Clause 1 of the Statute Law (Miscellaneous Provisions) Bill 1999
Short title of the Bill

Background

In the past, we originally called our miscellaneous (or "omnibus") Bills "Administration of Justice (Miscellaneous Provisions) Bills". In 1995, the Special Committee on Criminal Law of the Hong Kong Bar Association made submissions to the Bills Committee for the Administration of Justice (Miscellaneous Provisions) Bill 1995 to the effect that the title of that Bill was a misnomer since many the amendments proposed bore "no readily discernible relationship to the administration of justice matters". Members of LegCo also noted that where a Bill covers matters outside the administration of justice, such a title was misleading. In 1996, therefore, we entitled the Bill the 'Law Reform (Miscellaneous Provisions and Minor Amendments) Bill'.

Issues

2. The title of 'Law Reform (Miscellaneous Provisions and Minor Amendments) Bill' was not adopted this year for the following reasons: -

(a) whilst the word "Minor" emphasises that such bills should only deal with small, uncontroversial amendments it is arguable that the present Bill contains some provisions that are controversial, even if not to a great degree. For example, the abolition of the "year and a day rule" in homicide; and

(b) this year's Bill, as has occurred in previous years, sometimes goes beyond the administration of justice in some respects. For example, the proposed delegation of the Director of Audit's powers. It was therefore decided that it should be retitled so that the content of the Bill is more accurately reflected in the title.

3. It was ultimately decided that the present title of the Bill should be adopted because:-

(a) the title would cover minor and non-controversial amendments as well

as more important or controversial amendments that do not warrant a separate Bill;

(b) the term "Statute Law" would also cover matters that were not strictly "Law Reform";

(c) Part XIII of the Bill does not pertain to amendments to primary legislation but to the making of subsidiary legislation.

In future the Administration is likely to adopt this title for bills of this nature to maintain consistency.

Practice in other jurisdictions

New Zealand

4. It is noted in Burrows Statute Law in New Zealand (1992), p. 312 that in that jurisdiction it had been the practice for many years (until 1988) to gather small amendments to miscellaneous Acts in a single omnibus "Statutes Amendment Bill" for the sake of economy. More recently, a new type of omnibus Bill called the "Law Reform (Miscellaneous Provisions) Bill has emerged and has sometimes contained amendments which were neither minor or non-controversial. The author cautions against the use of this device in the interests of proper scrutiny of legislation.

Canada

5. The Canadian Federal Government follows a practice similar to that of New Zealand under a programme known as the Miscellaneous Statute Law Amendment Programme ("the MSLA programme"). The MSLA programme is intended to provide a simple and informal mechanism for correcting inconsistencies and errors in the Statutes of Canada and making other amendments of a non-controversial and minor nature.

6. Eight or nine Bills have been enacted since the MSLA programme was established in 1977. The standard long title for each Bill is "An Act to correct certain anomalies, inconsistencies and errors in the Statutes of Canada, to deal with other matters of a non-controversial and uncomplicated nature in those Statutes and to repeal certain provisions of those Statutes that have expired, lapsed or otherwise ceased to have effect". The standard short title is "Miscellaneous Statute Law Amendment Act 199_ ".

New South Wales, Australia

7. Two Statute Law (Miscellaneous Provisions) Bills will usually be prepared each year. The Bills will generally contain the following 5 kinds of matters only:-

(a) minor amendments proposed by government agencies;

(b) minor amendments by way of pure statue law revision, proposed by the Parliamentary Counsel

(c) amendments removing gender-specific language from the statute book;

(d) repeals of obsolete or unnecessary Acts, proposed by government agencies or the Parliamentary Counsel;

(e) savings and transitional provisions.

Clauses 6 & 7 of the Statute Law (Miscellaneous Provisions) Bill 1999 proposed amendments to the Conveyancing and Property Ordinance (the "Ordinance")

Background to the proposal

The need for the present proposal was brought to the attention of the Administration by the newspaper reporting of a case in 1997 (MP 3448/96). No decision has been handed down in MP 3448/96. The case was adjourned and apparently has not been restored but the issues could be gleaned from the newspaper reporting, a copy of which is annexed marked "A". A copy of the judgment (the "Judgment") handed down by Mr. Justice Godfrey (as he then was) in the case referred to in the newspaper reporting is also enclosed marked "B".

Objective of the proposed amendments

2. The objective of the proposal is to provide for the discharge by the court of an encumbered property by payment into court of an amount sufficient to meet the encumbrance where the mortgagee cannot be found and the mortgage document cannot located.

Current Law

3. Under current law, when a mortgage is redeemed, no reconveyance is necessary. Under s. 56 of the Ordinance, a receipt for the mortgage money made by mortgagee or the person in whom the mortgage is vested would constitute sufficient discharge of the mortgage.

4. A mortgagor cannot redeem a mortgage and obtain a discharge if he cannot trace the mortgagee. Such a mortgagor may also be unable to deal with the property by way of sale or as security for a fresh loan. The mortgagor may, through no fault on his part, be stuck with the consequences of an uncleared title.

5. A property owner may rely on s. 7 of the Limitation Ordinance (Cap. 347) which operates to the effect that no action can be brought by the missing mortgagee at the expiration of 12 years if the property owner did not pay any mortgage repayment during the preceding 12 years. The missing mortgagee will lose his right to bring any action accrued to him for recovering the land. This is one way of "clearing" the title of the land without going through any court proceedings.

6. Another alternative is for the property owner to institute proceedings against the mortgagee (applying for leave, if he cannot be found, to serve him by substituted service) asking for a declaration that the mortgage is no longer subsisting or capable of taking effect. This is the course of action referred to by Mr. Justice Godfrey in the Judgment (page 3, last complete paragraph).

Practice in other jurisdictions

7. The statute law of respectively the United Kingdom; New South Wales, Australia; and New Zealand all provide for situations in which the mortgagee cannot be located. Enclosed marked "C", "D" and "E" are copies of:-

(a) section 50 of the Law of Property Act, 1925;
(b) section 98 of the Conveyancing Act 1919 (NSW, Australia);
(c) section 102A of the Property Law Act 1952 (New Zealand).

Number of properties likely to be affected

8. The number of properties likely to be affected should be small and likely to further decrease in number with the passage of time because most of these properties should be pre-war buildings and because mortgage and/or loans have usually been supplied by financial institutions (as opposed to individuals) in the last few decades.

Consultation

9. The Judiciary has been consulted and it is in support of the proposed amendments.

10. The views of the Land and Conveyancing Office ("LACO") of the Lands Department were sought as that office deals with claims for compensation after resumption (which often involves aged buildings where the incidence of the same having been mortgaged to individuals is higher) and it is its practice to ignore these small pre-war mortgages provided that :-

(a) the mortgage has existed and been registered in the Land Registry on or before 31st December 1950;
(b) the redemption of the mortgage is not possible because the mortgagee cannot be traced, or it is considered impossible for the mortgage to be redeemed even if the mortgagee can be traced;
(c) the mortgage amount does not exceed $5,000 (or it is obvious from the age of the mortgage or relatively small value of the land concerned that the mortgage could not possibly exceed $5,000); and

(d) the former owner executes a Deed of Indemnity and makes a Statutory Declaration stating the reasons why or circumstances in which the mortgage cannot be redeemed.

11. This is an administrative decision taken by LACO as a matter of policy in order not to unnecessarily delay the release of compensation. LACO also stated that the issue had not amounted to a significant problem in the cases with which it has been concerned.

12. The Hong Kong Conveyancing and Property Law Association Limited has been consulted and they are in support of the proposed amendments. They are of the view that although the number of cases that would be affected by the proposed amendments would be few, the proposed amendments would remove the hardship created by law to parties to sales and purchases and facilitate such transactions. The Association additionally proposed that the relief should be extended to situations where no sale or exchange is involved, where the property owner only wishes to further mortgage or charge the subject property to secure fresh finance. The Administration will consider this proposal and introduce the same by way of CSAs if the proposal is to be adopted.

Whether the court has the responsibility to settle the amount of interest in allowing payment into court of an amount sufficient to meet the encumbrance and any interest thereon

13. An applicant for discharge would have to supply the court with information of the outstanding principal, agreed interest(if any), the time the last repayment was made and the amount that is due as at the time of application (including interest and the method of calculation where it is alleged that no interest rate had been agreed) and provide documentary proof in support where possible. The court will check these and decide on the amount to be paid into court. The amount paid into court will be retained in the normal way that payments into court for other reasons are retained and will generate interest unless otherwise directed to be invested.

Clauses 17 to 24 of the Statute Law (Miscellaneous Provisions) Bill proposed amendment to the Audit Ordinance

Whether the proposed delegation of power is already governed by general principle of delegation set out in other ordinances such as the Interpretation and General Clauses Ordinance, Cap. 1

Section 43 of the Interpretation and General Clauses Ordinance, Cap. 1 provides that: -

> "*where any Ordinance confers powers or imposes duties upon a specified public officer, such public officer may delegate any other public officer or person for the time being holding any office designated by him to exercise such powers or perform such duties on his behalf, and thereupon, or from the dates specified by such specified public officer, the person delegated shall have and may exercise such powers and perform such duties.*"

2. Section 43 of Cap. 1 pertains to general principle of delegation of power by public officers. However, it is not applicable to section 10 of the Audit Ordinance, Cap. 122 because section 10(3) of Cap. 122, the subject section of clause 20 of the Bill, provides that:-

> *"The Director may delegate any of his duties or powers under this Ordinance,* ***other than the certifying and reporting of accounts,*** *to any public officer."*

Whether other legislation contain provisions for similar delegation of powers and duties

3. Examples of provisions for delegation of powers and duties found in our statute books:-

Title of Ordinance	**Content of subject provision**
Public Finance Ordinance Cap. 2, section 16(4)	The Director of Accounting Services may, in writing, delegate to any public officer any of the powers conferred upon him by subsection

