

## HIGH TEMPERS IN HIGH PLACES

There is no doubt about it, life in a small colonial society can present many problems. The present generation will not be familiar with the tetchy nature of colonial judges, yet even within living memory it is said that two British judges, sharing chambers in Ipoh, refused to speak to each other, and communicated by means of written memoranda, so deep was their mutual detestation. Vanity is one of the emblems of the judiciary. Within a colonial society, a narrow expatriate conceit feeds upon itself; lacking those avenues for its expression common within their mother country, its members anxiously make mountains out of molehills; and the bruising of their egos can be as noisy in its outcome as the earth-shaking antics of enraged elephants.

Among members of a colonial society, none was more sensitive to all that was due to him than the colonial judge. Leonard Woolf, a civilised, intellectual administrator trained in Ceylon, in his autobiography wrote that he had "always felt that that the occupational disease of judges is cruelty, sadistic self-righteousness, and the higher the judge the more criminal he tends to become." That occupational disease was usually founded in deep-seated, often unpleasant prejudices. The common law has elevated the judge to a status that few deserve, yet many seek. The inflated courtesy required of counsel, the deference required of a witness, the humility of the court officials, all these, combined with the majesty of robes and the flummery of wigs, creates even in the mildest and humblest of men a sense of his own importance. Transplant these characteristics to the colonial society of the eighteenth and early nineteenth centuries, and they are then magnified. Consequence is all.

So much, then, by way of moral introduction to our tale. Let us now go back in time to the Penang of 1838. Trafalgar, Waterloo and the Reform Act of 1832 had come and gone, and a period of British supremacy (and complacency) had set in. The Treaty of London of 1824 had settled the colonial boundaries of Southeast Asia, and Penang, Malacca and Singapore prospered. At least, Singapore did so, at the expense of the other two settlements.

Our story takes us to Penang in 1838. In April of that year the Recorder, Sir William Norris, informed the Grand Jury that some thirty-five to fifty cases, involving sixty prisoners and no murders, were pending. In his address to the Grand Jury it seems that he took the opportunity to comment upon the state of the law relating to testate succession and the irregular behaviour of executors. His observations on the condition of the law of Penang concluded, he then had to address himself to the calendar of crime itself. One case in particular he may, on reflection, have preferred to have had dealt with by another judge: for in the words of the *Pinang Gazette*

and *Straits Echo*, it "seemed to have attracted almost the whole of the settlement to the hall of justice."

Those were stirring days. On 2 April that year the *Times* in London had reported the completion of Mr. T.B. Macaulay's penal code, a work that had taken some four years in the completing, Mr. Macaulay having been paid £10,000 a year, and passage money of £1,000. Whilst it is a digression from our tale, it is worth quoting the comments of the *Times*, both for their intrinsic interest and as reflecting the views of a no doubt learned writer upon a codification of the criminal law of the day. Calculating "the total national cost of this rhetorical gentleman" as £14,000, the *Times* continued:

He has for assistants three law commissioners at £6,000 a piece. The commissioners and secretary have house and office, and travelling charges, and a large establishment, and their cost for four years will not fall short of £100,000; so that, in all, this famous criminal code will have cost at least, £140,000. Any barrister with a moderate quantum of law, commonsense and acuteness, would have written a better without stirring out of London. But long live jobbery and Whiggism!

In those days, as we shall discover, those who wrote to the newspapers were masters of abuse. Whether a London barrister could have produced a better penal code we shall never know: but Malaysia can take comfort in the fact that its adoption cost the country not a cent. Perhaps there was something to be said for jobbery and Whiggism.

Glossing over the recorder's address, let us resume our investigation of the momentous events of 1838 in Penang, where one Brevet Captain Hornsby, of the 12th Regiment, M.N.I., was staying in Penang, on Flag Staff Hill. Also on the Hill that day was one Mr. William Balhetchet, a name not unknown to the diligent reader of Kyshe's *Reports*. Mr. Balhetchet, at one time a merchant, was admitted as a Law Agent in Penang on 24 December 1832, and was for some time Law Agent to the East India Company, although at the time when these momentous events took place he was a magistrate. Accompanied by certain members of the fair sex, Mr. Balhetchet seems to have lost his way upon the Hill and taken the wrong path to the convalescent bungalow he sought. (The adjective *convalescent* presumably applies to the occupants of the bungalow, but it is as a "convalescent bungalow" that it appears in the reports).

