather than on chattel mortgages.

B/ The availability of other alternatives to a loan

The use of bills of sale is only one of the many ways to obtain a loan. Provided that his relationship with the bank is close, a borrower may be able to obtain unsecured loans.[27] But, by far, secured loan on real or personal property, on choses in action (for example, shares), on a life insurance policy or on a legacy, etc., are more commonly used. Moreover, the manufacturer may be able to get Packing Credits

22 See John Bash, *Taxation and Investment Law in Hong Kong* (1978) Chapter 8.

23 A.L. Diamond, *Instalment Credit* (1970) pp. 78-80.

24 Growther Committee on *Consumer Credit Report* (Cmnd. 4596/71) vol. 2, p. 549.

25 Chung Tong Wu, "Societal Guidance and Development, A case study of Hong Kong" (1973, U.C.C.A. Dissertation) at Chapter 7 pp. 260-262.

26 K.P. Chou, *The Hong Kong Economy, a Miracle of Growth* (1966) pp. 63-70.

27 Unsecured loan is not very common, but a bank may occasionally give advance to personal borrowers and professional customers.

or Manufacture Advance.[28] In addition, there are also other devices to raise a loan, such as the use of a trust receipt, seasonal advances (chiefly to farmers) and advance (above 100%) against assigned accounts which is given for a short period of time to be repaid by the future sale.[29]

As indicated above, firms, though small in the start, may be improved and expanded due to efficient management, and once established, they become more accessible to other kinds of loan for they can now offer more acceptable forms of security. Moreover, small firms nowadays can resort to the Government-sponsored Small Industrial Loan Scheme[30] for assistance to bridge over periods of financial difficulty. Besides, the proliferation of finance companies with the great varieties of loan services they provide means that loans are no longer confined to chattel mortgages. Furthermore, after the Stock Exchange turnover in 1973 with the resulting increase in government supervision on the stock exchange market,[31] the latter has become an important capital market for industrial or commercial establishments. In the past, the fear of a loss of control in family-owned concerns prevented many local firms from raising funds from the public by issuing shares. However, recently, increasing number of firms, having realized the great potential of the Stock Exchange as a source of capital, started to incorporate.[32] All in all, intended borrowers now have more alternatives and the source of needy funds is no longer restricted to that raised by mortgaging their machineries.

C/ Bank loan policy

The banks usually adopt a very strict approach towards small unincorporated firms[33] in which case the banks are more concerned with security rather than with the business potential of the borrower. Therefore small firms, even having good prospects for growth but offering insufficient security will be rejected.

Like all other loan transactions, the bank will meticulously inquire into every aspect of the loan proposal. Firstly, they will inquire into documentary proof to ascertain the original price, origin, existing state of condition, title and even reliable source of spare parts of the machinery in question in order to determine the true nature of the security. Technical surveyors who are experienced in dealing with the particular kind of machinery (the subject matter of the bill of sale) will be engaged to give an assessment of its value, function and whether it is commonly used among other local merchants in the same trade.

Secondly, the bank will painstakingly analyse the entire project to be financed to see the prospects of success and to determine whether the purpose and usage of the loan is realistic or speculative.

Thirdly, the bank will scrutinize the latest balance sheet, the Profit and Loss Account (to see the amount of reserve, trade debit, etc.) and also the physical inventory (to determine the accuracy of the book records) in order to see if the intended borrower could operate his proposed programme safely and profitably in any event (for example, a price drop, a change in taste, sudden change in demand and in production cost, etc.).

Besides, the bank will also consider the internal management and the creditworthiness of the borrower's business. The bank, in addition, may also check the director's character and integrity in the trade.[34] The corollary is that those small firms (which constitute the majority of the grantors of the bills of sale) are usually unable to pass through all these hurdles even though they can offer some form of security for the proposed loan. This is one reason why the number of bills registered each year is never large.

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28 Advance of up to a maximum of 50% of the total value of the Letters of Credit or confirmed order from buyers may be obtained, see M.G. Carruthers, "Financing Industry" (1966, Feb.) Far Eastern Economic Review pp. 367, 369.

29 For the types of loan, see Chiu Hung Chen, *A Manual of Banking Practice for Executives* (1977) vol. 2, pp.31-38.

30 *Industrial Investment, Hong Kong (1974-75),* by the Trade Developing Council, Chapter VII.

31 *H.K. Annual Report 1980,* p. 44.

32 In 1979, there were 10,284 newly incorporated companies, 1438 more than 1978. At the end of 1979, there were 67,429 companies compared with 57,945 in 1978. (*H.K. Annual Report 1980,* p. 34).

33 Chung Tong Wu, (loc. cit.).

34 Chiu Hung Chen, (op. cit.) pp. 24-30.

2. Some Practical Difficulties

A/ Problems facing grantee

(i) The technical difficulties

To begin with, a chattel mortgage involving machinery involves highly technical and expert knowledge. It is not only difficult to have an accurate assessment of the value of the machinery at the date of the bill but also highly speculative in forecasting the value the machinery can realize in a default situation.

(ii) Problems in case of a seizure

Two further problems arise in relation to a seizure of the subject matter of the bill in case of default. Firstly, the removal of the machinery, which is usually firmly bolted to the ground, is not easy because an unwise moving of the machinery may cause damage to it and reduce its value. More troublesome is the possibility of causing a confrontation with the workers working in the grantor's premises. A seizure is usually, though not always, a prelude to the final winding up of the grantor's business. The shrewd workers, upon learning their employer's financial difficulty, will prevent the removal of their employer's asset by the bank because this directly affects their share in case of their employer's final winding up. Moreover, the statute[35] prohibits immediate seizure and realization of the security. Armed with their trade union, the workers will make extortionate demands on the bank, demanding that their wages in arrears being paid first before any removal of their employer's asset. The result is a deadlock followed by endless negotiations and mediations together with publicity and all kinds of troubles. Therefore, the use of bills of sale in Hong Kong is limited to a few banks which have experience in dealing with these situations.

(iii) Necessity of keeping a close watch on the grantor

Besides, the law does not provide sufficient protection to the grantee's interest. Firstly, although the grantee's title in goods comprised in the bill usually prevails over claimants whose interests arise subsequently, his title may be defeated if it is purely equitable.[36] Secondly, the chattels in the bill are vulnerable to distress for rent,[37] for rates and tax,[38] and to the claim of grantor's trustee in bankruptcy.[39] Thirdly, a lien holder may also exercise his lien against the grantee and in some situations, to recover the value he adds to the chattels.[40] Fourthly, the grantee, without leave of the court, cannot seize or remove the goods if they have already been in the possession of a duly appointed Official Receiver.[41] In addition, the grantee's claim will lose if the chattel in the bill has been attached to land or building[42] or has become an accession to a third party's goods.[43] The grantee's title is only valid as against an execution creditor.[44]

Consequently, the grantee has to be extremely vigilant as to the grantor's financial well-being and must be sharp enough to take the chattels out of the possession of the grantor before the latter commits any act of bankruptcy. In case of large size loan, the grantee may even have to engage private investigation agents to carry out periodic checking upon anything relating to the grantor. All these troubles (which result in extra costs) to the bank render the latter reluctant to use bills of sale as a device to a loan transaction.

B/ Problems facing the grantor

(i) Duty to report

The grantor is obliged to report everything relating to the chattels comprised in

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35 S.17 and s.14 of the Bills of Sale Ordinance 1886.
36 A bona fide purchaser for value without notice acquiring a legal title will prevail over the grantee's title.
37 S.102 and s.103 of the Landlord and Tenant (Consolidation) Ordinance (Cap. 7, L.H.K. 1975 ed.).
38 S.18.
39 S.2(b).
40 *Greenwood* v. *Bennett* [1913] QB 195.
41 *Re Mead, ex parte Cochrane* (1875) E.R. 20 Eq. 282.
42 *Wake* v. *Hall* (1880) 7 Q.B.D. 295.
43 *Appleby* v. *Myers* (1867) L.R. 2 C.P.D. 651.
44 *On Faith Wollen Weaving Fty.* v. *Star Ind. Corp.* [1965] H.K.L.R. 80.

the bill. They, for instance, cannot even replace spare parts to the machinery without their grantee's prior consent; otherwise, this constitutes a breach of the covenant relating to the maintenance of security in the bill (which justifies a seizure).

(ii) Limited extent of the interest

In case of a chattel mortgage, there can only be one legal mortgage of the goods at one time leaving the grantor with his equity of redemption, which in case of chattels, is of little value.

(iii) Acceleration of grantor's insolvency

The registration of the bill, an essential requirement under the statute, may vitiate or even wreck completely the grantor's credit amongst all persons having any dealing with him thus precipitating his final insolvency.[45] Although it is no longer true today that bills of sale are usually the last resort of a person in extreme financial embarrassment[46] (for the local bills of sale transactions always involve an element of genuine investment and the banks are always very discriminating in their loan policy), it is an undeniable fact that grantors to a bill of sale will always be suspiciously treated, especially when he is trying to obtain a further loan.

From practical problems we pass to the most headache problem facing every person to a bill of sale, namely, the technicalities of the statutory provisions.

3. Technicalities Under the Statute

A/ Definitions under Section 2

(i) Meaning of "personal chattels"

The artificiality of it lies in the fact that it embraces some form of property which would not be regarded as personal chattels at law (for example, fixture and growing crops) but excludes others which would be so regarded, for example farm stock and produce.

Under the statute, fixtures "separately assigned" are personal chattels. It is clear that a mortgage of land silent as to fixtures is outside the scope of the Ordinance whereas a mortgage of a fixture alone is.[48] It is, however, not clear whether a mortgage of land with some mention of fixture is also inside the ambit of the Ordinance.[49]

(ii) Confusion as to future goods

The contradiction in meaning between the definition of personal chattels and of a bill of sale raises the problem as to whether a mortgage of future goods is within the statute.

One view is that it is not because, firstly, future goods are not goods capable of complete transfer by delivery;[50] secondly, they are not an immediately operative assurance of property at all; and lastly, they confer no power of seizure.[51]

The correct view, the writer submits, is that the term "article capable of complete transfer by delivery" in section 2 refers to the physical characteristics of the asset sought to be transferred and not the ability of the transferor to deliver the asset.[52] Besides, the extended definition of a bill of sale given in the third link of the statutory definition aims at catching documents containing an assignment of future goods; otherwise, the statute will be easily evaded by taking a bill shortly before the grantor will have acquired the ownership of the asset in question. So, the statutory definition of personal chattels, though remaining unchanged ex facie, is in fact extended by

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45 J.B. Matthew, "Ought Bills of Sale to be abolished?" (1891) 7 L.Q.R. pp. 74-79.

46 Hanbury & Waldock, *Law of Mortgages* (1938) p. 20 and also Waldock, (op. cit.) p. 18 and p. 79.

47 *Thomas* v. *Kelly* (1888) 13 App. Cas. 306 at 517.

48 *Meux* v. *Jacobs* (1875) L.R. 7 481; *Waterfall* v. *Penistone* (1856) 6 E & B 876, and *Re Yates* (1888) 38 Ch. D. 112.

49 *Re Yates*, supra note 48; c.f. *Re Brooks* [1894] 2 Ch. 600 and *Small* v. *National Provincial Bank* [1894] 1 Ch. 686.

50 See Lord Macnagthen in *Thomas* v. *Kelly*, (supra note 47). Lord Macnagthen stressed that the operation of the statute (and the meaning of personal chattels) is confined, with two exceptions in s.13, to chattels capable of delivery at the time of the bill.

51 Sykes, (op. cit.) p. 474.

52 *3 Halsbury's Law of England*, (3rd ed.) p.262 (para. 638).

the third limb to the statutory definition of a bill of sale so as to bring in future goods.[53] Lord Macnagthen's view in *Thomas* v. *Kelly* was criticized by Cussen ACJ in *King* v. *Criag*[54] who remarked that Lord Macnagthen failed to observe the effect of the extended definition of a bill of sale. Indeed, if Lord Macnagthen's approach is correct, it will render section 12 nugatory, as when section 12 speaks of grantor not being the true owner at the time of the bill. This would be a contradiction in terms since a lack of ownership would prevent the chattel from being capable of transfer by delivery thus constituting a personal chattel within the statute. Lord Macnagthen's further argument that specific description (which is required under section 11) can only take place in existing goods is also unsound for many future goods are equally capable of being specifically described.

As a matter of construction, it is more permissible to widen an interpretation clause so as to comprehend a class of objects which are inferentially included in it by the express mention of some of their kind in another part of the same statute, than to restrict the clause to a narrow class of objects altogether, and only add to it the favoured exceptions.[55] Therefore, it is submitted that the latter view is more sensible and logical.

(iii) Contradictions between section 2 and section 15

Under section 15, the use of the statutory form (Form 2 in the Schedule) is mandatory. But, some instruments defined as bills of sale in section 2 (for example, receipt and inventory, charge or agreement to charge, power of attorney, etc.) can never be used because their peculiar nature prevents them from being drawn in accordance with the statutory form, which only contemplates an outright transfer of goods.[56] It is ridiculous for a statute to provide for the use of something in one section but prohibit the use of them by another section in the same statute.

B/ Effect of registration

The original intention behind section 7 is to give notice to a third party; yet a failure to comply with it renders the security void even as against the grantor.[57] Moreover, the requirement of registration is not very effective in protecting grantees for the doctrine of constructive notice was held not to apply to chattels.[58]

C/ Anomalies in the statutory form

Since the object of the statute is that, firstly, the borrower should understand the nature of the security he gives, and secondly, that a creditor or anyone upon searching the register should be able to understand the position of the borrower without being compelled to seek legal advice as to the meaning of the document, the statutory form is meant to be simple and comprehensible to the layman.[59] However, the curious wording of the statutory form backfires this laudable object.

(i) Meaning of "now paid"

The form refers to a consideration of a stated amount "now paid" to the grantor. To the layman, it is quite surprising to learn that the two words can also mean payment already made prior to the date of the bill,[60] or payment made a very short period of time after the execution of the bill.[61] More surprising to the simple-minded grantor or grantee is the fact that the law is more strict in the latter case than is in the former.

(ii) Consideration

Since the form only requires the bill to be made for the "payment", not repayment, of money and provides, as an alternative,

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53 ibid p. 245 (para. 610).
54 ibid p. 246 (para. 610).
55 Sainsbary, "The True Ownership Clause in Bills of Sale Act" (1924) 40 L.Q.R. 465, 470.
56 *3 Halsbury's Law of England* (3rd ed.) p. 288 (para. 670).
57 *Growther Report* (op. cit) Chapter 4.2.1. Part V.
58 *Joseph* v. *Lyons* (1884) 15 Q.B.D. 280 at 286 per Cotton L.J.
59 *Davis* v. *Burton* (1883) 11 Q.B.D. 539 and also per Lord Herschell in *Manchester Sheffield etc. Rly. Co.* v. *N. Central Wagon Co.* (1883) 13 App. Cas. 554 at 560.
60 *Re Pound* (1915) 85 L.J.K. B. 393.
61 *Re Smith* (1880) 15 L.J.N.C. 39.
See E. Cooper Willis, "Observation on the working of the Bills of Sale (1878) Amendment Act 1882," (1887) 3 L.Q.R. pp. 300-313.

that people can put down "whatever else the consideration may be", it follows that the consideration may be of a non-monetary character. The question whether an object whose value is above $150 (for example, a gold watch) can be a consideration is left open.

(iii) "Equal payment"

More incomprehensible to the layman is the fact that although the form refers to "equal payment", it is permissible to repay by unequal instalments with times of payment and quantum to be stipulated by the parties. It is submitted that the word "equal" is superfluous and misleading especially to those who have no legal training. The word will give sense to the sentence if the bracketed words "or whatever the stipulated time ... of payment" are deleted. Furthermore the words "equal payment" is ambiguous as to whether the sum required to be filled in is an aliquot part of the principal alone or of the total of principal and interest.

(iv) Payment upon a contingency

Reading literally, the words "or whatever the stipulated time or times of payment" plainly allow a payment upon a contingency since if it is true that a time to be ascertained on a contingency is a time agreed on, then a time agreed on is a time stipulated. But the court has repeatedly refused this interpretation.[62] In trying to carry out the intention of the statute they believed, the court was actually influenced by something outside the statute and this is a direct result of the inept simplicity of the statute as regard matters like this.

(v) Specific description of chattels

Another source of confusion comes from the words in the middle of the form "assign all and singular ... and things specifically described in the Schedule". Under section 11 and section 12, the grantee can take a charge over after-acquired property and the avoidance under these two sections is partial in that the bill remains valid as against the grantor. But section 15, by requiring all bills to be in accordance with the statutory form, deprives the grantee of the benefit given by sections 11 and 12 because the rigidity plus the curious wording of the form cannot accommodate such a charge. Therefore, section 15 denies an arrangement and annuls a legal right expressly allowed by some provisions in the same statute and turns a qualified avoidance into an absolute one.

(vi) Maintenance and defeasance of security

Even harder for the layman to understand are the words in italics bracketed at the end of the long paragraph in the form, which allow the parties to agree between themselves on the terms as to maintenance and defeasance of security, the meaning of which is controversial even among the judges.[63]

(vii) Comments

Providing a statutory form is certainly not a bad thing in itself provided that it is both easy to understand and to comply with; flexible to accommodate commercial requirements in the forever changing circumstances and provides relief in case of minor infringement which does not materially affect other parties. Thus the form so provided should not go beyond what is necessary for the protection of the parties. The odd thing about the statutory form is that it insists on simplicity where it appears unintelligible to do so but invites prolixity where brevity seems to be more desirable. The aim of having simplicity in the form may be achieved but for the insertion of words in italics bracketed throughout. The legislature, instead of prescribing a hard-and-fast form only to be filled in mechanically, allows, within certain limits, some terms to be agreed upon by the parties. But these provisions may be drafted as great

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62 *Sibley* v. *Higgs* (1885) 15 Q.B.D. 619; *Re Williams* (1883) 25 Ch. D. 656; c.f. *Lunsley* v. *Simmons* (1887) 34 Ch. D. 698.

63 *Re Barber* (1886) 17 Q.B.D. 259, *Goldstorm* v. *Tallesman* (1886) 18 Q.B.D. 1; but c.f. *Bianchi* v. *Offord* (1888) 14 Q.B.D. 71 and *Fucher* v. *Coble* (1887) 18 Q.B.D. 494.

a length as the ingenuity of the draftsman can utilize. Indeed, it is very common to find lengthy and verbose provisions in the bill, especially in the case of a large-size loan. As a result of this partial concession to the notion of freedom of contract, the original aim of having simplicity of shortness was frustrated by allowing the parties to engraft legitimately prolix provisions into the bill.

Besides, the aim of having simplicity in the form seems to be an expedient more familiar to ancient mercantile practice than modern commercial law. It has been pointed out that the parties to a bill nowadays in Hong Kong are largely businessmen, with banks on the one hand and factory proprietors on the other. The Victorian relic of small needy impecunious persons being beguiled by usurious moneylenders is no longer true of the bill of sale transaction presently carried out in Hong Kong. In the present day complicated commercial transactions, the need for clarity and exactness in the document prevails over the necessity of simplicity or shortness. From the point of view of both the lender and the borrower (nowadays in Hong Kong), it is extremely fair to express every detail to the loan transaction in a meticulous way in the bill even at the expense of simplicity and comprehensibility to the parties concerned or to other people. After all, the intelligibility of the document can easily be obtained from their legal advisers whose assistance is always available to them at their demand.

D/ Problems arising from section 15

The criterion is that the bill should not depart in certain material aspects from the form. Whatever form the bill takes, it must produce the same legal effect it would have produced had it been drawn in the form so provided in the statute.[64] Therefore certain points of detail in the form are treated as matters of substance, thus producing a lot of technicalities which may upset a purely just claim. The following are some examples of the technicalities so involved:

(1) An untrue or misleading description of the names and addresses of the parties;[65]

(2) Grantor fails to acknowledge receipt of money in case of a present advance;[66]

(3) An assignment of chattels not by way of security;[67]

(4) An omission as to the attestation clause, or as to the name, address, and description of the attesting witness;[68]

(5) The description of chattel being made in the body of the bill (which should be relegated to the schedule annexed to the bill[69]) and an omission of a schedule altogether;[70]

(6) Failure to insert amount secured, interest rate and time of payment, or they are made uncertain;[71]

(7) An omission to include proviso limiting the grounds of seizure to those specified in section 14;[72]

(8) An omission to put in any agreed terms concerning the maintenance or defeasance of the security or the inclusion of other terms of a nature other than a maintenance or defeasance of the security. The exclusion of one such term will invalidate the whole bill even though all other terms are for maintenance and defeasor of security;[73]

(9) A mortgage of after-acquired property inserted in the body of the instrument is bad whereas the occurrence of it if made in the schedule is good;[74]

(10) A failure to attest under section 7 will render the security in the goods void but leaving the other covenants intact. However, since attestation is one of the characteristics of a statutory form, its omission renders the whole bill void.

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64 *Re Barker*, (loc. cit.).
65 *Wong Shau Kee* v. *Leung Aiu Huen* [1930] H.K.L.R. 7.
66 *Davis* v. *Jenkim* [1960] 1 Q.B. 133.
67 *Robert* v. *Robert* (1884) 13 Q.B.D. 794.
68 *Parsons* v. *Brand* (1890) 25 Q.B.D. 110.
69 *Thomas* v. *Kelly*, (loc. cit).
70 *Griffins* v. *Union Deposits Bank* (1887) 3 T.L.R. 608.
71 *Myers* v. *Elliott* (1886) 16 Q.B.D. 526.
72 *Far East Bank* v. *Meng Yung Tai* [1963] H.K.L.R. 390.
73 *Re Barber*, (loc. cit.).
74 c.f. *Thomas* v. *Kelly*, (loc. cit.).

E/ Overall comments on the statute

On the whole, it is fair to say that the statute has done what it ought not to have done in defeating many perfectly honest transactions by rigidly adhering to minor details, and has left undone which it ought to have done in not putting down opportunities for oppression. A philanthropist lending money but weaving his right to interest loses the benefit of his security. On the other hand, there is nothing in the statute to prevent a large increase to principal advanced being secured; a situation of which is equally as harsh as exorbitant interest rate being charged.

In practice, it protects people who do not need such a protection (namely, the merchants who by far constitute the majority of the grantors), but fails to do so in the case of those who really wants such a protection (namely, those small needy people). After all, these people are still compelled to seek legal advice because the bill and all the technicalities therein are by no means simple and comprehensible, and indeed, they have never been made simple by either the court or by the Legislature.

Rudden and Mosley[75] suggests that an ideal framework should be able to achieve the three aims of the law of mortgages, namely, to protect the lender by giving him prior claims on the security, to protect the borrower and to protect the public. It can hardly be said that situations under the present statute achieve these three aims. Indeed, the exacting and cumbrous nature of the statute interferes directly with perfectly honest transactions. In as much as the original motivation of it was to protect grantors, it depended on a theory which belonged to the last century and on circumstances peculiar to the Victorian society which differed entirely from the present commercial environment in Hong Kong. The rationale (i.e. to protect needy persons from usurers) on which it is based is entirely out of touch with modern commercial realities. It fails to distinguish private loans from commercial transactions. The inflexibility and the mass of technical minutia impede the use of bills of sale as instruments of chattel security financing. The outcome is that evasion of it was frequently attempted, especially by dressing the transaction as a hire-purchase transaction.[76] In short, the mistake is to try to force business transaction into a rigid form instead of stating and applying the principles.

F/ Miscellaneous

Other undesirable features of the statute include firstly a failure to provide any link with the Money-lender Ordinance[77] resulting in an unhappy overlap of the two pairs of statutes, and secondly, the fact that the statute only touches on a segment of the legal relations between the parties leaving other rights for example, sale, foreclosure, borrower's right of redemption, etc.) to the common law rules, and lastly, the fact that by prohibiting the taking of security on future goods, the statute represents a major obstacle to the financing of the dealer's stock in trade by way of a "cross-over" security.[78]

One last comment is that the use of bills of sale, once validly created, enables the grantor to obtain credit but withdraws overnight the property upon which the creditor advances his credit from liability to be seized in execution at the suit of his creditor who is well justified in assuming the style a person lives is some indication of his financial position.[79] And the use of bills of sale may on some occasions also prejudice the grantor's landlord.

(V) CONCLUSION

The preceding paragraphs clearly show that in Hong Kong as well as in England, the unsatisfactory nature of the bills of sale legislation operates unfairly to nearly all the parties to a bill of sale transaction and thus precludes the possibility of effecting a chattel mortgage to secure the payment of instalments in a consumer credit transaction for the purchase of a chattel. However, although in England, the bills of sale may be the last resort of the impecunious, this is not so in Hong Kong where bills of sale transactions usually associate with some element of genuine investment. Therefore some criticism of

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75 *An Outline of the Law of Mortgage* (1967) pp. 2-3.

76 A.L. Diamond, "Hire Purchase Agreement as Bills of Sale". (1960) 23 M.L.R. 399 and 516, and see Goode, (op. cit.) Chapter 4, p.63.

