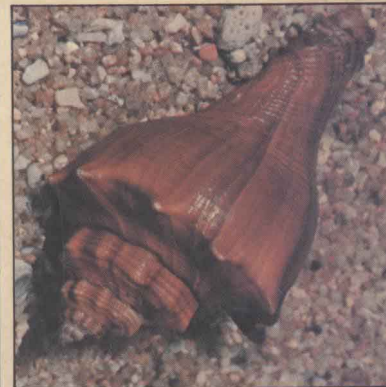
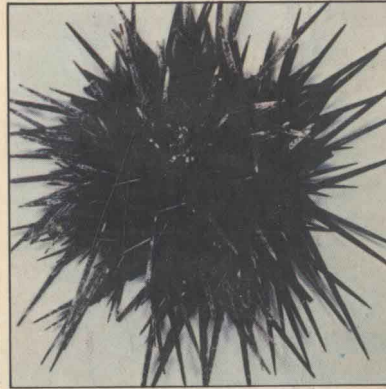
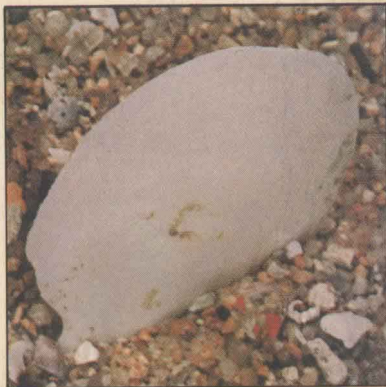


The Future of the Hong Kong Seashore

edited by Brian Morton



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Finally, as editor, I have received the largely enthusiastic advice and counsel of many friends, colleagues, and acquaintances; but I have been steadfastly encouraged by my wife Janice, by my friends John Morton, Maurice Yonge and Brian Lofts.

Brian Morton

CONTRIBUTORS

Soloman Bard O.B.E.; M.B.E. (Mil.); M.B.B.S. (H.K.); D.Litt. (Hon.); J.P.

Formerly Director, University Health Service, University of Hong Kong

Robert Collis A.A.Dip.; R.I.B.A.

Lecturer, Department of Architecture, University of Hong Kong

Raymond Faulkner B.A. (Cantab.); Barrister of the Inner Temple.

Lecturer, Department of Law, University of Hong Kong

John Hodgkiss B.Sc., Ph.D. (Wales); F.L.S.

Lecturer, Department of Botany, University of Hong Kong

Brian Morton B.Sc., Ph.D. (London); F.L.S.; F.Z.S.

Reader, Department of Zoology, University of Hong Kong

Rona Peck B.Sc., Ph.D. (Cambridge)

Formerly Demonstrator, Department of Geography and Geology, University of Hong Kong

John Pitman B.Sc., Ph.D. (Hull)

Formerly Assistant Lecturer, Department of Geography and Geology, University of Hong Kong

Brian Young B.Sc., Ph.D. (Hong Kong)

Formerly Lecturer, Department of Psychology, University of Hong Kong

FOREWORD

It must now be over fifteen years since this writer first visited Hong Kong. This was in connexion with fisheries activities but a series of later visits had to do with the tendering of biological advice during the construction of the Plover Cove reservoir. The dramatically sudden change that this involved from a completely marine to an entirely fresh-water regime presented problems on a scale never previously encountered. At the same time I was exposed to the no less unique situation represented by the extraordinary concentration of human beings on this small peninsula with its fringe of islands; in the centre, the two great cities of Victoria and Kowloon facing each other across the narrow waters of the harbour. The deepest impression of all was made by the abounding vitality of the constantly growing population.

To the occidental eye, the immediate impact came from the completely Chinese character of so many of the streets, the totally different visual impression, the colours, the decorative effect of Chinese signs — yet more vivid when picked out in neon lights after nightfall — against the incessant movement. With successive visits this impression of activity grew ever greater but against an increasingly prosaic background of higher and higher buildings — what were seen going up during earlier visits were now being pulled down to allow for the erection of others yet taller! Roads raised on concrete piers provided new routes for the ever increasing traffic while entire hillsides were being covered, almost as one watched, with seemingly limitless blocks of flats. Hong Kong appeared to be housing the surplus population of China, at the same time itself producing hosts of children. There were so very many obviously urgent problems for a future that seemed so very close at hand.

This movement towards the future involves activities that no man can stay. People must be adequately housed, their means of livelihood improved and increased, and their children must be educated to fit them for life with these opening possibilities. All has to be achieved in so very small an area much of the significant extent of which can be viewed in day trips by the visiting tourist.

The centre of everything is to be found in the narrow stretch of water between Hong Kong island and the mainland peninsula of Kowloon. This one-time 'fragrant harbour' is now a scene of incessant movement. Vessels of all descriptions — merchant vessels, ferries, junks, lighters, smaller craft of many kinds — all seemingly impelled by diverse but equal forces, jostle for place and passage

between the opposing cities. Few scenes in the world can compare to this.