Brevet Captain Hornsby was upset by the trespass, and hard words seem to have been exchanged. The society of those days was one insistent on much stricter rules of etiquette than those of today's degenerate communities. Major-General Sir William Sleeman (at one time himself a Brevet Captain) writing of the British way of life in India in the 1830's, explained the rules of behaviour required of a new arrival:-\*

\*Quoted in Tucker, *The Yellow Scarf* (1961), 16

Every new-comer calls in the forenoon upon all that are at the station when he arrives and they return his call at the same hour soon after. If he is a married man, the married men upon whom he called take their wives to call upon him and he takes his to return the call of theirs. These calls are all indispensable and, being made in the forenoon, become very disagreeable in the hot season: all complain of them, yet no one foregoes his claim upon them, and until the claim is fulfilled people will not recognize each other as acquaintances.

It may well be that Hornsby and Balhetchet had not been formally introduced and did not really recognize each other as acquaintances. Men of some rank and distinction, their positions reinforced their vanity: so that any collision between them seemed likely to involve other members of the community.

The hard words led to blows and the blows to the levelling of an indictment against the gallant Hornsby "for an aggravated assault on W. Balhetchet Esquire by shoving him backwards from off a parapet about four feet high in the grounds of the government bungalow on Flag Staff Hill, whereby the assailed had his left collar bone broken." One cannot "shove" a magistrate, even in these less punctilious times, without attracting the full fury of the law. Hornsby offered "satisfaction" to the learned magistrate, an offer which, according to the no doubt even more learned Recorder, was "very properly refused". So, the case went to trial in April, before the Recorder and (of course) a jury; the Recorder summed up; and the jury retired and found Hornsby guilty of a common assault.

The Recorder then took three days to consider a homily and the matter of sentence, during which Penang must have buzzed with expectation. At last the court was convened, the Recorder spoke. There were, he considered, some mitigating circumstances. It was, he thought, "imprudent and improper" of Mr. Balhetchet to have taken the wrong path, a private path, to the bungalow he sought; still, there were ladies with Mr. Balhetchet and, the Recorder considered, there was no need to assault him. Striving to be fair, he fined Hornsby in the sum of two hundred rupees, and no doubt considered that this was an end of the matter.

The which, as far as the gallant Hornsby and the learned Balhetchet, no doubt it was. For there now enter upon the scene more formidable figures indeed, with more extraordinary consequences. On 5 May, the *Pinang Gazette and Straits Chronicle*, a newspaper controlled by a committee of management of which one James F. Carnegy Esq., a law agent in the Court of Judicature of Prince of Wales Island, Singapore and Malacca, was a member, published two letters. One of these letters was written by a gentleman (I think it is reasonable to assume that all the letters in this odd case were written by gentlemen entitled to the appellation of Esquire, for no peahen can compare with the majestic splendour of the fulgent peacock) styling himself "Justitia", and the other, an even more formidable figure, writing under the curious name of "Blue Light".

"Justitia" wrote at length on the Hornsby case. The Recorder, he considered, "must have misunderstood some portion of the evidence. . . a circumstance not at all improbable from the little attention generally paid

to the continual call to order in the Court. . .” The point the writer made was that what seemed to be an intrusion was not in fact an intrusion, but merely a polite exchange between gentlemen who up to then had addressed each other as “My dear Balhatchet” and “My dear Hornsby”. The Recorder had suggested that if Mr. Balhatchet had fallen and been killed, Hornsby would have “stood at [the] bar as a felon on a charge of wilful murder.” This was not so. “I take it for granted,” wrote “Justitia”, “that his lordship did not exactly comprehend this point of the evidence.” The Recorder was right in his comments on duelling, but “it may be regretted that his lordship did not go one step further in his admonitory address to the defendant: by reminding him that when a gentleman so far forgets what is due to another as to presume on his superior personal strength to lay violent hands on him, he violates the code of honour. . .”