77 Cap. 163, L.H.K. Rev. ed. 1977.

78 Diamond, *Instalment Credit* (op. cit.) pp. 61-62 and Chapter 5.

79 J.B. Matthew, (op. cit.) p. 74.

the bills of sale by the English writer basing on the assumption that bills of sale are only taken by persons in extreme financial stringency may not be true to the local situation. Nevertheless, it is undisputed that the present unsatisfactory state of the law relating to bills of sale is largely a result of the archaic nature of the bills of sale legislation especially the rigid requirement of complying with the statutory form. All in all, the statute is based on a theory which belonged to the last century and is completely out of touch with reality.

In view of the above, the writer, while acknowledging the importance of bills of sale as a device to obtain a loan, at least to certain groups of people in the economy, ventures to make some proposals. Firstly, it is desirable to have the present bills of sale legislation which is cumbered with anachronisms repealed. The new legislation should be more commercially realistic with all formal requirements kept to a minimum. Secondly, the new statute should also provide the normal rights of mortgagee and mortgagor for the grantee and grantor respectively. Lastly, there should no longer be any prescription of a particular form to be used by the parties. As indicated above, the parties to a bill of sale are businessmen, merchants or factory owners on the one hand, with banks on the other, they should be allowed to use whatever kind of loan agreement that can neatly fit their respective aims. In short, in preserving a proper balance between the opposing interests involved in bills of sale transactions, the legislature in making new legislations, should adopt a functional point of view of what needs a security transaction should try to answer.[80] The unsatisfactory nature of the present state of law concerning bills of sale is a good example of the kind of danger that would result when an English statute is 'shoehorned' into a Hongkong legislation regardless of the peculiar local situation.

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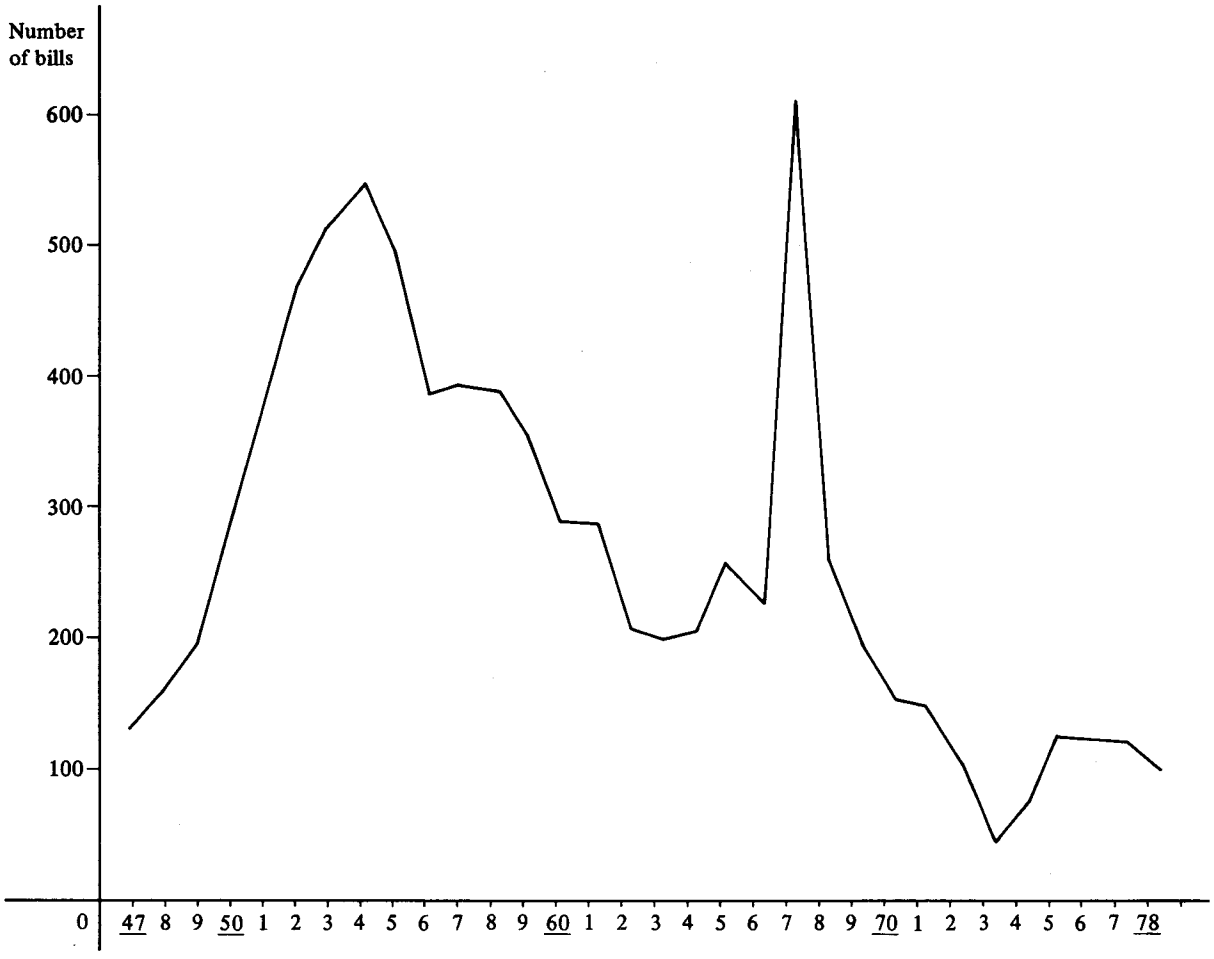
80 For proposals concerning chattel mortgages, see *Growther Report* (op. cit.), the *Rogerson Report* and the *Molomby Report* (C. No.5) – 777/72, the latter two reports deal with the situation in Australia. The three Reports were heavily influenced, so far as the security aspect was concerned, by the *U.S. Uniform Commercial Code* (especially Article 9 of the U.C.C.). It must be pointed out that, although the three Reports devote special attention to the position of security *(Molomby Report,* pp. 108-125, *Growther Report,* pp. 196-230 and *Rogerson Report* pp.9, 15-18), the discussion of chattel mortgages in them is mainly in the context of consumer credit laws in the respective country, which may not be directly applicable to Hong Kong. The writer is of the opinion that the proposals contained therein are only of reference value. Also note that the British Parliament has implemented only part of the *Growther Report* relating to consumer sale and loans and by passing the Consumer Credit Act, 1974; the part concerning chattel security is left untouched.

APPENDIX A

Table 1
Number of bills registered with the Supreme Court Registry from the year 1947-1978



N.B. (i) The above reference to year refers to years beginning with the letters "19";
(ii) The number of bills in 1913 was 100
(iii) The number of bills in 1979-80 has not yet been published;
(iv) The number of bills from 1st, January 1980 up to 1st September 1980 is 80, (of which 75 are security bills).

Table 1A
Number of bills registered in H.K.

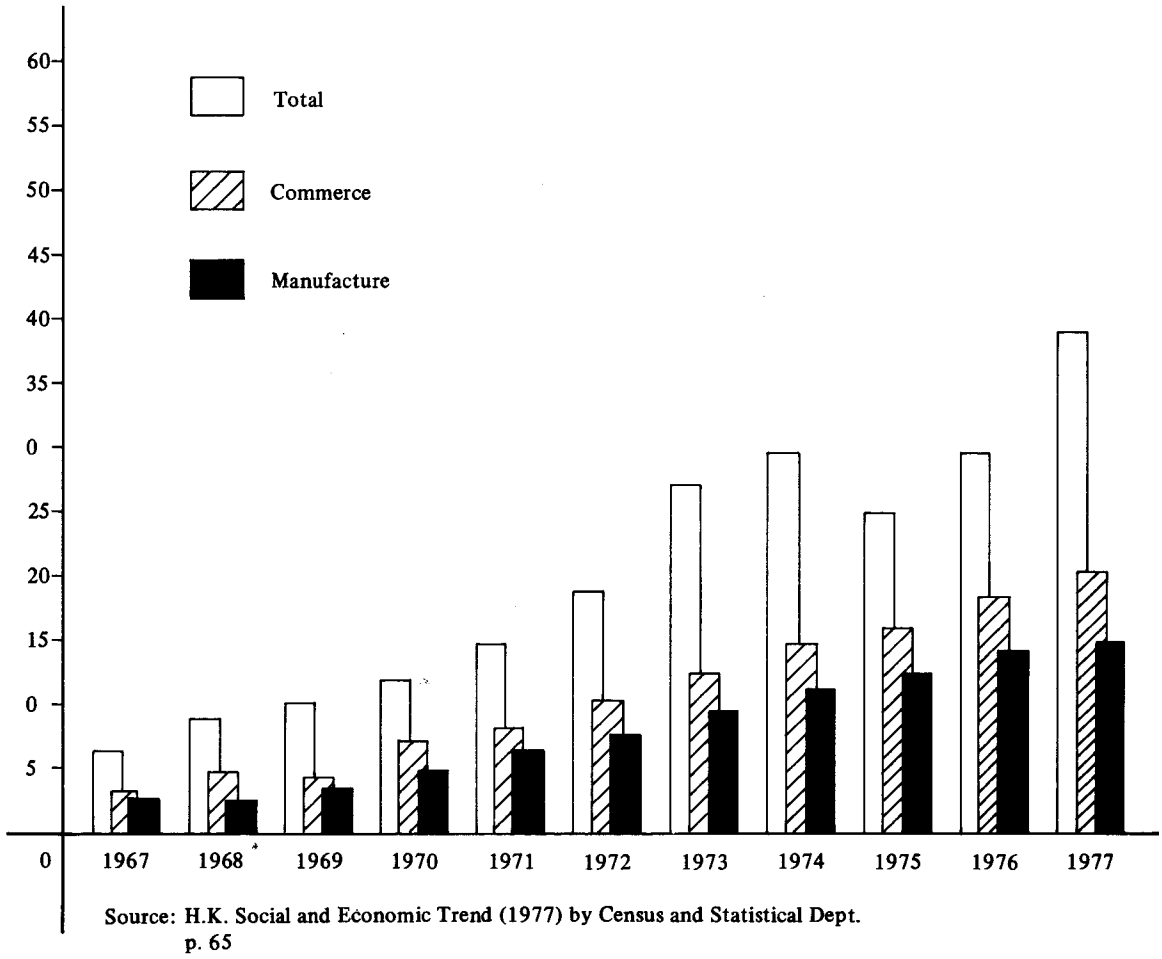
Year	*Number of bills*
1913	100
1947	130
1948	157
1949	198
1950	294
1951	379
1952	468
1953	512
1954	545
1955	498
1956	389
1957	395
1958	390
1959	353
1960	287
1961	284
1962	203
1963	195
1964	202
1965	253
1966	221
1967	615
1968	268
1969	196
1970	156
1971	143
1972	101
1973	48
1974	76
1975	126
1976	122
1977	124
1978	104

N.B. Statistics are taken from the Annual Judicial Statistics (1972-79) and from the Government Departmental Report-Supremene Court Registrar (1947-71).

Table 2
Bank Loans and Advances (1967-79)

Year	*Loan Total ($ Million)*
1967	5,401
1968	6,038
1969	7,884
1970	9,670
1971	11,836
1972	17,726
1973	23,263
1974	29,549
1975	24,998
1976	29,480
1977	36,855
1978	52,814
1979	73,690

Table 2A
Major Components of Loans and Advances



Source: H.K. Social and Economic Trend (1977) by Census and Statistical Dept. p. 65

Table 3
Instruments Registered in the Land Office

Year/Month	*Building Mortgage*		*Other Mortgages*	
	No.	*Value ($ Million)*	*No.*	*Value ($ Million)*
1976	152	493.96	31,214	5,705.96
1977	114	728.49	36,589	7,673.55
1978	127	586.75	46,347	11,575.87
1979	121	801.63	44,288	16,876.35
1980 : January	10	95.20	4,415	1,688.78
February	11	47.52	4,134.3	1,734.45
March	11	157.80	4,683	2,721.83
April	17	297.68	3,754	1,899.53
May	22	174.13	5,027	2,337.37
June	8	30.62	4,365	2,018.04

Source: H.K. Monthly Digest of Statistics, June 1980, p. 44 (section 9.16).

Table 3A
Total Amount secured by Bills Registered from January to September 1980

Month	*Amount ($)*	*Amount (Cumulative)*
January	1,548,350	1,548,350
February	3,022,500	4,570,850
March	986,271.78	5,557,121.78
April	1,423,542.6	6,980,664.38
May	2,726,000	9,706,664.38
June	2,740,000	12,446,664.31
July	1,520,094	13,966,758.38
August	2,488,638.4	16,455,396.78
(TOTAL)	16,455,396.78	

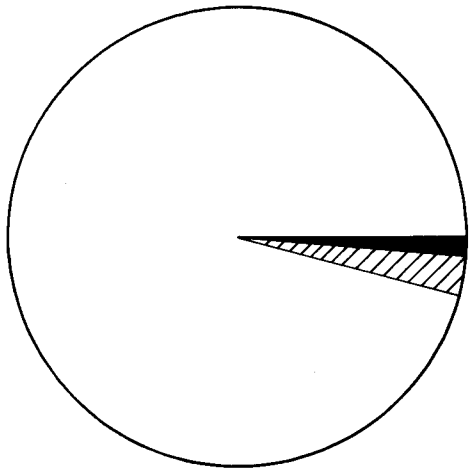
N.B. loan made on 1st, September 1980 is also included.

Table 3B
Size of the Loan Secured by Bills of Sale (January – July, 1980)

Key:

- Loan secured by bills of sale
- Loan secured by building mortgage
- Loan secured by mortgages other than building mortgage

Total: 2,048.66 ($ Million)
Bills of sale: 12.44 ($ Million)
Building mortgage: 30.62 ($ Million)
Other mortgages: 2,018.04 ($ Million)



1978 (January)

Total: 781.03 ($ Million)
Bills of sale: 1.182 ($ Million)
Building mortgage: 32.4 ($ Million)
Other mortgages: 748.63 ($ Million)

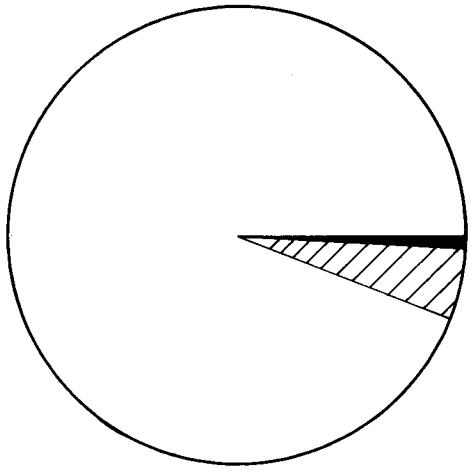


Table 4
Table Showing the Identity of the Parties (January – September 1980)

Grantor	*Number*	*%*	*Grantee*	*Number*	*%*
Factory owners	70	93.33	Banks and finance companies	49	65
Individuals	5	6.67	Individuals	14	18.66
			Others	12	16.34
(Total)	75	100		75	100

Table 5
Bills of Sale Registered, from 1st January to 1st September 1980

Amount	No. of bills	% of total	*Interest Rate (Per Annum)*													
			not stated	not required	expressed in other ways (*)	below 10 %	11-20 %	21-30 %	31-40 %	41-50 %	51-60 %	61-70 %	71-80 %	81-90 %	91-100 %	over 100 %	
below 10,000	1	1.33														
10,001-50,000	17	22.6				1	7	7		2							
50,001-100,000	18	24	1		1	1	11	4	1								
100,001-200,000	20	26.6		1	2	1	10	5								1	
200,001-300,000	7	9.33		1			5	1									
300,001-400,000	2	2.66	1		1												
400,001-500,000	2	2.66					2										
500,001-600,000	1	1.33					1										
600,001-700,000	3	4					3										
700,001-800,000																	
800,001-900,000	1	1.33					1										
900,001-1 Million	2	2.66					1	1									
1 Million-2 Million																	
over 2 Million	1	1.33					1										
Total No. of bills	75	100%															
No. of Bills			3	2	4	3	42	18	1	2							75
% of total			4	2.66	5.33	4	56	24	1.33	2.6							100%

Source: Figures taken from a survey on the Bills registered with the Registry.

Table 6
Kinds of Chattels Comprised in the Bills of Sale (January – September 1980)

Subject – Matter of the Bills	*%*	*Number*
Machinery	88	66
Crane	1.33	1
Direct screne	1.33	1
Household utensils	1.33	1
Emeralds	1.33	1
Cars	2.66	2
Caterpillar	2.66	2
Wine	1.33	1
(Total)	100	75

N.B. Figures in Table 3, 4 and 6 are taken out from a survey of the bills registered with the Supreme Court Registry from 1st, January to 1st September 1980. Statistics of the survey are shown in Table 5.

THE MAREVA INJUNCTION

by Lee Wai Man

(I) THE BACKGROUND

* "The judges have an inherent jurisdiction to lay down the practice of the courts. To the timorous souls, I would say in the words of William Cowper:

> – Ye fearful saints, fresh courage take,
> The clouds ye so much dread are big
> with mercy, and shall break in blessings
> on your head.
>
> Instead of "saints" read "judges", Instead of "mercy" read "justice". And you will find a good way to law reform."
>
> – Lord Denning M.R. in the *Siskina* case [1979] A.C. 210 at 236.

* "We should not allow the urgent merits of particular plaintiffs, whom we see in peril of being deprived of any effective remedy, to tempt us to assume the mantle of legislators. The clouds in Lord Denning M.R.'s adaptation of William Cowper may be big with justice, but we are neither midwives nor rainmakers."

> – Bridge L.J. in the *Siskina* case [1979] A.C. 210 at 243.

The date was 22nd May, 1975. A case came before the English Court of Appeal, which gives rise to one of the greatest pieces of judicial invention in our time. A group of Japanese shipowners entered into charterparties with two Greek gentlemen. The slump in shipping overtook them. The two gentlemen failed to pay the charterparty and subsequently closed their office in the Piraeus. But, they had funds with a bank in London. The Japanese owners feared that those funds would be transferred to other places in a moment by a telegraphic transfer. They applied ex parte for an injunction to stop the funds being moved. Donaldson J. in the first instance refused it. Lord Denning granted it. The case is *Nippon Yusen Kaisha* v. *Karageorgis.*[1] The practice is later known as the "Mareva injunction".

This judicial invention deserves close analysis because of its uncertainty as much as its popularity. After the case, judicial conflicts were aroused and incessant doubts were cast on such innovation. Even at the beginning of 1981, no one can say with

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1 [1975] 1 W.L.R. 1093.

confidence the origin of this novelty, or the precise implications of it. Yet Mustill J. in 1979 remarked: "... the rise of the remedy greatly increased. Far from being exceptional, it has now become commonplace. At present, applications are being made at the rate of about 20 per month."[2]

The Mareva jurisdiction takes its name from a Court of Appeal case right after the *Nippon* case: *Mareva Compania* v. *International Bulkcarriers.*[3] Despite authorities pointed in the opposite direction, the Court granted such an injunction. The Mareva injunction has never been well-defined. The least faulty definition is made by Lord Diplock.[4] "A Mareva injunction is interlocutory, not final; it is ancillary to a substantive pecuniary claim for debt and damages; it is designed to prevent the judgment against a foreign defendant for a sum of money being a mere brutum fulmen." This otherwise perfect definition suffers from one weakness – it refers only to foreign defendants. In subsequent cases, it was unexpectedly held that even an Englishman would be bound by such practice![5]

The developments after the *Mareva* case are all a history of conflicts between limitations and expansions to the existing practice. This is understandable because some judges are too eager to do justice whereas some are concerned about status quo. Eighteen months later, *Rasu Maritima S.A.* v. *Perusahaan*[6] held that the granting of relief need not be confined to cases strong enough for a judgment under Rules of the Supreme Court Order 14 and the procedure can be used to restrain a removable asset other than money. In 1977, *Siskina* v. *Distos Compania Naviera*[7] appeared and it is the only case that goes to the House of Lords. Unfortunately, it is because the counsel for the defendant Mr. Anthony Lloyd Q.C. deliberately saved such a useful device. Thus, he did not challenge the Mareva principle itself. He only submitted that it did not apply to the *Siskina* case. As a result, the question whether the court in fact has such a jurisdiction was expressly left open in the speeches. They only held that to come within Rules of the Supreme Court Order 22 r.1(1) (i), the injunction sought had to be part of the substantive relief which could be enforced by an English court.

Third Chandris Shipping Corporation v. *Unimarine*[8] set out the guidelines on procedure on applications for the injunction. *Stewart Chartering Ltd.* v. *C. & O. Managements S.A.*[9] examined the implications of Rules of the Supreme Court Order 13 r.6 on the new practice. *Allen* v. *Jambo Holdings Ltd.*[10] discusses whether the injunction can be extended to cases of personal injuries. *Prince Abdue Rapman* v. *Abu-Jaha*[11] considered the question whether it can be granted against an English-based defendant. *A and another* v. *C*[12] held that the court had power to make an order for discovery of documents (eg. bank accounts) for interrogatories in aid of a Mareva injunction. Sir Robert Megarry in *Barclay-Johnson* v. *Yuill*[13] ventured into a major grey area: Is the Mareva practice restricted to only foreigners?

The above is a brief introduction of all the "landmark cases". Since the new practice gains widespread popularity almost by a side-wind, the sudden availability of this power has given rise to what has been referred by Kerr J. as "asset hunting"[14] because many foreign companies with no easily traceable assets elsewhere used to have funds, such as bank accounts, credits with insurance brokers, in London. Thus, the law on the new procedure is developing rapidly and consequently becoming uncertain.

Despite the significance of the Mareva injunction, very few articles have been published on that, let alone those comprehensive in scope. Perhaps "even among those who believe that the jurisdiction is legally well-founded and highly beneficial in appropriate cases, there is a good deal of room for

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2 [1979] 3 W.L.R. 122, 125.
3 [1975] 2 Lloyd's Rep. 509.
4 The *Siskina case* [1979] A.C. 210, 253.
5 For example: *Barclay-Johnson* v. *Yuill* [1980] 3 All E.R. 190.
6 [1978] 1 Q.B. 644.
7 [1979] A.C. 210.
8 [1979] 3 W.L.R. 122.
9 [1980] 2 Lloyd's Rep. 116.
10 [1980] 2 All E.R. 502.
11 [1980] 2 All E.R. 409.
12 [1980] 2 All E.R. 347.
13 [1980] 3 All E.R. 190.
14 The *Siskina case* [1977] 3 W.L.R. 532, 536.

doubt and difference of opinion in this context."[15] Thus, it is the attempt of this dissertation to examine the various controversial aspects of this innovation, namely: is this jurisdiction part of the evolutionary process of our law, or just a mere assumption of the legislators' mantle? What are the limits within which the jurisdiction should be exercised? Is it a useful and just practice? What is the local situation related to it?

(II) IS THE NOVEL DEPARTURE KNOWN TO THE ENGLISH LAW?

The invention of the Mareva injunction is really a novel departure from precedent as hitherto it was believed that the only remedy for a creditor was to obtain his judgment and to take out execution. The validity of the innovation is upheld by Lord Denning on three grounds: (i) the old concept of foreign attachment in English law, (ii) the harmonizations of the laws with other E.E.C. countries, (iii) the inherent jurisdiction laid down in section 45 of the Supreme Court of Judicature Act 1925. The following is an attempt to analyse critically the abovementioned justifications.

(1) Foreign Attachment

Lord Denning in the *Pertimina* case[16] said that the new procedure is in fact one which was much used in former times in the City of London called foreign attachment. It was originally used to compel the defendant to appear and to give bail to attend. It was later extended to all cases when he was not within the jurisdiction, i.e. if the defendant was not to be found, the plaintiff was enabled instantly to attach to any money or goods of the defendant to be found within the jurisdiction. Pulling in 1842 noted in his book that this customary mode of proceeding existed in other ancient cities and towns in England, such as Bristol, Exeter, Lancester; and in most maritime towns of Europe.[17] Furthermore, this remedy was expressly recognised in an old House of Lord's decision *Mayor of London* v. *London Joint Stock Bank*[18] and such local customs were later carried across the Atlantic by the early American settlors and there became part of the common law system[19]. Thus, the Court should feel justified in reviving these local customary powers as part of its general armoury.

But, as K. Lipstein has pointed out in his article[20] that despite the old House of Lords case, it is unlikely that this old remedy can be resuscitated today. It is because the Common Law Procedure Acts 1854 sections 60-67 and 1860 sections 28-31, dealing with execution after judgment, disregarded such practice deliberately for mesne process. And, after the Act of 1852, the law had introduced what is now Order 11 procedure. In fact, a similar view had already been expressed in another old case *Mayor of London* v. *Cox.*[21] Willes J. said, "Indeed, there is good reason to believe that the legislature advisedly abstained from adopting foreign upon mesne process, as being a retrograde step towards imprisonment for debt before judgment, in cases where the debt was disputed." In view of the above reasons, it is doubtful whether such a revival of power is proper. Moreover, even if such power can be revived, should not the boundaries be up to the Legislator, rather than the court, to draw?

