

OFFICIAL REPORT OF PROCEEDINGS**Sitting of 7th May 1969**

MR PRESIDENT in the Chair

PRESENT

HIS EXCELLENCY THE GOVERNOR (*PRESIDENT*)
SIR DAVID (CLIVE CROSBIE) TRENCH, GCMG, MC
THE HONOURABLE THE COLONIAL SECRETARY
SIR HUGH (SELBY) NORMAN-WALKER, KCMG, OBE
THE HONOURABLE THE ATTORNEY GENERAL
MR DENYS TUDOR EMIL ROBERTS, OBE, QC
THE HONOURABLE THE SECRETARY FOR HOME AFFAIRS
MR DAVID RONALD HOLMES, CBE, MC, ED
THE HONOURABLE THE FINANCIAL SECRETARY
SIR JOHN (JAMES) COWPERTHWAITTE, KBE, CMG
DR THE HONOURABLE TENG PIN-HUI, CMG, OBE
DIRECTOR OF MEDICAL AND HEALTH SERVICES
THE HONOURABLE WILLIAM DAVID GREGG, CBE
DIRECTOR OF EDUCATION
THE HONOURABLE DAVID RICHARD WATSON ALEXANDER, MBE
DIRECTOR OF URBAN SERVICES
THE HONOURABLE GEORGE TIPPETT ROWE
DIRECTOR OF SOCIAL WELFARE
THE HONOURABLE JAMES JEAVONS ROBSON
DIRECTOR OF PUBLIC WORKS
THE HONOURABLE DONALD COLLIN CUMYN LUDDINGTON
DISTRICT COMMISSIONER, NEW TERRITORIES
THE HONOURABLE DAVID HAROLD JORDAN, MBE
DIRECTOR OF COMMERCE AND INDUSTRY
THE HONOURABLE ARTHUR PATRICK RICHARDSON
COMMISSIONER OF LABOUR
THE HONOURABLE KAN YUET-KEUNG, CBE
THE HONOURABLE FUNG HON-CHU, OBE
THE HONOURABLE TSE YU-CHUEN, OBE
THE HONOURABLE KENNETH ALBERT WATSON, OBE
THE HONOURABLE WOO PAK-CHUEN, OBE
THE HONOURABLE WILFRED WONG SIEN-BING, OBE
THE HONOURABLE ELLEN LI SHU-PUI, OBE
THE HONOURABLE WILSON WANG TZE-SAM
THE HONOURABLE HERBERT JOHN CHARLES BROWNE
DR THE HONOURABLE CHUNG SZE-YUEN, OBE
THE HONOURABLE MICHAEL ALEXANDER ROBERT HERRIES, OBE, MC
THE HONOURABLE LEE QUO-WEI
THE HONOURABLE ANN TSE-KAI

IN ATTENDANCE

THE DEPUTY CLERK OF COUNCILS
MR DONALD BARTON

OATH

MR A. P. RICHARDSON made the Oath of Allegiance and assumed his seat as a Member of the Council.

HIS EXCELLENCY THE PRESIDENT: —May I welcome Mr RICHARDSON to this Council.

PAPERS

The following papers were laid pursuant to Standing Order No 14(2): —

<i>Subject</i>	<i>LN No</i>
Subsidiary Legislation: —	
Diplomatic Privileges Ordinance.	
Notification under section 2	59
The Hong Kong and Shanghai Banking Corporation Ordinance.	
Ordinary Resolution	60
The Hong Kong and Shanghai Banking Corporation Ordinance.	
Special Resolution	61
Sessional Paper 1969: —	
No 12—Annual Report by the Secretary for Chinese Affairs for the year 1967-68.	

QUESTIONS**Plover Cove Contract**

1. MR H. J. C. BROWNE asked the following question: —

In view of the misunderstanding that has apparently arisen from the recent report of the Director of Audit about payments for the Plover Cove Scheme, would Government please clarify the position?

MR J. J. ROBSON: —Sir, it is unfortunate that the Director of Audit's report* has been misunderstood and the wrong impression given that the Contractor for the Plover Cove Dam was paid a bonus of \$10 million through a misunderstanding.

* Page 248.

Tenders were called for the construction of Plover Cove Dam in 1963 and the contract documents specified that the closure of the dam had to be timed to make maximum advantage of either the period of reduced tidal range in October 1966 or that in April 1967. This was necessary because it was felt that it would be extremely difficult to effect closure at periods of normal tidal range because the water pouring through the gap in the dam which was to be sealed off would have washed away any material deposited therein. In broad terms what was meant by closure was the stage when the work would be sufficiently far advanced to permit the sea water trapped behind the dam to be pumped out.