	(3)
Apprenticeship Ordinance Cap. 47, section 5	(1) Subject to subsection (3), the Director may, either generally or in any particular case, delegate to an officer appointed under section 33(2) the performance or exercise on his behalf of any of the functions, duties or powers imposed or conferred upon him under this Ordinance. (3) The Director or , as the case may be, the Commissioner shall not delegate his powers under section 46 or 47.
Import and Export Ordinance Cap. 60, section 3(9)	The Director may delegate any of the powers and duties conferred or imposed on him by this section to any appointed officer.
Fire Service (Installation Contractors) Regulations Cap. 95A, R. 15	The Director may authorize the Deputy Director or a Chief Fire Officer to exercise any of the powers or duties conferred or imposed on him by these regulations.
Fire Service (Installations and Equipment) Regulations Cap. 95B, R. 11	The Director may authorize the Deputy Director or a Chief Fire Officer to exercise any of the powers or duties conferred or imposed on him by these regulations
Government Rent and Premium (Apportionment) Ordinance Cap. 125, section 26	The powers, functions and duties conferred or imposed by this Ordinance on the Director of Lands may be exercised or performed by any public officer authorized in wring by the Director of Lands for the purposes of this Ordinance.
Volunteer and Naval Volunteer Pensions Ordinance Cap. 202, section 34(1)(b)	Subject to subsection (2), the Director of Accounting Services may delegate in writing, either generally or for any particular purpose, such of his functions or powers under this Ordinance, other than those specified in subsection (3) as he thinks fit to any public officer or other person.
Protection of Children and Juveniles Ordinance Cap. 213, section 48(2)	Save where a contrary intention appears from the context of any of the provisions of this Ordinance, and subject to any special instructions of the Chief Executive, the director of Social Welfare may authorize any public officer to exercise or discharge any of the powers or duties which the Director of Social Welfare is entitled to exercise or required to

	discharge by any of the provisions of this Ordinance.
Mass Transit Railway (Land Resumption and Related Provisions) Ordinance Cap. 276, section 29(3)	The Director of Lands may in writing authorize any person, who is not a public officer, either generally or in any particular case, to exercise any of the powers and functions conferred on him by section 21(4) or 21(6A)(b) if he is satisfied that such person is qualified to exercise such powers and functions.
Housing Ordinance Cap. 283, section 10(3)	The Director of Housing may, by notice published in the Gazette, delegate any of his powers and functions to a person who is an officer to whom this section applies and who is specified in the delegation.
Education Ordinance Cap. 279, section 5	The Director may authorize any officer of the Education Department to exercise any function of the Director under any provision of this Ordinance other than section 9(5).
Adoption Ordinance Cap. 290, section 3	The Director may delegate any of his powers, duties and functions under this Ordinance to any public officer.
Lifts and Escalators (Safety) Ordinance Cap. 327, section 36	The Director may delegate to any officer of the Electrical and Mechanical Services Department, either generally or particularly, such of his powers or functions under the provisions of this Ordinance as he may consider expedient: Provided that no delegation made hereunder shall preclude the Director from exercising or performing at any time any of the powers or functions so delegated.
Shipping and Port Control Ordinance Cap. 313, section 58(1)	Subject to subsection (3), the Director may, either generally or in any particular case, delegate to any other public officer the performance or exercise on his behalf of any of the functions, duties or powers imposed or conferred upon him under this Ordinance.
Merchant Shipping (Safety)(Gas Carriers) Regulations Cap. 369Z, R. 6(3)	The Director may, in writing, delegate to any public officer or class of public officers any of his powers, functions or duties under these regulations and may at any time revoke any such delegation.
Tsing Ma Control Area Ordinance	A relevant officer may in writing delegate any public officer to exercise the powers and

Cap. 498, section 9(1)	perform the duties conferred or imposed on a relevant officer by this Ordinance

Why the Director of Audit has not been authorized to delegate certain powers and duties to directorate officers in the first place

4. When the Audit Ordinance which was enacted in 1971 the accounts of the Government and various funds were much less complex than those of the present day. Therefore, it was considered appropriate for the Director to personally certify all the accounts. Accordingly, section 10(3) of the Ordinance provides that the Director may delegate his duties or powers under the Ordinance, other than the certifying and reporting of accounts, to any public officer.

5. In 1999-2000, the Director of Audit has to personally certify over 70 accounts. These accounts vary in size and complexity. The certification of some of these accounts has taken up an inordinate amount of the Director's time, at the expense of his performance of other tasks including value-for-money audit and other administrative functions in the Audit Commission. In order to relieve the Director's workload, it is considered necessary to empower the Director to delegate the certifying and reporting of the less complicated accounts to his directorate officers. However, those accounts submitted by the Director of Accounting Services under section 11 of the Audit Ordinance (including the General Revenue Account, the Capital Works Reserve Fund, the Land Fund etc) would continue to be certified and reported by the Director of audit because of their nature and materiality. Such delegation is also in line with international practices (see Attachment).

Clauses 25 & 26 of the Statute Law (Miscellaneous Provisions) Bill 1999 proposed amendments to the Transfer of Sentenced Persons Ordinance (the "Ordinance")

Current anomalous situations in respect of transfer of persons serving indeterminate sentences and the existing practice to deal with these situations.

Under current law in Hong Kong, "indeterminate" sentences, i.e. sentences of, say, 10 to 20 years imprisonment, cannot be imposed in Hong Kong.

Importance of the proposed amendments

2. The amendment is only relevant to persons serving "indeterminate" sentences. As such sentences cannot be imposed in Hong Kong, the amendment is accordingly only relevant to Hong Kong people who have been sentenced to an indeterminate term in a place outside Hong Kong and wish to be transferred to Hong Kong to serve their sentence.

3. The Administration does not have statistics of Hong Kong people who have been sentenced to indeterminate terms in places outside Hong Kong.

4. Unless the amendment to the Ordinance is made, these people will not be able to be transferred to Hong Kong.

5. To our knowledge, the USA and the Philippines impose indeterminate sentences. The Transfer of Sentenced Persons Agreement with the USA is in force; the Agreement with the Philippines will be signed shortly. Both the agreements govern the transfer of sentenced persons who are serving indeterminate sentences. The USA and the Philippines could be expected to object if Hong Kong was unable to accept the inward transfer of a person serving an indeterminate sentence.

Clauses 44 to 47 of the Statute Law (Miscellaneous Provisions) Bill 1999 proposal to deem subsidiary legislation laid before the Legislative Council

Background

In January 1999, in the process of scrutiny of the Ozone Layer Protection (Controlled Refrigerants) Regulation (Commencement) Notice 1998, it came to the attention of the Legislative Council ("the LegCo") and the Administration that certain pieces of subsidiary legislation (namely those listed in Schedule 1 to the captioned Bill), although gazetted, were not laid before the LegCo in accordance with section 34(1) of the Interpretation and General Clauses Ordinance, Cap. 1 of the Laws of Hong Kong ("the Ordinance"). The subsection reads:-

> *"All subsidiary legislation shall be laid on the table of the Legislative Council at the next sitting thereof after the publication in the Gazette of that subsidiary legislation."*

2. The Legal Service Division of the LegCo was of the view that section 34(1) of Cap. 1 is directory and not mandatory, and that subsidiary legislation has legal effect upon its publication in the Gazette.

3. The Administration was of the view that the tabling requirement in section 34(1) is mandatory and an essential part of the legislative process which provides for the amendment of subsidiary legislation by resolution after the gazettal of the same (section 34(2)).

4. The authorities as to whether or not the duty to lay subsidiary legislation before the legislature is directory or mandatory are not conclusive one way or the other, a fact illustrated by the divergence of views between the Administration and the Legal Adviser to LegCo.

5. The matter was discussed in detail by the Subcommittee on Ozone Layer Protection (Controlled Refrigerants) Regulation (Commencement) Notice 1998 ("the Subcommittee") on 21 January 1999 and the Subcommittee to Study Issues Relating to the Tabling of Subsidiary Legislation in Legislative Council was set up ("the Second Subcommittee"). The Second Subcommittee met on 2 February 1999 and 27 April 1999. The matter was also discussed in the 27 May 1999 meeting of the Panel on Administration of Justice and Legal Services.

Issues

6. A number of issues evolved in the course of the discussions between the Administration and the LegCo. They are:-

(a) the legality of the subsidiary legislation that has been gazetted but not laid before LegCo;
(b) the mechanism of laying subsidiary legislation before LegCo and how improvements can be made;
(c) the institution that is to decide what should constitute subsidiary legislation and what should not;
(d) the extent of LegCo's power to scrutinize subsidiary legislation [under the Basic Law].

7. The issues embodied in subparagraphs 6(c) and (d) are still being studied by the Administration and are not the focus of the present proposed provisions.

8. Agreement has been reached between the LegCo and the Administration in relation to an improved mechanism for laying subsidiary legislation before the LegCo, namely by way of the printing of a note on the contents page of Legal Supplement No. 2 of the Gazette to specify the subsidiary legislation to be laid on the table of the Legislative Council. Such an arrangement has been in place with effect from the Gazette published on 11June 1999. The note reads:-

> "The following Legal Notices are to be laid on the table of the Legislative Council at its next meeting following (date of the Gazette)"

The present proposed provisions

8. The present proposed provisions are solely for the purpose of dealing with the issue set out in paragraph 6(a) hereof. As stated in paragraph 3, there are differences in opinion as to the nature of the provision in section 34(1) of the Ordinance. While there are many cases and authorities showing that the obligation to lay subsidiary legislation is mandatory, there are also some authorities which suggest that it may be only directory. From these authorities it might be argued that the position with respect to a failure to lay might be, at least unclear. However even if it is only unclear then this is also unsatisfactory and should be remedied. It is desirable that the position be clarified for the avoidance of doubt.

Factors considered by the Administration

9. The following factors have been taken into consideration by the Administration when deciding upon the present course of action:-

(1) Normal statutory construction

It is a primary rule of construction that words in a statute should be given their natural and ordinary meaning in context. It is submitted that in this case the plain meaning of section 34(1) of the Ordinance is that the legislature intended subsidiary legislation to be laid on the table of the Legislative Council so that it could be scrutinized. The word "shall" is the traditional word used in legislation to impose an obligation. The use of affirmative words such as "shall" in legislation is taken *prima facie* as imposing an obligation. There is nothing in the Ordinance to suggest that the requirement of section 34(1) may be dispensed with.

(2) Object intended to be secured

The Legislative Council is the legislature of Hong Kong (BL66). It alone is empowered by the Basic Law to make laws. However, it has long been accepted at common law that a legislature may delegate its power to legislate. Such delegation must though be given within defined parameters. It seems logical therefore to deduce from section 34(2) of the Ordinance that review of the subsidiary legislation, by the legislature which authorized its making, is the intended object of section 34(1) of the Ordinance. The Legislative Council cannot carry out this review function if the subsidiary legislation is not laid. A failure to lay would defeat the object intended to be secured by section 34(1) of the Ordinance.