Lord Denning's response has always been very defensive and tactful. He did not discuss the applicability of the "foreign attachment" in the present days. But rather, he said, "The House of Lords has this procedure under their close consideration. It was in *Siskina.* If the House had any doubts about our jurisdiction in the matter, I should have expected them to give voice to them, rather than let the legal profession continue in error. But none of their Lordships did cast any doubt on it."[22] Perhaps Lord Denning is right. It is unfortunate that such a matter of importance was deliberately set aside in the House of Lords. Indeed, Lord Hailsham, impressed with the unanimity of his colleagues, remarked that "Since the House is no way casting doubt on the validity of the new practice by its decision in the instant appeal, I do not wish to do so myself."

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15 Michael Kerr, "Modern Trends on Commercial Law & Practice" (1978) 41 M.L.R. 1, 12.
16 [1978] 1 Q.B. 644, 657.
17 Pulling, *The Laws, Customs, Usages and Regulations of the City and Port of London* (2nd ed. 1842) pp. 187-192.
18 (1881) 6 App. Cas. 393.
19 The *Siskina case* [1979] A.C. 240.
20 "Conflicts of Laws – Jurisdiction – Mareva Injunction," [1978] C.L.J. 241, 242.
21 (1867) L.R. 2 HL 239, 272.
22 In the *Third Chandris case* [1979] 3 W.L.R. 122, 135.

Whether the Mareva practice is known to the English law is in substance an academic discussion which simply reflects the various judges' preferences. Since it is undisputed that "foreign attachment" is a concept known to the English law, the only question is: Could we revive it? It has been observed in the earlier analysis that such revival is logically not sound. But, if it is practically desirable, we should not tolerate injustice while it can be avoided. Since equity grows with great elasticity and expands with social concepts, there is no reason not to revive a disused practice simply because the court should not be too ready to disturb the Legislators. Lord Denning said in the *Siskina* case, "to wait for the Rule Committee would be to shut the stable door after the steed had been stolen. And who knows that there will ever again be another horse in the stable?"[23] The need for the practice today is evidenced by how often it has been invoked since it was introduced.

(2) Harmonization of the Laws

Practice similar to the Mareva injunction is in force in many continental countries: Holland, Belgium, France, Italy and Germany. Since Britain has joined the Common Market, it would be appropriate to follow a vigorously surviving process existing in most E.E.C. member-states. (The process is called in French "saisie conservatoire", i.e. a seizure of assets). By so doing, Britain would be fulfilling one of the requirements of the Treaty of Rome. Furthermore, the European Judgments Convention of 1968 obliges the English courts to enforce the judgments and orders of the Common Market partners, most of whom have powers of saisie conservatoire. It is therefore desirable that the English law will bring the powers of the courts into line with theirs.

On the other hand, it is often argued that despite the urgent need for assimilation of law, the proper way to achieve this is by statute. Large-scale reforms must be dealt with by mechanism which enables all issues to be resolved. Mr. Justice Kerr, for example, said, "It is a complex topic which will require considerable research and detailed legislation. It cannot be achieved by the decision of the courts in individual cases, let alone in one case, however important."[24] Also, some argue that a half step towards harmonization is worse than no step at all. It is because the Mareva injunction is directed to the foreign defendants, whereas against local residents, there is apparently no power – except the law concerning fraudulent preference, etc. Thus, it seems that different standards apply to residents and non-residents. However, one of the essential aims of the jurispudence of the European Community and of the European Judgments Convention is to achieve equality of treatment of the nationals of different states throughout the Community. It must become untenable for English courts to apply different interim measures of attachment as between the assets of foreigners and nationals.

It is submitted that the two above-mentioned arguments are of doubtful validity. With regard to the first one, it is not unusual for the courts, instead of the Legislature, to initiate reforms when there is an urgent and genuine need. Submission to that effect, for instance, has been urged upon the House of Lords in *Miliangos* v. *George Frank Ltd.*[25] It was accepted by Lord Simon but the House rejected it. This implies that they upheld the new procedure which the Court of Appeal started. Another similar example is the new injunction in Chancery: the Anton Piller injunction,[26] which has proved widely acceptable and equally beneficial. With regard to the second one, such criticism perhaps becomes obsolete and unimportant nowadays. As it has been clearly held in *Prince Abdul* v. *Abu-Taha*[27] in 1980 that the court's jurisdiction is extended to an English-based defendant as well. Thus, the worry that there will be different standards for residents and non-residents is no longer well-grounded.

However, one has to honestly admit that the harmonizations of the laws with other E.E.C. countries is no more than a beautiful justification for the Mareva innovation. The real reason in fact should be that here we have a need for justice to be done and the "trial and error" method by judges is better than the long drawn out discussions in the Parliament. Thus, the justification provides a ready short-cut.

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23 [1979] A.C. 210, 236.
24 (1978) 41 M.L.R. 1, 15.
25 [1976] A.C. 443.
26 *Anton Piller* v. *Manufacturing Processes Ltd* [1976] Ch. 55.
27 [1980] 2 All E.R. 409.

(3) Section 45 of the Supreme Court of Judicature Act 1925

". . . a mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient."

—Section 45

Conflict over decided cases

In *Beddow* v. *Beddow,*[28] Sir George Jessel M.R., gave a wide interpretation to this section. He was of the view that the power to grant an injunction is unlimited. *Halsbury's Laws of England* summarized the position as "whenever a right ... does exist, then, whatever the previous practice may have been, the Court is enabled by virtue of this provision to grant an injunction to protect that right."[29]

But, there is another line of counter-authorities. The leading case is *Lister* v. *Stubbs*[30] in 1890. The plaintiff was a manufacturing company which employed the defendant to buy raw materials for business. However, the defendant, under a corrupt bargain, made a secret profit and invested it in other businesses. The plaintiff moved for an injunction to restrain the defendant from dealing with the investments. The plaintiff nevertheless failed. It is submitted that *Lister* v. *Stubbs* is not a good authority for two reasons. Firstly, the judgment does not consider at all any arguments. Lord Justice Cotton simply said, "I know of no case where it is possible ..." It is not convincing that a simple reason as such is sufficient to preclude the Court, as a matter of precedence, from granting such a useful remedy. Secondly, the facts of *Lister* v. *Stubbs* can be distinguished because the defendant in that case had no intention to, nor was there any danger that he would, remove his assets out of the jurisdiction.

Although *Lister* v. *Stubbs* is not a good authority, the others are hardly not (for example, *Scott* v. *Scott*[31] and *Wright* v. *Wright*[32]). The cases specifically rejected reliance on section 45 to that effect. This is why textbooks (for example, *Kerr on Injunctions,*[33] *Spry – Equitable Remedies*[34] and *Halsbury's Laws of England*[35] have unanimously agreed that the courts will grant the remedy only in exceptional cases. This is again why Sir Robert Megarry remarked, "The refusal to grant these injunctions was well-settled law before 1975."[36] Lord Denning, in an earlier attempt, made an effort to distinguish these cases. He maintained all these cases do not deal with the situation that a defendant is out of the jurisdiction, but rather a defendant who is within the jurisdiction yet with the intention of removing his assets outside the jurisdiction.[37] Perhaps this statement was correctly made in 1978 when the Mareva practice was limited in its scope of application. But, in 1980, *Prince Abdul* v. *Abu-Taha*[38] extended the Mareva practice to include a defendant within the jurisdiction. It is interesting to note that Lord Denning, as a result, remains curiously silent on this point in the more recent cases. Obviously, our revolutionary judge, in formulating this argument two years ago, failed to foresee the vigorous growth of his innovation.

Perhaps the realistic attitude now should be to recognise the principles of these conflicting cases and yet to maintain that from 1975 onwards these cases have been overruled due to the emergence of the Mareva injunction.

An inherent discretion

Another line of defence is "although statements limiting any judicial decisions are binding, there are decisions which make it clear that when a discretion is given by a statute, the courts must not fetter it by rigid rules from which a judge is never at liberty to depart. It was so held by the House of Lords in *Blunt* v. *Blunt*[39] and by the Court of Appeal in *Ward* v. *James.*[39a] In those cases, the courts departed from a long line of previous opinions as to the way in which discretion should be exercised. Lord Denning reiterated in the *Pertimina* case[40]: "The court can lay

28 (1879) 9 Ch. D. 89.
29 3rd ed., vol.21, p.348 para.729.
30 (1890) 15 Ch. D. 1.
31 [1951] P.193.
32 [1954] 1 W.L.R. 534.
33 6th ed., p.613.
34 At p.406.
35 3rd ed., vol 21, p.399.
36 *Barclay-Johnson* v. *Yuill* [1980] 3 All E.R. 190, 193.
37 *The Pertimina case* [1978] 1 Q.B. 644, 659.
38 [1980] 1 All E.R. 409.
39 Discussed in the *Pertimina case.*
39a [1965] 1 All E.R. 563.
40 [1978] 1 Q.B. 644, 660.

down the considerations which should be borne in mind in exercising the discretion" —— From time to time, the considerations may change as public policy changes, and so the pattern of decision may change "this is all part of the evolutionary process." It is unfortunate that again the law lords deliberately left the matter unanswered in the only Mareva case that goes to the House of Lords: the *Siskina* case. Lord Diplock, having regarded the fact that the counsel for the defendant did not challenge directly the court's jurisdiction, said, "I do not think that the instant appeal provides an appropriate vehicle to carry your Lordships into a consideration of the wider question of what restrictions, whether discretionary or jurisdictional, there may be upon the powers conferred upon the High Court by section 45 (1)."[41]

On the contrary, it can be argued that although section 45 confers on the court a discretion, that discretion must be exercised with due respect for decided cases because what makes the English law certain is that the courts are bound by precedent. Nevertheless, it may be an argument which is not in accordance with the practicality of real life, because such a view will sound most disagreeable to a man in the street who has long been puzzled by the rigidity of the law.

Conclusion

As we can see from the above analysis, "the law is always in a dilemma": to preserve certainty or to do justice? It has been concluded that the Mareva injunction, being a modern version of the old "foreign attachment", is known to the English law. Furthermore, such a practice is widely accepted and proved extremely useful on the Continent of Europe. Moreover, section 45 of the Supreme Court of Judicature Act 1975, on a literal interpretation, does possibly enable the Court to have such a jurisdiction. Yet, because of the chain of well-settled authorities to the contrary and the possibility that the judges may deprive the legislators of their proper duty, should we sacrifice such an extremely useful judicial innovation? The answer inevitably cannot be a simple matter of "yes" or "no". This may be why the House of Lords remains silent in the only Mareva case, the *Siskina,* that goes to it. Perhaps, they need a longer time to observe the process of development before they can reach any conclusion. Nevertheless, in view of the frequency with which such injunctions have been granted for more than two years and of their undoubted beneficial effect in many cases, it now seems unlikely that in future the jurisdiction will be rejected if and when such a case again reaches the House of Lords. So to hold at that stage would not only be a retrograde step but it would also represent something of an anomaly.

(III) THE PROCEDURAL ASPECTS OF THE MAREVA INJUNCTIONS & ITS GREY AREA

(1) The Procedural Aspects

Application for the Mareva injunction has to be made under Order 29 Rule 1 of Rules of the Supreme Court. The two important sub-rules are (1) and (2). Rule 1 (1) says that an application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter. Rule 1 (2) says that where the applicant is the plaintiff and the case is one of urgency, such application must be made ex parte on affidavit.

Lord Denning in *Third Chandris Shipping Corporation* v. *Unimarine S.A.*,[42] trying to curb the automatic grant of the injunction, re-assessed the conditions on which it ought to be available. Mr. A.A.S. Zuckerman in his article in the *Law Quarterly Review* predicted the developments of the injunction by comparing with those of restrictive covenant. He drew two conclusions. Firstly, there will be a shift from generosity to stringency among the judges in granting such a remedy. Secondly, that shifting process will be slow yet evident and very often takes over half a century.[43]

For the sake of clarity, the requirements which the plaintiff must satisfy are listed as follows:

Part of the substantive relief

It is a fundamental rule that an injunction sought in an action must be part of the substantive relief to which the plaintiff's cause of action entitled him. This means that the foreign defendant will be restrained from doing in England had to amount to a

41 The *Siskina case* [1979] A.C. 240, 254.
42 [1979] 3 W.L.R. 122.
43 (1979) 95 L.Q.R. 474, 475.

waiver of some legal or equitable right belonging to the plaintiff in this country and enforceable by a final injunction. Therefore, such a Mareva injunction is a form of interlocutory relief. The court has no jurisdiction to grant such an injunction unless it is ancillary to a substantive cause of action, and the Mareva injunction cannot by itself act alone as the foundation of an action for the purposes of Order 11 Rule 1 (1) (i).[44]

Burden of proof – "A good arguable case"

The court's discretion is not limited to cases so plain that the plaintiff can get judgment under Order 14.[45] An order restraining removal of assets can be made whenever the plaintiff can show that he has a "good arguable case". This is the test applied for service on a defendant out of the jurisdiction.[46] Also, it is in confirmity with the test of granting of injunctions whenever it is just and convenient as laid down by the House of Lords in *American Cyanamid Co.* v. *Ethicon Ltd.*[47]

Disclosure of all matters

The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know.[48]

Amount of claim

Besides giving particulars and the ground of his claim, the plaintiff must state the amount of his claim.[49]

Assets

In *MBPXL Corporation* v. *International Banking Corporation,*[50] it was held that the plaintiff should give some evidence for believing that the defendant had assets within the jurisdiction. Assets include not only money because money can easily be changed into pictures, diamonds, stocks or shares. The procedure applies to goods. However, care should be taken to make sure that it does not bring the defendant's trade to a standstill. Since in most cases, the plaintiff will not know the extent of the assets and he can only have indications of them. Therefore, the existence of a bank account in England is enough, whether it is in overdraft or not.

Danger of default

The plaintiff should give some grounds for believing that there is a risk of the assets being removed. However, "the mere fact that the defendant is abroad is not by itself sufficient."[51] If a corporation is registered in a foreign country where the company law is so loose that nothing is known about it – its membership, assets, control and charges on it, etc; and the corporation does no work and has no officers there; and in consequence, judgment cannot be enforced against it, the very fact of the existence of such a corporation may be some grounds for believing there is a risk that, if judgment is obtained, it may go unsatisfied.

Sir Robert Megarry tightens the test slightly in *Barclay Johnson* v. *Yuill*[52] by adding that there must be a danger of default. He said, "even if the risk of removal is great, no Mareva injunction should be granted unless there is also a danger of default. A reputable foreign company, accustomed to paying its debts, ought not to be prevented from removing its assets from the jurisdiction, especially if it has substantial assets in countries in which English judgments can be enforced. In commercial cases, it suffices, if there are facts from which the Commercial Court, like a prudent sensible commercial man, can properly infer a danger of default if assets are moved from the jurisdiction."

An undertaking in damages

The plaintiff must give an undertaking in damages – in case he fails in his claim or the injunction turns out to be unjustified. This may be a bond or security. "A legally aided plaintiff is by our statutes not to be in any worse position by reason of being legally aided than any other plaintiff would

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44 The *Siskina case* [1977] 3 W.L.R. 532.
45 The whole point has been discussed in the *Pertimina case* [1978] 1 Q.B. 644, 661.
46 *Vitkovise Horni a Hutni* v. *Korner* [1951] A.C. 869.
47 [1975] A.C. 396.
48 See *Negocios Del Mar* v. *Doric Shipping* [1979] 1 Lloyd's Rep. 331.
49 In the *Third Chandris case* [1979] 3 W.L.R. 122, 136.
50 Unreported, of Stephenson and Scarman L.J.J., August 28, 1975.
51 per Lord Denning in the *Third Chandris case* [1979] 3 W.L.R. 122, 137.
52 [1980] 3 All E.R. 190.

be." Thus, a legally aided plaintiff can promise to give the cross-undertaking in damages although his undertaking may be in fact worth nothing.

Conclusion on procedural aspects

It is submitted that the above-mentioned procedural limitations are reasonable because it achieves a two-fold purpose: on the one hand, it reduces the risk of injustice to the defendant, and on the other, it does not impose on the plaintiff stringent requirements as to proof which will destroy the practical benefits envisaged by the court when the new procedure was deviced. Furthermore, speed and ex parte are of essence. As Lord Denning mentioned in the *Third Chandris case*, "If there is delay, or if advance warning is given, the assets may well be removed before the injunction can bite."

(2) The Grey Areas

The Mareva injunction is in a rapid process of development and it is still in the course of throwing up problems which have yet to be solved. However, any attempt to clarify the obscurities of the law is difficult if not fruitless because anything grey may within a few months becomes a matter of black and white or vice versa. Thus, the following analysis could by no means be exhaustive and conclusive. It could perhaps serve as a basis for further interesting discussion.

In Relation with Order 14 of Rules of the Supreme Court (Summary Judgment)

Rasu Maritima S.A. v. *Perusahaan Pertambangan*[53] decided that the jurisdiction to grant such an interim injunction as the Mareva injunction should not be limited to cases where the plaintiff could obtain judgment under Rules of the Supreme Court Order 14 and could be exercised when the plaintiff shows that he has a "good arguable case". Lord Denning said, "We have all had experience of summonses under Order 14. The defendant may put in an affidavit putting forward a specious defence sufficient to get him leave to defend, conditional or unconditional. But when the case actually comes to the court for trial, he throws his hand in." Orr L.J. similarly said, "Experience shows that a claim which may not appear to be strong for the purposes of an Order 14 may in the event prove to be very strong." Nevertheless, he added that, "one of the factors which may be taken into consideration is the apparent strength or weakness of the plaintiff's case for the purpose of Order 14." Orr L.J.'s last comment leads one to doubt whether his reservation is sensible because it inevitably brings Order 14 back into consideration again. In a later case *Third Chandris Corporation* v. *Unimarine*[54], Mustill J. assumed the consideration to be one exclusive of Order 14. "Proceedings under Rules of the Supreme Court, Order 14 were too slow." "The Mareva injunction performed a valuable service in enabling the creditor to detain the asset during the relatively short interval which elapsed before he obtained a judgment under Order 14." Mustill J.'s remarks seem to suggest that the considerations under Mareva injunction and Order 14 are separate altogether because they are two remedies sought at different stages.

The Position of an English-based Defendant

The House of Lords in the *Siskina* seems to imply that the Mareva cannot be extended to an English-based defendant. Lord Hailsham expressed in an ambiquous tone that:

"Either the position of a plaintiff making a claim against an English-based defendant will have to be altered or the principle of the Mareva cases will have to be modified."

The recent cases are divided into two hostile camps. Cases like *Chartered Bank* v. *Daklouche*[55] and *Barclay-Johnson* v. *Yuill*[56] decided that foreign and local defendants should be treated alike whereas cases like *The Agrabele*[57] held the contrary. The issue comes to be considered by the Hong Kong Court of Appeal in a recent case *Yuma Shipping Limited* v. *Trigon Rederiene*[58] which agreed that foreign and local defendants must stand or fall together.

K. Lipstein supports the idea that the injunction should only be applied to foreign defendants because, "the fact that residents abroad may have greater facilities for transferring assets abroad." Thus, local

53 [1978] 1 Q.B. 644.
54 [1979] 1 Q.B. 645.
55 Unreported, 16 March, 1979, CA.
56 [1980] 3 All E.R. 190.
57 [1979] 2 Lloyd's Rep. 117.
58 Unreported, Civil Appeal No. 103 of 1978.

remedies against fraudulent preference, similar remedies in matrimonial matters and of succession as well as in bankruptcy often cannot reach them.[59] Sir Robert Megarry in *Barclay-Johnson* v. *Yuill*[60] stated, "The essence of the jurisdiction is the risk of assets being removed from the jurisdiction, I cannot see why it should be confined to 'foreigners' in any sense of that term – Naturally, the risk of removal of assets from the jurisdiction will usually be greater or more obvious in the case of foreign-based defendants, and so the jurisdiction has grown up in relation to them – Is it really to be said that in relation to Mareva injunctions, there is one law for the foreigners and another for the English – I do not intend to suggest the matters of nationality, domicile residence and so on are irrelevant in Mareva applications. Any or all of them may be of considerable importance in so far as they bear on the risk of removal."

Confinement to commercial cases

In *Ruth Allen* v. *Jambo Airways,*[61] a light aeroplane – taking only four people – was on the ground at a small aerodrome near Watford. It was owned by a Nigerian company and was about to leave on its way back to Nigeria. Before the passengers embarked, the pilot tested the engine. He started it up. Soon afterwards, the passengers came across to get aboard. The 1st man had his head caught in the revolving propeller. He was decapitated and killed.

Lord Denning delivered a crucially important speech: "This is the first case we have had of a personal injury – it is a fatal accident case – where a Mareva injunction has been sought. The nearest parallel is a ship in an English port where there is an accident causing personal injury or death. It has been settled for centuries that the claimant can bring an action in rem and arrest the ship. She is not allowed to leave the port until security is provided so as to ensure that the claim will be duly met.

"The question is whether a similar jurisdiction can be exercised in regard to an aircraft. In principle I see no reason why it should not, except that it is to be done by a Mareva injunction instead of an action in rem."

Sir Robert Megarry in *Barclay-Johnson* v. *Yuill*[62] supported Lord Denning's viewpoint: "The Mareva doctrine grew up in commercial surroundings, particularly in relation to ships. Much that was said in the judgments reflected that commercial background. On the other hand, I do not think that there is any authority for confining it to commercial matters, even if it were possible to define them at all accurately."

Thus, although it is doubted by few, it seems that the foundation of the doctrine is the need to prevent judgments of the court from being rendered ineffective by the removal of the defendant's assets from the jurisdiction, so there is no reason for confining it to commercial cases and it is a doctrine of general application which in the short five years of its life has shed all the possible limitations of its origin.

(IV) THE SITUATION IN HONG KONG

– Two barristers, Mr. R.J. Faulkner and Mr. William Waung, are very much owed for their assistance in supplying useful information concerning the local development of the Mareva injunction. –

Soon after the case *Mareva* v. *International Bulkcarriers*[63] was decided in England in 1975, the new doctrine was adopted in Hong Kong. Before 1975, local courts used to go under Order 44A of the Supreme Court Rules of the which is not available in England, to give a similar result. Today, the Mareva injunction is still a very popular remedy. The court is usually presented with five to ten applications every month. Most of them are shipping cases. It is not clear in Hong Kong whether the judicial invention is confined to only commercial cases, or can be extended to those of personal injuries as in *Allen* v. *Jambo Holdings Ltd.*[64] It is because no such application has ever been made locally. Moreover, this procedural innovation is particularly useful in Hong Kong since our city is an international financial as well as shipping centre free from any exchange control. A defaulting defendant could within seconds of the service of a writ, put all liquid assets out of the jurisdiction by a

59 (1978) 37 C.L.J. 241, 244.
60 [1980] 3 All E.R. 190, 194-195.
61 *The Times,* July 20, 1979.
62 [1980] 3 All E.R. 190, 196.
63 [1975] 2 Lloyd's Rep. 509.
64 [1980] 2 All E.R. 502.

telephone call or telex message. Despite the usefulness of the Mareva injunction, Mr. Faulkner remarked that, "I am sure that in real life, most unfortunate creditors still fail to make use of it because in 99 out of 100 cases, they are slower than the cunning defaultors!"

There is no reported case concerning the Mareva injunction in Hong Kong at all. The only Mareva case which goes to the local Court of Appeal, *Yuma Shipping Limited and Others* v. *Trigon Rederiene,*[65] is again unreported. Mr. William Waung suggests two reasons for the lack of reported materials. Firstly, most cases are not contested and therefore not worth reporting. Secondly, decision in granting a Mareva injunction has to be quickly made. As a result, the judgment is usually delivered orally.

In *Yuma Shipping Limited and Others* v. *Trigon Rederiene,* a Mr. Fong, the owner of Yuma Shipping Ltd., misrepresented that he was the agent for a respectable shipping company. He entered into charterparties with a Danish shipowner: Trigon Rederiene. Later, Mr. Fong did not pay the hire and disappeared. Trigon Rederiene, on learning that Mr. Fong had previously been engaged in a series of similar fraudulent transactions before 1978 and he had funds with three banks in Hong Kong, applied immediately for an injunction to stop the funds being removed outside the Colony.

Mr. Justice Cons of the High Court in the first instance began his judgment by a general discussion of the position of the law in Hong Kong. "The concept of the 'Mareva injunction' has been endorsed by the English Court of Appeal: *Rasu Maritima* v. *Pertambangan.*[66] The House of Lords has not committed itself in *The Siskina.*[67] Such injunctions have also been granted here from time to time. I assume for the moment that they are viable in law." The jurisdiction in Hong Kong is based on section 19 of the Supreme Court Ordinance which is a reproduction of section 45 of the Supreme Court of Judicature Act 1873. "On a plain, straight-forward reading, the words of that section give clear jurisdiction." Nevertheless, the judge doubted whether these words intended to cover injunctions of the Mareva kind because the Act was intended, inter alia, to amalgamate the existing practices of equity and law then, and not to create any new practices. In addition, he thought that it may be unnecessary to have the Mareva jurisdiction introduced in Hong Kong because we have legislation on the lines of Order 44A Rule 7. Despite these doubts, the injunction was granted against Mr. Fong who was a local resident. The defendant appealed.