The Contractor submitted a tender based upon the closure of the dam in April 1967 but offered to achieve the earlier date subject to a premium of \$10 million. This tender plus the premium was still the lowest tender received even for the April closure. Government therefore accepted the Contractor's offer for early closure as this meant that the dam would be emptied of sea water in the winter of 1966 before the first rains of 1967 and that the water impounded during the 1967 wet season would be potable. It also reduced the time for completion of the dam from 5 to 4 years. Closure in 1967 would have meant pumping out the dam during the wet season and the pumping to waste of much of the fresh water impounded simply because it was too salty for use. It would also have meant having a temporary spillway at low level in the dam because in time of torrential rains the flow of water into the dam would have far exceeded the pumping capacity.

One of the conditions of Government's acceptance of the Contractor's offer for early closure was that the Engineer would be empowered to grant extensions of the closure date—the 15th October 1966—on account of varied or additional works, or of delays in the supply of pumps or the provision of power supply by Government, or of any other act or default of Government *but not in respect of any other cause whatsoever*. In this context Government's understanding was that the varied or additional works were only those works ordered by the Engineer for Government and that the Contractor accepted the risk of difficulties occurring during construction which might delay progress. This was not the Consulting Engineers' interpretation of the wording and in the event, they granted extensions to the closure date because of varied or additional works consisting largely of the expenditure of additional effort by the Contractor to overcome conditions which, in the opinion of the Consulting Engineers, were not and could not reasonably have been foreseen at the time of the acceptance of the tender.

Thus, although the pumping out of the sea water did not commence until the 2nd of February 1967, the Consulting Engineers certified a

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bill for payment of the \$10 million premium because of the extensions of time granted by them. This bill was disputed and reference to arbitration considered, but in the event the point in dispute was never finally settled and Government passed the bill for payment not on contractual but on equitable grounds.

The reasons for this were: —

Firstly, although closure of the dam was delayed, the objective of pumping out the dam before the early rains in 1967 was achieved—although only because the rains of that year were late.

Secondly, it is estimated that the Contractor incurred at least \$10 million in extra costs in his efforts to meet the accelerated date for closure; and

Thirdly, it is now evident that if this effort had not been made, closure would not have been achieved until April 1968. This would have meant that the water shortage which developed in 1967 would have been of longer duration and rationing, which was as severe as 4 hours of water every fourth day from the 13th July to 21st August of that year, could well have persisted until the summer rains of 1968. It should be remembered that it is water from Plover Cove which has enabled a full 24 hours supply to be given ever since this supply was resumed on the 1st of October 1967.

In other words, as far as the premium is concerned, Government obtained good value for its money. 9,855 million gallons of useful water were stored in Plover Cove in 1967 which would otherwise have been lost and this volume of water, even if a trifle salty, is worth more than \$10 million even in normal times. In the water shortage of 1967, however, when it was not possible to obtain additional supplies from China, it was invaluable as its mere presence enabled better use to be made of the water stored in the older reservoirs.

Finally, I should like to add that the clause which permits the Engineer to grant extensions of time and extra payments when adverse and unforeseen site conditions occur, has now been deleted from the PWD General Conditions of Contract. This clause usually gives rise to arguments as to what constitutes adverse site conditions and whether they could or could not have been foreseen by an experienced contractor. It is however accepted that deletion of this clause means that the Contractor has now to accept greater risks and this may lead to higher prices for some projects.

Measles vaccine

2. MR FUNG HON-CHU asked the following question: —

Will Government tell us whether there is any significant decline in the response from the public to the new measles vaccine in view of the earlier reports of fatalities from the use of the old vaccine in certain countries and, if so, will Government issue a statement to reassure the public?

DR P. H. TENG: —Sir, the vaccine used in Hong Kong up to 20th March 1969, was of the Beckenham 31 strain and according to the figures supplied by the manufacturers some 5 million doses of this vaccine had been given throughout the world.

In March this year it was reported from Britain that three cases of encephalitis with one death had occurred following its administration. Immediate steps were taken to suspend its use in Hong Kong, though no case of encephalitis had been reported here.