We are not concerned here with how all this has come about, although the speed with which it has happened is certainly of high significance, because problems became urgent almost before those in harassed authority were even conscious of their existence. It is the future with its all too apparent difficulties that must demand all our attention. How are the present and the far more numerous future inhabitants of Hong Kong going to live in this restricted area side by side with the products of their own intense activities?

In developed countries the world over, battle is now being joined between the advocates of development and those who wish to conserve and so to maintain what is possible of the pristine beauty and peace of the countryside and shore, to build in accordance with the surrounding landscape, to contain and eventually push back the rising tide of aerial and aquatic pollution. This often involves conflict between moneyed interests with limited although often compelling objectives on the one hand and enlightened concern for an enduring future on the other. Faults and virtues are not necessarily restricted to one side or the other; the end result must often be some reasonable compromise. But it is fortunately true that in many developed countries the plans of the developer are being modified in deference to the demonstrated needs of conservation.

Such victories are the results of public opinion stimulated and guided by the directed enthusiasm of the few. Such is precisely the aim of this book and quite literally nowhere in the world is there greater need for such opinions to be voiced and consequent action to be taken. Nowhere is development more rapid or available land so limited as in Hong Kong. The over four million to which the post-war populations of half a million has so quickly risen will soon be doubled, and each person will rightly demand space in which to live and to work. But what of the equal necessity for contented leisure, for the intelligent appreciation of nature and for the enjoyment of the beauties of land and sea? How can there be content in a life confined to crowded tenements in a land bounded by polluted shores and seas?

The seashore looms large in all considerations of amenity. Although so restricted in its land area, Hong Kong is fortunate in the relatively enormous stretches of extremely varied shores that bound the indented coastline of the New Territories and the islands.

The opposing factors of rock formation and of weather which are responsible for these variations in the character of the shore are described in this book and so is the present legal position; this, however, is man-made and to be altered should need for this arise. Men have long dwelt on these shores and we are further told what archaeologists have discovered about them. There is an added need for care in developments which might possibly obliterate further such evidence about the past.

These shores also support a marine life of particular interest and diversity. All shore life is fascinating because it consists of very many different types of both animals and plants with the common capacity of being able to live for part of the time beneath the surface of the sea and for the other part exposed, sometimes to the effects of major storms but always to great ranges in temperature and salinity with the constant danger of dessication. Only sand dwellers escape these dangers but only because all of them have become most ingeniously adapted for burrowing below the surface when the tide retreats.

Owing to the geographical situation of Hong Kong the local marine population has an added interest because some of its members are of temperate origin and others are related to the more southern and tropical fauna and flora. For long past many animals and also some seaweeds have been sought as food, some being the object of major fisheries. Today their numbers, especially of intertidal oysters and other shellfish, can be increased by current methods of mariculture. Shores, moreover, are rich in lessons about the meaning of life; they are natural laboratories where so much may be learnt about the adaptations and interrelationships of living things. Above all else, long stretches of the shoreline must be maintained, their rocks and sandy beaches protected against tasteless exploitation and their waters cleansed from pollutants. This is necessary for the enjoyment and for the essential health of all who live in Hong Kong.

The most pressing needs, not of the future but of the very urgent present, are for the reconciliation of these needs with those of industry and shipping on which it must always be remembered the prosperity of all depends. How best to build, how best to conserve here and to develop there, how to cleanse sewage outflows and prevent industrial effluents and agricultural pollutants from fouling these restricted waters? All of these problems are discussed in the pages that follow and possible solutions suggested.

As Brian Morton tells us, the idea of this book came to him during a recent visit to New Zealand. There he encountered an imaginatively conceived book entitled *Seacoast in the Seventies — The Future of the New Zealand Shoreline* jointly written by a marine ecologist, a consulting engineer and a biochemist. From their very different but converging standpoints these three authors seek to stress the exceptional significance of the seashore, to emphasize the many dangers to which, unless protective action is soon taken, it will be increasingly exposed.

Yet New Zealand is a country of far greater and more varied coastline than Hong Kong and with a smaller and much less rapidly growing population. If there are justifiable fears for New Zealand shores — at any rate in the vicinity of the larger cities — how much greater and more immediate must these be for the shores around this intense centre of human activity?

Planning for the future is essential but unless carefully co-ordinated to take every consideration into adequate account, planning can so easily go astray. Fortunately, a Department of the Environment has recently been established under the aegis of which it is to be hoped that all action concerned with the shore ranging from education to pollution — previously the concern of many different bodies — will gradually be concentrated. The first essential is to draw general attention to the size and urgency of the problems involved leading to the creation of strong public opinion on these matters. If this book assists to this most desirable end it will have been abundantly justified. It has been truly observed by Dr. Barry Commoner that the developed nations (among which Hong Kong must surely be included and certainly in this context) which have invented modern technology are 'also the first victims of the environmental disease that technology breeds'. The health of Hong Kong depends on the right diagnosis and the correct treatment of this disease.