The local Court of Appeal for the first time considered the jurisdiction of the Hong Kong High Court to grant Mareva injunction in a brief oral judgment. Mr. Justice Huggins recognised its applicability in Hong Kong. He said, "Injunction against foreign defendant is too well-established for us to say Mareva is wrong," and "The door of Mareva has been opened so much that it cannot be closed and I will not close it." With regard to its application against local defendants, the three judges, Messrs. Justices Huggins, Pickering and Leonard unanimously agreed that it should not make any difference because it was so decided in some English cases. Moreover Mr. Justice Huggins said, "There is no logical distinction between foreign and local defendants. They must stand or fall together. However, the fact that the defendant is local is of course a factor to be taken into account." Mr. Justice Pickering said, "The judge will stand on the canal bank to control the floodgate in case there is the fear that Mareva injunction against local defendant will open wide the floodgate of litigation." Yet, Mr. Justice Leonard cautiously warned that "Injunction against the local defendant should only be given after most careful consideration." As a result, the appeal was dismissed.

Order 44A Rule 7

It is worth-while to note that the relationship between Order 44A Rule 7 of the Supreme Court Ordinance and the Mareva injunction is a matter of particular interest in Hong Kong. Many years ago, with the writ "ne exeat regna" abolished in England, the writ "ne exeat colonia" (attachment of property in colony) was still enforced in many parts of the Commonwealth. By borrowing similar provision from India, the early local legislators enacted Order 44A Rule 7. The similarities between Order 44A Rule 7 and the Mareva injunction are striking. In the former, if the defaulting defendant is going to dispose of his

65 Unreported, Civil Appeal No. 103 of 1978.
66 [1977] 3 All E.R. 324.
67 [1977] 3 All E.R. 803.

property from the jurisdiction, the Court again can call upon him to furnish sufficient security or to direct his property to be attached. But, what are their differences. Mr. Faulkner thinks that there are two. Firstly, the plaintiff's right in the Mareva injunction is a relief in personam. It could not operate as an attachment of goods or money because attachment means a seizure of assets with a view to them being sold to meet an established claim. Therefore, for example, a Mareva injunction does not prevail against a foreign debenture holder where the foreign floating charge crystallizes after the injunction has been granted. Secondly, for Mareva injunction, the plaintiff has to prove that the defendant has assets in the jurisdiction and it is not a simple matter to "put up the security" or "go to jail" as in Order 44A Rule 7. Mr. William Waung considers the Mareva injunction a better remedy in the sense that it is often difficult to secure the Order 44A because of the strict rules attached to it. For the Mareva injunction, the only consideration is whether it is "just or convenient" to grant it. On the contrary, Mr. Faulkner is of the view that Order 44A Rule 7 may not be worse because "you are sure that you will get something": either having cash and property attached in the Court or having the rogue in the jail. But for the Mareva injunction, it is very often that the bank account frozen may not have a penny in it!

Conclusion

In view of the above analysis, the Mareva injunction is perhaps a supplementary device which overcomes the practical limitations of Order 44A Rule 7 in Hong Kong. However, it is a pity that there is virtually no reported material available which is necessary for a detailed discussion. Finally, it is interesting to note that the fact that the Mareva innovation is initiated judicially in England is of great importance to Hong Kong. Had it been a statutory enactment rather than a judicial invention, the local Court would have been unable to invoke assistance from it as English Acts do not apply automatically to Hong Kong.

(V) TO WHAT EXTENT IS THE INJUNCTION A USEFUL AND FAIR PRACTICE?

(1) Arguments For:

Historical standpoint

Mr. Justice Lawton is of the view that the reason why such a useful practice fell into disuse in the last century is mainly historical.[68] Before the coming of the electric telegraph, the railways and steamships, foreign debtors who wished to flee the jurisdiction and take their assets with them must have found doing so far from easy. Travel overland was slow and once the coast was reached, there might be long waits because of the vagaries of wind. It was unnecessary and thus wrong to seize the debtor's assets before an judgment had been granted against him. Unfortunately, the prospects for the defaulting party nowadays are much better. A telephone call or a telex message could within seconds of the service of a writ, or knowledge that a writ had been issued, put all liquid assets out of the reach of the creditor. Thus, what seems unjust and inconvenient according to section 45 of the Supreme Court of Judicature Act 1925 in the old days may be just and convenient today as historical circumstances have changed.

Hardships of helpless creditor

There are in fact strong practical reasons which justify the procedure. A plaintiff who has an indisputable claim against a defendant resident outside the jurisdiction is usually in many difficulties. First, he needs leave to serve the defendant outside the jurisdiction. Then, the defendant is given time to enter an appearance from the date when he is served. All of these usually take several weeks or even months. It is only then that the plaintiff can apply for summary judgment under Order 14 with a view to levying execution on the defendant's assets. However, on being apprised of the proceedings, the defendant removes his assets. Thus, the scope of section 45 has to be necessarily widened to overcome such hardships.

68 *Third Chandris Corporation* v. *Unimarine* [1979] 3 W.L.R. 122, 138-9.

Use of Corporations

Nowadays, defaulting on debts has been made easier for the foreign debtor by the use of corporations, many of which hide the identities of those who control them, and of so-called flags of convenience together with the development of worldwide banking and swift communications. By a few words tapped out on a telex machine bank balances can be tranferred from one country to another and within seconds come to rest in a bank which is untraceable or, even if known, such balances cannot be reached by any effective legal process. If such state of affairs is to be tolerated, there is no more room for justice.

Incidence of abuse is small

Sensible commercial men do not issue writs merely because a dispute has arisen with someone, whether he be British or foreigner, who is known to be good for the debt and who is likely to meet his obligations if any dispute is decided against him. Furthermore, a temporary fall in the market which makes the other party to a contract meet unexpected trouble or mischievous and malicious rumours around the exchange again will not cause businessmen to issue writs. Thus, most cases that go to the court are usually based on irresistably clear evidence. Thus, in theory, the Mareva injunction may result in hardship yet in practice there is an indication that potential hardship does not in fact materialize. Despite the fact that applications for the injunction are being made at the rate of about twenty per month, "the incidence of application to discharge Mareva injunction is remarkably small."[69]

(2) Arguments Against:

The usefulness of the Mareva injunction is seldom disputed. Yet, it is often claimed that such usefulness may be outweighed by the grave injustice and hardship that the practice has given rise to. This is especially so with the blocking of a bank account.

Damage to the defendant's business

Mr. A.A.S. Zuckerman criticizes the judges who believe that the impeding of the defendant's business by the freezing of a substantial asset is not an obvious potential source of injustice are "Achilles heel of the new doctrine".[70] For example, in the case of the blocking of a bank account, cheques or bills may be dishonoured because the injunction inhibits the bank in making payment. On the other hand, the very secrecy of the procedure deprives the defendant of the opportunity to make a timely alternative arrangement for presentment or payment abroad. This dishonour of the defendant's paper may have disastrous consequences, and all this in a situation where the plaintiff has shown no more than an arguable case. Secondly, an undertaking by the plaintiff for damages may not always be a sufficient indemnity for the loss the defendant may suffer. Thirdly, the blocking of an account may have very serious consequences for a defendant who is dependent on cash flow for his commercial survival. The case of a charterer provides an example. On a rising market, the free use of his bank account is of crucial importance. Late payment of hire may lead to the loss of a charter. It is true that he can apply to have the ex parte injunction discharged. Yet, by the time his application is heard, the damage may have been done.

Foolishness should not be compensated

It has been argued that sensible commercial men operating on the world's exchanges have to learn to spot those who are likely to be defaulters. They should have no difficulty in doing so particularly when there is a known record of default. If they trade with such a defaulter, any losses they sustain are the result of their own foolishness. It is submitted that such an attitude is emotional and unrealistic. Very often, a cunning rogue will do something akin to a long term fraud by the build up of confidence to be followed by default. The experienced operators often sense what is likely to happen. But an inexperienced businessman of ordinary intelligence could hardly not suffer. Thus, we are punishing one for his lack of experience rather than foolishness.

Reply

In *Allen* v. *Jambo Holdings Ltd.*, Lord Denning, when being faced with similar criticisms, replied, "I

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69 per Mustill J. in *Third Chandris Shipping Corporation* v. *Unimarine* [1979] 3 W.L.R. 122, 128-9.

70 (1979) 95 L.Q.R. 474, 475.

can see no reason in this case, as is done in shipping cases all over the world, why security should not be given in the way of a bond, or an undertaking by a reputable company, or concern in England, so as to ensure that any award of damages to the plaintiffs would be met."[71] Mustill J. in another case defended that, "It is true that the provision of guarantees may be more expensive and difficult than is often believed. Nevertheless – it is also worth mentioning that jurisdictions of a similar kind have existed for many years in other countries and counter-security is quite commonly ordered. But, I have heard no evidence to suggest that the freezing of the bank accounts has given rise to notorious difficulties in other jurisdictions."[72]

Conclusion

The usefulness and the popularity of the Mareva injunction are evident. The only debatable issue is: Does it cause injustice and hardship to the defendant by freezing his assets? It is argued that, for example, in blocking a bank account a defendant very often has no cash to pay off the debts and to do his business. Yet, it is seen that by giving security, he can at once release his frozen assets. If the defendant is a reliable company which is ready to accept any liability, there is no doubt that a bank or an insurance company will be willing to back up the security. Furthermore, counter-security is quite commonly ordered and most important of all, the defendant is at liberty to apply to have the injunction discharged at any time on short notice. For example, in *Rasu* v. *Perusahaan Pertaribangan,*[73] the plaintiff, besides taking proceedings in England, had also sought in many other countries to attach the assets of the defendant. He did succeed in attaching two ships at Singapore, but he failed to provide the counter-security required. So, the ships were released. Lord Denning, moreover, laid down guidelines for the court which could prevent injustice. He said, "Care should be taken before an injunction is granted over assets which will bring the defendant's trade or business to a standstill, or will inflict on him great loss, for that may not be fully compensated for by the undertaking in damages."[74] Actually, in blocking a bank account, judges in these injunction cases usually set out the limits. They usually specify the amount (say, "the order shall not apply to assets in excess of US$750,000). Thus, if the judges specify an amount which still leaves sufficient cash flow for the defendant's commercial survival, it is unlikely that the defendant would be unable to pay off his debts. In fact, in a recent case, *Iraqi Ministry of Defence* v. *Arcepey Shipping Co. S.A.*[75] Robert Goff. J. permitted the defendant to use the assets for paying debts as they fall due, so the assets will not remain sterilised for the benefit of the plaintiff.

Perhaps, the only case of injustice is when the asset frozen is an aircraft as in the case of *Allen* v. *Jambo Holdings Ltd.*[76] Unlike ships which have their protection and indemnity clubs, aircraft have not. Furthermore, some insurance policies do not cover the provision of security of aircraft. So hardship will result.

Taking it all in all, the Mareva injunction is an extremely useful and fair practice. In fact, similar procedure was recommended by a Committee presided over by Mr. Justice Payne on the Enforcement of Judgment Debts 10 years ago![77] But, it is not implemented. Recently, another Committee has been sitting under the chairmanship of Mr. Justice Kerr about the enforcement of debts within the European Common Market. It is hoped that the Mareva injunction will be under their consideration and a Bill will soon be introduced to give effect to them because the issues are too complex to be satisfactorily resolved by judicial decision, bearing in mind that at the close of 1980, the unconvinced Sir Robert Megarry still insisted that "I would regard the *Lister* v. *Stubbs* principle as the remaining rule, and the Mareva doctrine as constituting A LIMITED EXCEPTION to it!"[78]

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71 [1980] 2 All E.R. 502, 505.
72 *Third Chandris Shipping Corporation* v. *Unimarine* [1979] 3 W.L.R. 122, 128-9.
73 [1978] 1 Q.B. 644.
74 *Rasu* v. *Perusahaan,* [1978] 1 Q.B. 644, 662.
75 [1980] 1 All E.R. 480, 486.
76 [1980] 2 All E.R. 502.
77 In paragraphs 1252 & 1253, Cmnd. 3909. Para. 1252 gives the reasons and Para 1253 recommends that the Court should have the power on the application of a creditor before or after jurisdiction.
78 *Barclay-Johnson* v. *Yuill* [1980] 3 All E.R. 190, 195.

INSURANCE INTERMEDIARIES IN HONG KONG

by Li Po Wan, Pauline

INTRODUCTION

With the increasing importance of insurance in modern civilised life, the role of intermediaries in the marketing of insurance is also given increasing recognition, for upon them falls the bulk of the responsibility of dealing directly with the insuring public.

Regulation, in one form or another, of insurance intermediaries has been introduced in many countries, but not yet in Hong Kong. The purpose of this dissertation is therefore to examine the position of insurance intermediaries in Hong Kong, to spotlight some of the mischiefs which frequently arise when intermediaries approach members of the public, and to propose remedies in the form of legislative regulation.

(I) GENERAL DEFINITIONS

An intermediary is, by definition, a go-between. An insurance intermediary is therefore the middleman between the two parties to an insurance contract – the insurer and the insured. In the English language, two different terms are used to describe this class of persons according to the capacity in which they act: "agent" and "broker", though in the legal sense, both are agents.

A. Brokers

The term "insurance brokers" is defined in the directive issued by the Council of the European Communities in 1976[1] as "persons who act with complete freedom as to their choice of undertaking .....".[2] This means that brokers are agents not tied to

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1 Directive 77/92/EEC.

2 Ibid. Article 13(2) (1) (a), subsequently adopted by the British Insurance Brokers Association in their 'Consultative Document of 1976, and the Govt. White Paper: *Insurance Intermediaries* (Cmnd. 6715) took it up as a working definition of the persons to whom the Insurance Brokers (Registration) Act, 1977, applies.

any particular insurer under any agency agreement, whose business is to arrange insurance on behalf of persons seeking cover.

Brokers normally receive commissions from the insurers calculated as a percentage of the initial premiums payable on the policies. Some brokers, at times, adopt a client-fee system in similar fashion to other professional men.

B. Agents

The term "insurance agents" is defined in the European Economic Community directive as "persons instructed ..... or empowered to act in the name and on behalf of ..... one or more insurance undertaking .....".[3] This means that agents are those persons tied to single insurers or a limited number of insurers by agency agreements,[4] whose job it is to sell policies on behalf of the insurers they represent.

Agents normally receive commissions from the insurers. Some insurance companies, however, pay their agents salaries calculated to cover the minimum amount of business the agents contracted to bring in within a year,[5] with profit commissions for excess policies brought in.

In addition to full-time agents, persons such as solicitors, accountants, garage owners, travel agents, etc., are in a special position to sell insurance as a sideline to their occupations.[6] These persons may or may not be under agency agreements with insurers, and are usually remunerated on a commission basis.

(II) THE PROBLEM OF TERMINOLOGY

A. Terminology in other countries

In countries such as Britain and the U.S.A., the importance of drawing a clear distinction between tied agents and independent brokers is well-recognised as crucial for the purpose of notifying the insuring public which class of intermediaries they are dealing with. Thus, in the U.S.A., there are separate licensing systems for agents and brokers.[7] In Britain, the first attempt to combat the problem was made in 1976: the Department of Trade, in pursuance of section 64 of the Insurance Companies Act 1974, issued the Insurance Companies (Intermediaries) Regulations.[7a] These regulations require the sole agents of insurance companies to disclose their relationships with the company when inviting a member of the public to enter into an insurance contract, such as to enable the prospective policyholder to distinguish an agent from a broker. A further move has been made with the passing of the Insurance Brokers (Registration) Act 1977, which restricts the use of the title "Insurance Broker" to registered persons and enrolled bodies corporate.[8]

B. Terminology in Hong Kong

In Hong Kong, there is complete confusion in the usage of the terms "agents" and "brokers" and similar terms, among both men of the insurance industry and the public.

In the Chinese language, the terms "agents" and "brokers" mean the same: 保險經紀 – a middleman in the insurance business who acts in his own interest. It follows that there is no distinction in concept between the independent broker and the tied agent acting for the insurer. Even the English terms are used interchangeably and arbitrarily by the people in the industry. Some attach their own meaning to the two terms. To take an example, the Manager of the Production Department of the New Zealand Insurance Company Ltd., Mr. Michael Yeung, informed me that the company nominates as "brokers" those persons who are on probation in the broking department, who will have to prove their abilities as insurance salesmen before the company would employ them as "agents". These persons, though named "brokers", are really starting tied agents, without any formal agency agreement.

The confusion becomes greater when some of the intermediaries employ alternative titles such as "insurance consultants", "insurance advisers", etc. Consequently, a member of the public, when seeking

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3 Ibid. Article 13(2) (1) (b).
4 I shall hereinafter refer to them as "tied agents".
5 This is sometimes called the "quota system".
6 I shall hereinafter refer to them as "part-time agents".
7 See E. W. Patterson, *Essentials of Insurance Law* (McGraw-Hill Book Co., Inc., 2nd Edition, 1957) pp.45-47.
7a 1976 S.I. 1976/521. See [1976] 126 New Law Journal, 386 and 389.
8 Section 22 of the Act. The ambit of this section has been subject to some criticisms which shall be discussed later.

an intermediary's advice as to the choice of an insurance company, can hardly tell whether he is dealing with an impartial broker or a tied salesman.

(III) IMPORTANCE OF INTERMEDIARIES IN INSURANCE TRANSACTIONS

When compared with agents and salesmen in other business, not only do insurance intermediaries perform, or are expected to perform, a great many tasks, but, owing to the unique nature of the insurance business, the role they play is much more significant. Indeed, the insurance industry has often been described as of a "tripartite structure": insurer, intermediaries and the insured. The following factors account chiefly for their significance.

A. Nature of The Insurance Business

The insurance business is characterised by a host of technicalities and complexities, with a language of its own and innumerable unwritten practices and principles, fine distinctions unknown and incomprehensible to ordinary persons. The numerous conditions, promises of benefits and clauses relating to the definition of the risk in an insurance policy, written in trade terms bearing special meanings, add up to a pretty complicated and involved contract which few policyholders, not even the most educated, can understand without explanations given by the intermediary – the normal person who comes into direct contact with the insuring public. Furthermore, the bewildering variety of insurance schemes offered by insurers, with little difference in terms and benefits but possibly big differences in costs and coverage, make it necessary and yet difficult for the average person to judge one set of terms as against another and to select the best cover at the best price. For these reasons, the insured needs more guidance and protection than in other business deals. The assistance of the intermediary is thus invaluable, whereupon the average buyer relies extensively.

B. Ignorance of The Consumer

In Hong Kong, the problem of consumer ignorance in insurance is aggravated by several factors making the responsibility of the intermediary even greater.

1. The general level of education is relatively lower than in western countries. Compulsory education has only been expanded recently.

2. The standard of English amongst the average Chinese, especially the lower-middle classes, is comparatively low. Some proposal forms and the majority of insurance policies are in English without Chinese translation. The majority of the public therefore relies on the intermediary to complete their proposal forms and explain the policies in comprehensible terms. The former act has become the normal practice in the industry, which has created infinite problems.[9]

3. There is a complete lack of consumer education in insurance. As the Chairman of the Education Sub-Committee of the Insurance Institute of Hong Kong, Mr. Paul Lam,[10] pointed out, this important aspect of consumer protection has so far been neglected;[11] the Education Sub-Committee of the Insurance Institute, though aware of the problem, can do nothing about it at present, since teaching staff is inadequate even for insurance staff. Insurance is excluded even from the economics and business courses at the two universities.[12] As a result, even the highly educated and the well-bred may be ignorant as to basic insurance knowledge, let alone the lower-middle classes, which accounts for the utter reliance that the average buyer places on the intermediary.

(IV) EXPERTISE AND INTEGRITY

To shoulder the responsibilities owed to both insurers and insureds, and to fulfill their role efficiently, insurance intermediaries must possess a high degree of expertise and integrity. Expertise enables them to offer the best possible advice to their clients, while integrity ensures that they do in fact

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9 To be discussed later.

10 Mr. Lam is also manager of the Sales and Promotion Department, Jardines Insurance Services Ltd.

11 The Consumer Council is as yet occupied with other areas of consumer protection.

12 The insurance course offered by the Polytechnic aims at the training of insurance staff only.

offer such advice, "even if the second best advice may bring a higher amount of commission".[13]

A. Expertise

1. Importance of Expertise

The highly technical and complex nature of insurance itself means that it would perhaps take an aspiring intermediary years of study and practical experience before he can grasp the essentials of the business. Moreover, to cope with the great number of tasks involved in effecting an insurance transaction, he must have a thorough, extensive and up-to-date knowledge of the business, the market in general, and the law on insurance. Indeed, it has been said that the "insurance broker's information needs are formidable, almost comparable to those of the practising lawyer."[14] Mr. Michael Brown, a life insurance agent, also wrote: "The study and development of skills is as essential to the (agent) as to lawyers, accountants, doctors and other professionals".[15]

2. Expertise in other countries

In England, under the Insurance Brokers (Registration) Act 1977, brokers, to be eligible for registration, must hold professional qualifications, either granted by an approved[16] institution after having received instructions therefrom,[17] or have reached a standard of proficiency at qualifying examinations,[18] or have been employed by an insurance broker or insurance company,[19] *and* have had "adequate practical experience in the work of an insurance broker",[20] to ensure that they possess adequate knowledge and skill.

In the United States,[21] state laws require intermediaries applying for a licence[22] to have completed a course or courses in insurance and passed prescribed examinations. To take New York as an example, the law requires that all agents (other than life, accident and health) shall have completed courses in institutions meeting prescribed standards and passed written examinations;[23] applicants for a broker's licence are required to have taken courses in insurance and passed prescribed examinations.[24]

3. Expertise in Hong Kong

In Hong Kong, unqualified and unprofessional persons can act as insurance intermediaries, provided they can memorise a few key words and phrases, and have sufficient relations to guarantee an inflow of business. There is no central control authority to prescribe qualifications to be attained by aspiring intermediaries, and no means by which the public may distinguish the professional from the non-specialist.

Most insurance companies do not seem to care. The only criterion for the selection of agents is the applicants' ability as salesmen. No other qualifications are necessary. In fact, an insurance staff informed the interviewer that the older generation of insurance agents in Hong Kong, those now aged above 50, do not even know English. And the staff of a large and reputable insurance company has admitted to the interviewer that a starting agent, to get permanent employment with the company, has simply to demonstrate his ability as a salesman during the probation period by bringing in risks beneficial to the company.[25] It readily follows that smaller companies might simply recruit men from off the street as their agents.

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13 Mr. M.S. Morris, Under Secretary, Insurance Division, Dept. of Trade, to the Insurance Institute of London, reported in *Broker's Chronicle* (April 1977), p. 48. See Current Law, Statutes Annotated, Insurance Brokers (Registration) Act 1977, cap. 46: *"Background to the Act".*

14 John Myers, 'The Services of Insurance Brokers' New Law Journal, May 6, 1976.

15 *The South China Morning Post,* February 26, 1980.

16 Insurance Brokers (Registration) Act 1977, s. 6(1).

17 Ibid., s. 3(1) (a).

18 Ibid., s. 3(1) (b).

19 Ibid., s. 3(1) (e) and (f).

20 Ibid., s.3 (2) (b). Note the alternative criteria in s.3(1) (c) and (d), applicable to those who have ongoing experience of insurance.

21 See E.W. Patterson, *Essentials of Insurance Law,* loc. cit.

22 All states require agents to be licensed; all except 15 make similar provision for brokers.

23 New York § 114 (2).

24 Ibid.

25 Termed "good risks" in contrast with "poor risks".

Training courses provided by insurance companies for new recruits last from half a day to two or three days,[26] and the contents are mainly on high-pressure sales techniques, with only a brief introduction to the types of policies offered by the companies. It can hardly be said that such training equips the agents with such knowledge or understanding of the business as to enable them to offer sound advice and assistance to their clients.

And yet no one seems to care – neither the companies nor the intermediaries. The Insurance Institute, when it first organised part-time day-release courses for insurance staff, encountered indifference and sparse attendance.[27] Few care to attain professional designations, such as Associateship of the Chartered Insurance Institute. These are generally felt to be of no avail, as salesmanship speaks for all, and the quality of service is totally neglected.

B. Importance of Integrity in Hong Kong

1. Competition

Hong Kong, it is admitted by many, is a profit-orientated society where the stress is on profit-earning. In the relatively small local insurance market, there are 344 registered insurance companies[28] competing for business; competition is, therefore, keen to the extent of being "cut-throat". The important thing to insurers is to secure the maximum volume of business possible, and this is the attitude they foster in their agents in place of the emphasis on the quality of service to be provided.

Competition between agents and brokers is no less keen. An agent remarked that if she discussed her "sphere of influence"[29] with a rival colleague, she would most probably find the next day that she had lost her client. Moreover, intermediaries live basically on commissions which turn on the volume of business they can secure. Even the salary received by agents of some companies is merely an advance against future commissions. It becomes all-important to secure business, and by all means. This attitude, as said, is fostered by companies who, in recruiting agents, select the successful salesman regardless of his ethics. Discriminating selection by large companies is in fact a pretence. Training stresses sales techniques, not insurance knowledge. Incentives are provided to encourage agents in sales: the quota system[30] under which the agent must struggle to meet the annual quota before he can earn any profit commissions; graded commission programmes, whereby different commission rates differ according to the type of risk brought in and its beneficiality to the company. Honours such as the "Million Dollar Round Table" highlights "profit" rather than "service" as the enshrined principle for the insurance intermediary.