If we consider a year to extend from 1st July to 30th June the biennial visitations of the disease are clearly seen: —

<i>Year</i>	<i>Cases</i>	<i>Deaths</i>
1964-65	6,496	279
1965-66	367	38
1966-67	6,702	995
1967-68	820	27
1968-69 (1.7.68 - 30.4.69)	727	35

The use of measles vaccine prevented the epidemic which would otherwise, in all reasonable likelihood, have occurred last winter, and it is therefore essential that measles vaccine continues to be used. It is to be noted that deaths are mainly due to complications and to children not being treated before the onset of the complications.

Accordingly immediate steps were taken to procure a supply of another strain of measles vaccine, the Schwarz strain. This has been used extensively in various parts of the world and some 25 million doses have been given without any encephalitis or other serious complications having been reported.

The response to measles vaccine, Beckenham or Schwarz, varies slightly from one ethnic group to another. In Hong Kong, among Chinese children, vaccine of the Beckenham strain is slightly more potent than the Schwarz strain. This is why I preferred to use the

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Beckenham strain in the first instance. Vaccine of the Schwarz strain does however confer a satisfactory degree of protection against measles. This was fully proved by the research of the Hong Kong Measles Vaccine Committee which I appointed in 1966. This Committee investigated the effects of measles vaccine, of both the Beckenham and the Schwarz strains, on young Chinese children. The conclusions of this field trial were subsequently accepted for publication in the Bulletin of the World Health Organization.

In the three-week period ending 22nd March 1969, a total of 2,712 doses of measles vaccine of the Beckenham strain were given at Maternal and Child Health Centres of the Medical and Health Department, an average of 904 per week. The use of the Beckenham strain of measles vaccine was suspended between 21st March and 8th April because we had to wait for medical confirmation of the report regarding the encephalitis cases reported in UK, and also because it took some little time to procure a supply of the Schwarz strain of the vaccine. As soon as we were satisfied that it was advisable to use the Schwarz strain of vaccine and the supply became available the vaccination campaign using the Schwarz vaccine was recommenced on the 9th April and during the following three week period a total of 1,648 doses of the Schwarz strain, was given, an average of 549 per week. The publicity resulting from the untoward effects reported from Britain following the use of vaccine of the Beckenham strain has unfortunately resulted in a diminution in the response to Government's offer of free measles vaccination for infants and young children. I have already issued a statement to the public that in future vaccine of the Schwarz strain will be used and that it is considered safe and effective. It must however be expected that it will be some time before the tempo of the vaccination drive is restored. Time will be required for the doctors and the health visitors to reassure the mothers of infants and young children that the vaccine strain now being used is safe.

I thank my honourable Friend for giving me the opportunity to reiterate that in the circumstances of Hong Kong, measles vaccination is advised for all children of the age group 6 months to 4 years. He may rest assured that everything possible will be done, by the health education efforts principally at our Maternal and Child Health Centres, to which 84% of all infants born are brought for health advice and immunizations, to persuade mothers to have their infants and young children vaccinated against measles. The Schwarz strain of measles vaccine, which I would categorically emphasize is safe and effective, will be used.

MR FUNG: —Thank you, Sir.

BANK NOTES ISSUE (AMENDMENT) BILL 1969**Resumption of debate on second reading (23rd April 1969)**

Question again proposed.

Question put and agreed to.

Bill read the second time.

Bill committed to a committee of the whole Council pursuant to Standing Order No 43.

RESETTLEMENT (AMENDMENT) BILL 1969**Resumption of debate on second reading (23rd April 1969)**

Question again proposed.

Question put and agreed to.

Bill read the second time.

Bill committed to a committee of the whole Council pursuant to Standing Order No 43.

Committee stage**AGRICULTURAL PRODUCTS (MARKETING)
(AMENDMENT) BILL 1969**

Council went into committee to consider the bill clause by clause.

Clauses 1 to 4 were agreed to.

PRISONS (AMENDMENT) BILL 1969

Clauses 1 to 9 were agreed to.

**NEW TERRITORIES (RENEWABLE CROWN LEASES)
BILL 1969**

Clauses 1 to 5 were agreed to.

Council then resumed.

Third reading.

THE FINANCIAL SECRETARY reported that the Agricultural Products (Marketing) (Amendment) Bill 1969 had passed through committee without amendment and moved the third reading of the bill.

Question put and agreed to.

Bill read the third time and passed.

THE ATTORNEY GENERAL reported that the Prisons (Amendment) Bill 1969 had passed through committee without amendment and moved the third reading of the bill.

Question put and agreed to.