(3) Importance

The laying of instruments before the legislature is a constitutional safeguard of some value. The Legislative Council by its own record does not regard its scrutiny of subsidiary legislation as a trivial matter. In the years between 1995 to 1998, it has passed on average 30 resolutions a year under section 34 of the Ordinance.

(4) Public interest

It is in the public interest that the exercise of a delegated power should be scrutinized by the Legislative Council.

(5) Rectification

It is not possible to rectify the failure by tabling the subsidiary legislation now for 2 reasons-

(i) the length of time that has elapsed since the subsidiary legislation was first published in the Gazette; and

(ii) the fact that under section 34(2) of the Ordinance, only 28 days are allowed for amendment following the first sitting of the Legislative Council after publication of the subsidiary legislation in the Gazette.

Bill of Rights Implications

10. Clause 47(1) of the Bill provides that the deemed laying shall be subject to Article 12 of the Hong Kong Bill of Rights set out in Part II of the Hong Kong Bill of Rights Ordinance. This means that the provisions do not create retrospective offences or increase penalties with retrospective effect.

11. Although the Administration is of the view that the legality of the subject pieces of subsidiary legislation may be subject to challenge and the present remedial provisions are therefore proposed, there are established authorities to the effect that unless the subsidiary legislation is invalid on its face, or the invalidity is patent, they will be presumed valid unless struck down by a court of competent jurisdiction. None of the subject subsidiary legislation has been so struck down to date.

12. Any act done pursuant to the subsidiary legislation was done pursuant to valid law at the relevant time. The deemed laying will only clarify the status, which is the same before and after the deemed laying, of the subsidiary legislation once and for all, but will not affect the nature of any act done.

附件 A
Annex A

Extract from S.C.M.P. dated 17 OCT 1997

Law blocks bid to pay back $210 mortgage

CLIFF BUDDLE

A landowner desperate to repay a mortgage of $210 is prevented from doing so by the law, a judge said yesterday.

To Wai-sum wants to clear the loan, which dates from 1939, because it could hinder the sale or development of ancestral property he manages in Tuen Mun.

But mortgage documents, with a monthly interest rate of $2.50, are missing and the date by which it should have been repaid is not known. The man who lent the money 58 years ago, To Cheung-ming, cannot be found and may be dead.

Stephen Fong, for the manager, asked Mrs Justice Doreen Le Pichon to allow money to be lodged with the court to discharge the mortgage. This would mean that if Mr To Cheung-ming appeared and wanted the loan repaid he would be able to receive the money from judicial coffers.

But Mrs Justice Le Pichon said while it was possible to do this in England, Hong Kong had no equivalent legislation.

Another judge, Mr Justice Gerald Godfrey, expressed concern about this in an earlier case and urged that the law in Hong Kong be changed. "As far as I am aware, it has not been done," said Mrs Justice Le Pichon.

She adjourned the case, at the Court of First Instance, so Mr To Wai-sum's lawyers could search for evidence to show the date by which the mortgage should have been repaid.

The problem could then be settled under limitation laws which would render the mortgage invalid 20 years after the date by which it should have been repaid.

Mr To Wai-sum is manager and trustee of the To Kam Shan Tso, which owns the agricultural land in Tsing Chun Wai, Tuen Mun.

The woman who originally borrowed the money died in 1950. The only evidence that the mortgage exists is in a memorial record dated February 6, 1939.

1991] 1 HKC 321

FUNG KAM CHEUNG & ORS v KWOK YIU WING & ORS

HIGH COURT - MISCELLANEOUS PROCEEDINGS NO 1493 OF 1991
GODFREY J
3 JANUARY 1991

Land - Sale of land - Land subject to mortgage - Last payment on mortgage in 1942 - Whether mortgage still subsisting and capable of taking effect - Limitation Ordinance (Cap 347) s 19(1)

Mortgage and Charging Orders - Discharge of mortgage - Last payment on mortgage in 1942 - Whether mortgage still capable of taking effect - No action could be brought to recover money under mortgage - Limitation Ordinance (Cap 347) s 19(1)

The plaintiff vendors and the defendant purchasers entered into an agreement of sale and purchase of a property in a number of lots in Yuen Long, New Territories. A mortgage had been created over one of the lots on 25 August 1931. The last payment due under the mortgage was payable in 1942. However, the agreement for sale and purchase provided, inter alia, that the vendor would, after the signing of the agreement, apply to the Supreme Court of Hong Kong to discharge the said mortgage and would use his best endeavours to discharge the said mortgage prior to completion. The vendors applied to court for a declaration that the mortgage of 25 August 1931 was no longer subsisting or capable of taking effect.

Held, granting the declaration:

(1) The mortgage of 25 August 1931 was barred by limitation under s 19(1) of the Limitation Ordinance (Cap 347). The right to receive the money due under the mortgage appeared to have accrued at the latest by the end of 1942. After 1942 therefore, no action could have been brought on the mortgage in the absence of any acknowledgment or part payment.

(2) Time could have begun to run afresh if during the period, the mortgagor had made any written acknowledgment, or if he, or the person in possession of the land, made any payment of interest or of capital under the mortgage. However, there was no evidence of any such acknowledgment or payment here.

Unlike the courts in England and Wales, the courts in Hong Kong had no power under the provisions of the Conveyancing and Property Ordinance (Cap 219) to declare land to be free from an encumbrance on payment of sufficient money into court to meet the

encumbrance, together with interest and costs. An alternative course open to the intending vendor in the circumstances would be for him to institute proceedings against the mortgagee (applying for leave, if he could not be found, to serve him by substituted service) asking for a declaration that the mortgage was no longer subsisting or capable of taking effect.

Cases referred to

Lewis v Plunket [1937] 1 All ER 530

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Legislation referred to

Conveyancing and Property Ordinance (Cap 219)
Limitation Ordinance (Cap 347) s 19(1)
Law of Property Act 1925 [UK] s 50

Summons

The plaintiffs sought a declaration that the mortgage of 25 August 1931 over the subject property was no longer subsisting or capable of taking effect. The facts appear sufficiently in the following judgment.

Louis Chan (Tang & Co) for the plaintiffs.
Albert Poon (Edward Wong & Ng) for the defendants.

Godfrey J

This is a vendor and purchaser summons. The plaintiffs, Fung Kam Cheung and Fung Kun Cheong, are the vendors under an agreement for sale and purchase dated 27 November 1989 (I shall refer to them as 'the vendors'). The defendants are Kwok Yiu Wing and Wan Juen Hing, the purchasers under this agreement (I shall refer to them as 'the purchasers'). The property the subject of the agreement comprises Lot Nos 3412, 3416, 3403, 4149 and 4018 all in Demarcation District No 104, Yuen Long, New Territories, Hong Kong. This summons is concerned solely with Lot 4018.

The problem arises because on 25 August 1931, a mortgage affecting this property was created and registered in the District Office by a memorial No 80261. The then owner of the property appears to have mortgaged it to one Cheung Kwok-ping. The memorial indicates that the property was mortgaged 'for securing payment on the 17th day of the Chinese seventh and tenth months in each year up to and including the seventh month of the year 1942 at $16.50 as the mortgage money without interest'.
Subsequent to the mortgage, there has been a number of transactions or dealings in respect of

the property, all of them voluntary. I need refer only to a succession to property dated 25 October 1966 registered under Memorial No 58480. This does not indicate that the mortgage dated 25 August 1931 is still subsisting. This is not surprising, since the last instalment of the mortgage money was due to be paid in 1942 and we are now in 1966, 24 years later. It is, as it seems to me, a reasonable assumption, and indeed the only reasonable assumption, that the mortgage had long since been discharged. There is, however, no satisfactory conveyancing evidence to that effect.

When the parties entered into the agreement dated 27 April 1989, they did so with the problem, if any, created by the mortgage of 25 August 1931 in mind. The agreement provided (by cl 21) as follows:

> Notwithstanding anything hereinbefore contained, the vendor and the purchaser hereby mutually agree admit and acknowledge that this sale and purchase is subject to the order granted by the Supreme Court of Hong Kong that the mortgage dated 25 August 1931 registered in the District Land Office Yuen
> **||Page 323>>**
> Long by Memorial No 80261 be discharged. The vendor will, after the signing of this agreement, apply to the Supreme Court of Hong Kong to discharge the said mortgage and will use his best endeavours to discharge the said mortgage prior to completion. If the vendor [is] unable to obtain the said order prior to the completion date, then the completion date hereof shall be extended until and unless the said order for discharging the said mortgage shall have been granted.

The parties have since agreed to extend the time for completion so as to enable this court to pronounce upon the matter of the mortgage dated 25 August 1931. I have no criticism of the parties in bringing the matter before the court in this way, although I have not in the circumstances had the benefit of any real adversary argument against the contention of the vendors that the mortgage of 25 August 1931 does not constitute a blot upon the vendors' title.

The provisions of cl 21 contemplated an order being made by this court to discharge the mortgage. Counsel for the vendors accepted that the court has no jurisdiction to make any such order. The court in England and Wales has power, under s 50 of the Law of Property Act 1925, to declare land to be free from an encumbrance on payment of sufficient money into court to meet the encumbrance, together with interest and costs. But there is, unfortunately, no similar provision in any Hong Kong Ordinance and I would suggest that when the Conveyancing and Property Ordinance (Cap 219) is next revised, consideration ought to be given to the incorporation in the Ordinance of such a provision.

This is not the first case which has come before this court in which a problem has been created by the existence of a mortgage, the mortgagee under which cannot be found, and the provisions of s 50 are apt to deal with this sort of problem. An alternative is for the intending vendor to institute proceedings against the mortgagee (applying for leave, if he cannot be found, to serve him by substituted service) asking for a declaration that the mortgage is no longer subsisting or capable of taking effect. Indeed I venture to suggest that that would be a better course than leaving the question to be dealt with after contract as between vendor and purchaser on the hearing of a vendor and purchaser summons, which is what has happened here. But, be that as it may, the only point I now have to consider is whether I ought to make any, and if so, what order upon this present summons.

The originating summons asks for a declaration that the mortgage dated 25 August 1931 'be

discharged and/or declared null and void'. As I have indicated, I cannot make any such order; and counsel for the vendors did not ask me to do so. Prompted by a suggestion from the Bench, counsel for the vendors now asks for a declaration that the mortgage of 25 August 1931 is no longer subsisting or capable of taking effect. And it seems to me that, if I am in the vendors' favour, that is the form of declaration which I ought to make.
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The case for the vendors is that the mortgage of 25 August 1931 is barred by limitation. The vendors rely on s 19(1) of the Limitation Ordinance (Cap 347) which provides as follows:

> No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, or to recover proceeds of the sale of land, after the expiration of 20 years from the date when the right to receive the money accrued.