2. Scope for Fraud and Deceit

As a result of the keen competition, quite a number of intermediaries are money-minded and readily yield to temptations to commit fraud and deceit. And there is plenty of scope for fraudulent and deceptive practices in Hong Kong. The technicality of the business, the ignorance of the public and their inevitable reliance on intermediaries make the majority of insurance buyers, particularly the Chinese of the lower and middle classes, ready prey for dishonest insurance intermediaries.

Moreover, few people, not even the well-educated, care to read a document before signing or accepting it. This is partly attributable to carelessness, and partly due to the fact that most insurance policies are printed in small prints, which "requires quite an effort to go through".[31] People simply do not have the time and patience to read through them to find out the contents for themselves. They prefer to rely on the oral utterances of the intermediaries. This renders them prey to misrepresentations, fraudulent or otherwise, by the intermediaries.

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26 According to the staff of 2 companies interviewed.

27 According to an insurance staff.

28 The figure provided by Mr. Paul Lam, and taken up to August 31, 1980.

29 Meaning an area, residential or industrial, in which the agent has established a relationship.

30 See note 5.

31 Miss Ophelia Cheung, Executive Director of the Consumer Council, in her speech to the Insurers Club on April 28, 1980.

A final point to be observed is that quite a number of policies are in English without Chinese translation. The non-English-speakers, whether they like it or not, are compelled to depend on the intermediaries to inform them of the contents of the policies. This, again, leaves them at the mercy of dishonest intermediaries.

3. Importance of integrity

In short, there is for the insurance intermediary in Hong Kong a great temptation to resort to unethical practices. Integrity is therefore of particular importance in safeguarding the interests of the insuring public.

In Britain, any person seeking to be registered as a broker under the Insurance Brokers (Registration) Act 1977 must satisfy the Insurance Brokers Registration Council[32] as to his character and suitability to be a broker.[33] In addition, all registered brokers are governed by a Code of Conduct drawn up by the Council;[34] breach of the Code and other "unprofessional conduct" have the possible effect of erasure from the register.[35]

Similarly, in the U.S.A., an applicant for an intermediary's licence must produce a statement by a recognised insurer certifying that the applicant is of good character.[36] Unethical conduct is a ground for revocation or suspension of the licence by the Insurance Commissioner.[37]

The integrity of insurance intermediaries is thus given prominence in other countries. In Hong Kong, where there is a great temptation for insurance intermediaries to resort to unethical practices, integrity is of particular importance in safeguarding the public's interests. Nevertheless, control over the professional conduct of intermediaries is absent altogether.

(V) THE OVERALL SCENE

It is undeniable that there are a number of insurance intermediaries who are both ignorant and money-minded.[38] Sharp practices are not uncommon. According to Mr. Paul Lam, the problem came to a head about a decade ago, in relation to life insurance agents. Their widespread malpractices, besides causing incalculable loss to insurers and policyholders, led to the loss of public confidence in insurance intermediaries generally. Even to the present day, the profession has not completely recovered from the injury done to its public image about a decade or so ago.

(VI) BUSINESS PRACTICES, MISCONDUCT AND THE LAW OF AGENCY IN ACTION

1. The first task of an intermediary, be he agent or broker, is to advise the client as to his insurance needs – how exposed he is to risks, the type of policy and the amount of coverage required, and how much he can afford to spend. An unqualified intermediary would not be able to do so due to his own lack of knowledge and experience, while a money-minded intermediary would recommend the type of policy which brings him the highest commission, or recommend more insurance than the client's circumstances warrant to bring himself more commission.

Some agents, on the other hand, partly due to their ignorance of insurance practices and partly due to their desire to sell by all means, recommended inadequate cover to clients. One case[39] related to agents selling accident (workmen's compensation) insurance. They persuaded factory owners that it sufficed to buy cover for a portion of the workers in the factory, which means saving a great deal for the owner. The Chinese always seek the lowest costs in buying, and, out of ignorance, the employer bought as recommended. It is true that the law does not require full insurance in this respect, but the regulations of insurance companies do require it, otherwise the insurer is entitled to deny any claim made under the policy or else require the

32 The Council is established in pursuance of s.1 of the Act, for the purpose of administering and enforcing the provisions of the Act.
33 Insurance Brokers (Registration) Act 1977, s.3(2) (a).
34 Ibid., s.10.
35 Ibid., s.15.
36 See E.W. Patterson, *Essentials of Insurance Law*, loc. cit.
37 Ibid.
38 Mr. Paul Lam's comment.
39 The incident was reported in *Sing Tao Wan Pao*, March 1980.

employer to pay up for a full policy before the insurer settles the claim. In the former case, the full loss falls on the employer; in the latter case,[40] the insurer would feel aggrieved as, prior to the purchase of full insurance by the employer, the risk borne by the insurer was out of proportion to the premium paid.[41]

2. The intermediary, especially the broker, has the duty to differentiate the policies or programmes available in terms of price, conditions, and benefits and advise the client on the programme most suitable for his needs.

Insurance agents, out of ignorance or for commission considerations, might fail to mention a programme more advantageous to the client but which would bring a higher commission to the agent under the graded commission schemes set up by some companies.

3. It is the broker's duty to place his client's business with the insurer whose overall cover best suits the client's needs at the best price. However, brokers may be easily tempted to place business with the insurer who offers the highest commission rates or allows the longest period of credit in respect of premiums withheld by brokers for investment purposes, regardless of the reputation of the company or the suitability of the policy.

The intermediary, especially the broker, is usually given a discretion involving the exercise of his personal judgment in the above-mentioned matters; even if he does so in a way disadvantageous to his client, the latter cannot sue him for professional negligence unless it be proved that no reasonable agent would have taken the course of action which the particular agent adopted.[42] The broker, e.g., is not bound to place cover with the company offering the lowest premium or the most satisfactory terms.[43] Hence, the insured, had he been prejudiced at the intermediary's hands, can seldom find protection at common law.

4. The agent, knowing that the client is shopping for the best price, may lie about the premium of his recommended policy, deliberately quoting low, or about the cash value of the policy at the end of the insurance period. The client, in most cases, remains deceived, it being the practice not to read the policy on its receipt, until it is too late to reject the policy unless at a substantial loss.[44]

5. Insurance agents are also known to mislead clients as to the financial stability and reputation of the company by statements as: "Our company never disputes claims", or going about door-to-door selling, carrying huge volumes and attractive pamphlets.[45]

At common law, brokers have been held liable for negligence for recommending an insurance company known to be in financial difficulties.[46] Where the misrepresentation as to the insurer's position is wilful, the broker has been held liable for fraud.[47] The position of the agent is not so clear, much depending on the legal capacity in which he makes the misrepresentation,[48] but it seems only right that he should be similarly liable.

6. Many agents, being unqualified and ill-trained, are often themselves unaware of the implications of the conditions and terms of policies, expressed in technical trade terms. Their explanations are therefore superficial and inaccurate, with misleading and at times false statements as to the benefits provided. The client is often unaware of discrepancies between the agent's oral promises and the written terms of the policy, until it becomes too late to reject or

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40 This is usually the case with reputable companies who do not wish to be reputed as a company denying claims frequently.

41 The risk covers all the workers, the premium only a portion.

42 *Cumber* v. *Anderson* (1801) 1 Camp. 523; *Tasher* v. *Scott*, (1815) 6 Taunt. 234.

43 *Moore* v. *Mourgue*, (1776) 2 cowp., 479; *Dixon* v. *Hovill*, (1824) 4 Bing. 665.

44 V.P. Chernik, *The Consumer's Guide to Insurance Buying* (Los Angeles: Sherbourne Press, Inc., 1970), p.37.

45 This practice was reported in *Sing Tao Wan Pao*, March 1980. The reporter recommended that the Consumer Council propose some control over it.

46 *Osman* v. *Ralph Moss*, [1970] L1. Rep. 313.

47 *Poutifex* v. *Bignold*, (1841) 3 Man. & G., 63.

48 To be discussed later.

surrender without considerable loss.

7. The policyholder is entitled to know what protection he receives under the policy and what points are excluded. It is therefore of importance that the intermediary points out to his client clauses in the policy excluding or limiting the insurer's liability in certain events. This enables the client, where necessary, to negotiate with the insurer on the scope of the risk covered.

In addition to the above-mentioned express clauses, the case-law has established various principles relating to the definition of the risk in insurance policies.

To take fire insurance as an example,[49] policyholders are often told by agents that explosions are covered, whereas, in law, where an explosion is caused by the application of fire to a substance not of itself explosive, the loss thereby occasioned is not a loss by fire.[50]

From the interviews conducted, it appears to the interviewer that all well-trained and qualified intermediaries are aware of this common law limitation on the definition of the risk, and of their duty to inform their clients of the restriction.[51] However, unqualified and under-trained intermediaries can hardly be aware of such fine distinctions, let alone be able to warn their clients. They almost always keep silent on the scope of the risk covered by a particular policy, or mislead the client into believing that the policy covers all risks associated with the particular type of cover.[52] This practice has led many policyholders to be surprised and disappointed on finding their claim rejected because the particular loss was excluded from the cover. And it is well-known that policyholders never read their policies until a loss has occurred.

At common law, the Court of Appeal recently held in *McNealy* v. *Pennine Insurance Company Ltd., W. Lancashire Insurance Brokers, Ltd. & Carnell*[53] that it was part of the brokers' duty of care to ensure that the policy effected sufficiently covers the risk, and to inform the client of exemptions which may affect the cover given, failure of which rendered him personally liable in negligence. This protection, however, does not extend to agents.

8. Insurance agents often give the false impression, deliberately at times, that the insured may surrender the policy at any time before the date of expiry and recover in full the premiums paid. In fact, the recognised trade practice is that the insured must pay for the administrative costs of the policy.[54] Usually, should he surrender within three years of the issue of the policy, he recovers nothing; on surrender after three years, the cash value will be calculated according to the schedule of Policy Values.

The client, on the faith of the agents' ambiguous verbal promises, buys and surrenders some time later, and loses substantial amounts of money.

The majority of complaints relating to insurance to the Consumer Council are cases of this nature, mostly involving door-to-door salesmen of life insurance or home service insurance of some sort.[55]

9. Where the intermediary induces the client into the contract by misrepresentation, the situation is covered by legislation in Britain. Section 63 of the Insurance Companies Act 1974 makes it an offence for an intermediary to induce his client into the insurance contract by deliberately or recklessly making a false, misleading or

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49 Ivamy, *Fire and Motor Insurance* (London: Butterworths, 3rd ed., 1978).

50 *Thames & Mersey Marine Insurance Company Ltd.* v. *Hamilton, Fraser & Co.* (1887) 12 App. Cas. 184: the explosion of a boiler used for generating steam was held to be excluded.

51 Both Mr. Michael Yeung and Mr. Paul Lam pointed out this example to the interviewer.

52 Miss Ophelia Cheung dealt with this point in her speech, op. cit.

53 [1978] 2 Ll. Rep. 18. The same was held in a Canadian case, *McCawn* v. *Western Farmers Mutual Insurance*, (1978) 87 D.L.R. (3d) 135, Ontario High Court Justice.

54 Miss Cheung pointed this out in her speech, ibid., and so did Mr. Martin Wong, Chief Complaints Officer of the Consumer Council, in the course of the interview.

55 Mr. Wong, Chief Complaints Officer; also, *South China Morning Post*, 25th November, 1975.

deceptive statement.[56]

In Hong Kong, however, there being no similar statutory provision, the situation remains governed by the common law. The issue at law is whether the insurer is bound by the intermediary's representations and thus taken to have waived his rights under the policy, or whether the insured is bound by the terms of the policy. The answer depends on the capacity in which the intermediary makes the representation and the scope of his authority.

In the case of an agent, it has been held that oral representations contradicting the terms of the policy fall outside the scope of his authority, and so does not bind the insurer.[57] In any event, such oral statements are inadmissable as evidence under the parol evidence rule.[58] On the other hand, a broker, in explaining the terms of the policy to his client, is normally the latter's agent and not acting under any authority conferred by the insurer.[59] Thus, representations made by him do not bind the insurer. The insured is therefore bound to the terms of the policy, and not entitled to claim under such terms as were stated by the brokers.

10. Where the insured suffered loss as a result of the intermediary's default, he may sue the latter for breach of the duty of care, and recover damages accordingly.[60]

However, even if action against the intermediary succeeds, the latter is, more often than not, not in a position to satisfy the judgment.

In Britain, the situation is provided for in the Insurance Brokers (Registration) Act 1977. Section 12 (1) empowers the Insurance Brokers Registration Council to make rules requiring practising brokers to take out professional indemnity cover as a condition precedent to acceptance for registration. Section 12 (2) provides for the making of grants to persons who have suffered loss as a result of the default of brokers. Such grants are to be made out of funds maintained by the Council to which brokers are to contribute.

In Hong Kong, however, there is no similar mechanism to provide for a means to back up intermediaries to meet judgment debts. The insured, after meeting all the costs and trouble of litigation, might therefore find himself in an even worse position.

In Hong Kong, moreover, policyholders are most unlikely to bring civil action against the intermediary in default. The majority of such victims are of the poorer classes who hardly have the knowledge, time and financial means to instigate litigation. Secondly, the Chinese are, by nature, a passive and peace-loving race who are, by tradition, most reluctant to be involved in any litigation, let alone to bring legal action against another. They would rather shoulder the full loss and allow the defaulter to get off.

11. Brokers, or agents representing many insurers, may, having received instructions to effect a policy, wait to weigh which company pays him the highest commission before selection. Should a loss occur before cover has been placed with any particular insurer, the entire loss falls on the client, though he may sue the agents for unreasonable delay and recover his loss,[61] for

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56 S.63: "Any person who, by any statement, promises or forecasts which he knows to be misleading, false or deceptive, ... or by reckless making of any statement (dishonest or otherwise), induces or attempts to induce another person to enter into or offer to enter into any contract of insurance with an insurance company shall be guilty of an offence."

57 *Comerfield* v. *The Britannic Assurance Co.*, (1908) 24 T.L.R. 593; *Horncastle* v. *Equitable Life Assurance Society of the United States*, (1906) 22 T.L.R. 735.

58 *Horncastle's* case, ibid.

59 Unless the broker is acting under a specific agreement with a particular insurer.

60 *Hedley Byrne* v. *Heller*, [1964] A.C. 465: a duty of care arises irrespective of contract; *Bromley L.B.C.* v. *Ellis*, [1971] 1 Ll. Rep. 97, where the insurer's agent was held liable to the insured for negligence.

61 *Bromley L.B.C.* v. *Ellis*, op. cit., Lord Denning, M.R., held that the insurer's agent, once he has undertaken a duty to arrange insurance for a prospective buyer, owes the latter a duty to act with reasonable care to ensure that he is protected.

the intermediary, especially the broker, owes a duty to the insured to act with reasonable speed to effect an insurance.[62]

12. *Proposal Forms*

It is the practice that intermediaries fill in proposal forms for their clients on the latter's oral answers and submit to the latter to sign. Sometimes the client signs a blank form and allows the intermediary to complete it, and sometimes, the intermediary completes the form and signs it without referring to the client at all. And it is well-known, too, that the client almost never reads or has read back to him the completed form before signing, being careless and ignorant of the legal significance of a signature.

As a result, cases frequently arise where intermediaries insert false answers or omit material facts disclosed by the proponent or simply fail to enquire of material facts of the proponent[63]. Sometimes this is due to their ignorance of what facts are material to the risk and must be disclosed to effect a valid policy. At other times it is due to their fear that the insurer might reject the risk if a particular material fact were disclosed, whereby they would lose substantial commission.

Consequently, the insurers often deny claims on the ground of non-disclosure of material facts or misrepresentations. This gives rise to complex questions of law as to the agent's capacity and the doctrines of imputed knowledge and estoppel. There is a multitude of case-law and arguments on the subject, of which I will not go into any detailed analysis.

Briefly, there are two lines of authorities. In *Biggar* v. *Rock Life Ass. Co.*,[64] followed in *Newsholme Brothers* v. *Road Transport & General Insurance Co.*,[65] the agent in filling in the proposal form was held to be the agent of the proponent, who is solely responsible for mistakes therein and takes all the consequential loss. In the other line of cases,[66] the insurer was held responsible for the agent's default. The *Newsholme* line is at present dominant, and has been followed in Hong Kong cases,[67] while the other line has largely been thought of as turning on the particular facts of the cases.

This present state of the law is far from being satisfactory or certain in that no satisfactory attempt has yet been made to reconcile the two lines of cases by some consistent principle of law. Judges, by attributing each case to its own particular facts, seem to avoid proposing any authoritative solution, even where the opportunity arises for so doing.[68] This makes it difficult, if not impossible, to predict that a case in hand will fall within either line.

The *Newsholme* principle, now dominant, has encountered much criticism as being impractical, artificial and remote from reality,[69] for it imposes an onerous duty on the proponent to read, or, if illiterate, have the completed answers read or translated to him, before signing the form, a duty which few insured would ever care to discharge.[70] At the same time, it seems contrary to broad notions of justice and fair play to allow the insurer to take advantage of his employee's wrongful act.

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62 *United Mills* v. *Harney Bray and Co.*, [1952] 2 Ll. Rep. 631.

63 *Warren* v. *Scrutton*, [1976] 2 Ll. Rep. 276: the broker has a duty to enquire of material facts from the insured, failure of which rendered him liable.

64 [1902] 1 K.B.D. 516.

65 [1929] 2 K.B. 356.

66 consisting of cases as *Bawden* v. *London, Edinburgh & Glasgow Ass. Co. Ltd.* [1892] 2 Q.B. 534, *Stone* v. *Reliance Mutual Insurance Society Ltd.* [1972] 1 Ll. Rep. 469.

67 *The United Insurance Co. Ltd.* v. *Chan Park-sang* [1960] H.K.L.R. 267; *Ng Kai-hau* v. *The Oriental Fire and General Ins. Co. Ltd.* [1977] H. Ct., OJA No. 3130 of 1975; *Law Union & Rock Insurance Co. Ltd.* v. *Suen Suk-man* [1978] H.K.L.R. 501.

68 Judges tend to leave the issue to posterity. In *Paxman* v. *Union Ass. Society* (1923) 39 T.L.R. 424, McCardie J.: "Those two leading cases [referring to *Bawden* and *Biggar*] must soon be brought into line", but did nothing himself.

69 See P.A. Jacobs, "Insurance Law Reform" 5 A.L.J. 330, 333.

70 Reece, J., in *United Insurance* v. *Chan Park-sang*, op. cit., at p. 276:"Chan Park-sang [the proponent], could very easily, if in fact he was unaware of the contents of the form, have had them explained to him, and if he neglected to avail himself of the knowledge ..... he signed it at his peril."

Proposal forms, however, are not always necessary in insurance transactions. In fact, in Hong Kong, many insurances are effected over the phone: the agent or broker phones in details of the risk to the insurer, and policies are issued without proposal forms. But the problem is not thereby avoided. Trainor J., in *Ng Kai-kau* v. *The Oriental Fire and General Ins. Co. Ltd.*,[71] said: "A telephone call giving details to insurers ..... is analogous to the filling in of a proposal form on behalf of a person seeking insurance cover,"[72] and the *Newsholme* doctrine is applied accordingly.

The Law Reform Committee in England recommended in its Fifth Report[73] that persons soliciting or negotiating contracts of insurance "shall be deemed, for the purpose of the formation of the contract, to be agents of the insurer", and their knowledge imputed to the latter.[74] This approach has the advantage of making the law simple and certain, and it seems more just to make insurers, who primarily permitted their agents to complete proposals for clients, responsible for the agent's default.[75] The insurer, moreover, is financially more able to bear the loss, which it can recover from the agent for the latter's breach of duty.[76]

Australian writers, however, suggested that the ultimate solution lies not at common law[77] but in establishing a licensing system for all insurance intermediaries,[78] by which professional standards may be raised and default diminished.[79]

In so far as brokers are concerned, the above proposal is a reflection of the present position in the U.K. under the Insurance Brokers (Registration) Act 1977. The Code of Conduct drawn up by the Insurance Brokers Registration Council pursuant to section 10 of the Act[80] stipulates that brokers, when completing proposal forms for their clients, must make it clear that all answers or statements are the clients' own responsibilities. The client should always be asked to check the details of the completed forms and told explicitly that the inclusion of incorrect information may result in their claims being repudiated.[81] Basically, this is a reiteration of the *Newsholme* doctrine, save that a duty is now imposed on the broker to make the client aware of the problem.

In relation to the completion of proposal forms by agents, the common law position is preserved, except in the field of industrial assurance. In the latter field, the approach recommended by the Law Reform Committee in 1957, which prevents the insurer in such cases from denying a claim on the ground of misrepresentation or non-disclosure in the policy, has long been adopted since the Industrial Assurance Act of 1923.[82] Since the Insurance Brokers (Registration) Act in 1977, however, the British Government has been looking into the problem in relation to other fields of insurance, and has recognised that the complexities at common law require clearing up.[83] The proposal under consideration is to place the onus for the acts of agents in this respect "fairly and squarely on insurance companies".[84] This largely accords

71 Op. cit.
72 At p.6 of the judgement.
73 *Conditions & Exceptions in Insurance Policies* (1957, Cmnd. 62.)
74 Ibid., para. 14.
75 Mr. Clement Shum, Lecturer in Business Law of the H.K. Polytechnic, is also in favour of this approach.
76 Subject, of course, to the agent's ability to pay.
77 W.K.F., "The Preparation of Proposals by Insurance Agents" 1 A.L.J. 68, 70: "Does not the introduction of questions as to the precise relationship of the 'agent' to his company and to the proponent at various given moments rather cloud the issue?"
78 P.A. Jacob, "Insurance Law Reform", 5 A.L.J. 330, 334.
79 To be discussed later.
80 Details of the Code will be discussed later.
81 Breach of the Code may constitute unprofessional conduct: s.10(1) of the Act. This may have the effect of erasure from the register: s.15(1).
82 Industrial Assurance Act 1923, s.20(4): "If a proposal form for an industrial assurance policy is filled in wholly or partly by a person employed by the ..... company, the .....company shall not, except where a fraudulent statement in some material provision has been made by the proposer, be entitled to question the validity of the policy founded on the proposal on the ground of any misstatement contained in the proposal form."
83 See *Protecting the Policyholder*, Insurance Record, May 1978, p. 36: Mr. S.C. Davis, Parliamentary Under Secretary of State for Companies, Aviation and Shipping, in his address to the National Union of Insurance Workers, indicated the government's concern in this respect.
84 Ibid.

with the recommendation of the Law Reform Committee.[85]

13. It is the practice for intermediaries to collect the initial premium on behalf of the insurer, who allows credit periods, ranging from one to three months, in respect thereof. There being no requirement of a separate account to be kept for clients' money, the temptation is great for the agents to appropriate the money for his own investment purposes, in stocks and shares for example. Where the money is lost, the insurer is usually taken to have acquiesced in the practice, especially where he has authorised the agent to issue premium receipts, and bound to honour the policy,[86] thus suffering substantial loss. The insurer, in theory, may recover the premium from the agent who, in most cases, is unable to pay.

14. Mr. Michael Brown[87] pointed out: "Integrity in insurance business includes treating competitors fairly." The cut-throat competition in Hong Kong, however, drove agents to lie to clients about the latter's existent policies, which the former may not really understand, and by incomplete, misleading comparisons, induce the client to discontinue his existent policy and take out substantially the same policy with the agent's company, which action may be to the client's detriment. This practice, called "twisting", is prohibited by law in the United States.[88]

15. "Servicing existing business is one of the most important aspects of the insurance industry."[89] An insurance manager has, however, admitted to the interviewer that many complaints by clients concern the disappearance of the agent after the completion of the sale and their failure to assist clients to update their insurance and settle claims.

(VII) REMUNERATION OF INTERMEDIARIES

A. The Commission System

Apart from a few brokers, most insurance intermediaries are remunerated by commissions, rates being fixed by individual insurers. This system has a profound influence on the judgment and integrity of the intermediary,[90] and accounts greatly for their unethical practices.[91]

B. The Vicious Circle

Insurance intermediaries, as part of the inducement to prospective buyers, always give a certain discount to clients, deducted from their commission. To make up for the rebate, they demand higher commissions from insurers. Some brokers and multi-agents tend to place their business with the company willing to pay the highest commissions, and competition is such that there are always companies, struggling to survive, willing to pay exhorbitant rates to intermediaries. The net premium received by the insurer is thus less, and the fund out of which claims are met decreases. When a loss occurs, the insurer is unable to meet the claim, and the loss falls back on the insured.

To avoid this end, insurers had been compelled in the past to increase premium rates, which meant higher costs for the insured. In 1976, for example, there was un uproar over the 60% increase for Third Party risk premium:[92] it was revealed that the increase was attributable to the huge commissions demanded by and paid to intermediaries, who asked for as high as 40% commission.[93]

So, as always, the loss is inflicted onto the insured, initially induced to buy insurance by lower costs promised by the intermediary, and it all goes in a vicious circle.