Sir Maurice Yonge, C.B.E., F.R.S. (University of Edinburgh)

INTRODUCTION

The success story that is Hong Kong can justifiably be said to be the story of its industry and trade. At the centre of this success is Hong Kong's harbour.

First colonized by the migrations of people along the Pacific coast in primitive times, Hong Kong eventually came under the cloak of China between 221–214 B.C. Ceded to the British in 1841 under the convention of Chuenpi during the first opium war, Hong Kong has steadily grown in stature. The convention of Peking in 1860 added the Kowloon peninsula to Hong Kong island, thereby giving the British control of both sides of the harbour. A further treaty of the same name in 1898 ceded the New Territories to the colony for 99 years.

The 'liberal' rule of the British allowed for a steady growth in the development of industry, largely utilizing Chinese money and cheap Chinese labour. Furthermore, it allowed for the steady influx of mainland Chinese seeking, though not always finding, a better life. Thus population and industry have grown hand in hand. During the Pacific war, Hong Kong was occupied by the Japanese and the population fell to 600,000, but by 1947, with the somewhat surprising return of the British, it had risen to 1,800,000. Following a huge influx of people from China with the collapse and ultimate defeat of the Nationalist government in 1949, the population rose to 2,360,000 by 1950. Today, the population stands at over 4 million as successive waves of people have left the mainland.

In the 1950s and 60s came a new era of industrialization, utilizing a disorganized, refugee, and job-hungry people. So it has continued up until the present time when at last there are signs that the twentieth century is catching up with Hong Kong. With a rise in real income and a movement towards a greater equality in the distribution of income, the people of Hong Kong are beginning to enjoy a better standard of living and to seek an improved quality of life. Now that the pressing problems of providing work and homes are lessened if not yet solved, people will need greater facilities for leisure activities.

The harbour has been Hong Kong's heart to which raw materials have come to sustain it and from which its exports have flowed to enrich it. Shipyards, godowns, and all the associated paraphernalia of a community dependent upon the sea have grown up on the waterfront. So too have the offices, factories, and homes in intermingled unplanned conglomerations on the margin of the sea. The

sea has served as the sewer for Hong Kong and the sea has also fed Hong Kong; its fishing fleet now comprises nearly 6,000 vessels. But the sea is also Hong Kong's countryside. After 133 years of despoilation, the sea is increasingly asked to cater for the recreational needs of a community having more time to relax. Ten years ago, the beaches were empty apart from a handful of westerners. Now they are packed to capacity with local people in the summer months.

Will the sea, and more especially the seashore, be able to cope with the seemingly opposing demands made upon it in the future?

Hong Kong has a land-mass of some 1,049 sq km. There are more than 230 islands, most of which are uninhabited. Owing to the heavily indented nature of the coastline, the Hong Kong seashore is approximately 800 km long, surprisingly almost one-fifth the length of the coastline of England and Wales.

Some 70 per cent of the shore is steep and rocky; the remaining 30 per cent comprises relatively flat sandy or muddy inlets. Thus the total area of land regularly exposed and covered by the tides is extensive in proportion to the total land area of Hong Kong. From a variety of standpoints it is the soft shores that are the most important recreationally and the most susceptible to development. The steep rocky shores are still inhospitable and largely inaccessible. The often precipitous coastline is notched with numerous bays and small fertile valleys which, easily reached by boat, afforded sheltered anchorage and a limited farming potential to past generations. The same bays are still important in the provision of at least a subsistence level of food for the poor of Hong Kong and serve as shelter for both the weekend sailor and for the boat dwellers. From an educational point of view these same shores provide natural laboratories which can be used in a variety of ways by the educationalist. That they should be so used in Hong Kong is important, considering the few opportunities the urban child has to see at first hand natural ecological, geological, and archaeological phenomena.

Ecologically too the Hong Kong seashore is important; the soft shores marginally more so than the rocky ones. The wealth of plant and animal life that this interface of land and sea supports belies its size. The geographical position of Hong Kong, situated in the tropics and experiencing a wide range of meteorological conditions, from the relative calm of the north-east monsoon to the fury of the typhoons in mid-summer when the south-easterly

monsoon prevails, gives the shoreline a dynamic character both in geological and ecological terms — the two being inseparably inter-linked. Such an interaction of environmental extremes provides for a fascinating variety of seashore communities.