The right to receive the money here appears to have accrued at the latest by the end of 1942, under the terms of the mortgage which I have already set out. So after 1942, no action could have been brought on the mortgage in the absence of any acknowledgment or part payment. The effect of the statutory provision I have just read seems to me to be the same as the effect of the corresponding statutory provision in the English legislation (save that the time of 20 years applies in Hong Kong as against the time of 12 years which applies in England and Wales). In England and Wales, the position is that the mortgagee's right to foreclose, to sue for possession, and to sue for principal, all become barred after 12 years from the date when repayment became due under the mortgage and (as is pointed out in *Lewis v Plunket* [1937] 1 All ER 530, see especially at p 534) the mortgagee's title is then extinguished. Time can begin to run afresh if during the period, the mortgagor makes any written acknowledgment, or if he, or the person in possession of the land, makes any payment of interest or of capital under the mortgage. But there is no evidence of any such acknowledgment or payment here, and indeed I would not expect it. It might, perhaps, have been better if the vendors had made a statutory declaration to the effect that they had neither given nor made any such acknowledgment or payment, but I do not regard that as essential in the present case.

In the result, I am completely satisfied that the mortgage of 25 August 1931 is indeed no longer subsisting or capable of taking effect and I propose to declare that accordingly. It must be appreciated that such a declaration operates only as between the vendors and purchasers, the parties to these proceedings, and does not bind the mortgagee. But I cannot see that that gives rise to any real difficulty. I would hope that no subsequent purchaser or lender will, in the future, seek to raise any objection to the title here based on the existence of the mortgage of 25 August 1931, but nothing in the order I make in this action can preclude him from doing so.

For the reasons I have endeavoured to state, I shall declare that the mortgage dated 25 August 1931 is no longer subsisting or capable of taking effect, and constitutes no valid objection to the title of the vendors. The vendors do not ask for costs, and so I make no order as to costs.

Reported by George F Chu

Endnotes

1 (Popup - Cases on this CD-ROM which cite this case)

Broada Ltd & Anor v Chow Cheuk Yin [1997] 3 HKC 168
Castle City Ltd v Choi Yue Development Ltd [1995] 2 HKC 593

"Annex B"

(2) Any covenant or stipulation contained in, or entered into with reference to any lease or underlease made before or after the commencement of this Act—

(*a*) whereby the right of preparing, at the expense of a purchaser, any conveyance of the estate or interest of the lessee or underlessee in the demised premises or in any part thereof, or of otherwise carrying out, at the expense of the purchaser, any dealing with such estate or interest, is expressed to be reserved to or vested in the lessor or underlessor or his solicitor; or

(*b*) which in any way restricts the right of the purchaser to have such conveyance carried out on his behalf by a solicitor appointed by him;

shall be void:

Provided that, where any covenant or stipulation is rendered void by this subsection, there shall be implied in lieu thereof a covenant or stipulation that the lessee or underlessee shall register with the lessor or his solicitor within six months from the date thereof, or as soon after the expiration of that period as may be practicable, all conveyances and devolutions (including probates or letters of administration) affecting the lease or underlease and pay a fee of one guinea in respect of each registration, and the power of entry (if any) on breach of any covenant contained in the lease or underlease shall apply and extend to the breach of any covenant so to be implied.

(3) Save where a sale is effected by demise or subdemise, this section does not affect the law relating to the preparation of a lease or underlease or the draft thereof.

(4) In this section "lease" and "underlease" include any agreement therefor or other tenancy, and "lessee" and "underlessee" and "lessor" and "underlessor" have corresponding meanings.

Applications to the court by vendor and purchaser.

49.—(1) A vendor or purchaser of any interest in land, or their representatives respectively, may apply in a summary way to the court, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the court may make such order upon the application as to the court may

appear just, and may order how and by whom all or any of the costs of and incident to the application are to be borne and paid.

(2) Where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit.

(3) This section applies to a contract for the sale or exchange of any interest in land.

Discharge of incumbrances by the court on sales or exchanges.

50.—(1) Where land subject to any incumbrance, whether immediately realisable or payable or not, is sold or exchanged by the court, or out of court, the court may, if it thinks fit, on the application of any party to the sale or exchange, direct or allow payment into court of such sum as is hereinafter mentioned, that is to say—

(*a*) in the case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, the sum to be paid into court shall be of such amount as, when invested in Government securities, the court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge; and

(*b*) in any other case of capital money charged on the land, the sum to be paid into court shall be of an amount sufficient to meet the incumbrance and any interest due thereon;

but in either case there shall also be paid into court such additional amount as the court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the court for special reason thinks fit to require a larger additional amount.

(2) Thereupon, the court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale or exchange, and give directions for the retention and investment of the money in court and for the payment or application of the income thereof.

(3) The court may declare all other land, if any, affected by the incumbrance (besides the land sold or

exchanged) to be freed from the incumbrance, and this power may be exercised either after or without notice to the incumbrancer, and notwithstanding that on a previous occasion an order, relating to the same incumbrance, has been made by the court which was confined to the land then sold or exchanged.

(4) On any application under this section the court may, if it thinks fit, as respects any vendor or purchaser, dispense with the service of any notice which would otherwise be required to be served on the vendor or purchaser.

(5) After notice served on the persons interested in or entitled to the money or fund in court, the court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(6) This section applies to sales or exchanges whether made before or after the commencement of this Act, and to incumbrances whether created by statute or otherwise.

Conveyances and other Instruments.

Lands lie in grant only.

51.—(1) All lands and all interests therein lie in grant and are incapable of being conveyed by livery or livery and seisin, or by feoffment, or by bargain and sale; and a conveyance of an interest in land may operate to pass the possession or right to possession thereof, without actual entry, but subject to all prior rights thereto.

(2) The use of the word grant is not necessary to convey land or to create any interest therein.

Conveyances to be by deed.

52.—(1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.

(2) This section does not apply to—

(*a*) assents by a personal representative;

(*b*) disclaimers made in accordance with section fifty-four of the Bankruptcy Act, 1914, or not required to be evidenced in writing;

(*c*) surrenders by operation of law, including surrenders which may, by law, be effected without writing;

(*d*) leases or tenancies or other assurances not required by law to be made in writing;

(*e*) receipts not required by law to be under seal;

(*f*) vesting orders of the court or other competent authority;

(*g*) conveyances taking effect by operation of law.

Instruments required to be in writing.

53.—(1) Subject to the provisions hereinafter contained with respect to the creation of interests in land by parol—

(*a*) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;

(*b*) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;

(*c*) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.

(2) This section does not affect the creation or operation of resulting, implied or constructive trusts.

Creation of interests in land by parol.

54.—(1) All interests in land created by parol and not put in writing and signed by the persons so creating the same, or by their agents thereunto lawfully authorised in writing, have, notwithstanding any consideration having been given for the same, the force and effect of interests at will only.

(2) Nothing in the foregoing provisions of this Part of this Act shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine.

Savings in regard to last two sections.

55. Nothing in the last two foregoing sections shall—

(*a*) invalidate dispositions by will; or

(*b*) affect any interest validly created before the commencement of this Act; or

(*c*) affect the right to acquire an interest in land by virtue of taking possession; or

(*d*) affect the operation of the law relating to part

附件 D

New South Wales Consolidated Acts Annex D

CONVEYANCING ACT 1919 - SECT 98

98 Facilitation of redemption in case of absent or unknown mortgagees

(1) Where land is subject to a mortgage and the person empowered to reconvey the land or, where the land is under the provisions of the Real Property Act 1900, to execute in respect thereof a discharge referred to in section 65 of that Act, is out of the jurisdiction, cannot be found or is unknown, or if it is uncertain who that person is, the court may, upon the application of the person for the time being entitled to redeem the mortgaged land, determine in such manner as the court thinks fit whether or not all amounts due under the mortgage have been paid and, if not, the amount thereof the standing.

(1A) Where the court has made a determination under subsection (1) in relation to a mortgage, the mortgagee is, to the extent provided by this section, liable to pay the costs of the applicant incurred in obtaining the determination, any rule of law or stipulation to the contrary notwithstanding.

(1B) The amount of costs that a mortgagee is liable under subsection (1A) to pay in respect of a determination under subsection (1) is the amount by which:

(a) the amount certified by the court when making the determination as reasonable costs of the applicant incurred in obtaining the determination,

exceeds:

(b) the amount of remuneration that would have been payable by the mortgagee pursuant to the general order for the time being in force under section 206 if:

(i) a discharge of the mortgage had been executed at the time the determination was made, and

(ii) that general order had been applicable in respect of that discharge of mortgage.

(1C) The amount of costs that a mortgagee is liable, under subsection (1A), to pay to an applicant shall, except to the extent that it is extinguished or reduced by the operation of this section, be deemed to be a specialty debt recoverable by the applicant and incurred at the time of the making of the determination to which the costs relate.

(1D) Where the court determines under subsection (1) that the amount due under a mortgage has not been repaid and the amount thereof determined by the court to be outstanding exceeds the amount of costs calculated under subsection (1B) in respect of the determination, the applicant for the determination may pay into court the difference between the amount so determined and the amount so calculated and, upon the amount of that difference being so paid:

(a) the amount due under the mortgage at the time of the payment into court shall be deemed to have been reduced by the amount so calculated and by the amount paid into court, and

(b) the debt owing under subsection (1C) by the mortgagee to the applicant shall be deemed to have been extinguished.

1E) Where the court determines under subsection (1) that the amount due under mortgage has not been repaid and the amount thereof determined by the court o be outstanding is equal to or less than the amount of costs calculated nder subsection (1B) in respect of the determination:

(a) the amount due under the mortgage at the time of the determination shall be deemed to have been reduced by the amount so determined,

(b) the debt owing under subsection (1C) by the mortgagee to the applicant for the determination shall be deemed to have been reduced by the amount so determined, and

(c) for the purposes of subsection (1F), the court shall be deemed to have determined that the amount due under the mortgage has been repaid.

1F) ere:

(a) the court determines under this section that the amount due under a mortgage has been repaid, whether by the operation of paragraph (c) of subsection (1E) or otherwise, or

(b) payment into court is made under subsection (1D),

1 officer of the court prescribed by rules of court may give a certificate to ıe effect that this section has been complied with in relation to the ɔrtgage in respect of which the determination was made or the money paid into ɔurt.