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85 Op. cit.
86 *Hawke* v. *Niagara District Mutual Fire Ins. Co.* (1876) 23 Gr.139; *Patterson* v. *The Royal Ins. Co.* (1867) 14 Gr. 169.
87 See note 15.
88 E.g. California § 781 prohibits misrepresentation by the agent to induce the client to surrender a policy.
89 Mr. Michael Brown, see note 15.
90 V.P. Chernik, op. cit., p.46.
91 As seen from the accounts given above.
92 *South China Morning Post*, July 1, 1976.
93 Compared with a maximum of 5% in Britain, 10% in Malaysia and 15% in Singapore.

Included in the general underwriting rules of the Fire Insurance Association is a set of "agency rules" governing the appointment and regulation of agents by tariff companies, and stating that insurers are to prohibit agents from giving discount to clients, in order to promote fairer competition. This rule, however, has never been enforced or followed:[94] insurers, for business considerations, ALWAYS allow the practice.

(VIII) THE PRESENT POSITION: WINDS OF CHANGE

The real position, of course, is not as dismal. After all, it is only the minority who are responsible for giving the intermediary a bad public image. Moreover, according to insurance managers, the standard of expertise and integrity has been improving during the last decade. The importance of academic qualifications has been increasingly felt. Attendance at insurance courses organised by the Insurance Institute increased rapidly, while many have called for the establishment of an insurance college for staff training.[95] Insurers are increasingly selective in their recruitment of agents, and insistent that aspiring agents attain professional qualifications, attend courses, study insurance texts and magazines,[96] as well as participate in community activities to help foster their image as persons who care. The increasing number of brokers, on the other hand, contributes much to raise professional standards and instil a sense of professionalism in the marketing of insurance.

At the same time, many insurers feel that the present agency system, with its demand for high commissions and the poor quality of the services provided, stands as an impediment to the survival of insurance companies and the development of the industry. Consequently, large insurance companies now prefer to employ "salaried agents". Like commissioned agents, salaried agents are recruited to solicit business for the company, but are trained to perform more extensive duties and to offer to clients professional services similar to those offered by brokers. According to Mr. Michael Yeung,[96a] the new system is welcomed by both insurers and their clients. Through their salaried agents, insurers can now deal directly with their clients, thus avoiding much of the misunderstanding arising from the interposition of the commissioned intermediary. The insuring public, on the other hand, have more confidence in dealing with professional, salaried insurance staff than with commissioned agents. Insurers also find it easier to keep effective control over salaried agents. Moreover, by obviating the need to pay huge commissions to intermediaries to get business, insurers' costs are greatly reduced, while marketing methods are becoming professionalised and efficient.

As a result of all these advantages, salaried agents are steadily increasing in number, while commissioned agents are fast declining in importance. In fact, the latter are now largely dependent on established business relations for business, and their profits are dwindling.

Considering the intermediary system as a whole, the long-existing malpractices, the decline of commissioned agents, and the growing significance of salaried agents and brokers, all indicate that it is high time for change.

(IX) LOOKING TO THE FUTURE

A. Present and Future Control Over The Insurance Industry

In Hong Kong, current legislative control over the insurance industry is still piecemeal. The Insurance Companies (Capital Requirements) Ordinance[97] and the Motor Vehicles (Third Party Risks) Ordinance[97a] provide for the regulation of insurance companies in financial matters only. Mr. David Jeaffreson, Secretary for Economic Services, has pointed out[97b] that the former Ordinance is intended to be an interim measure only; more comprehensive legislation, on lines similar to the British

94 According to Mr. Paul Lam.
95 *South China Morning Post*, March 5, 1978: "Insurance firms want a college".
96 Mr. Michael Brown, op. cit.
96a The Production Department of which he is manager is in fact the salaried agency department of the insurance company.
97 Cap. 71, L.H.K. 1978 ed.
97a Cap. 272, L.H.K. 1976 ed.
97b *South China Morning Post*, February 16, 1978.

Insurance Companies Act of 1974, is now under contemplation.[98]

Our present concern is whether the new legislation covers the regulation of insurance intermediaries. Mr. P. Jacobs, the Registrar-General,[99] when interviewed in 1977,[100] admitted that intermediaries are causing problems, but, in his words, "it is not something ..... we are yet in a position to deal with." He indicated that he would not tackle agents or brokers initially.

It seems, therefore, that the comprehensive legislation under contemplation will cover only insurance companies, whilst regulation of intermediaries is likely to be left to a later date, but it is sure to come.

Although any future legislation governing intermediaries is likely to be based on the British model of control, we ought to take into account criticisms of the British system, the U.S. and Canadian models, as well as local factors which may render parts of the British system inappropriate for Hong Kong.

B. The British Model

Brokers

I. The Insurance Brokers (Registration) Act 1977

1. Mechanism of Control

The Act established the Insurance Brokers Registration Council[101] as a statutory body with delegated powers of legislation. Its function is to enforce the provisions of the Act under the supervision of the Department of Trade. Twelve out of seventeen of its members are representatives of registered brokers, elected by members of the British Insurance Brokers Association. The remaining five members are nominated by the Secretary of State, and include one lawyer, one accountant and representatives of policyholders.[102] Thus, the basic feature of the British system of control is self-regulation under government supervision.

2. Form of Control

The Act establishes a registration system whereby persons wishing to employ the title "Insurance broker" must be registered.[103] The Council maintains a register of all registered brokers[104] which is published for public reference.[105]

3. Improvement of Standards

(a) Expertise

Section 3 of the Act lays down conditions for registration based on academic achievement and/or practical experience.[106] The British government contemplates that insurance broking would eventually become a profession, entry to which is determined by academic qualification followed by an appropriate period of training.[107]

(b) Integrity

(i) Code of Conduct

Section 10 empowers the Council to draw a Code of Conduct which all registered brokers must follow. The Code drawn up and approved by the government[108] lays down fundamental rules governing the professional conduct of registered brokers, and sets out specific examples of the application of

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98 In 1976, the Registrar-General has set up a working party consisting of interested government departments and representatives from the industry to help prepare the new legislation. See *HK Standard*, July 2, 1976.

99 The Registrar-Gen. is the official responsible for monitoring the insurance industry in Hong Kong.

100 The *Insight*, April 1977 issue: "Tidying up Hong Kong's Insurance Laws".

101 S.1; I shall hereinafter refer to it as "The Council".

102 Schedule to the Act, s.1.

103 S.22.

104 S.2.

105 S.9.

106 Discussed above, p.60, notes 17 to 20.

107 See Current Law, Statutes Annotated, 1977, c.46.

108 Insurance Brokers Registration Council (Code of Conduct). Approval Order, 1978 S.I. 1978/1394; for details, see *Insurance Record*, December 1978, p.20: "Brokers' Code of Conduct".

these principles. Breach of the Code, gross negligence or repeated cases of negligence may constitute unprofessional conduct,[109] which is a ground for de-registration under section 15.

(ii) Disciplinary Proceedings

Section 13(1) requires the Council to set up an Investigating Committee to deal with complaints from the public and allegations against brokers which might result in de-registration on the grounds set out in section 15.

If the Investigating Committee feels that there is a prima facie case, the matter is referred to the Disciplinary Committee.

4. Supervision of Business

To ensure their financial solvency, registered brokers must meet a minimum working capital requirement,[111] keep their business assets at a prescribed level above their liabilities,[112] keep separate accounts for clients' money,[113] and report their accounts to the Council at prescribed intervals.[114] Further, the Act empowers the Council to make rules specifying types of securities in which clients' money may be held.[115]

II. Criticisms of the Act

1. Restriction on The Use of Title

Section 22 of the Act restricts the use of the full term "Insurance Broker" only. Non-registered persons can still act as brokers, using equally impressive titles such as "insurance consultants" or "insurance advisers" or simply "brokers". Thus, it has been suggested that some brokers might not take the trouble to register, and so manage to stay outside the net of control.[116] Moreover, unless there is a massive and continuing advertising campaign to familiarise the public with the contents of the Act, many insurance purchasers would not be able to appreciate the distinction between registered and non-registered brokers.[117]

Furthermore, as tied agents are allowed to register as brokers under the Act,[118] the public would be as confounded as before as to whether they are dealing with independent brokers or tied salesmen.[119]

2. Remuneration

The Act fails to provide for some measure of control over commission rates, such as fixing maximum or uniform commission levels.

3. Tied Agents

Tied agents, whether full-time or part-time, are excluded from the regulatory system[120] provided by the Act.

Agents

1. The Present Position

The only legislative control over tied agents at present is found in the Insurance Companies Act 1974.[121] Such piecemeal

109 Note that s.10(2) makes it clear that the Code is merely indicative and not conclusive of what constitutes unprofessional conduct.

111 S.11 (1) (a); the figure is to be specified in rules made by the Council.

112 S.11 (1) (b).

113 S.11 (2) (a): This makes improper usage of clients' money more difficult to conceal.

114 S.11 (2) (c), (d).

115 S.11 (2) (b): This avoids the investment of premiums, collected for transmission, to insurers, in risky or long-term assets.

116 The concern was expressed in Parliamentary debates. See H.C. Vol. 924, cols. 1876-1879, Mr. Nott.

117 Parliamentary debates: Standing Com.C., 19-2-1977, Col. 119, Mr. Moates; also Australian Law Reform Commission, Discussion Paper No. 7, para. 97.

118 S.3(1) (c): Full-time agents acting for 2 or more insurance companies for a period of not less than 5 years may register under the Act.

119 The point was made by R.R. Cockcroft, "The Life Assurance Market and the Consumer", *Policy*, Feb. 1980.

120 Except in so far as they are allowed to register as brokers under s.3(1) (c), ibid.

121 SS.63 and 64, discussed above, p.58, note 7a, and p.65, note 56, respectively.

control, however, is generally felt to be grossly inadequate,[122] and there have been calls for the government to lay down uniform standards for agents. The government, however, rejected this idea in its Consultative Paper on Insurance Intermediaries,[123] dated January 1977. The reason given was that a system of central control of agents would be impracticable in view of the wide variety of agents retained by insurance companies and the high cost in terms of manpower and money. The Paper recommended instead that insurance companies should be made fully responsible for the conduct of their agents in carrying out the terms of their agency agreements, and that the terms on which insurance companies employ agents should be standardised. However, these proposals were not implemented in the Act.

2. Future Plans

In response to calls for more extensive control of insurance agents, the British government is at present contemplating further legislation to cover this gap in the protection of policyholders. There have been indications[124] that the proposals on the Government Consultative Paper[125] will be largely implemented: insurance companies will be made fully responsible for their agents' acts within the terms of their agency agreements. It is believed that this will encourage insurance companies to be more selective in their choice of agents and to train agents properly. Only if insurers are slow to accept their responsibilities will the government introduce direct control.

The British government, according to Mr. Davis,[126] also contemplates restricting the sale of insurance to several clearly recognised channels:[127] registered brokers governed by the Insurance Brokers (Registration) Act 1977; properly accredited agents of insurance companies for whom the latter would be fully responsible under forthcoming legislation; members of other professions, such as solicitors and accountants, who are prepared to offer policyholders certain safeguards; insurance companies and their employees. It would be an offence to sell insurance outside this framework.

C. The United States Model[128]

In the United States of America, provisions for regulation of insurance intermediaries vary in different states, but the basic features are common to all states.

1. Mechanism of Control

Regulation of intermediaries is effected through legislation which is administered and enforced by government officials. In most of the states, insurance commissioners are appointed to take care of insurance matters.

2. Form of Control

The licensing system is adopted, under which no person may act as insurance agent or broker[129] without a licence. To do so is an offence in law. Moreover, insurers can employ only licensed persons as agents, and deal only with brokers who are licensed.

3. Licensing Requirements

These have been discussed above.[130]

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122 See, e.g. *Insurance Record*, June 1976, p.28: "Insurance Marketing Methods".

123 Cmnd. 6715; see *Insurance Record*, March 1977, p.22: "Regulation of Intermediaries".

124 Mr. Davis, Parliamentary Under Secretary of State for Companies, Aviation and Shipping in *Insurance Record*, May 1978, op. cit., outlined the government's future plans in this area.

125 Cmnd. 6715, op. cit.

126 See above, note 124.

127 This was also recommended in the Consultative Paper, op. cit.

128 See E.W. Patterson, *Essentials of Insurance Law*, op. cit.; V.P. Chernik, *A Consumer's Guide to Insurance Buying*, op. cit.

129 It has already been mentioned that all states have licensing systems for agents, and all except 15 have similar systems for brokers.

130 See p.60, notes 21 to 24.

4. Integrity

Some states, e.g. New York, lay down specific codes of conduct governing the professional conduct of intermediaries. Some unethical practices are also forbidden by law in some states.[131]

Insurance Commissioners are empowered to revoke or suspend an intermediary's licence on one of several grounds, including violation of the law in the capacity of insurance agent, fraudulent or dishonest practices, and proof of untrustworthiness or incompetence.

D. Hong Kong: Some Tentative Proposals

1. Clarification of Terminology

To enable the public to distinguish between tied salesmen and independent brokers, and to determine the location of responsibility for insurance intermediaries,[132] the future control mechanism should provide for some means for differentiating "agents" from "brokers" and controlling the use of these and similar terms. For instance, tied agents may be required to disclose their relationships with the companies they represent.[133] Use of the titles "agents" and "brokers" should be confined to registered or licensed persons, while use of equally impressive titles such as "insurance agents" or "insurance consultants", which are likely to confuse the public, should be prohibited or restricted to qualified persons.[134]

2. Mechanism of Control

The choice is between, on the one hand, self-regulation by a professional body under government supervision, as in Britain, and, on the other, government control, as in the United States.

In Hong Kong, there is as yet no professional organisation among insurance intermediaries which is comparable to the British Insurance Brokers' Association and capable of exercising self-regulation. Should one be formed for the latter purpose, intermediaries may stay outside the net simply by not joining.[135] Moreover, administrative control in the hands of a professional body incurs the danger of its being dominated by a few powerful businessmen, the creation of a closed shop, and the growth of restrictive practices disguised as disciplinary controls.[136] For these reasons, both insurance businessmen and the Consumer Council favour that a government unit be responsible for administering and enforcing the regulatory measures, with assistance and advice from the private sector.

3. Staffing and Budget[137]

Government control, though strongly recommended, involves new problems. Currently, the government unit responsible for insurance matters is the Registrar-General with a very small senior staff. With the forthcoming comprehensive control over insurance companies, the present number of administrative staff will become grossly inadequate should government control cover insurance intermediaries as well. Moreover, men familiar with the insurance industry must be recruited to ensure efficient implementation of the regulatory measures. However, at the end of 1978, the Registrar-General advertised for applications for the new senior post of "Insurance Officer", but there were no successful applicants.[138] This demonstrates the difficulties in the recruitment of experienced staff.

In addition, recruitment of additional

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131 E.g. in New York, it is an offence in law for agents to engage in incomplete comparisons between different policies, programmes or companies.

132 As will be suggested below, insurers should be made generally responsible for agents, while policyholders should be generally responsible for brokers.

133 Similar to Insurance Companies Act 1974, s.64.

134 In the light of criticisms of s.22 of the Insurance Brokers (Registration) Act 1977, this is a possible improvement on the section.

135 This is the case with the H.K. Insurance Associations.

136 This has always been the fear of British brokers after the passing of the Act in 1977.

137 See *Asian Money Manager*, October 1979, p.28: "Capital Scheme Brakes Hong Kong's Numbers".

138 Ibid.

staff and the costs of administration would impose an extra burden on the taxpayers. This would certainly raise voices of opposition within the Government.[139]

4. Form of Control

The main forms of control are "registration" and "licensing".

Under a licensing system,[140] only licensed persons are allowed to act as intermediaries for remuneration; control can thus be extended to all classes of intermediaries, both agents and brokers.

A registration system,[141] on the other hand, merely gives members of the public a means of marking out registered intermediaries as persons having official approval and subject to standards of control; non-registered persons can nevertheless act as intermediaries. Public confusion is no less alleviated.

From the interviews conducted, it appears that insurance men in Hong Kong generally favour the licensing system as being more effective and comprehensive. Nevertheless, it is most unlikely that Hong Kong would adopt a system which is far more extensive than that in Britain, particularly in view of the fact that Hong Kong has traditionally pursued a policy of limited government intervention in the insurance industry.[142] Hence, it is more probable that the British registration system would be followed.[143] If so, it becomes necessary to determine the scope of regulation.

5. Scope of Control

In Britain, the proposal now under contemplation is that insurance companies be made fully responsible for their agents' acts within the terms of their agency agreements.[144] This, however, would still involve complicated legal questions of construing agency agreements and determining the scope of agents' authorities. The Australian Law Reform Commission[145] criticised this position and suggested that insurers should be made responsible even where the agent acts outside the scope of his actual and apparent authority. Though this may sound harsh as far as insurers are concerned, they have the power to fire and hire and should be responsible for errors of judgment in the exercise of that power and in the training of their own agents.

As for brokers and agents tied to more than one insurance company, it would be virtually impossible to make any particular insurer responsible for their acts.[146] These two classes should therefore be subject to government regulation.

6. Contents of Control

(a) Expertise

Academic qualifications with a minimum period of professional training or practical experience should be made the minimum criteria for registration. For this purpose, examinations conducted by the Insurance Institute of Hong Kong for the Chartered Insurance Institute and the Insurance Institutes of Australia, New Zealand and Canada can be adopted as standard qualifications.[147]

(b) Disciplinary Control

(i) A code of conduct prohibiting unethical practices should be drawn up. The British Code and the law

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139 The Consumer Council: On proposals for reform being raised by the Council, public expenditure is always the government's foremost concern.

140 Adopted in the U.S.A. and Canada.

141 Adopted in Britain.

142 *Asian Money Manager*, Oct. 1979, op. cit.

143 Mr. Paul Lam takes the same view, though he personally favours a licensing system.

144 See above, p. 72, note 123.

145 Op. cit., para. 90.

146 Except where they are acting under special arrangements with particular insurers, who can be made responsible for such intermediaries' acts.

147 Mr. Paul Lam: The H.K. Insurance Institute is not yet in a position to conduct its own examinations.

in the United States can serve as models.

(ii) Section 63 of the Insurance Companies Act[148] should have its counterpart in Hong Kong.

(iii) Disciplinary proceedings should be held to investigate complaints concerning an intermediary's unprofessional conduct. Erasure or suspension from the register should be made the appropriate penalty.

(c) Professional Indemnity Insurance

To guarantee the solvency of registered intermediaries, and their ability to meet judgment debts, the taking out of professional indemnity insurance should be made one of the conditions for registration. A fund supported by brokers contributions might also be established for this purpose and would be maintained by a brokers' professional organisation.[149] Brokers should, moreover, be required to submit their accounts at prescribed intervals to the central control authority for inspection.

(d) Premiums withheld for Investment

The abuses arising from credit arrangements between insurers and intermediaries have already been discussed.[150] This may be remedied by requiring intermediaries to keep separate accounts for clients' money. This would prevent any mixing of the personal or business funds of brokers with premiums collected from clients for transmission to insurers. Moreover, limits should be placed on the types of investments of premiums allowed, to exclude risky speculations.

(e) Commission and Credit Periods[151]

Brokers are often tempted to place business with the insurer who offers the highest commission rate or the longest credit period within which premiums may be withheld for investment. To remedy this, maximum or uniform commission rates ought to be introduced.[152] In fact, as early as 1976, insurance managers had called for legislation limiting the amount of commission payable to intermediaries; one manager suggested the maximum rate to be 15%.[153]

Alternatively, the commission system may be replaced by a client-fee system, which some brokers in Hong Kong have already adopted. The latter proposal would greatly help in fostering the "professionalisation"[154] of insurance broking.

In relation to credit periods, maximum or uniform periods should be imposed.

(f) Rebating

The vices arising from rebating, i.e., the practice of insurance intermediaries giving discount to clients, have already been discussed.[155] In the United States, rebating is strictly prohibited by statute,[156] violation of which is a ground for revocation of licence by the Insurance Commissioner. It seems that similar provisions are desirable in Hong

148 See above, p.65, note 56.
149 To be discussed later.
150 See above, p. 68.
151 This is excluded from the British Act but highly desirable in Hong Kong in view of the absence of self-regulation.
152 In Britain, this has been introduced by the Life Offices' Association, and brokers subject to control have found their position more tenable, as they can now justifiably disclaim any vested interest in selecting a particular insurance company.
153 *H.K. Standard*, 1st July, 1976.
154 This is the slogan of brokers in Britain.
155 See above, p. 68: "The vicious circle".
156 E.W. Patterson, *Essentials of Insurance Law*, op. cit., p. 42.

Kong,[157] especially in the light of the unfortunate incidents in 1976.[158]

7. Professional Organisation

An insurance manager recently called for the establishment of an Insurance Intermediaries' Association,[159] and Mr. Paul Lam backed up by saying that insurance brokers, at least, are ready to take this move. The body, composed of representatives from the profession, will act as its spokesman, promote its interests, promote professional standards by conducting courses for its staff, and assist the government in drafting detailed regulations.

CONCLUSION

It seems that future trends are two-fold: (1) In the tied agency force, salaried agents will gradually replace commissioned agents. (2) Brokers will come under a central system of control. The form and efficacy of such a system is unknown yet; it will probably be based on the British mode, with, hopefully, improvements and modifications to suit local circumstances.

As Mr. Martin Wong of the Consumer Council pointed out, the regulation of insurance intermediaries is inseparable from that of insurance companies. For purposes of consumer protection, one without the other cannot be fully efficacious. The Government has taken the first move towards the protection of the insuring public by enacting the Insurance Companies (Capital Requirements) Ordinance.[160] More comprehensive control over insurance companies is forthcoming. It seems that the regulation of insurance intermediaries will not be put into serious consideration until some two or three years later. Meanwhile, it is hoped that the movement towards professionalism, recently begun among brokers, will continue and will serve to prepare members of the occupation for future government regulation.

* * * * *

ACKNOWLEDGEMENTS

Much of the information in this dissertation is gathered from interviews with the following:

Mr. Paul S.K. LAM	Manager, Sales and Promotion, Jardines Insurance Services; Chairman, Education Sub-Committee, H.K. Insurance Institute
Miss Susanna LI	Staff member, Associated Bankers Ltd.
Mr. Clement SHUM	Lecturer, H.K. Polytechnic
Mr. Martin WONG	Chief Complaints Officer, Consumer Council
Mr. Michael YEUNG	Manager, Production Department, New Zealand Insurance Co. Ltd.

My thanks are due to the above for their invaluable assistance and to my supervisor, Mr. Andrew HICKS, for many detailed comments and suggestions.

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157 Mr. Paul Lam strongly recommended this as highly desirable.

158 See p. 31: "The vicious circle".

159 Mr. Fung Yick-keung, manager of Asian Eagle Insurance Co. Ltd., in *Suen Pao*, 15th September, 1980.

160 Cap. 71, L.H.K. 1978 ed.

DIVORCE IN HONG KONG — A STATISTICAL APPROACH

INTRODUCTION

Since the enactment of the Matrimonial Causes Ordinance in October 1971, virtually no statistical research effort has been made to show the characteristics of the Hong Kong community who have been taking advantage of this piece of legislation and to assess the extent the legislation has been utilized. It is hoped that by our editorial board's effort to conduct a survey of the demographic features of the divorce petitioners, respondents and their family composition as registered in the divorce records of the Divorce Registry in Hong Kong, further interests in this area of the research may be stimulated.

Our findings are based on a collection of data over a period of three years (from 1978 to 1980) as recorded in the divorce petitions and other court orders related thereto. The petitions under analysis are undefended suits. However, a review of the defended suits at the Supreme Court was also undertaken for the period of ten years from 1971 to 1980.

We had hoped that our analysis of the undefended petitions should cover a larger sample size spanning from 1971 to 1980; unfortunately, due to the impossibility of obtaining access to the pre-1978 divorce petitions, the objective of achieving a larger sample size for a relatively longer period of time cannot be pursued. However, notwithstanding the fact that our research sample size was based on the three-year data collection, we feel confident that it will reflect the significant features of the parameters covered over the ten-year period. This is due to the fact that the number of petitions for the three years under analysis accounts for 53% of the total number of petitions over the ten-year period. Attempts to remove bias and other statistical errors have been made through the applications of computer in various stages of our survey. The section entitled "Data Collection" will give a detailed account on the mechanism and the documentation involved in the process of data gathering.

We must further point out that this statistical survey was conducted by a team of law students and for this reason, the outlay of data and presentation of the findings may not be complying with the generally accepted format of statistical information

presentation. However, conscientious efforts have been made by the Editorial Board to ensure that the presentation of the data is as accurate as possible. To achieve clarity, we have adopted the method of incorporating into the body of the narrative tables of figures and graphs, each of which is followed by an account of observation and comments. The observation is based on the prominent features drawn from the statistics.