At variance with the intrinsically rural nature of Hong Kong's past, the industrialized, largely urbanized modern community is one of the most significant polluters of the sea in Asia. Rivers and streams, authoritatively described as among the most polluted in the world, generally empty on to soft shores where infaunal animals are still dug for food. Virtually all the urban and rural sewage passes into the sea untreated, as well as much of the rubbish derived from a community embracing the 'sophistication' of the disposable society. High intensity farming in the New Territories utilizing toxic pesticides and creating agricultural waste further pollutes the rivers and thus ultimately the shore. Factories discharging industrial effluents into natural watercourses also compound the problem of marine pollution. Control of pollution, with the exception of attempts to prevent ships from blatantly cleaning out their tanks in Hong Kong waters, is negligible as is research into the medical effects and consequences of pollutants. Yet it is to the sea that the people of Hong Kong still turn as a source of food and as a major recreational outlet. The beaches are perhaps one of Hong Kong's greatest assets. The benefits, both from a physical and a psychological standpoint, that our predominately youthful community could derive from clean, healthy beaches are inestimable. The seemingly endless process of industrial growth and urbanization goes on, however, not as one might hope in a modern society in an orderly and planned manner, but in a way which is causing either piecemeal pollution or wholesale destruction. The demand for land is so great that inevitably the environment suffers. Vast reclamation projects compete for space on the waterfront with tin-pot factories which are born out of despair and maintained by greed. Both have one common effect, namely, the pollution and destruction of the environment, the heritage of all. A rash of indiscriminate, ill-conceived — let alone poorly designed — 'developments' has appeared to blight the coastline of Hong Kong. Apart from detracting from the aesthetically spectacular coastline of Hong Kong, such indiscriminate development destroys, under a welter of concrete pilings, the basis of any society — its ethnological beginnings. Hong Kong's archaeology is that of the seashore and the preservation of the past, of which the

seashore contains such important relics, some possibly still undiscovered, is vital. The recovery, the study, the recording, and in some selected cases the preservation of Hong Kong's past is an important duty. It is a society's roots in the past that confer stability. Who can deny that this is missing in Hong Kong?

What then is the future of the Hong Kong seashore? Does it even possess a future? At the rate urban and industrial progress is catching up with Hong Kong, the short answer is that it does not. Hong Kong seems destined to become a megalopolis. If it is not already too late, we have to decide now whether or not beaches and open parks are to be preserved within the urban complex.

Being both terrestrial and aquatic, the seashore often defies definition. It is owned by the Crown but has always, by tacit agreement, been regarded as existing for the benefit of all. It may yet be necessary, however, for these privileges to be denied so as to protect it from destruction by a few. Certainly, some kind of a freeze on coastal development seems to be urgently required both for conservation and to allow planners a pause for breath and time to think before committing themselves further. There is no reason why development and conservation should not go hand in hand, and a balance be achieved to cater for the needs of all.

It is to the law then that the eyes of both the conservationist and the developer must turn and it is appropriate that the law as it exists today with regard to both the past, present, and future of Hong Kong's seashore is examined first in this book. Only by operating within the framework of the existing law and by drafting new laws and repealing outmoded ones can the natural environment survive and the best interests of the majority be served.

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PREFACE

The idea for this book came out of a working visit under the auspices of the Leverhulme Trust to the University of Auckland, New Zealand in 1972.

New Zealand still has a clean and relatively well-controlled environment by comparison with other more industrialized countries with a heavy population. Its people regard a pleasant living space as a heritage to be jealously guarded. This is an attitude that especially involves the seashore, where most New Zealanders spend a great part of their leisure.

While in New Zealand I was able to see a draft of the seashore conservation book, *Seacoast in the Seventies — The Future of the New Zealand Shoreline*, edited by the Auckland ecologist, Professor John Morton, one of a group of environmental politicians energetically concerned about the future of the seacoast.

The chain of events that ultimately brought us to write a similar book about Hong Kong began with the inspiration of this parent text. Ours is an interdisciplinary approach. We make no pretensions to originality, but argue that if such a book is thought necessary for New Zealand it must certainly be long overdue for Hong Kong.

Here eight teachers from the University of Hong Kong, all specialists in their own fields, have involved themselves with one realm of the environment — the seashore. Each of us has written from an individual viewpoint. As conservationists, we may be considered overanxious by some. We make no apology for that — the alternative of complacency is far worse. Many facets of the seashore remain to be investigated. But we feel that we have explored the major aspects of this very distinct environment, and we hope that the references we give will enable the more specialized reader to pursue his interest more widely.

After considering the present, and sometimes the past, status of the seashore, we have looked to the future and made a number of short-term and long-term recommendations as to how the seashore could best be managed for the benefit of all. We do not press for such recommendations to be immediately and unswervingly followed; they are offered as contributions in official circles to an as yet non-existent debate. We have sufficient faith in the discernment of our people to hope that the future of the Hong Kong seashore is in safe-keeping.

February 1975

Brian Morton

1

Chapter

The Law of
the Seashore

The Law of the Seashore

Raymond Faulkner

INTRODUCTION

The law defines the seashore, or foreshore as it is also called, as the area between the high and low watermarks of ordinary tides. The area which falls within these marks is not static for it will alter as the high watermark either encroaches further upon or recedes from the land. The rights pertaining to the seashore will attach to that area which, at the relevant time, fulfils the legal definition. In this chapter the law (as in existence on 1st February 1975) which will be discussed is that solely or mainly concerned with the seashore. It must of course also be borne in mind that the general law of Hong Kong applies equally to the seashore. It is no more permissible to commit a crime or a civil wrong on a beach than elsewhere.