Bill read the third time and passed.

MR D. C. C. LUDDINGTON reported that the New Territories (Renewable Crown Leases) Bill 1969 had passed through committee without amendment and moved the third reading of the bill.

Question put and agreed to.

Bill read the third time and passed.

LAW OF INTESTATE SUCCESSION

MR P. C. WOO moved the following resolution: —

Resolved, that the existing law of intestate succession applicable to Chinese dying intestate in Hong Kong (with the exception of the law of succession of land in the New Territories) be abolished and that legislation be considered to provide for one system of law of intestate succession (with the exception as aforesaid) to be applied to all persons dying intestate in Hong Kong.

He said: —Sir, when Hong Kong was ceded to Great Britain in 1841 two Proclamations were issued to the Chinese inhabitants.

The first Proclamation was issued by Commodore BREMER as Commander-in-Chief and Captain ELLIOT as Plenipotentiary on the 1st February 1841 and read, *inter alia*, as follows: —

"The inhabitants....are further secured in the free exercise of their religious rights, ceremonies, and social customs and in the enjoyment of their lawful private property and interests. They will be governed, pending Her Majesty's

further pleasure, according to the laws, customs and usages of the Chinese (every description of torture excepted) by the elders of villages, subject to the control of a British magistrate;”.*

The second Proclamation was issued by Captain ELLIOT alone and dated the 2nd February 1841, it read, *inter alia*, as follows: —

"And I do hereby declare and proclaim, that pending Her Majesty's further pleasure, the natives of the island of Hong Kong, and all natives of China thereto resorting, shall be governed according to the laws and customs of China, every description of torture excepted.

And I do further declare and proclaim, that pending Her Majesty's further pleasure, all British subjects and foreigners residing in, or resorting to, the island of Hong Kong, shall enjoy full security and protection, according to the principles and practice of British law,”†

These two Proclamations were however mere interim measures. The Treaty of Nanking‡, by which Hong Kong was formally ceded to Great Britain, was signed in 1842 and by Article III thereof it was provided that Hong Kong was "to be governed by such laws and regulations as Her Majesty the Queen of Great Britain . . . shall see fit to direct”.

On the 5th April 1843 Hong Kong had a local legislature and section 3 of the Supreme Court Ordinance No 15 of 1844 provided as follows: —

"And be it further enacted and ordained, that the law of England shall be in full force in the said Colony of Hong Kong, except where the same shall be inapplicable to the local circumstances of the said Colony, or of its inhabitants; Provided nevertheless, that in all matters and questions touching the right or title to any real property in the said Colony, the law of England shall prevail, and that no law shall be recognized in the said Colony, which shall in any way derogate from the sovereignty of the Queen of England....”

This section was amended from time to time culminating in section 5 of the Supreme Court Ordinance (Chapter 4), and was ultimately repealed by the Application of English Law Ordinance in 1966 (Chapter 88)§.

* Revised Edition of -the Laws, Volume 15, Appendix IV, page A1.

† Ibid, pages B1-2.

‡ Ibid, page C1.

§1965 Hansard, pages 598-600 and 1966 Hansard, pages 6-7.

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It therefore clearly shows that there are 2 systems of laws in Hong Kong—one applicable to the Chinese and the other applicable to other inhabitants.

May I digress for one moment to point out that in ancient China there was no legal system equivalent to the concept of Western jurisprudence.

In the pre-Republic days the Chinese were not governed by law but by a system of morals. They were under the complete domination and influence of the Confucians who preached a set of practical ethics and who placed virtues above the law. This influence permeated throughout all the Dynasties until the Chinese Republic which came into being in 1911. On the other hand the English legal system so far as marriages and succession are concerned is based on Christianity. Just as virtues constituted the conduct of life of the ancient Chinese so Christianity has been part of the laws of England. In English family law religion has played not an unimportant part in its development and we see the enormous influence of the Church over the English people in their domestic life.

However, the most important distinction between the 2 systems of laws is that in ancient China, the family had always been regarded as a unit both for the ownership of property and the control of the individual. In fact the Chinese family was almost a corporation. This collective responsibility was emphasized in the dynastic codes by punishing the whole family in the event of a member of the family committing certain crimes, *eg* high treason. Behind this was the maintenance of the rites of ancestor-worship which, together with the desire of the Chinese to preserve the continuity of the family line, formed the real basis on which the Chinese family was built. In England, on the other hand, there is no similar status of the family. Christianity has always emphasized the sanctity of the individual and so has primogeniture based on the necessity of finding the rightful heir—hence the family as an entity barely exists—the right of the parent may exist over the child but only while he is a minor and it is because of this emphasis on individuality that the Courts are accorded the sole power to determine the rights and liabilities of the individual. It is therefore surprising that since 1841 these 2 systems of laws so far as Chinese private rights are concerned existed, and in some degree is still existing, in Hong Kong.