On top, it may not be as easy to make conclusive statements from the statistics available, as factors contributing to a divorce are complex. Indeed, drawing tenable relationship from different sets of figures will become too presumptuous an activity and thus, we cannot but restrict our research to making observations and comments.

Following the data analysis, interviewing the legal practitioners becomes our next major task. The main objectives of these interviews are as follows:

1. To confirm the statistical findings.
2. To examine the complex inter-related circumstances and reasons behind the phenomenon of divorce.
3. To solicit views on the practical aspect of divorce and ancillary matters such as custody of children.
4. To invite comments for the possible reform of the present state of divorce law.

The results of these interviews will be set out in the second part of this article.

DATA COLLECTION

The present research is based on information collected from the Divorce Registry. This section attempts to explain how the information is gathered and processed to form the basis of analysis and discussion.

Sampling Method

The divorce petitions filed at the Registry from 1970 to 1980 consist of a total of 11591 files, known as the total population of the survey.

From these a 20% random sample is selected by computer. This forms the sample of the survey.

Due to the inaccessibility of the pre-1977 files, only the samples from 1978 to 1980 have been examined, a total of 2010 files, out of a population of files. The 2010 figure includes a number of missing files, missing in that at the time of the survey they are not available for examination.

The analysis of the 1978 to 1980 sample population forms the backbone of the present research.

Manual labour was employed in going through these samples. Fellow students were engaged to examine the files, recording, in a pre-devised standard survey form, information such as the particulars of the petitioner and the respondent, children, length of marriage, grounds of divorce, nature and outcome of the action and the award of custody.

Error from this process is inevitable, though attempts have been made to keep it at a minimum. Where mistakes still occur, they may be due either to the inexperience of the researchers or to the inadequacies of the sample files.

The former is self-evident. The latter arises where the proceeding recorded in the file stops half-way through with no record of either a decree being granted or the action being withdrawn. Or certain documents, for example a marriage certificate, is missing from the file. Or occupation is described in broad umbrella terms such as civil servants, workers or clerks. Limitations such as these undermine the accuracy of the survey, though it is believed not to the extent of actually distorting it.

Coding and Processing of Data

The information thus collected are translated, again manually, into codes and fed into the computer. The SPSS (Statistics – Package for Social Sciences) is used for processing. The data then obtained form the basis of the following analysis.

FINDINGS:

A. General

I. *Growth Trend in the Undefended Divorce Petitions*

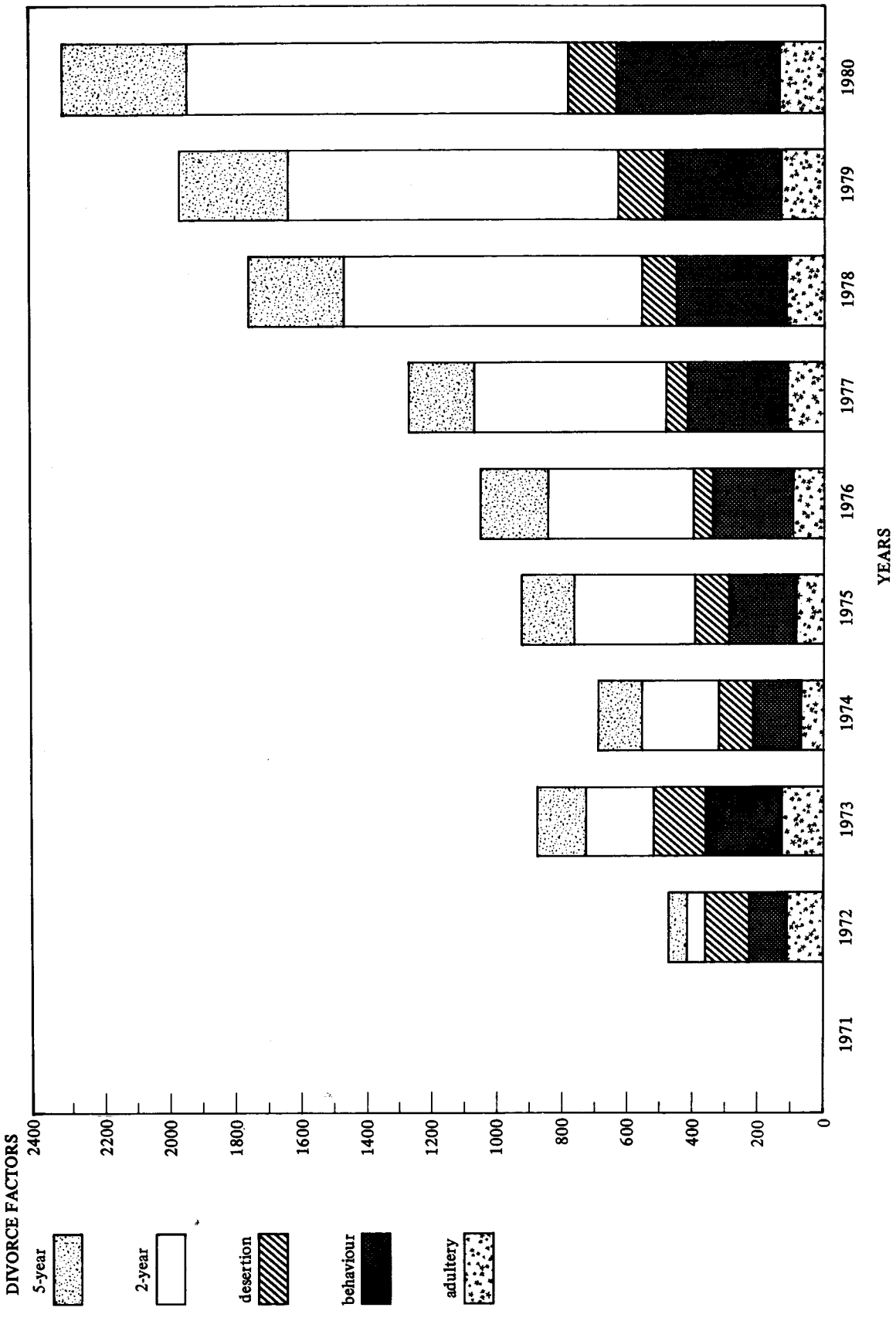


Figure 1: THE DIVORCE STATISTICS OF VDC 1971 – 1980

Figure 1 shows the breakdown by year and by facts pleaded of the number of divorce petitions over the past ten years from 1971-80.

The total figure, 11591, includes cases of undefended divorce, nullity and judicial separation. Since the latter two form a very negligible proportion and therefore statistically insignificant, 11591 is taken as the total number of undefended divorces for the purpose of our ensuing analysis, and in some cases, the petitioners seek three forms in the alternative, so there is considerable overlapping.

The greatest increase in the number in divorce petition is in the year of 1977 representing 29.3% increase over the previous year. The general trend is that divorce petitions have been increasing over the last ten years from 532 in 1972 to 2421 in 1980, almost five times as many as in the first year. However, this should not be an alarming figure taking into account the increase in population and the increase in the number of marriages in the past ten years. The average rate of increase is 21.2%. It is observed throughout the ten years the rate of increase has been accelerating, with an increase of 13.2% from 1974 to 1975, 18% from 1975 to 1976, 29.3% from 1976 to 1977, 26.8% from 1977 to 1978, 16.8% from 1978 to 1979 and 20% from 1979 to 1980.

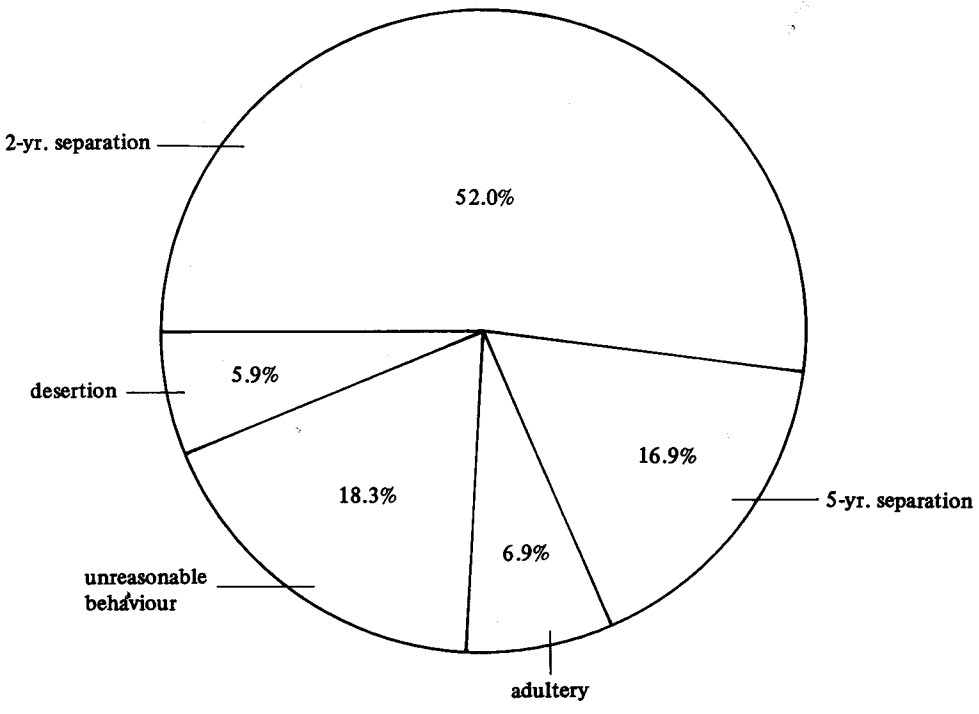
II. *Distribution of the Various Facts Pleaded in the Divorce Petitions*

Looking at Figure 1, one will find that the facts provided in s.11A(1) of the Matrimonial Causes Ordinance which constitute the ground of divorce, irretrievable breakdown of marriage, in the decreasing order of frequency, for 1972 were: – desertion, adultery, unreasonable behaviour, two-year separation with consent and five-year separation; in 1973, unreasonable behaviour, two-year separation with consent, desertion, five-year separation, adultery. A sudden shift in the order took place in 1974, where two-year separation with consent became the fact that was most frequently used, followed by unreasonable behaviour, five-year separation, adultery and desertion. This order has remained unchanged since 1974 until 1980, with only a switch in order of preference between adultery and desertion in 1980.

B. Survey Covering the period 1978-1980

I. *Analysis of the Choice of Facts pleaded in Divorce Petition*

Figure 2: Grounds of Divorce



The non-fault facts (two-year separation with consent and five-year separation) constituted 68.9% of the facts relied on by the petitioners and between the two non-fault facts, two-year separation with consent outweighed in proportion the five-year separation by 35.1%.

In the category of fault facts, viz. adultery, unreasonable behaviour, and desertion, unreasonable behaviour was the most frequently pleaded fact accounting for 18.3% of the total cases.

These statistics appear to indicate the phenomenon that couples who seek divorce welcomed the less bitter form of terminating their marriages and are able to come to agreement with respect to the granting of the divorce decree. One suggestion is that people would tend to avoid washing their dirty linen in public. It is not without some truth, especially where the couples do have choice in selecting facts to establish irretrievable breakdown of marriage.

It appears that the fact of desertion is the lowest in rank among the five facts. It is because this fact is often pleaded as an alternative with other facts. It seems that the infrequent use of this fact may throw doubt on the value of retaining it as one to establish irretrievable breakdown of a marriage.

Correlation between Fact and Sex

With 32.5% of the petitioners being male and 67.5% being female, the number of female petitioners almost doubled that of their male counterparts.

As disclosed by Miss Pamela Lee of Legal Aid Department, the majority of petitioners are female in the legal aid cases because the husband will not qualify for the assistance from Legal Aid Department. Very often the husband is not able to pass the means test. On the other hand, the wife who is either not working or is earning too little to pass the means test will be able to make a successful application for legal aid to help them to petition for divorce. With the relief from worry for legal costs, the number of female petitioners would be more than the male. This can be one of the contributing factors for the greater number of female petitioners. But the law does not tilt in favour of the female. There is nowhere in the mechanism of the divorce proceedings which favours the female petitioners nor is there any provision which allows easier access to the divorce process by female petitioners as opposed to their male counterparts.

Figure 3
Ratio of Female to Male petitioners in relation to grounds

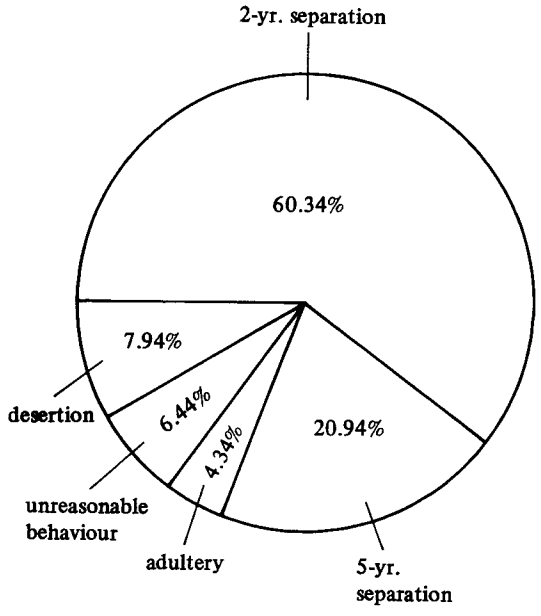
Ground	Female/%	Male/%	Ratio Female : Male
Adultery	81.2	18.8	4.32
Unreasonable Behaviour	89.1	10.9	8.17
Desertion	57.6	42.4	1.36
Two-year Separation	62.1	37.9	1.64
Five-year Separation	60.0	40.0	1.50

In the case where fault facts were pleaded, one will find that the fault facts of adultery and unreasonable behaviour were more frequently pleaded by the female petitioners. This phenomenon can perhaps be accounted for by the fact that the great majority of the female petitioners under the survey came from poor families and less educated group and in most cases, the husband and wife would fall into arguments over money matters. When the arguments become heated, the men very often become violent towards their wives and this

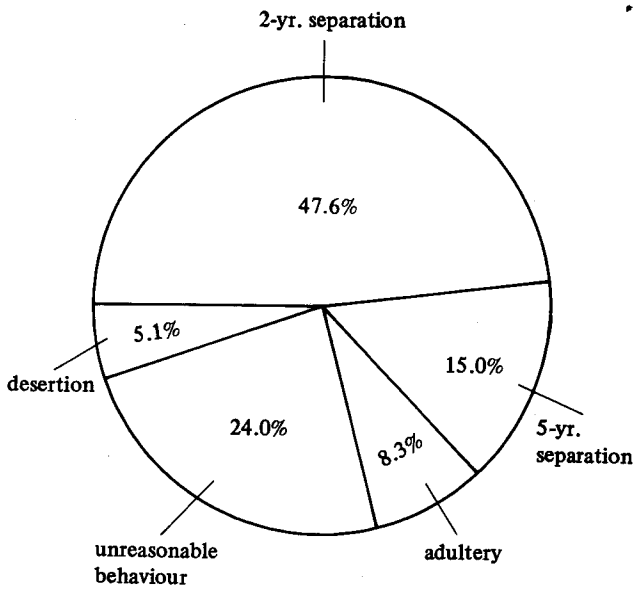
account for the wives pleading unreasonable behaviour in the petitions. The legal practitioners have confirmed to us during the interviews that among the cases they came across, a high proportion of complaints received from the wives concerned violent acts from the husbands which usually form the basis for pleading this fault fact. Perhaps this may well be a justification for a higher level of public concern to be called for towards the social problem of "battered wives".

While the female petitioners prefer to rely on the two fault facts of adultery and unreasonable behaviour, it is observed that the fact of desertion is more favoured by the male petitioners.

Figure 4: Fact & Sex



Male



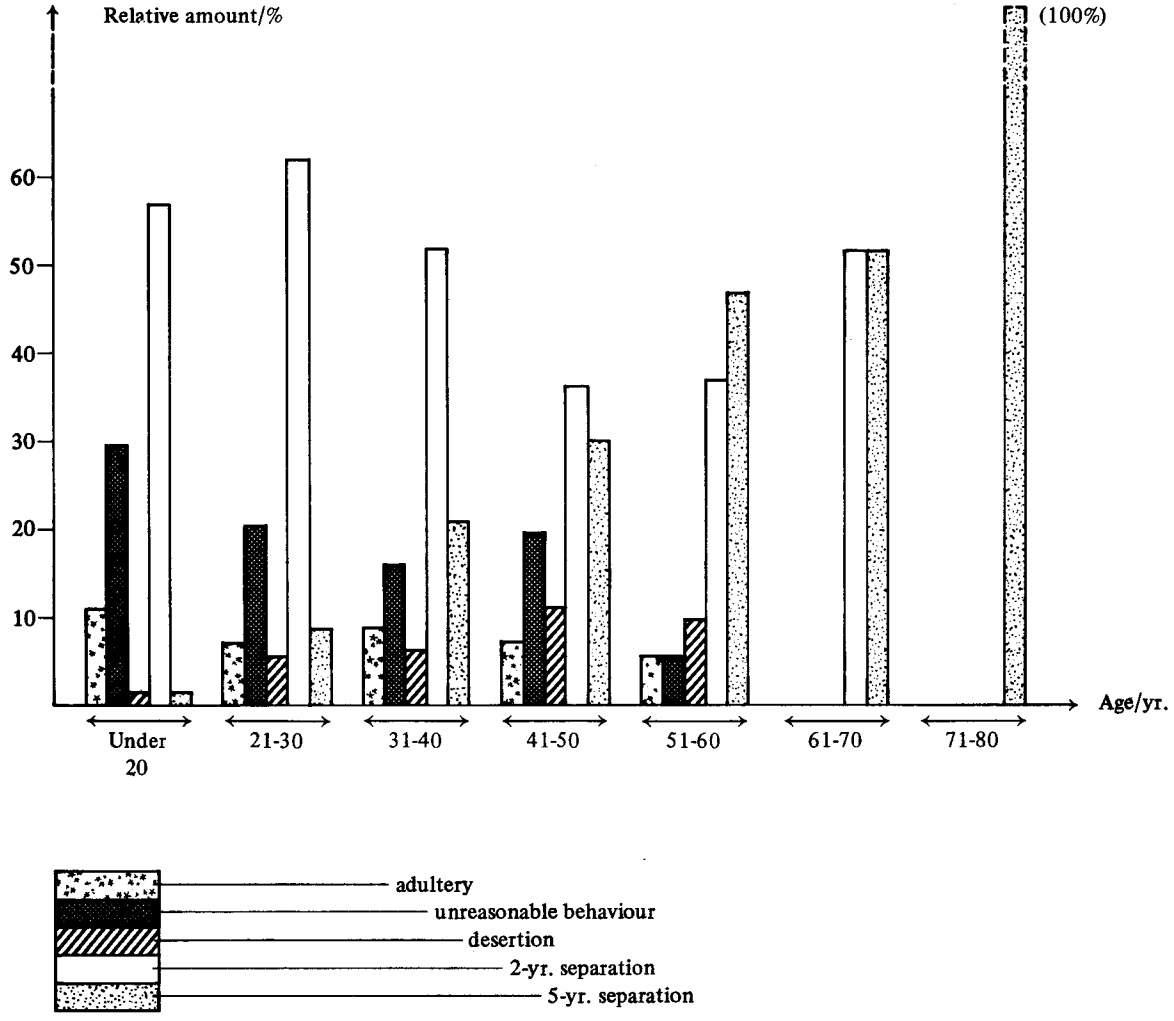
Female

Looking at the non-fault facts, one can see that two-year separation with consent, the most widely used fact by both sexes, is more frequently relied on by the male petitioners than the female. The same applies to five-year separation.

In summary, a very rough distinction can be drawn in the type of facts pleaded by the two sexes. Though the larger number of the petitioners under the survey are female, statistics show that the female petitioners prefer to rely on the traditional fault facts, while the male petitioners tend to rely more heavily on the non-fault facts.

Correlation of Facts Pleaded and Age of Petitioner

Figure 5: Ground v. Age

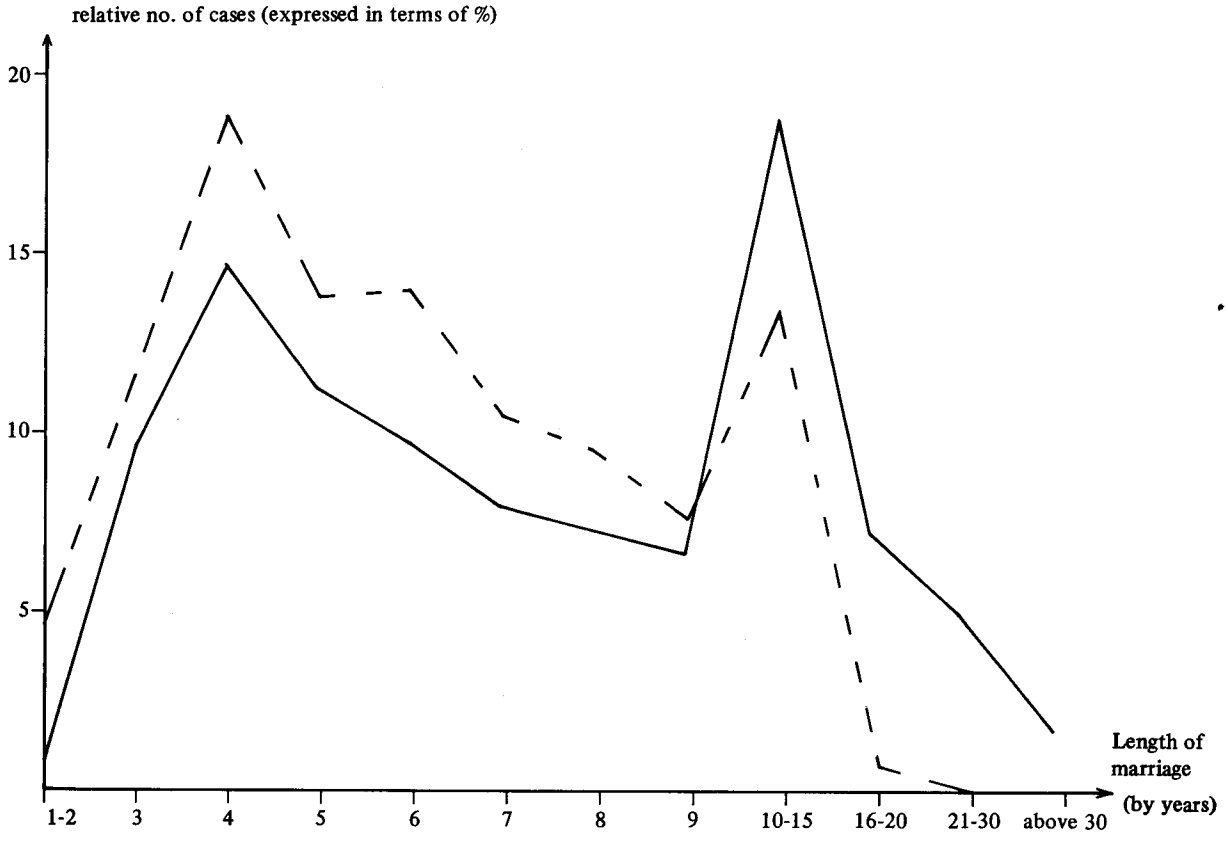


An analysis of Figure 5 shows that young couples use the fault facts of unreasonable behaviour and adultery and the non-fault fact of two-year separation with consent more frequently than the old couples. The tendency to use desertion and five year separation, however, increases with the age of the petitioners. Almost half of the petitioners over 50 years of age invariably choose five-year separation. Similarly, one can find that a large number of couples who divorce after a long period of marriage life (accounting for 43% of the couples with 20 years of marriage or more) adopt this cause.

An explantion is offered: some older Chinese couples are more stubborn and therefore are reluctant to give consent to divorce even though they may be aware of their marriage being beyond redemption. Also, since they are older, their need to remarry is lesser than the younger couples who may wish to get out of the marriage sooner in order to remarry.

Relationship between Length of Marriage, Age of Petitioner and Frequency of Divorce

Figure 6: Relative Percentage of divorce cases v. Duration of Marriage



Key:

—— for all divorce cases

– – – for divorce cases where marriage takes place between 16 and 23.

From Figure 6 we see the highest percentage (14.6%) of the divorce petitions clutters around the fourth year of marriage. The next highest percentage clutters at the fifth year of the marriage. It appears statistically that the fourth year of marriage is the year at which the marriage is most likely to fall apart. 67% of the petitioners have had a length of marriage of less than ten years, with 9.2 years being average length for the divorce cases.

This point can be clearly borne out by the statistics which show that the mode of the petitioner's age at marriage is 22. The respective modes of the divorce age were 28, 30 and 26 for the years of 1978, 1979 and 1980. While the average age of divorce is 35.2, with the average age of divorce decreasing over the three years' period. Probably it is likely that more people tend to marry at young age, resulting in dropping of the divorce age over the years.

Figure 6 also shows the relative percentage of petitions in marriages taken place between 16 and 23 compared with their respective lengths of marriage. It is discovered that 58% of all the marriages that were taken place between 16 and 23 only sustain for a relatively short period, viz. between 3 to 6 years. This piece of statistics confirms the usual understanding among people that marriages of young couples are unstable. The reasons of it are of course manyfold. Yet

it is believed that the mental immaturity of the young couples is clearly an important contributing factor. Young couples might not even be able to realize what type of people really suits them at the date of their marriages. As a result therefore, such marriages are extremely risky and very often ends in failure.