PUBLIC RIGHTS

The soil of the seashore belongs to the Crown but this ownership is subject to certain rights which the public are entitled to exercise. The most remarkable feature of these public rights is that they are so limited. As Harman L.J. said in *Alfred F. Becket v. Lyons* [1967] Ch. 449, 468: 'It is notorious that many things are done on the seashore by the public which they have no legal right to do.' An example of this arose in *Llandudno U.D.C. v. Woods* [1899] 2 Ch. 705 where a clergyman held services on the shore without the permission of the local council (which had leased the shore from the Crown). Cozens-Hardy J. said: 'The plaintiffs have . . . *prima facie* a right to treat every bather, every nursemaid with a perambulator, every boy riding a donkey, and every preacher, on the shore at Llandudno as a trespasser.' However, the court showed its displeasure at the bringing of the action by refusing to grant an injunction and by refusing to award the costs of the case to the Council: 'It is no part of the duty of the Council to prevent harmless usage of the shore . . . This action is an attempt to assert rights which the Crown would never have thought of putting forward . . .'

The two rights which may be exercised by the public are those of navigation and fishery.

The Right of Navigation

The right of navigation is a right of way. When the tide is in, the inundated beach becomes like any other highway for the purposes of navigation, commerce, trade and intercourse. In addition to a right of passage, the common law recognizes certain other requirements essential to the safe and efficient utilization of the right of navigation. These came, therefore, to be considered necessary incidents of that right, complimenting it so as to assist the sailing public. It became accepted that a boat may not only sail over the shore when the tide is in but may also moor on the seashore because this was essential to the full enjoyment of the right of navigation. No charge may be made for the exercise of this right. The result is that, at common law, neither the Crown nor anyone leasing the foreshore from the Crown, may prevent a member of the public from sailing over or dropping anchor on the shore. The position is, of course, different where the mooring is in a port or harbour or against a quay, but even on the seashore the right is limited. As it is an incident of the right of navigation, mooring is only permissible for temporary periods. A permanent anchorage as

a residence or a place of business is not allowed. In practice, the common law right is restricted to small vessels as the *Merchant Shipping Ordinance* (Cap. 281, L.H.K. 1974 ed.) forbids the mooring of ships (excluding those propelled by oars) and junks in unauthorized places without reasonable excuse or permission. In general the courts have refused to allow claims by boat owners to land on the seashore so as to embark goods and passengers. Such activities are not regarded as an integral part of the right to navigate and will only be allowed if legislation, custom or usage so permit.

Situations of peril or necessity often arise in connection with navigation. The law therefore allows for exceptions to the general rule. On these occasions, ships may moor on the seashore for the purpose of loading or unloading goods or passengers. The whole coast is then said to take on the qualities of a port. Such situations also allow members of the public a right of access not merely across the seashore but over private land if a vessel is wrecked, stranded or in distress. Access is permitted, unless there is an equally convenient public road, for the purpose of assisting the vessel and saving lives, cargo or apparel. It is a criminal offence for the owner or occupier of intervening land to bar the access to the sea of would-be rescuers.

The Right to Fish

There is a general right to fish in tidal waters and it applies to the area of sea covering the seashore. The public may cross the shore when dry for the purposes of navigation and fishing. Again it must be stressed that this right of passage does not give even those who fish for a living right to load, unload, land on or embark from the beach. It is a right of access only, but even then it is limited to those places which legislation, necessity and usage have appropriated for the purpose. Further, whether or not usage or custom have legalized public passage across the beach, no rights above the high watermark may be claimed as incidents of the rights of fishing or navigation. The fisherman does not take precedence over the private occupier of land.

The right to fish in a particular area may be totally extinguished by the grant of exclusive fishing rights to an individual or group of individuals. But even when the common law right applies in full, those members of the public who exercise it must still comply with the general law of Hong Kong. Regulations prevent the use of

explosives and certain toxic substances for the capture of any form of aquatic life including turtles. The use of stake nets or beach seine nets is only allowed if licensed by the Director of Marine. Bright lights for the purpose of fishing or attracting fish are only permissible in specified areas. The limitations placed upon the fisherman extend not only to where and how he may fish. It has been seen that there is no general right to unload fish on the seashore, but it is also an offence to unload marine fish (excluding crustaceans, molluscs and fish alive and in water) at places other than those specified by legislation, unless the written permission of the Director of Marine allows it. Any sale must take place at a wholesale marine fish market conducted by a specified organization. These rules do not apply to fish caught for pleasure or which are not intended for sale or export.

The right of fishery relates equally to shellfish found on the beach. Individual members of the public may take shellfish but they cannot, pursuant to this public right, build ponds in which to collect shellfish for fattening or subsequent collection. This may only be done with Crown permission. In so far as the collection of shellfish amounts to carrying on the operations of oyster rearing or fishing, it is prohibited unless done in pursuance of a Crown lease or permit. If the acts in question amount to cultivation of pearl oysters, they, too, are forbidden unless licensed. There are also limits upon the right to sell shellfish, both molluscs and crustaceans. It is forbidden to collect for sale for human consumption any shellfish in the harbour of Hong Kong or any of its waters adjacent to the New Territories, the harbour of Aberdeen, Kwai Chung Bay or Tsuen Wan Bay.