Although it will be wrong to apply the concept of one system of law to the other, yet in Hong Kong such a case did however happen. The Imperial Enactments Extension Ordinance (Chapter 351) extended the Administration of the Intestates' Estates Act 1856 to Hong Kong

except "in so far as it may be deemed to affect the customs or usages of Chinese people, touching the distribution of the personal estate of Chinese persons dying intestate". The Courts here presuppose that in ancient China there were laws governing testate and intestate succession. May I point out that there was no distinction in Chinese law of testate and intestate succession at all. Succession to the family property was laid down in the penal code, any variation of which would be punishable as a criminal offence. The code I refer to is what we generally call "The Ta Tsing Lu Li"*. In the division of family property in the said code it was provided: —

"1. As regards children in general, hereditary official rank descends only to the eldest son and his descendants born in lawful wedlock, but all family property moveable or immoveable must be divided equally between all male children whether born of the principal wife or of a concubine or domestic slave. Also male children born of illicit intercourse shall be entitled to a half share, or to an equal share in event of a successor having been adopted through default of other children. If no legal successor is in existence, then such illegitimate son shall be entitled to succeed and receive the whole patrimony."

(JAMIESON'S translation).

In another section of the code it was provided that no sons could own separate property except with the consent of the head of the family and all property must be regarded as belonging to the family. Furthermore, the head of the family was prohibited from disposing of the family property by will except in accordance with the said provisions.

The Probate Court in Hong Kong has by a series of decisions adopted the opinions given by experts on Chinese law and recognized the law above stated that all property of Chinese dying intestate and domiciled in Hong Kong should go to the sons alone with right of maintenance to the widow until her death or re-marriage and also maintenance for the unmarried daughters until their marriage. No married daughters can inherit the deceased's property. Such system of succession might seem reasonable in 1841 but in 1969 no one can say that this is equitable and indeed during my practice of 30 years I have found that despite this rule of succession members of families of Chinese intestate invariably come to a compromise by way of family arrangement and if there are minors they apply to the Court for approval of the same by dividing the deceased's estate in an equitable manner. However, such a state of affairs is not satisfactory. In 1948 the Committee on Chinese Law and Custom in Hong Kong did in its Report

* [大清律例]

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make recommendation to abolish this unsatisfactory law of Chinese intestate succession and recommended to—

"Abolish the Tsing law as to succession on intestacy in all cases except in so far as such law may be applicable to intestate succession to land in the New Territories and substitute the law applicable to such succession under the Chinese Civil Code with certain modifications."

(Page 75 of the Report).

When this recommendation was made China was still under the Nationalist regime and the Chinese Civil Code therein mentioned was then in force.

Its provisions on intestate succession followed substantively the Swiss Civil Code and for the first time China had a law of intestate succession. Into these provisions we need not now go as this Code is no longer in force in China though it may be still applicable in Taiwan. The Government of the People Republic of China has not, as far as I can ascertain, enacted any law of succession though on the 1st May 1950 it promulgated the Marriage Law. Article 12 thereof provides:

"Both husband and wife shall have the right to inherit each other's property", and by

Article 14:

"Parents and children shall have the right to inherit one another's property".

It is clear that we cannot accept the second part of the recommendation of the Committee on Chinese Law and Custom and as there is now no law of intestate succession in China, the only solution in my opinion is to abolish the law of intestate succession applicable to Chinese in Hong Kong and to provide one system of law of intestate succession to be applied to all people dying intestate here.

May I again digress for one moment to say that the existing law of intestate succession in Hong Kong applicable to non-Chinese is also out of date as it is based mainly on the Statutes of Distribution of 1670. We ought to bring the law up to date and follow the present law of intestate succession in English, *ie*, the Administration of Estates Act of 1925. This was in fact so recommended by the Law Reform Committee in its Third Report in 1959*. If one system of law of intestate succession is made to be applied to all the people in Hong Kong whether Chinese or not, it would not only rectify the unfortunate and unjustifiable exclusion of females to succeed to their husbands' or their

* 1960 Hansard, pages 10-11.

fathers' estates but also would facilitate the administration of justice in the Probate Jurisdiction of the Supreme Court.