Perhaps surprisingly enough, it is discovered that length of marriage does not necessarily have close correlation with the marriage age of the petitioners. For instance, out of the 14.6% of the total divorce petitions with a length of marriage being 4, only 19.1% are of marriage ages between 16 and 23. The same is true for other corresponding pairs of statistics.

Figure 7: Age of Petitioners for Divorce

Age of Petitioner	%
19 and below	10.71
20 – 24	38.26
25 – 29	26.29
30 – 34	11.69
35 – 39	7.29
40 – 44	2.97
45 – 49	1.79
50 and above	1.00
Total	100.00

This survey shows that in 55.8% of the petitions, the age difference between the spouses is below 5 years and in 30.5% of the petitions are in the range of 5 to 9 years.

This discovery is significant in that it refutes a commonly held concept that the age difference of the spouses is an important factor in divorce. No doubt, it is true that in certain cases, this may be a major reason but from the foregoing analysis of other Figures a clear picture must now come up; that is: the factors behind divorce are complex and not easily predictable. The reasons for divorce normally are more in number than expected and depend upon many social reasons. The family or education background and upbringing of the spouses are but few of the examples.

Nature of Action

Figure 8

Nature of Action	Sex of Respondent Male	Female
Defended	3.0%	0.6%
Undefended	58.4%	28.7%
Cross Petition	0.2%	0.2%
Withdrawal	2.6%	1.3%
Missing	3.1%	1.8%
Total	67.5%	22.5%

As shown in Figure 8, 58.4% of the total number of respondents are male who did not contest the proceedings. Given the fact that the total number of male respondents is twice that of the female, it is not surprising to note that the number of uncontesting male respondent is double that of the female.

However, the number of male respondents who defend their case is 5 times as much of their female counterpart. A possible explanation may be that the male respondents are more anxious to defend their reputation and to prevent their name from being tainted by such allegation of faults on their part.

Relationship Between Nature of Action and Fact Pleaded

Figure 9: Relationship between Nature of Action and Fact Pleaded

Ground Action	Adultery	Unreasonable Behaviour	Desertion	2-year Separation	5-year Separation
Defended	6	17	3	0	0
Undefended	59	149	51	489	132
Cross Petition	1	3	0	0	0
Withdrawal	3	10	3	17	7
Total	69	179	57	506	139

(N.B. 70 cases missing)

In Figure 9, it is observed that undefended suits are predominant which represents 87.2% of the total cases under survey irrespective of the fact pleaded. Only 3.6% of the respondents defend their cases. The proportion of cross petition is only an insignificant 0.4% and the cases of withdrawal amount to only a humble 4%.

The predominance of undefended suits reflects the willingness of the parties to an unhappy marriage to treat the relationship as having irretrievably broken down and not to contest the petitioners' allegations. Even most respondents to petitions of unreasonable behaviour are of the same attitude.

Of the few cases where the respondents did contest, 64% were alleged to have been behaving in such an unreasonable manner that the petitioners find it unbearable to live with the respondents. It is both logical and consistent with common sense.

Correlation between the Age of Children and Custody

Figure 10: Frequency distribution of custody orders versus age of children below 21.

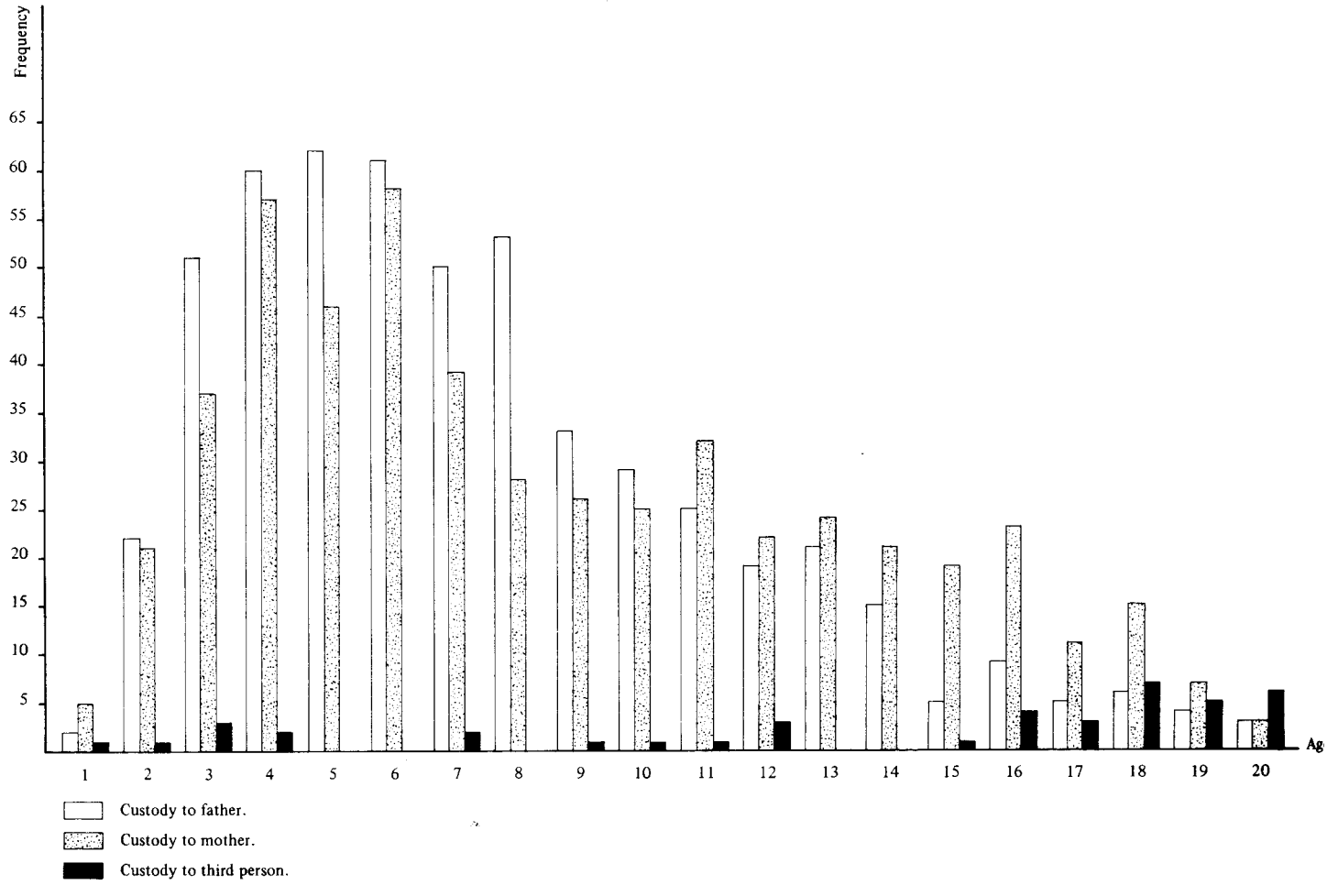


Figure 10 covers the frequency distribution of custodial orders against the age of the children of all divorce families:–

1. The youngest child :–
   The relative percentage of custodial orders awarded between father and mother are almost equal though in terms of absolute figure, custodial orders to the father slightly outnumber those to the mother. The disparity between the two figures is in the region of 15 to 25. It is interesting to note that the difference between the awards is the greatest when the child is below ten years old and the difference closes off gradually as the age of the child increases.

2. The second youngest child:–
   The number of custodial orders to the father exceed those to the mother by a significant amount, especially when the child in question is between the age of six and ten. If the age of the child is beyond eleven the situation is reversed in that more custodial orders are made in favour of the mother. For example, for the child of age between 11 and 15, custodial orders to the mother exceed those to the father by fifteen in terms of absolute figure (10.7%).

3. The third youngest child:–
   There is almost no difference for children under the age of ten in the number of custodial orders to the father and the mother, However, as the age of the child moves to the age bracket of eleven to fifteen, more custodial orders are given in favour of the mother.

4. The fourth youngest child:–
   Very little difference can be found in the number of the two types for child under the age of 15.

5. The fifth youngest child:–
   They are usually above the age of 10. There is again virtually no difference in the number of the custodial orders made in favour of the father and the mother.

Generally speaking, there appears to be a trend indicating judicial preference for granting custodial orders to the father when the child is at young age i.e. where the child is below ten years old, and the preference shifted towards the mother when the child's age is above ten and below fifteen. This pattern is recurring in all the custody cases in relation to the five youngest children of a divorce family as revealed in the above observation. It further appears that the age of ten is the watershed. However, it must be stressed that this figure is purely one obtained from the observation of a pattern deriving from statistical data and it should not be conclusively interpretated that years of age is the most important criterion in the judges awarding of custodial orders nor can any legal basis be found to support this figure. Nonetheless, it is interesting to learn the pattern of judicial decisions in Hong Kong in awarding custodial orders as reflected by this example.

Custody Orders to the Third Party

No consistent pattern can be observed in the granting of custodial orders in favour of the third party in relation to the age of the child. However, it can still be safely said that such custodial orders are more frequently granted when the child's age is older particularly in the region of fifteen years old and above. Such custodial orders must necessarily be treated as special cases and no reason can be found for such statistical pattern. By way of conjecture, one may say that this phenomenon is probably attributed to the fact that as the child grows older, he or she is more able to lead his or her own life and the need to be put under parental care or supervision is accordingly diminished.

General Comment

The number of custodial orders decreases with the increase of the child's age and it appears that the age range from ten to twelve is the mark-off point, beyond which the number of custodial orders diminishes sharply. This can be attributed to the fact that 68% of the sample of the children under survey are children of ten years old and below.

Out of the total of the divorce cases, 33.7% are couples with only one child whose ages are below ten years; 88.7% of the divorced couples with only one child have a child of age less than ten. Given that such a high percentage of the divorced couples in this sample is found to be couples with only one child of less than ten years old, it may imply that these couples tend to have shorter lengths of marriages than couples with greater number of children. However, it does not necessarily follow that the number of children that a couple has will

affect the decision of the couple to divorce.

It is apparent that the distribution of frequency of divorce cases does not clutter around the category where the number of children is the smallest. Instead, with reference to the age of the children, divorce mostly take place where the couples have up to two children (866 out of 1020 cases). With reference to the length of marriage divorces mostly occur when marriages are at third to ninth anniversaries, beyond which, the divorce rate drops.

Interesting though it is to learn, the statistics regarding the age and number of children in a divorced family, no conclusive statement may be drawn from such statistics that the two are the dominant factors affecting divorce rate and the way the judicial decision operates in granting custodial orders. The criteria and factors are varied, the parents' relative financial positions, capability of the mother to provide care and security to the children are all other relevant factors in the court's decision of granting custodial order. The paramount interest to be protected is the welfare of the children. As told by all the legal practitioners interviewed, no one single dominant criterion can be found in the making of custodial orders. Age of the children is one of the factors. Similarly, the number of children is one of the factors affecting the decision of a couple to divorce.

Views of Legal Practitioners

The legal practitioners with whom some members of the Editorial Board have conducted interviews are, in alphabetical order:–

Miss Victoria Chan, solicitor
Miss Bebe Chu, solicitor
Miss Pamela Lee, Legal Aid Officer
Miss Jacequeline Leong, Barrister-at-Law

Divorce

General

The interviews not only seek to answer queries which have arisen from the findings of the statistical survey but also solicit the legal practitioners' views on the existing state of the family law and the need for reform. The Board hopes through these interviews to blend the theoretical exercise with practical insight from the practitioners.

The practitioners interviewed all agree it is a prominent feature in their practice that female petitioners far exceed their male counterparts though no special explanation can be given. There are several possible reasons:–

1. In recent years, more and more female are becoming financially independent. As a result, they would have the means to petition for divorce in the event of the marriage breaking down.
2. On the other hand, if the women are staying at home as housewives, their poor financial position would invariably entitle them to legal aid.

Agreement is again found in the practitioners' views in that it is very difficult to pinpoint any particular sectors of the community which most frequently seek divorce, whether in terms of their age, financial background, number of children they have or length of marriage.

However, some air the view that their clients who mostly come from Legal Aid Department are relatively young (viz. in the early twenties); probably with their youthfulness they lack sufficient tolerance for and understanding of the other party in the marriage which lead to early breakdown of the marriage.

Choice of Fact

It is impossible to generalize the main reason for a petitioner's choice of a certain fact. It must depend on the character of the individual and the circumstances available to support the fact to be pleaded.

However, some practitioners do point out the following features:–

1. The more educated young clients tend to adopt the modern approach, i.e. come to accept that the marriage is at an end without alleging fault on the other party, therefore the fact of two-year separation with consent is widely used by these people.
2. Young couples tend to use adultery as a fact to plead in their petitions even if they have choice in pleading alternative facts. This may be due to the change of social norm in that adultery is no longer socially that shameful and regarded as a taboo in the mind of the fellow residents in

Hong Kong. And so the petitioner may be more willing to plead and the respondent more ready to admit.

3. Older couples tend to be more conservative and stubborn and when they feel bitter they are reluctant to consent to divorce. In the case when the petitioning party finds apparently no fault on the other party but only finds himself/herself no longer able to live together with the other party, he/she can only resort to plead five-year separation. This, in most of the cases, only increases the bitterness involved in divorce making an already bad situation worse.
4. The uneducated group usually take the traditional complaints such as unreasonable behaviour which was based on cruelty.

Their views throw light on the reasons for our findings that more female plead adultery. We may borrow the practitioners' view to explain that probably, it is more socially acceptable for the men to have sexual relationship outside marriage and in fact according to one practitioner's experience, men prefer the wives to plead adultery rather than unreasonable behaviour, which is an indication of the men's chauvinistic attitude.

It appears that the practitioners play an important role in influencing the client's choice of fact pleaded in the petition. Very often, they will advise their client to plead a non-fault fact when the circumstances of the case permit even though their client may also have evidence to support a fault fact, thereby reducing the heat and bitterness between the couple and at the same time save a lot of costs in the proceedings.

The choice of fact also depends on the clients' needs as to whether or not they want a quick divorce. Usually, the client does not really know exactly what the "grounds" for divorce legally are. They merely have a vague idea that adultery is surely one of the "grounds".

Generally, most men would prefer to avoid to have their past events which they considered private revealed. Unfortunately, if the wives plead unreasonable behaviour, such conduct would unavoidably have to be disclosed.

Besides, the choice of fact also depends on whether or not the case would be contested by the respondent. If the case is likely to be contested, the client will be advised to rely on more than one fact. So that even if one fact fails another fact will still be available to prove against the respondent. Of course, it is only possible if the client's evidence would accomodate alternative facts. However, for an uncontested case, the client would usually be advised to choose a fact that will involve lesser amount of time and costs involved and is more easier to plead.

Further, it is noted that adultery alleged on an uncontested basis will involve a simple signing of confession statement by the respondent but on a contested basis, proof will be required which would be very complicated. In such case clients would seldom be advised to rely on the single fact of adultery.

As agreed by the practitioners based on their practical experience, desertion is found the fact least pleaded in divorce petition. The following reasons are offered:

1. To establish desertion, the petitioner would have to prove desertion for a period of two years prior to the issue of petition. As the law now stands, desertion is not as easy to prove as the other facts eg. the two-year or five-year separation. It is so especially in the case when the petitioner has to prove constructive desertion. So where there happens a choice of fact in the petition, they would choose the others which are comparatively 'easier' to prove.
2. As the petitioning spouse is invariably the one being deserted, the respondent, who takes the initiative of "leaving the home", will not normally contest in the petition. Notwithstanding the foregoing, it appears that in a number of instances, the deserting spouse will have in fact, before they have separated for two years, consented to divorce. So when the two years' period comes to an end, they simply rely on two-year separation.

Two-year separation with consent is the least contentious. This is obvious. Difficulty may however arise where the respondent is required to sign a separation agreement and the consent document. He or she might demand harsh terms or conditions before they agree to sign the agreement or consent, as the case may be. Despite the possibility of 'blackmail', it is really the easiest alternative which

generates the least ill-feeling and bitterness to everyone concerned and yet achieves the ultimate objective. It seems therefore sensible to use this fact. Indeed, nowadays the question of fault or blameworthiness should no longer be an important issue; if the parties realize their marriage relationship as dead, they ought to put aside all ill feelings that are necessarily involved, give each other a chance to turn a new leaf and direct their minds to the more important matters that follow the issue of divorce – custody of children (if any) and maintenance.

The introduction of five-year separation into the law has really made it possible to attain the ultimate objective of the Law Reform Committee which is to remove the otherwise unsurmountable barrier to the dissolution of a marriage. So where there happens a choice of fact in the petition, they would choose the others which are comparatively 'easier' to prove.

Indeed, divorce is made easier not only because a lesser degree of fault is required to be proved in such petitions but also because of the introduction of the five-year separation.

This fact is probably the easiest fact for someone who has no other fact for divorce and who is receiving enormous opposition from the other spouse in a divorce petition.

This fact also enables a spouse to get out of an marriage where the other spouse has disappeared and cannot be traced any more. Despite the ease of pleading this fact, it has not been used widely. Several reasons may be given for this situation. Younger couples tend to plead two-year separation instead of having to wait for five years. This is also probably true that by the time people have lived apart for five years, their relationship may have broken down long time before the five years' period is over, and more often than not, they would make use of the other facts available to them rather than to have to sit down and wait for the five years to elapse. People in this situation often are anxious to get back to some degree of normality and would be reluctant to be left in the limbo for a period of up to five years before they can normalize their marital status.

Custody

The other important issue related to divorce is the question of custody and provision for the children.

Custody and Provision for Children

Procedurewise, the law ensures that the interests of the children should be well looked after after the marriage has broken down. The practitioners' account on what happens during the intervening period between the making of decree nisi and decree absolute throws light on the way this purpose is achieved: where the divorced couple have children the special procedure in an undefended divorce suit will not apply. This means that the judge must hear and make arrangements on the question of children.

In any event, matters concerning the children such as custody or financial provision would have to be adjourned and dealt with in chambers. The judge will have to make extensive investigation into the kind of arrangement that will be in the best interests of the children. The parties will put on affidavit their proposed arrangements for the children; the judge may call for the social welfare report which looks into the background as well as the present situation and conditions of the parties and the children; the welfare officer may be required to give recommendations; the parties may be required to appear at a separate hearing to be cross-examined on their affidavits. Sometimes the parties may ask other people who may be involved with the children to swear affidavits in the proceedings and these people may be called to be cross-examined on their affidavits and then the judge will have to consider all those matters in relation to the question of custody and/or financial arrangement in respect of the children and come to a decision as to what is in the best interest of the children. The judge will then make a declaration if he is satisfied with the arrangements for the children and the petitioning spouse can then apply for a decree absolute. Therefore, it is a misconceived notion that the making of the decree absolute is a purely mechanical function automatically following the granting of the decree nisi at the end of the six weeks' period. It is true that in a sense the actual making of the decree absolute is an administrative act discharged by the Registrar of the Supreme Court but this act cannot be done without the declaration of the judge as stated above.

Custody of children is indeed a serious matter, requiring a separate hearing of its own and in no way does it rank secondary (in terms of significance) to the divorce proceeding.

Joint Custody

There is also another misconception among law students which needs to be clarified in relation to custody. Joint custody is often mistaken to mean that the child has to reside with the father and the mother alternatively. In truth, it means that the child would stay with either the father or the mother, but the parents have a joint right to make decisions concerning the child eg. on his schooling, surgical operation. It does not merely imply joint care and control, but also a joint right. Therefore joint custody should be granted only when it can be sure that the two spouses are sensible and co-operative people.

Legal practitioners do not generally favour advising their clients to apply for joint custody because such an arrangement is very often impractical and difficult to carry out smoothly:

a. decision in relation to a child under joint custody can only be made by consent from the spouses. This, in practice, is difficult because the chances that either of the spouse cannot be traced increases as the length of time after divorce increases. He or she may have long moved abroad – and these cases are not uncommon. As a result the welfare of the child may be adversely affected,
b. the difference in opinion between the couple due to, say, their difference in character and the like may also make a joint decision impossible and hence the idea of joint custody unfeasible.

Why are the Majority of Divorce Cases Undefended?

According to the practitioners' opinion, large proportion of divorce cases coming before the court are undefended due to the following reasons:

1. Both parties accept the fact that the marriage is beyond reconciliation and redemption and understand that it serves no sensible purpose to defend the case.
2. The high cost that would incur if one spouse decides to defend the case – the cost of a defended action may exceed that of an undefended case by more than ten times of the cost of the latter. So for financial reasons, the respondent will usually leave the case undefended even though he or she may not really agree to the allegation made in the petition by the petitioners.
3. In some cases, the respondent may wish to defend the petition but later decides not to pursue with it for the possible reasons that he or she does not wish to reveal their own shortcomings or private affairs in public.

On the other hand, the reasons for a respondent to defend a case are varied, some of which may be as follows:–

a. they may dispute the facts used in the petition,
b. they may not want a divorce at all,
c. where some respondents also want a divorce, they want it on the fact(s) pleaded by themselves in their cross-petition.

EPILOGUE – REFORM

1. *3-year Rule*

The purpose of this rule is to give the parties reasonable cooling-down period to ponder over the question whether or not there is any future to the marriage. As it takes time, some consider that three years is a reasonable period. Doubts, however, may be raised as to whether the 3-year period is too long, for the following reason:– if the couples really find themselves unable to cope with each other and cohabit, why should they be bound for as long as three years? Is the institution of marriage so paramount to sacrifice the happiness of a person, even though such unhappiness after marriage may be due to his or her own immaturity or mistake? This is indeed an interesting question for the moralists.

Besides, another outstanding phenomenon is the extremely low number of applications for leave to divorce within three years of marriage. It is found that such applications are not common. No definite reason can be put forward. Perhaps it is due to the difficulty in satisfying the requirement of "exceptional hardship or depravity".

2. *Desertion*

In view of the difficulty in establishing this fact (especially in establishing constructive desertion) and its overlapping with other facts in practice, there may be an argument for its abolition. With the statistics showing that desertion has been very little utilized, its abolition may not create any practical adverse

effect on those who seek divorce.

3. *Specialization by Judiciary in Family Law*

It is desirable to have judges dealing with this branch of the law on a regular basis rather than as the present position where matrimonial cases are just being passed around from one judge to another.

As is clear, matrimonial laws are highly complex and in practice touch on very complicated and very delicate social problems such as the disruption of a family and its possible effect on the children of the family. Also it touches on one of the most important aspect of ordinary citizens. Hence it is all the more important to have consistency and certainty in this branch of the law. In order to achieve such objectives, it is suggested that there should be a group of judges specialized in this branch of the law and constantly adjudicating on such matrimonial cases. This move should be coupled with the setting up of a Family Law Court supplemented by the adequate provision of a whole backup services such as welfare officers, child psychologists, etc.

It is admitted, however, that there are considerable practical difficulty in implementing this idea such as the problem of an enormous increase in manpower and expenditure and availability of expertise in the field of social welfare. Yet despite all these, it is felt that such a specialization is necessary for the interest of the community.

Apart from specialization in the judiciary, specialization by the legal profession in this area of the law is also desirable. After all, this trend of specialization is inevitable as the community becomes more sophisticated and litigation becomes more sophisticated.

4. *Two-year Separation*

A shortening of the two years period may be an appropriate move for the legislature to consider. There is the proposal for one-year separation. In fact, some practitioners question whether the intention of the legislature in respect of this ground of two-year separation, which is to encourage reconciliation, is ever achieved. Indeed, cases do not reveal that separation for two years would lead to a higher chance of reconciliation.

5. *Five-year Separation*

Proposals for shortening the separation period from five years to three years or less has been advanced on the simple basis that in real life the petitioners who have to use this fact just resent this long period of separation when they have determined to end the marriage at all costs and reconciliation to them is almost an impossibility. In some practitioners' view, very rarely would there be cases where parties would come to a reconciliation after they have separated and if this is the case, a longer separation period may not make any difference.

One sees that despite the good intention of the legislature very often the practical effect is far from the theoretical objective. Perhaps all that can be done is best and should have been done at the early stage the marriage starts to go wrong and the Marriage Guidance Council will and should be able to perform a more useful role in providing assistance to the couples to save their marriages. This often proves to be a more effective and better remedy in saving a marriage rather than providing a longer separation period in the hope that the couples would reconciliate when facing such long time of 'delay' before they can get a divorce.

6. *Incompatability of Character*

There are also suggestions for a new fact, viz. incompatability of character to be introduced in the legislation as a new fact under s.11A of the Matrimonial Causes Ordinance.

It is felt that in real life there are in fact many cases where the couples, with or without fault on the part of either or both of them, just find after their marriage that the other party is not suitable to him or her. If this is true, it is just fair for them to get out of the miserable situation.

This has the advantage that couples who are in this type of condition do not need to technically 'invent' evidence to support their pleading facts under the present s.11A. Naturally, safeguards should be built in to prevent any abuse of such a system such as requiring solid proof to establish genuineness of such petitions.

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