Because the rights of navigation and fishery co-exist in the same location, it is clearly possible for conflicts to arise. In such cases, the right of navigation generally prevails. If fishermen, or others, interfere with the right of passage across the water it will, unless duly authorized, constitute a public nuisance. This of itself, is a criminal offence but the *Summary Offences Ordinance* (Cap. 228. L.H.K. 1972 ed.) specifically prevents any person, without lawful authority or excuse, from doing any act whereby injury or obstruction may accrue to the shore of the sea, or to navigation, mooring or anchorage, transit or traffic. In some cases obstructions may be licensed, as with stake net fishing, but then navigation is protected as far as possible, for example, by the requirement for the lighting of such nets during the night.

Although navigation generally takes precedence over fishing, sailors are not given licence carelessly or intentionally to inflict damage upon a fishery. Intentional damage may, of course, result in criminal liability but, as regards civil liability, the right of navigation must be exercised reasonably. A failure to do so will result in an obligation to pay compensation.

Other public rights may arise by virtue of custom. Custom is a local variation of the common law which is recognized because it is ancient, certain, reasonable and continuous. In England, the law recognized the customary right of fishermen in certain parishes to dry their nets on the seashore. In Hong Kong, however, there appears to be no reported decision on customary rights over the seashore. Also the public, although having no common law right to cross the beach, may clearly do so if the seashore has become a validly constituted right of way.

Unlawful interference with public rights across the seashore is, as has been stated, a public nuisance. The Attorney General may bring an action for a court order on the information of a private individual. This order is called an injunction and it will forbid the offender from continuing his interference or prevent him from carrying it out if he has merely threatened to do so. A person ignoring an injunction is liable to be imprisoned for contempt of court. Individual members of the public may not generally bring private actions against a wrongdoer for the commission of a public nuisance. If it were possible, numerous suits could be commenced where only one is necessary to end the interference. It would thus waste the time of the courts and prove an unnecessary burden to the wrongdoer. However, if an individual can show that he has suffered some damage over and above that suffered by the public at large, he can sue in his own right to recover compensation for that loss. Consequently, if the right of navigation is interfered with by the unlawful erection of structures on the seashore, all sailors will have to sail round the obstruction, causing them inconvenience and loss of time. All of them suffer the same inconvenience and so none of them can sue individually. One legal action to remove the obstruction would satisfy them all. If, however, through no fault of his own, one member of the public runs into the obstruction and his boat is damaged, he may maintain an action to recover the loss that he has sustained, such damage being a special loss peculiar to him.

Bathing

Hong Kong legislation has set aside a number of specified beaches as public pleasure grounds. These beaches may be closed for purposes such as cleaning or when the interests of health and safety so require but, presumably, no beach can be permanently closed to bathers unless it ceases to be designated a public pleasure ground. These beaches are specifically bathing beaches and the Urban Council may set aside, for the sole use of swimmers, all or part of the waters adjacent to the beach. Once this is done, the general right of navigation is excluded, save for certain types of inflatable craft, unless the user has permission or reasonable cause or excuse. There is also power to control or prohibit fishing at bathing beaches. The by-laws also provide for a number of other restrictions on public behaviour. Generally they relate to the maintenance of decent and orderly behaviour and to the cleanliness of the beaches. With regard to the latter, littering, fouling or polluting the beach or adjacent waters is prohibited. The unlicensed erection of beach structures is generally forbidden, although the temporary erection of certain types of shelters for use by their owners may be permitted. The selling and hiring of certain commodities, the holding of public meetings and the posting of notices are only allowed if done with the permission of the Urban Council. With regard to maintenance of orderly behaviour, the by-laws provide for a general prohibition upon the commission of acts likely to endanger, obstruct, inconvenience or annoy other beach users. In particular, vehicles, excluding perambulators, are banned from bathing beaches, although there is an exception where the beach includes part of a road. Animals are forbidden. Begging, causing annoyance by playing music, spitting, obscene language, indecent exposure, disorderly conduct and the depositing of articles likely to cause injury are all criminal offences under the by-laws. If a member of the public uses a beach other than one designated as a public pleasure ground, he must, when permitted to bathe, do so in a decent fashion, it being a criminal offence for those aged fourteen or over to expose themselves indecently near any public place or dwelling house.

Restrictions

It is clear from the paucity of rights over the seashore available to the public that many possible sources of profit are inaccessible without Crown permission. The right to fish is clearly a profitable

one but there are statutory limitations on its free exercise for profit. Also, at common law, although the right to take shellfish was not denied, it is doubtful whether the public have a further right to collect empty shells. Seaweed, cast up or growing on the shore, belongs to the owner of the shore. It is only when the seaweed is floating above the shore at high tide that the public may gather it, either as an incident of the right to fish or of the right to navigate.