Finally, may I deal briefly with the succession of land in the New Territories where succession is governed by the New Territories Ordinance (Chapter 97) and section 13 provides that "In any proceedings in the Supreme Court or the District Court in relation to land in the New Territories, the court shall have power to recognize and enforce any Chinese custom or customary right affecting such land." Most of the land in the New Territories are Tso Tin (祖田), *ie* ancestral land or paddy-fields and they have been handed down from generation to generation and succession follows the Chinese law and custom of time immemorial. I do not suggest the abolition of this system unless and until the inhabitants in the New Territories so desire to follow the law of intestate succession prevailing in Hong Kong. In such event we can easily change the law to suit the purpose.

THE SECRETARY FOR HOME AFFAIRS: —Sir, for my part I shall find no difficulty in supporting this motion and I understand that this is the position of the Official Members generally. Indeed Sir, we are grateful to the Unofficial Members concerned for having taken this initiative. My honourable Friend the Attorney General will be referring later in the debate to the legal implications of the motion, and I am sure he will welcome the prospect of one law for all; meanwhile I shall confine my observations to the social and general aspects.

The Government has from time to time been taken to task for its slowness in coming to grips with a number of matters in the field of personal law, of which this question of intestate succession is one. As I have said before in this Council one of our reasons for caution in this field lies in the importance of keeping in step with public opinion and in the difficulty of ascertaining with certainty what public opinion is*. The point was well summed up by the late Sir Man-kan Lo in his comments on the Strickland Report from which I may perhaps quote briefly: —

Sir Man-kam wrote—

“ this difficulty is enhanced by the fact that the subject matter of the Report concerns the family relations and family inheritance and succession of the very people who, *ex hypothesi*, still observe the old law and who are traditionally reticent in expressing their views in public or for publication.”

That is the end, Sir, of Sir Man-kam's monogram.

* 1967 Hansard, page 259.

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I am sure Members will agree that the need for caution on these grounds still exists, but my own view accords with what I believe is the unofficial view, namely that there probably remains little or no opposition to the enactment of uniform legislation on the lines contemplated in the present motion. This debate will no doubt itself stimulate public comment, and the fact that there will thus be a further opportunity afforded for the expression of public opinion is to my mind an additional reason for welcoming the motion.

There is one more point, Sir. If there is one area in this general field of personal law and Chinese custom in which I think we may properly resist the temptation to be over-cautious, it is the field of intestate succession, for the reason that, whatever provisions may be enacted, any individual is free to escape their application to his own affairs by the simple expedient of making a comprehensive will.

Sir, I support the motion.

MRS ELLEN LI: —Sir, I rise to support the motion before Council standing in the name of my honourable Friend Mr WOO, particularly because it calls for the abolition of the existing law of intestate succession applicable to a Chinese intestate leaving an estate in Hong Kong. The existing law governing the distribution of a Chinese intestate's estate in Hong Kong is based on the Ta Tsing Lu Li* of 1843, which excludes all female members of the family of the intestate from inheriting any part of his or her estate in Hong Kong. That this antiquated law, which has long been discarded by Chinese system of law outside Hong Kong and which is full of doubts in many respects as to its exact meaning, practice or interpretation, should still exist in Hong Kong is most astounding. It is submitted that the abolition of such antiquated and such unjust law is more than overdue, resulting in the continuing injustice to the female members of a Chinese intestate, so far as the intestate's estate in Hong Kong is concerned. I venture to think that as this ancient law has not been used or enforced anywhere outside Hong Kong for over half a century no living person can reasonably be expected to give an authentic view thereon on any particular point without giving rise to controversy or challenge. That this is so has been, I believe, demonstrated by cases that have come before our courts.

In this connexion I may mention that as long ago as 1953[†] the Report of the Committee appointed by the Governor in 1948 to consider and make recommendations, *inter alia*, as to how far the Chinese

* [大清律例]

† 1953 Hansard, page 134.

law and custom as existing in 1843, with or without any modification should be incorporated into the law of the Colony, recommended that this ancient law of intestacy as applicable to Chinese should be changed to follow the modern law of intestacy elsewhere, which accorded equality to children of both sexes of a Chinese intestate, so far as the distribution of his or her estate in Hong Kong was concerned. It is now 1969, and the recommendation of that Report has not yet been implemented. Furthermore, if I am not mistaken, in 1965 my Friend, the Honourable Sir Cho-yiu KWAN, urged Government in this Council to change this law*. Although four years have now elapsed since he spoke on this floor, no change of this archaic law has been effected. In the circumstances not only do I heartily support the motion now before Council which calls for the abolition of this law, but also I feel that in the name of justice I cannot urge too strongly that Government should not delay any further in introducing the necessary legislation to remedy the injustice inherent in the present law which unjustly deprives the female members of the family of a Chinese intestate from getting their rightful share in the estate in Hong Kong of their parents and their relatives to which they would under the law of all the civilized countries be entitled.