2) In favour of a purchaser of land comprised in a mortgage referred to in a ertificate given under subsection (1F), the certificate operates as a ischarge of the land from the amount due under the mortgage, and as a deed of ɔnveyance, in the same manner as a memorandum of discharge operates under ıbsection (3) of section 91.

3) The Court shall order an amount paid into court under subsection (1D) to : pa to the person entitled, upon the application of such person, and on oof that the deed or instrument of mortgage, and all the title deeds which re delivered by the mortgagor to the mortgagee on executing the same, or in nnection therewith, have been delivered up to the person by whom the amount s so paid into court, or the person's executors, administrators, or assigns, have been otherwise satisfactorily accounted for.

A) A determination by the court under this section with respect to a rtgage is not, as between persons referred to in subsection (1), conclusive to:

(a) whether or not an amount is due under the mortgage at the time of the determination, or

(b) whether the amount determined by the court to be due under the mortgage is the amount so due at the time of the determination, and except to the extent of the operation of paragraph (a) of subsections (1D) and (1E), and of subsection (2), that determination does not prejudice any right conferred by the mortgage for the recovery of an amount due thereunder.

) This section, subsection (2) excepted, applies to and in respect of rtgages under the Real Property Act 1900.

(4A) Upon:

(a) application to the Registrar-General in the form approved under the Real Property Act 1900,

(b) production to the Registrar-General of a certificate under subsection (1F) that relates to a mortgage registered under that Act, and

(c) payment of the fee prescribed under that Act, the Registrar-General:

(d) shall, in the Register kept under that Act, make such recordings as the Registrar-General considers appropriate to give effect to the discharge of the mortgage, and

(e) may, if the relevant grant, certificate of title or duplicate registered dealing upon which the mortgage is recorded, or the duplicate registered mortgage, is produced to the Registrar-General for the purpose, record thereon the discharge of the mortgage.

(5) Section sixty-seven of the Real Property Act 1900 is hereby repealed.

附件 E
Annex E

Previous - Contents - Search Acts - List of Acts - Next

Property Law Act 1952 051
Commenced: 1 Jan 1953
VII: Mortgages
Sale by Mortgagee Through Registrar of High Court

102A Payment of surplus money after sale when mortgagor cannot be found

[102A. Payment of surplus money after sale when mortgagor cannot be found---(1) Notwithstanding anything in section 78 of this Act, or in the Fourth Schedule to this Act, or in any other provision of that Act any other Act, or in any mortgage or other instrument, the provisions of this section shall apply to every sale of mortgaged property by the mortgagee of the property in exercise of his power of sale if any surplus money arising from the sale of the property cannot be paid to the mortgagor by reason of his not being found after reasonable inquiry by the mortgagee as to his whereabouts.

(2) After any sale to which this section applies, the mortgagee may, on filing in the Court nearest to which he resides an affidavit giving to the best of his knowledge and belief particulars of the mortgagor, the mortgaged property, and the sale, and on serving a copy of the affidavit on the Secretary to the Treasury, pay the surplus money to the Crown by remitting it to the Secretary to the Treasury.

(3) All money paid to the Crown under this section shall be credited by the Secretary to the Treasury to the Trust Account established under [[section 42 of the Public Finance Act 1977]]; and sections 78 and 79 of the Trustee Act 1956 shall apply to all such money in every way as if the money were held by the Crown under section 77 of the Trustee Act 1956.

(4) The receipt of the Secretary to the Treasury shall be a sufficient discharge to the mortgagee for any money paid to the Crown under this section.

(5) If any mortgagee has obtained or is seeking a discharge in respect of any money under this section, the Secretary to the Treasury may at any time require the mortgagee to give such information in his possession or control as he may require in relation to the persons beneficially entitled to the money, including information as to the steps taken to trace those persons; and if any person refuses or wilfully neglects to give any such information that is in his possession or control when so required, or wilfully gives any false information in answer to any such requisition, he commits an offence and shall be liable on summary conviction to a fine not exceeding $200.]

This section was inserted by s. 3 (1) of the Property Law Amendment Act 1971.

In subs. (3) the words in double square brackets were substituted for the former words by s. 11 of the Public Finance Amendment Act 1986.

Attachment

Overseas and professional practices

In drawing up his proposal; D of A has made reference to the common practice in the accounting field and the practice of a number of overseas national audit offices as follows:-

(a) In major accountancy firms, the certification of accounts is usually not restricted to the principal partners of the firm. Junior partners of the firm are usually authorised to sign the audit certificates.

(b) In Canada, according to section 18 of the Auditor General Act of Canada, the Auditor General may designate a senior member of his staff to sign on his behalf any opinion that he is required to give and any report, other than his annual report on the financial statements of Canada made pursuant to section 64 of the Financial Administration Act and his reports to the House of Commons under this Act, and any member so signing an opinion or report shall indicate beneath his signature his position in the office of the Auditor General and the fact that he is signing on behalf of the Auditor General.

(c) In the United Kingdom, the duties and powers of the Comptroller and Auditor general (C&AG) of the United Kingdom National Audit Office (UKNAO) in respect of the signing of audit certificates may be delegated as follows-

(i) Firstly, section 2 of the Exchequer and Audit Departments Act (E&AD) 1957 provides for the delegation to a principal officer of the UKNAO of all the C&AG's functions under the E&AD Acts other than that of certifying and reporting on accounts to Parliament. This function may also be delegated, however, if the Speaker (for the House of Commons) and the Lord Chancellor (for the House of Lords) certify that the C&AG personally is unable to certify and report on the accounts. Principal officers generally refer to the Deputy C&AG and Assistant Auditor General (AAG); and

(ii) Secondly, for accounts other than those to the Parliament, C&AG has the full authority to delegate the signing of the audit certificates administratively. The administrative delegation used in practice is to an Assignment Director (who is junior in rank than the AAG), who, in the exercise of his delegated authority, has to observe the internal administrative guidelines as laid down in items 50 to 52 of Chapter 9 of the UKNAO Financial Audit Manual.

LRC

THE LAW REFORM COMMISSION OF HONG KONG

香港法律改革委員會

REPORT ON THE YEAR AND A DAY RULE IN HOMICIDE

June 1997

THE LAW REFORM COMMISSION
OF HONG KONG

REPORT

ON

THE YEAR AND A DAY RULE
IN HOMICIDE

JUNE 1997

The Law Reform Commission was established by His Excellency the Governor in Council in January 1980. The Commission considers such reforms of the laws of Hong Kong as may be referred to it by the Attorney General or the Chief Justice.

The members of the Commission at present are:

The Hon Mr J F Mathews, CMG, JP (Attorney General) (Chairman)
Mr Tony Yen (Law Draftsman)
The Hon Mr Justice J Chan
Mr Eric Cheung
Professor Yash Ghai, CBE
Professor Kuan Hsin-chi
Dr Lawrence Lai
Mr Andrew Liao, QC
Mr Gage McAfee
Mr Alasdair G Morrison
Mr Robert Ribeiro, QC
Professor Derek Roebuck
Professor Peter Wesley-Smith
Mr Justein Wong Chun, JP

The Secretary of the Commission is **Mr Stuart M I Stoker** and its offices are at:

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This report can be found on the Internet at: ***http://www.info.gov.hk***

Ms CathyWan, *Senior Crown Counsel, was principally responsible for the writing of this Commission report.*

THE LAW REFORM COMMISSION OF HONG KONG

Report on

The Year and a Day Rule in Homicide

CONTENTS **PAGE**

The Year and a Day Rule in Homicide

Introduction

1. This Report examines the long-standing common law rule ("the rule") that a person cannot be convicted of any species of homicide where the victim does not die within a year and a day after the injury was inflicted. The rule applies to murder, manslaughter, infanticide and aiding and abetting suicide.

2. In compiling this Report, the Commission has been greatly assisted by the Consultation Paper and subsequent Report of the English Law Commission on the Year and a Day Rule in Homicide.

1. Terms of reference

1.1 In April 1997, the Attorney General referred the following reference to the Law Reform Commission for consideration:

> *"To consider whether the existing 'Year and a Day Rule' in relation to homicide should be abolished, and whether any related changes in the law are necessary."*

1.2 A draft report prepared by Miss Cathy Wan, Senior Crown Counsel in the Commission Secretariat, was discussed and approved at the Commission's meeting in April 1997.

2. Historical background

2.1 "The genealogy of the rule is, like a pedigree, easy enough to trace in recent times, and more difficult in remoter."[1] The rule indeed has long origins and according to Yale, the rule was formulated as a result of historical accident instead of deliberate policy. Historically, two different actions could be brought in respect of the same death. Usually an appeal for felony of death, a private prosecution by interested parties or relatives of the victim, would be followed by proceedings at the king's suit which was a public prosecution.[2] Unlike the king's suit, private prosecutions, if not freshly pursued, would not be allowed.[3] The Statute of Gloucester[4] (1278), referring to the then normal action of the time of an appeal of felony for death, provided that if the relatives of the victim brought the action within a year and a day after the "deed"

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1 D.E.C. Yale "A Year and a Day in Homicide" [1989] CLJ 202 at 203.

2 English Law Commission "The Year and a Day Rule in Homicide" Consultation Paper at para 2.1.

3 D.E.C. Yale, *ibid,* at 205.

4 6 Edw 1, c 9 (1278).

was done, the appeal could go forward. This provision was restrictively interpreted to mean there was a time limit on the actionability of the private prosecutions. There is authority that in 1321 the public prosecution could still be brought despite that the private proceedings were out of time.[5] The rule evolved from being a rule of procedure to becoming a rule of substantive law, and in 1557 the rule was found in a legal textbook[6] which wrote:-

> *"(translation) Also it is requisite to homicide, if one strikes another so that he die, that his death should be within a year and a day next following..."*.

2.2 Holdsworth was also aware that the rule might have stemmed from a rule of procedure and wrote[7]:

> *"At an early date the rule was laid down that if death ensued within a year and a day sufficient connection [between the act and the death] would be presumed. Perhaps this period was connected with the fact that it was the length of time within which the relatives of the murdered man were able to bring their appeal."*

If Holdsworth's observations are correct, then what was originally a presumption of causation between the act and the death, has become a rule prohibiting the finding of a connection between the two.