In Hong Kong, where the needs of the expanding building industry and the desire for conservation conflict, the existence or otherwise of a general right to take sand, shingle or gravel from the beach is of great importance. Again the answer is that the public may only do so with permission. At common law, the owner could use gravel, stones and sand as he wished and could license others to do so. This was subject to an overriding prohibition on acts which would remove the natural barrier against the sea and put at risk land abutting the foreshore. It is an offence under the *Crimes Ordinance* (Cap. 200, L.H.K. 1972 ed.), without lawful excuse and with the necessary intent, to destroy or damage the property of another. 'Property' includes real property and so excavations on the seashore may be sufficient to 'damage' it. More specifically, the *Summary Offences Ordinance* (Cap. 228, L.H.K. 1972 ed.) prohibits the doing of any act, without lawful authority or excuse, whereby injury may be occasioned to the seashore. The large-scale removal of sand, gravel or shingle would, almost certainly, amount to such 'injury', particularly if it enabled the sea to encroach upon the land. Apart from the question of damage to the shore, the unlicensed removal of natural materials from the beach could amount to theft. A theft is committed, *inter alia*, when, with the requisite intent, a person, not being in possession of land, assumes a right of ownership over anything forming part of the land. Such an appropriation may occur after the property has been severed from the land or by the act of severance itself. The digging up of these materials would seem to amount to 'severance'.

The excavation of sand is further regulated by the *Sand Ordinance* (Cap. 147, L.H.K. 1970 ed.). Under its provisions, no person may take sand from any foreshore without the consent of the Director of Public Works. There are also restrictions on the importation of sand and its removal from one part of the colony to another. The *Sand Ordinance* expressly does not relate to foreshore which is being leased from the Crown. In such cases, the

offences already mentioned will still apply.

Criminal sanctions will be of no assistance in compensating the Crown or lessee of the foreshore in cases of illegal removal of natural materials. The *Sand Ordinance*, in addition to imposing penalties, provides that an order may be made restoring to the Crown sand seized under any enactment. The civil law also provides a number of more general remedies. The Crown may maintain a civil action in trespass against unwelcomed visitors. Any act which amounts to an unjustifiable interference with the possession of land is a trespass. This may not only occur when a person enters uninvited but also when he acts in excess of his permission. A person invited to use the beach for bathing purposes would become a trespasser if he began to dig up and carry off sand or shingle. In an action for trespass, damages (as compensation), an injunction (to prevent future interference) or both may be claimed. As trespass is a civil wrong, or tort, against possession, the Crown cannot usually bring an action when the seashore is the subject of a lease. The reason is that the lessor gives up possession to the lessee and so normally only the lessee can sue in trespass. If, however, the wrongful act would be such as to cause permanent damage to the land, the Crown can maintain an action. Otherwise, the seashore which would be received back at the end of the lease would be of less value than the land which was originally the subject matter of the lease. If the natural materials have been unlawfully carried away by the trespasser, an action in conversion may lie. Conversion is a tort which consists of the doing of some act in relation to another person's goods which constitutes an unjustifiable denial of the other's title to them. The denial of title could be the keeping of the goods, which would be a claim that the other did not have a better title to them than the trespasser. It could be the selling of the goods, which would be an assertion that the trespasser had (and inferentially that the owner did not have) a right to sell the goods. A person may sue in conversion either if he is the owner and possessor of the property or if he is a mere possessor. He can also sue if he has an immediate right to possession. In addition the tort of detinue may be applicable. Here the plaintiff must prove that he is entitled to immediate possession of the goods and that the defendant has refused to return them after a proper demand has been made. Damages may be recovered in actions for both conversion and detinue but in the latter case there is also the possibility of an order against the defendant that he redeliver the

goods to the plaintiff. The Crown may, in certain circumstances, restrain even a lessee from excavating on the seashore. The Crown has a duty to preserve the realm from the encroachment of the sea and every lessee or licensee of the foreshore is subject to that duty. If excavations are so extensive that they amount to a removal of the natural barrier against the sea, the Crown has a right and a duty to see that such activities cease.

Wrecks are another possible source of profit but again members of the public have no general right to benefit. The Crown, by virtue of the Royal Prerogative, is entitled to all *bona vacantia* (things in which no one can claim a property). Ships, wrecked and cast up on the shore by the tide and which no one claims, are *bona vacantia*. The Crown also has a right to goods from a vessel which float on the sea (flotsam); goods cast into the sea to lighten the ship (jetsam); and goods thrown overboard which sink but the positions of which are marked (lagan). In each of these cases, the goods must be left by the tide and found on the shore while the vessel from which they came must have been wrecked. The right also encompasses 'derelict' ships, i.e. ships abandoned or deserted at sea without any hope of recovery. The Crown may grant the right of wreck to an individual. Such a grant does not, of itself, give the grantee any right to the soil of the seashore, his only privilege there being a right to cross it to get to the wreck.