Sir, I have much pleasure in seconding the motion before Council.

MR Y. K. KAN: —Sir, I do not wish to prolong the debate on this motion, particularly as I have been given to understand that the motion will have the support of both the Official and Unofficial Members of this Council. I do however wish to make two or three points.

The first point I wish to make, Sir, is that I believe that the concept of the distribution of an estate on intestacy under the Tsing Law by excluding the wife and daughters is not in keeping with the conditions of our present society and, therefore, the abolition of the existing system, as proposed by my honourable Friend Mr Woo will, I think, have the general support of the Chinese community.

The second point which I should like to emphasize—a point which Mr HOLMES has just made—is that we are dealing here with a case of intestacy—that is to say—where a man dies without having left a will. There is nothing to prevent any person making a will disposing of his property—his estate—in any manner he wishes.

The third point that I would like to make (and I do so with diffidence, knowing that I may incur the wrath of my honourable Friend Mrs LI, knowing her strong views on concubinage) —Mr Woo's proposal is that the present system should be abolished and, instead, legislation should be made to provide one system of law of intestacy succession to

* 1965 Hansard, page 112.

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be applied to all persons dying intestate here. Under the present system, concubines have the right of maintenance, and daughters also have the right to maintenance. I do not wish any change of the law for very obvious social and economic reasons. I suggest that this position should not be affected. I feel it is—I wish to say no more than merely sounding a word of warning that, in introducing a new law, we should not overlook this very important point.

One final point I wish to make is this. We have heard both in this Council and outside this Council, time and again, the words "Chinese Laws and Customs". What exactly is Chinese laws and customs? No one can really say very definitely. We have had many experts writing many more books. I think, in case of disputes, experts have been called upon by Courts to give expert evidence. Sir, I have yet to find two lawyers agreeing on a legal point. I think, for that reason alone, I think this law should be changed.

Sir, I support the motion.

THE ATTORNEY GENERAL: —Sir, I am indeed grateful to the honourable Member for raising this matter in Council today and for his scholarly appraisal of the background to the problem.

Although there are many opinions as to the best solution, I believe that there is general agreement among those who are concerned with its administration that the law governing intestate succession in Hong Kong is archaic and obscure, and ill-suited to the requirements of a modern community. We are indeed, in this subject as in so many others, the prisoners of past traditions and customs which have lost much of their force with the passage of time and which may, as the honourable Mrs Ellen LI has argued so persuasively, and as the honourable Mr KAN has agreed, produce results which fail to accord with current ideas of social and family justice and of the status and rights of women.

One of the significant and, I venture to suggest, undesirable features of this branch of our law is that it varies so greatly according to the race of the person whose estate falls to be distributed. If a person of Chinese race dies domiciled in Hong Kong without leaving a will, a succession of Supreme Court and Full Court decisions has ruled that the distribution of the estate shall be governed by the Tsing law, the principles of which the mover of the motion has summarized in terms which are, in substance, the same as those which were set out in the Strickland Report, submitted to the Governor in 1950.

Although the Strickland summary of Chinese customary law has been generally adopted by the courts, expert evidence, as the honourable

Mr KAN indicated, either on affidavit or in person, has also been admitted, to supplement, and even on occasions to vary the Strickland summary. These variations, the paucity of contemporary written material and the fact that no help can be derived from other countries, since such custom no longer subsists elsewhere, have all increased the uncertainty which exists as to the details of this law and I entirely agree with the comments which have been made by the honourable Members on this aspect of the matter. Simplicity and certainty are desirable qualities in any law and particularly so where the distribution of property is concerned. Uncertainty gives rise to litigation, which is expensive and eats up resources which ought to be available for the benefit of the relatives of the deceased.