2.3 The rule was then passed down through the centuries and was reflected in the definition of murder found in Chief Justice Coke's Institutes[8]:

> *"Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in rerum natura under the King's peace, with malice aforethought, either expressed by the party or implied by law, so as the party wounded, or hurt, etc. die of the wound or hurt, etc. within a year and a day after the same."*

2.4 In England, the rule has been abolished by the Law Reform (Year and a Day Rule) Act 1996[9] but it still applies in Hong Kong. We have been unable to trace any case in which the rule has precluded a prosecution in Hong Kong, but it is clear that difficulties have arisen in other jurisdictions and, as this Report explains, the rule is an anachronism which should now be consigned to history.

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5 D.E.C. Yale, *op cit*, at 205, foot-note 20.

6 Staunford, *Les Plees del Coron* (1557), f. 21v.

7 Sir William Holdsworth, A History of English Law, Vol. III (5th edition 1942) p. 315.

8 (1809) Vol. I Part III, p 47.

9 A copy of the Act is annexed to this Report

3. Present scope of the rule

Manslaughter

3.1 The scope of the rule has been extended by case law, and the rule now applies to manslaughter as well. In *R v Dyson*[10] the defendant was indicted for the manslaughter of his infant child who was beaten in November 1906 and in December 1907, and then died in March 1908. The trial judge directed the jury that the defendant could be found guilty of manslaughter even if the death was wholly caused by the injuries inflicted in November 1906. The Court of Criminal Appeal held that this was a misdirection to the jury because:

> *"... whatever one may think of the merits of such a rule of law, it is still undoubtedly the law of the land that no person can be convicted of manslaughter where the death does not occur within a year and a day after the injury was inflicted, for in that event it must be attributed to some other cause".*[11]

Infanticide

3.2 The rule would also apply to the statutory crime of infanticide.[12] Section 47C of the Offences against the Person Ordinance (Cap. 212), which is equivalent to section 1(1) of the Infanticide Act 1938, reads:

> *"Where a woman by any wilful act or omission causes the death of her child being a child under the age of 12 months but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for the provisions of this section* ***the offence would have amounted to murder****, [emphasis added] she shall be guilty of infanticide, and shall be liable to be punished as if she were guilty of manslaughter."*

3.3 In circumstances where more than a year and a day has elapsed between the injury and the death, the defendant cannot be convicted of infanticide because she could not have been convicted of murder.

Suicide

3.4 The case of *R v Inner West London Coroner ex parte De Luca*[13] involved a 17-year old who shot himself in the head and died more than a year and a day after the self-inflicted injury. The coroner's verdict of suicide was quashed as the

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10 [1908] 2 KB 454, [1908-10] All ER 736.

11 [1908] 2 KB 454 at p 456.

12 English Law Commission, *op cit*, Consultation Paper, at para 2.10. Also, *obiter* in *De Luca* [1989] QB 249.

13 [1989] QB 249, [1988] 3 All ER 414.

court held that so long as the rule continues to apply to offences under section 4(1) of the Homicide Act 1957 and section 2(1) of the Suicide Act 1961, the rule should continue to be regarded as applying to suicide, even though suicide itself is no longer a crime.[14] It was therefore decided that a verdict of suicide could not be returned at an inquest if the death occurred more than a year and a day after the injury had been inflicted by the deceased. Bingham L J added that "While good social arguments could be advanced for abrogating the rule for purposes of [the above-mentioned] statutes and murder and manslaughter, I see very little social advantage in abrogating it for purposes of a coroner's verdict alone."[15]

3.5 The *De Luca* case further clarified the fact that the rule extends to killings pursuant to a suicide pact, reduced to manslaughter by section 4(1) of the Homicide Act 1957, and aiding and abetting suicide contrary to section 2(1) of the Suicide Act 1961. The corresponding sections in Hong Kong are section 5 of the Homicide Ordinance (Cap. 339), and section 33B of the Offences against the Person Ordinance (Cap. 212).

Causing Death by Reckless Driving

3.6 It seems that the rule also may apply to the offence of causing death by reckless driving under section 36 of the Road Traffic Ordinance (Cap. 374). Lord Roskill in *R v Governors of Holloway ex parte Jennings*[16] said, *obiter*, that the legal ingredients of manslaughter and of causing death by reckless driving were identical. If the dictum is taken literally, the rule is further extended by analogy from manslaughter to causing death by reckless driving.

4. Shortcomings of the rule

4.1 Three recent cases in England illustrate some of the shortcomings of the rule:-

(a) Miss Pamela Banyard was the victim of a savage attack in a robbery. According to the pathologist, Miss Banyard suffered irreversible brain damage from the attack, and remained in a coma for 18 months before she died of bronchial pneumonia in August 1988. The Crown could not prosecute for murder because she died more than a year and a day after the attack. The assailant was convicted of attempted murder and robbery, and sentenced to 10 years' imprisonment.[17]

(b) A man was stabbed in early 1986, but died as a result of the stabbing almost two and a half years later in November 1988. The assailant could not be charged with murder because of the rule, and was

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14 [1988] 3 All ER 414 at p 417.

15 *Ibid.*

16 [1983] 1 AC 624.

17 Cambridge Daily News, 15 August 1988, referred to in D.E.C. Yale, "A Year and a Day in Homicide" [1989] CLJ 202.

convicted of unlawful wounding with intent to cause grievous bodily harm and sentenced to 10 years' imprisonment.[18]

(c) Mr Michael Gibson was attacked in the street and suffered brain damage. His heart had to be revived and he was in a coma for 16 months until he died of pneumonia. The assailant could not be charged with murder or manslaughter because of the rule. The assailant was convicted of causing grievous bodily harm and sentenced to 2 years' imprisonment.[19]

4.2 It is evident that the rule when applied to modern conditions could lead to absurd results. It is highly unsatisfactory that a murder charge cannot be brought solely because of an antiquated rule, even though all other ingredients of murder can be established. It seems that the rule is neither necessary, appropriate, nor desirable. Whereas the rule might have been necessary in ancient times when medical science was too imprecise to ascertain the exact cause of death, the advance of medical science makes it unnecessary to retain the rule. It can be seen from the three examples that the actual cause of death was not in dispute and could be readily identified despite the lapse of time between the injury and death.

4.3 The rule was formulated at a time when life support machines were not in contemplation. Nowadays, the lives of seriously injured people can be prolonged for long periods of time by life support machines. The artificial prolongation of life would not affect the question of causation between the initial injury and the subsequent death.[20] The rule should be regarded as inappropriate, given the capacity of modern medical science to enable victims of serious assaults to survive for more than a year and a day.

4.4 It is also undesirable that an arbitrary rule which has outlived its usefulness should be able to hinder the ends of justice. If Miss Banyard had survived for 11 months instead of 18 months, the assailant would have received a life sentence instead of 10 years for attempted murder. Statistics in England and Wales indicate that murder and manslaughter attract on average substantially longer sentences than the substitute offences with which the defendant may have to be charged because of the rule.[21] A rule which exonerates the homicide if the victim is strong enough to cling to life for more than 12 months is not likely to attract public support.[22]

4.5 Another shortcoming of the rule is that, in some circumstances where an alternative offence is not available, the rule may enable the assailant to avoid prosecution altogether. An example would be gross negligence manslaughter. If the

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18 Oxford Times, 11 November 1988, referred to in English Law Commission, *op cit*, Report at para 1.7.

19 The Times, 1 September 1993, referred to in English Law Commission, *op cit*, Report at para 1.8.

20 D.E.C. Yale, *op cit*, at p 212.

21 English Law Commission, *op cit*, Consultation Paper at para 3.25.

22 D.E.C. Yale, *op cit*, at p 207.

victim died more than a year and a day after the injury, the assailant could not be prosecuted for gross negligence manslaughter or any alternative offence.[23]

4.6 The existence of the rule has led to further problems and uncertainties. The scope of the rule has been extended by analogy by case law. Apart from murder, the rule now applies to manslaughter,[24] infanticide,[25] killings pursuant to a suicide pact,[26] and verdicts of suicide returned by coroners' juries.[27] As for aiding and abetting suicide under section 2(1) of the Suicide Act 1961, although the view was expressed in *De Luca* that the rule would apply, the position is arguable.[28] There are also uncertainties as to whether the rule applies to causing death by reckless driving.[29]

4.7 It is also uncertain whether the period of a year and a day would start to run from the date of the defendant's act or from that of the infliction of the injury, where these are different. It seems that time starts to run from the infliction of the injury instead of the defendant's act.[30] For example, if a defendant planted a bomb on 1 January 1991, which exploded on 2 January 1992 and injured the victim, the defendant should be guilty of homicide if the victim died before 3 January 1993.

4.8 The rule may have insurance implications although the issue has not been tested in court. It was decided in *R v Inner West London Coroner ex parte De Luca*[31] that a verdict of suicide could not be returned at an inquest if death occurred more than a year and a day after the relevant injury had been inflicted by the deceased. It is an implied term in every insurance contract that the assured is not entitled to recover if the loss is caused by his own wilful misconduct.[32] The rule may become a problem for insurance companies which may not be able to avoid liability for life cover if the assured committed suicide but died more than a year and a day after the event initiating the suicide.

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23 English Law Commission, *op cit*, Report at paras 3.17-3.18.

24 *Dyson* [1908] 2 KB 454.

25 *Per Bingham L J in R v Inner West London Coroner ex parte De Luca* [1989] QB 249, 252E. The corresponding provision in Hong Kong is Section 47C Offences against the Person Ordinance (Cap 212).

26 *R v Inner West London Coroner ex parte De Luca* [1989] QB 249. The corresponding provision in Hong Kong is Section 5 Homicide Ordinance (Cap 339).

27 *De Luca*, ibid.

28 Section 2(1) of the Suicide Act 1961 makes it an offence to aid and abet suicide, including "an attempt by another to commit suicide". Even if the deceased could not be held to have committed suicide due to the year and a day rule, it is still arguable that there has been an attempt to commit suicide. See English Law Commission, *op cit*, Consultation Paper at p. 9 foot-note 23. The corresponding provision in Hong Kong is section 33B Offences against the Person Ordinance (Cap. 212).

29 Also *R v Governors of Holloway ex parte Jennings* [1983] 1 AC 624. See paragraph 3.6 *supra*. The corresponding provision in Hong Kong is Section 36 Road Traffic Ordinance (Cap. 374).

30 Smith & Hogan, Criminal Law, 6th edition p. 312. See also Criminal Law Revision Committee, 14th Report on Offences against the Person.

31 [1989] QB 249.