The *Merchant Shipping Ordinance* (Cap. 281, L.H.K. 1974 ed.) gives the Governor power to cause any sunken, stranded or abandoned vessel to be raised, blown up or destroyed. Twenty-four hours notice must be given before the raising, removal, blowing up or destruction can be carried out. If any part of the vessel or its cargo is raised or salvaged, the Director of Marine may order its sale after reasonable notice. The proceeds will be used to defray the expenses of the operation and any surplus will be held on behalf of those entitled, subject to any customs duties or other charges. If the owner of a wrecked vessel wishes to break it up himself prior to its removal from colony waters, he must apply for permission from the Director of Marine. Conditions may be attached to any permission which is granted. It is a criminal offence to break up any wreck without prior permission or to fail to comply with any condition imposed by the Director of Marine. No person may impede the saving of vessels or their cargo. It is also forbidden to secrete any wreck or wrongfully remove any part of a stranded vessel or its cargo.

PRIVATE RIGHTS

From the above discussion it is apparent that, although the activities of the public in general may well be limited, individuals may be entitled to privileges over and above those enjoyed by the general populace. It is with individual rights that this section is concerned. In practice, the difference between activities indulged in by the public as of right and those enjoyed by permission is not of great importance for the Crown does not usually withdraw its permission where the activities of the public prove harmless. It may well become relevant, however, where an individual becomes lessee of the seashore. He is much more likely to insist on the exclusion of the public. At common law, the lessee of the foreshore took subject to public rights and, in particular, he could not interfere with the right of navigation. In Hong Kong, the granting of leases is governed partly by the *Foreshores and Sea Bed Ordinance* (Cap. 127, L.H.K. 1970 ed.). The Governor is thereby given a statutory power to grant Crown leases of the foreshore. The lease may not run for a period longer than ninety-nine years unless the Secretary of State so authorizes, but renewal is possible. Leases may be granted for any purpose including reclamation, building and the furtherance of the requirements of commerce. The lease must specify its intended purpose and, in so far as it is necessary to carry out that purpose, the lessee takes the seashore free from any public or private rights. The extent to which the lessee can interfere with the rights of fishing and navigation will, therefore, depend upon the purpose designated in the lease.

Before a Crown lease can be granted, the Ordinance requires that notification be given to the public setting out the terms of the proposed lease and describing the property which is to be subject to it. The notification must also call upon those who object or who claim compensation because their property will be injuriously affected by interference with sea access to give notice to the Director of Public Works.

A right of sea access may be enjoyed by the owner of any land which is in daily contact with the water. It gives an automatic right to the owner, his lessees, and his licensees, to get to or come from the sea. As the tide goes out, the right extends over the foreshore. This right is distinct from the right of passage connected with navigation for it is a private rather than a public right, incidental to the ownership or occupation of adjacent land. Although the Ordinance provides that leases of the foreshore shall be free of private rights so far as is necessary having regard to the purposes of

the lease, it sets up a specific procedure for dealing with claims for compensation resulting from loss of sea access. The courts, in attempting to define what is involved in the right of access, have said that it is not limited to a right of coming from and going to the sea. As the Chief Justice said as long ago as 1912, in the *Harbour of Refuge Case*: 'it also includes a hundred and one advantages, some more apparent than others'. He went on to establish that, for the purposes of compensation, these somewhat indefinite advantages may be gauged by reference to the amount of money that members of the public would be willing to pay for property with sea access. The compensation payable being the difference between the rent accruing at the time of the passing of the *Harbour of Refuge Ordinance* and after the completion of the proposed reclamation, as brought about by the access to the sea being interfered with.

A right of sea access is available over accreted land. Accretion occurs when land is gradually and imperceptibly added either by the sea building up the land or by dereliction as the sea recedes. This will, of course, vary the position of the seashore and will also add to the land above high watermark. Any land which is added in this way will belong to the owner of the land above the old high watermark. The reason for this is that the process is so gradual that a man cannot from day to day or even month to month see his boundary line changing. The result is the same whether or not the old boundary was clear and whether or not the encroachment is natural or stimulated by some artificial means (as long as it is not deliberate reclamation). But in each of these cases the accretion must be slow and imperceptible. Where the alteration is sudden, whether caused naturally or artificially, no change occurs in the ownership of the land or foreshore. Conversely, the owner of land above high watermark will lose if the opposite process, that of encroachment, occurs. In either case, the public rights of navigation and fishery follow the seashore wherever it happens to be.

Deliberate reclamation is clearly different from gradual, natural accretion, although an owner who lost his sea access because of reclamation had a common law right to cross the intervening, reclaimed, land to get to and from the sea. The position is now governed by the *Public Reclamations and Works Ordinance* (Cap. 113, L.H.K. 1974 ed.). After due publicity and the authorization of a proposed reclamation scheme, all public and private rights over the seashore, seabed and land occupied by the undertaking