The honourable the Mover of the motion has referred to the prohibition against any alteration by will or other instrument of the rules which governed the division of a deceased's estate. This curb on the power of a man to dispose of his property after death as he wishes has in practice been modified in Hong Kong, as the honourable Mr KAN indicated. A recent decision of the Full Court has made it clear that a person of Chinese race domiciled in Hong Kong has full testamentary capacity and that, if he makes a will which is in the proper form according to English law which is applicable in Hong Kong, his estate will be distributed in accordance with that will. But if the will does not effectively dispose of the entirety of his estate, such part of it as he has not dealt with in the will continues to be distributed in accordance with Chinese customary law, which is a system which the testator has clearly shown, by the mere fact of making a will, that he does not wish to apply to his property.

With regard to non-Chinese persons (and it may not always be easy to distinguish whether a particular person falls within that category or not), the law is clear enough and an intestate's estate will be distributed in accordance with English law and particularly by reference to the Statutes of Distribution Act, 1670, which was repealed in England in 1925. Thus for non-Chinese also, the law, though not in doubt, is anachronistic and needs to be revised. I also agree that, so far as possible, the same rules of distribution should be applicable to everyone, irrespective of race, though it is, as the honourable Mover has indicated, likely that special provision would need to be made to preserve the position with regard to land in the New Territories.

The motion proposes that the estates of all persons who die intestate in Hong Kong should be dealt with in the same manner. While this is the neat and simple solution, it is necessary to take into account those rules of private international law which are embodied in the common law and thus apply in Hong Kong. According to those rules, the moveable property of a deceased should be regulated by the law of

[THE ATTORNEY GENERAL] **Law of Intestate Succession**

his domicile whereas the distribution of his immovable property should be dealt with according to the law of the place where the immovables are situated at the time of his death, and consequently the jurisdiction of Hong Kong law and courts should extend, according to private international law, only to the estates of those who die domiciled here. However, the concept of domicile is an artificial one, which does not take into account satisfactorily our particular circumstances, and the Strickland Report recommended that there should be a rebuttable presumption of Hong Kong domicile in the case of persons who had settled here and that such presumption should not be rebutted merely by evidence of a different domicile of origin or of links maintained by a resident of Hong Kong with China.

Recent reported cases suggest that the English courts are moving towards a recognition of jurisdiction based not on a technical definition of domicile as the place which a person regards as his ultimate home, but as including any country with which it can be said that he has a substantial connexion. This more flexible approach would mean that in personal law, the test of jurisdiction for Hong Kong law and its courts would be whether or not a person had lived here for a substantial period and intended to remain here for the foreseeable future, even if at some later time he intended to leave the Colony. While we must move with caution in this field, to avoid as far as possible any clash between different systems of law attempting to assume jurisdiction over the same property or refusing to recognize one another's decrees, I believe that the time has come when we must try to adapt the idea of domicile to the needs of Hong Kong.

This is an opportune moment to inform honourable Members that a great deal of work has been done in the preparation of several major bills dealing with property and personal law, all of which are in an advanced stage of drafting. Perhaps the most important of these is the Marriage Reform Bill, which is designed to deal with the problems of customary marriages, modern marriages and concubinage. Linked with it are bills on intestate succession, family maintenance, legitimacy, married women's property and affiliation. All depend, to a considerable degree, on an abolition, or at least a substantial derogation, from customary rights. Alternative sets of drafts have been prepared, one on the assumption that customary law needs to be preserved, albeit in a more limited form, another in the hope that it would prove possible to abrogate customary law, with such safeguards as may be thought desirable for the protection of existing rights, on the lines mentioned by the honourable Mr KAN.

The motion does not, in terms, commit the government to legislation of this nature, and it may be that some of the legal problems may

prove too difficult and public reaction to some aspects of the proposals too unfavourable, for the reforms proposed to be introduced in the near future in their entirety. Nevertheless, I am encouraged by this motion, and by the support which honourable Members have given to it, to believe that we may now be able to go forward with legislation which will radically improve the family law of Hong Kong making it simpler, and clearer and of universal application. It will take some courage to do so but I believe the benefits will outweigh the risks. It therefore gives me pleasure to support the motion.

Question put and agreed to.

ADJOURNMENT

Motion made, and question proposed. That this Council do now adjourn—
THE COLONIAL SECRETARY.

3.22 p.m.

Question put and agreed to.

NEXT SITTING

HIS EXCELLENCY THE PRESIDENT: —Council will accordingly adjourn. The next meeting will be held on 21st May.

Adjourned accordingly at twenty-four minutes past Three o'clock.