32 English Law Commission, *op cit*, Consultation Paper at para. 3.21.

5. Arguments against abolition of the rule

5.1 The rule was considered by the House of Lords Select Committee on Murder and Life Imprisonment ("the Nathan Committee"). In 1989, the Nathan Committee reported that it would not be appropriate to recommend the abolition of the rule in relation to murder while the rule continued to apply to other offences such as manslaughter, aiding and abetting suicide which were outside the Nathan Committee's terms of reference.[33] It is evident that the rule should be given comprehensive consideration as a subject in its own right.

5.2 The rule was also considered by the Criminal Law Revision Committee ("the Committee") as part of a wider reference on the law relating to, and the penalties for, offences against the person, including homicide.[34] The Committee recommended retention of the rule. It was stated that:

> *"... although with the advance of medical science it is arguably no longer necessary to retain the year-and-a-day rule, it would be wrong for a person to remain almost indefinitely at risk of prosecution for murder. A line has to be drawn somewhere and in our opinion the present law operates satisfactorily. When death follows over a year after the infliction of injury the killer does not necessarily escape justice. He may be charged with attempted murder or causing grievous bodily harm with intent ..."*[35]

5.3 In view of the recent cases mentioned in paragraph 4.1 above, it is doubtful whether the rule could be generally regarded as operating satisfactorily. It has also been discussed that the rule would often lead to substantially lesser sentences being imposed,[36] and in some cases where there is no substitute offence, the defendant would actually enjoy immunity from prosecution.[37]

5.4 It seems that the strongest objection to the abolition of the rule stems from the argument that it would be wrong for a person to remain almost indefinitely at risk of prosecution for murder. This ground, although valid, cannot outweigh the shortcomings of the rule set out in paragraphs 4.1 to 4.8 above. Further, it has been pointed out that the "remaining at risk" argument would be more appropriate as a policy consideration for the formulation of any rule of limitation. It is not appropriate to questions of causation. The rule can be regarded as a rule of limitation masquerading under the appearance of a rule of causation.[38] It seems logical therefore that the rule should be abolished. The only question remaining is whether the existing safeguards against late or repeated prosecutions are sufficient.

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33 Report of the Select Committee on Murder and Life Imprisonment (1989) HL 78 - I para 34.

34 Criminal Law Revision Committee 14th Report, "Offence against the Person" (1980) Cmnd 7844.

35 *Ibid*, at para 39.

36 See para 4.4 above.

37 See para 4.5 above.

38 D.E.C. Yale, *op cit*, p. 209.

6. Safeguards against late or repeated prosecutions

6.1 In England, the Law Reform (Year and a Day Rule) Act 1996 ("the Act") has devised specific safeguards against late or unnecessary second prosecutions. The Act requires the consent of the Attorney General for instituting homicide proceedings in two categories of cases. The first category is where there is an interval of more than three years between the injury and the death.[39] It was conceded that a time lapse of more than three years would render it difficult to strike the balance between the interests of justice in prosecuting for a criminal offence and in protecting the defendant from oppressive and stale prosecutions.[40] Hence, the discretion rests with the Attorney General.

6.2 The second category of cases requiring the Attorney General's consent under the Act is where the defendant is already convicted of another offence on facts connected with the death.[41] The rationale for this category is that the sentence imposed in the previous conviction may be already an adequate punishment. The Act has slightly departed from the recommendation of the English Law Commission in this respect. The English Law Commission recommended this category should be restricted to previous convictions with a custodial sentence of two or more years.[42] In cases where defendants have received less than 2 years' imprisonment, it is believed that the task of deciding whether to prosecute for a homicide offence is made easy by the much longer sentences that are usually imposed for homicide offences.[43] The English Law Commission also mentioned as illustration that it would scarcely be objectionable to prosecute for murder or manslaughter in a case where the defendant had only been fined in respect of the original assault.[44]

6.3 The Act's specific safeguard of requiring the Attorney General's consent is in addition to several existing forms of protection against late or repeated prosecutions. These include the onus on the prosecution to prove beyond reasonable doubt all the elements required of the homicide, the courts inherent power to stay proceedings which are oppressive or which constitute an abuse of process, and the principles on double jeopardy.

6.4 The independence of the prosecuting authorities in exercising their discretion as to whether or not to bring criminal proceedings provides protection against late or repeated prosecutions. In England and Wales, the Crown Prosecution Service adopts a Code for Crown Prosecutors which sets out some of the relevant public interest criteria which should be considered before a prosecution can be commenced or continued. In Hong Kong, prosecution counsel are guided by principles contained in a public document.[45] Counsel are advised that "where there has been a long delay in prosecution, for whatever reason, common law and Bill of

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39 Section 2(2)(a).

40 English Law Commission, *op cit*, Report at para 5.29.

41 Section 2(2)(b).

42 English Law Commission, *op cit*, Report at para 5.30.

43 *Ibid*, para 5.37.

44 *Ibid*, para 5.33.

45 *Prosecution Policy - Guidance for Crown Counsel*, Attorney General's Chambers 1993.

Rights[46] considerations make it necessary to consider the consequences of that delay. This is of special importance when delay might affect the conduct of the defence case."[47] Similarly, "Crown Counsel should be slow to prosecute if the last offence was committed three or more years before the probable date of trial, unless, despite its staleness, an immediate custodial sentence of some length is likely to be imposed. ... Generally, the graver the allegation, the less significance will be attached to the element of staleness."[48]

6.5 As for the inherent power of the court to stay proceedings which are oppressive or which constitute an abuse of process, it is submitted that the most common basis on which the exercise of the discretion to stay proceedings for abuse of process is sought is that of delay.[49] Whether or not the delay is justifiable is not the court's material consideration. The test is whether a fair trial would be possible in view of the delay.[50] The Court of Appeal has clarified that a stay of proceedings for delay should be imposed only in exceptional circumstances, and only if the defendant can establish, on the balance of probabilities that the defendant would suffer serious prejudice to the extent that no fair trial could be held.[51] The *Privy Council in George Tan Soon Gin v Judge Cameron*[52] confirmed that the court's discretion to stay criminal proceedings should be exercised very sparingly, and that the burden of proving exceptional circumstances remained on the defendant even after a long delay. The court would also have the power to stay the proceedings in cases where the defendant has already been tried for a non-fatal offence, if the proceedings are oppressive or prejudicial.[53]

6.6 The principles on double jeopardy provide protection against repeated prosecution but it seems to be established that a previous conviction for an assault offence is no bar to a later conviction for murder or manslaughter if the victim dies subsequently. In *R. v. Thomas*[54], Leonard Thomas was sentenced to 7 years' imprisonment for wounding his wife with intent to murder her. The wife subsequently died as a result of the wounds. The husband pleaded *autrefois convict* as a bar to the subsequent prosecution for murder. Humphreys J dismissed the plea of *autrefois convict* and stated that:

> *"The offence or crime of murder consists in the felonious killing of another with malice. It is plain that on 2 May [when the accused was convicted of wounding with intent] the accused was not convicted of that offence, nor of anything which is substantially the same offence or crime*

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46 Article 11(6) of the Bill of Rights reads that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted. It seems that the discussion on double jeopardy would also apply.

47 *Prosecution Policy - Guidance for Crown Counsel*, Attorney General's Chambers 1993, at paragraph 10(x).

48 *ibid*, at paragraph 13(ii).

49 English Law Commission, *op cit*, Consultation Paper at para 5.15.

50 *R v Telford Justices ex parte Badhan* (1991) 93 Cr App R 171.

51 Attorney-General's Reference (No. 1 of 1990) [1992] 1 QB 630.

52 [1992] 2 AC 205.

53 *Forest of Dean Justices ex parte Farley* [1990] Crim LR 568; *Humphreys* [1977] AC 1, 46.

54 [1950] 1 KB 26.

as that charged in the indictment, nor could he have been, since his wife was then alive. It follows that the plea of autrefois convict in the strict sense of the term is bound to fail, and does fail."

6.7 The defendant also raised the issue that "no one ought to be twice punished for one offence", and relied on *Miles.*[55] In this case, it was held that the assault for which the defendant had been convicted constituted one and the same offence with the subsequent proceedings for wounding and battery. However, it was observed in *Miles* that not every summary conviction or acquittal for common assault would operate as a bar to an indictment in which that assault was an element, and murder was given as an example. Humphreys J distinguished the *Miles* case on this ground, and went on to point out that as far back as 1867, in the case of *Morris*,[56] it had been held that a previous summary conviction for an assault is not a bar to an indictment for manslaughter founded upon the same facts.

6.8 In a more recent case,[57] a defendant sentenced to 8 years' imprisonment for causing grievous bodily harm with intent was subsequently sentenced to life imprisonment when the victim died 11 months after the attack. The defendant's accomplice, previously convicted of grievous bodily harm, was subsequently convicted of manslaughter.

6.9 If the defendant were acquitted of a non-fatal offence and the victim subsequently died of the wounds, it seems that prosecution for murder or manslaughter would not necessarily be barred for *autrefois acquit*.[58] It seems that *autrefois acquit* has a very narrow scope and the subsequent action is not barred because the offences of murder or manslaughter are not the same as assault or attempted murder.[59]

6.10 A previous acquittal may also involve the rule in *Sambasivam v Public Prosecutor, Federation of Malaya*[60] that the prosecution in a subsequent trial against the same defendant may not challenge the validity of an earlier acquittal by adducing evidence which is inconsistent with it. This rule was applied in *Hay*,[61] but was not applied in *Humphreys v DPP*.[62]

6.11 In considering whether additional safeguards, if any, are needed in Hong Kong it is useful to examine the law in other jurisdictions.

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55 (1890) 24 QBD 423.
56 (1867) 10 Cox CC 480.
57 The Times 28 April 1994.
58 Obiter in *Thomas* [1950] 1 KB 26.
59 *De Salvi* (1857) 10 Cox CC 481.
60 [1950] AC 458.
61 (1983) 77 Cr App R 70.
62 [1977] AC 1.

7. The rule in other jurisdictions

Canada

7.1 The rule is preserved in section 227 of the Canadian Criminal Code which reads:

> *"No person commits culpable homicide or the offence of causing the death of a person by criminal negligence or by means of the commission of an offence [of causing death by dangerous driving] or [causing death by driving while under the influence of alcohol or a drug] unless the death occurs within one year and one day from the time of the occurrence of the last event by means of which the person caused or contributed to the cause of the death."*

In 1987, the Law Reform Commission of Canada issued a Report on Recodifying Criminal Law.[63] Although it did not deal specifically with the rule, the draft legislation annexed to the Report replaced the specific causation provisions for homicide, including the rule, with a general causation provision. The Final Report of a Federal and Provincial Working Group on Homicide published in June 1990 also recommended removal of the rule.

7.2 There are a number of safeguards against delayed prosecutions in Canada. Section 11(b) of the Canadian Charter of Rights and Freedoms provides that "any person charged with an offence has the right .. to be tried within a reasonable time." In determining whether there has been an unreasonable delay in terms of section 11(b), four factors are considered by the court:

a) the length of the delay
b) any waiver of time periods
c) reasons for the delay, including limitations on the institutional resources, actions of the accused, actions of the Crown, the inherent time requirements of the case, and any other reasons
d) prejudice to the accused

The court must balance the interest of the accused in being brought to trial within a reasonable time and the factors resulting in the delay. Reported cases suggest that delays of up to 24 months will not often be found to be unreasonable.

7.3 A further protection against delayed prosecution is to be found in section 7 of the Charter of Rights and Freedoms, which states:

> *"Everyone has the right to life, liberty and the security of the person not to be deprived thereof except in accordance with the principles of fundamental justice."*

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[63] Report No. 31 p. 56.

This section provide the court with a discretion to stay proceedings where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the community sense of fair play and decency, and to prevent the abuse of the court's process through oppressive or vexatious proceedings. Delay, in itself, is not a basis for a stay of proceedings.

Australia

7.4 The rule was abolished in Victoria in 1991, New South Wales in 1990, South Australia in 1991, Western Australia in 1991, and Tasmania in 1993. Queensland is the only remaining state in which the rule operates. The Queensland Criminal Code Review Committee has recommended abolition of the rule.[64]

New Zealand

7.5 The rule is still in operation. Section 162(1) of the Crimes Act 1961, which applies to all forms of unlawful killing, states that "no one is criminally responsible for the killing of another unless the death takes place within a year and a day after the cause of death." The Crimes Consultative Committee recommended abolition of the rule in 1991.

United States of America

7.6 The Model Penal Code does not include the rule. However, a study has found that the rule has survived in most states either by judicial decision or statute.[65] In many states where the rule still applies, the courts have minimized its significance by interpreting it as no more than a rule of evidence or procedure.[66] It is interesting to note the Californian Penal Code No. 194 has transformed the year and a day rule into three years and a day rule.

7.7 The rule has never applied in South Africa, Scotland, France, Italy, Germany, Austria, Greece, Turkey or Poland.[67]

8. Summary and recommendations

8.1 The rule has been carried down the centuries and has expanded its scope despite the concern or criticism it has received. A judge[68] who regarded the rule as "something of an anachronism" and whose "initial inclination was that it should be curtailed rather than extended" had no choice but to extend the rule to suicide. If the rule is to be curtailed or abolished, it will require legislative action.

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64 Final Report (June 1992) Sched 2.

65 La Fave & Scott, Criminal Law (2nd ed 1986) p 299. English Law Commission, *op cit*, Consultation Paper Appendix B.

66 *Ibid.*

67 *Ibid.*

68 Hutchinson J in the *De Luca* case.

8.2 The rule has long outlived its usefulness and is neither necessary, appropriate, nor desirable given the present state of medical knowledge and the widespread use of life support machines. The rule has caused alternative lesser offences to be charged. In some cases where an alternative offence is not available, the rule may enable the defendant to avoid prosecution altogether. The rule has led to uncertainties as to its exact scope of application, the computation of time of pre-natal injuries and in cases where the defendant's act and the infliction of injury occur on different dates. The extension of the rule to suicide may lead to insurance problems as well.

8.3 In the light of all these factors, we have concluded that the rule should be abolished in relation to all offences involving death and suicide.

8.4 There remains the question as to what safeguards are necessary to ensure that the abolition of the rule does not result in unfairness to those accused of homicide either long after the initiating injury was inflicted or after a previous conviction or acquittal. We are of the view that, even without the provisions in section 2 of the Law Reform (Year and a Day Rule) Act 1996, the existing mechanisms are sufficient for the purpose of protecting defendants from late prosecution:

- The prosecution has a discretion as to whether and when to prosecute according to the facts of the particular case. Since the court has the power to award costs in favour of a defendant who is acquitted, the prosecution has an incentive to bring proceedings for well-founded cases only.

- A substantial body of case law on double jeopardy has been developed, and the present situation has struck the right balance between protection of the accused on the one hand, and maintaining sufficient deterrent against criminals on the other.

- The court has the inherent power to stay proceedings which are oppressive or which constitute an abuse of process for delay. This power is already well-developed by case law.

- The defendant's position is also safeguarded by a rule of evidence that the prosecution in a subsequent trial against the same defendant may not challenge the validity of an earlier acquittal by adducing evidence which is inconsistent with it.

- Most cogently, the onus remains with the prosecution to prove beyond reasonable doubt all the elements required of the homicide. The longer the time between the injury and the death, the more difficult it is for the prosecution to prove the homicide.

8.5 In examining section 2 of the Law Reform (Year and a Day Rule) Act 1996 we are aware that there are certain offences which specifically require the

Attorney General's consent to prosecute. We are, however, of the view that the imposition of a requirement of Attorney General's consent is unnecessary in Hong Kong because:

- While there are a number of statutory provisions which currently require the Attorney General's consent to prosecution, these are generally where issues of public policy are likely to arise, rather than where the offence is one of straightforward criminality such as homicide. The Attorney General's consent is not specifically required to bring prosecutions for murder and manslaughter. If a requirement for the Attorney General's consent were inserted in the proposed legislation this would produce the anomalous position that some homicide cases would require the Attorney General's consent while others would not.

- Decisions on prosecutions for homicide are, as a matter of practice, invariably made by a senior member of the Attorney General's Chambers. There is no reason why homicides in the category of cases referred to in section 2 of the English Act should be dealt with any differently. Section 7 of the Legal Officers Ordinance (Cap 87) empowers the Attorney General to delegate his authority except in certain specific cases. In practical terms, if a requirement for consent by the Attorney General were included in the proposed legislation, this would be delegated in the normal way, for there is no reason to argue that the cases are of a character which would justify precluding delegation. The result would be that the imposition of a requirement of consent would unnecessarily complicate the legislation while having no practical effect on the way in which prosecutions proceed.

- England and Wales have stronger reasons to require the Attorney General's consent because the Crown Prosecution Service there is divided into areas, and the decision whether to prosecute is made locally except in cases of importance or difficulty.[69] In Hong Kong, all decisions on prosecution are made within a single office and the risk of inconsistency of approach is therefore appreciably less.

- Those jurisdictions which have recently abolished the rule have not felt the need to incorporate similar provisions. Such jurisdictions include the Australian states of Victoria, New South Wales, South Australia and Western Australia.

- Jurisdictions which have never implemented the rule have not experienced particular problems with late prosecutions. Such jurisdictions include almost all European jurisdictions except England and Cyprus.[70] Scotland, for example, has worked well without the rule and the safeguarding

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69 Section 1(4) Prosecution of Offences Act 1985. Also Halsbury Statutes 4th ed. Vol. 12 page 1050.

70 English Law Commission, *op cit*, Consultation Paper at Appendix B para. 24.

provisions. Scotland has developed its case law on oppression for delay. It was held in *H.M. Advocate v Stewart*[71] that the Crown may be barred from proceeding with a trial if it would be oppressive for them to do so in view of the passage of time since the discovery of the offence. A recent decision[72] has clarified that the test of oppression for delay is the same as that in other cases of oppression, such as oppression based on prejudicial publicity, i.e. whether the prejudice was so grave that it could not be removed by an appropriate direction to the jury. In summary cases, the prejudice must be so grave that no judge could be expected to reach a fair verdict in all the circumstances.

- The consequences of delay in bringing a prosecution are already a factor to which Crown Counsel must have regard when deciding whether or not to prosecute. The prosecution's discretion to prosecute is guided by case-law as well as by internal guidelines to ensure consistency.

- Although it is true that private prosecutions may be brought if the Attorney General's consent is not specifically required, the Attorney General has the right to intervene and take over the proceedings if appropriate. Given that private prosecutions are rare in Hong Kong, it is anticipated that the absence of the Attorney General's consent requirement would not cause problems.

8.6 We have therefore concluded that the rule should be abolished and that there should be no provision equivalent to section 2 of the English Act requiring the Attorney General's consent to prosecution in certain cases.

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71 1980 J.C. 84.

72 *McFadyen v Annan* 1992 S.C.C.R. 186.

Law Reform (Year and a Day Rule) Act 1996

1996 CHAPTER 19

An act to abolish the "year and a day rule" and, in consequence of its abolition, to impose a restriction on the institution in certain circumstances of proceedings for a fatal offence.

[17th June 1996]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

Abolition of "year and a day rule"

1. The rule known as the "year and a day rule" (that is, the rule that, for the purposes of offences involving death and of suicide, an act or omission is conclusively presumed not to have caused a person's death if more than a year and a day elapsed before he died) is abolished for all purposes.

Restriction on institution of proceedings for a fatal offence

2. (1) Proceedings to which this section applies may only be instituted by or with the consent of the Attorney General.

(2) This section applies to proceedings against a person for a fatal offence if -

(a) the injury alleged to have caused the death was sustained more than three years before the death occurred, or

(b) the person has previously been convicted of an offence committed in circumstances alleged to be connected with the death.

(3) In subsection (2) "fatal offence" means -

(a) murder, manslaughter, infanticide or any other offence of which one of the elements is causing a person's death, or

(b) the offence of aiding, abetting, counselling or procuring a person's suicide.

(4) No provision that proceedings may be instituted only by or with the consent of the Director of Public Prosecutions shall apply to proceedings to which this section applies.

(5) In the application of this section to Northern Ireland -

(a) the reference in subsection (1) to the Attorney General is to the Attorney General for Northern Ireland, and

(b) the reference in subsection (4) to the Director of Public Prosecutions is to the Director of Public Prosecutions for Northern Ireland.

3. (1) This Act may be cited as the Law Reform (Year and a Day Rule) Act 1996.

(2) Section 1 does not affect the continued application of the rule referred to in that section to a case where the act or omission (or the last of the acts or omissions) which caused the death occurred before the day on which this Act is passed.

(3) Section 2 does not come into force until the end of the period of two months beginning with the day on which this Act is passed but that section applies to the institution of proceedings after the end of that period in any case where the death occurred during that period (as well as in any case where the death occurred after the end of that period).

(4) This Act extends to England and Wales and Northern Ireland.