As if this wasn't bad enough (I write at this point from the angle of the Recorder) “Blue Light” also devoted himself to the same case. “When somewhat tedious discourses emanate from authority,” he ominously began, “it is expected that some respect ought to be paid to them, but the *judgement* in question contains such a mass of apparent crudities, notwithstanding the three days taken in its preparation, that any favourable opinion, which might originally have been entertained for the talents of the author of the composition, vanishes immediately.” A forceful writer, “Blue Light”. “The dissertation on DUELLING is as unique as uncalled for. The obscure threat conveyed in the language too would merit no consideration, did it not proceed from the bench; but as it is, no gentleman, no jury, unless composed of the basest materials, will ever respect the decision.

“After being told that the Law had been violated, by an ‘unjustifiable assault’ on a magistrate subsequently aggravated by a challenge, a philippic of a most extraordinary nature is pronounced against the prosecutor. . .” “Blue Light” waxed indignant, asserting that if the defendant hadn't had a ‘red coat’ the penalty would probably have been more severe. “It is also currently reported,” he added, in an attack on the Recorder's impartiality, “‘the regiment’ in the interval of conviction and sentence, fearing doubtless the result, in some measure interfered. . .” He concluded that as a literary production, the Recorder's judgment was held “but in little estimation”, but that “as a judicial affair it is quite extravagant.” So, after quoting Dr. Johnson on duelling, and also Paley, he promised more reflections, this time on the Grand Jury, in the *Gazette* of the following week. One might almost assume that he did not like the Recorder.

True to his word, “Blue Light” was back in print in the next issue of the *Pinang Gazette*. In a letter dated 10 May, prefaced by a quotation from Claudian (“Blue Light” was nothing if not well read) he criticised the Recorder's address to the Grand Jury as entering on extraneous subjects. Why tell a Grand Jury the duties of executors, and the like? Even so, he seems to have felt that in his earlier letter he had gone too far: therefore calling in aid Tory criticism in England of the Prime Minister and Cabinet, as “rogues and fools”. In his defence, he affirmed that “a few wholesome

truths appear crude and vexatious to . . . refined ears." The refined eyes of the Recorder must at least have been cheered by the conclusion of the letter, where "Blue Light" observed: "I shall now take leave of you, Sir, for some time; and although a high authority would appear to condemn the *opinions* of all but *his own*, I am still satisfied that he has yet some sensitiveness left to relish occasionally a *lettre d'avis, qui me rendra sage pour l'avenir*".

It would seem that the cap fitted Sir William Norris, not a man to enjoy a letter of advice making him wiser in future. Exactly why the Recorder took no action against Mr. Boudville Senior, the printer and publisher of the *Pinang Gazette and Straits Chronicle* or, even more to the point, against the editor of that newspaper, in respect of the obvious contempt in the allegation of military influence upon the Recorder's verdict, is not known, and difficult to guess. The abominable "Blue Light"'s letter of 10 May was a Parthian shot suggesting that he was about to leave Penang, a prudent action on his part; so that no action seems to have been possible against him — assuming that the identity of such a distinguished epistolary artist could not have been secret, in the select community of expatriate Penang. Which leaves the possibility that the allegation of consultation with the military may well have been true, and that the Recorder was in this context indeed vulnerable to an exposure of the truth.

At all events, the Recorder seems to have thought it imperative to take some action in the matter, in spite of the departure of "Blue Light". It may be that the prestige of the magistracy was at stake: although as any wise counsel will advise, when tempers run high, it is best to pursue a policy of inaction. Not so, for Sir William Norris R. Ascertaining that the wretched Mr. Carnegy was involved with the infamous journal attacking the Recorder, Mr. Carnegy seems to have been summoned before the Recorder. In consequence, the Registrar of Sir William's court, Mr. A.J. Kerr, on 25 May addressed a letter to Mr. Carnegy. This letter, after referring to the anonymous letters in the *Pinang Gazette*, continued:

I am directed by his Lordship to convey to you, in the most explicit terms, his determination to withdraw your licence to act as an agent in the Court of Judicature, unless you are prepared to make the concessions which his Lordship, as already intimated, considers to be indispensable. I am to observe that, as, by your own admission to the Recorder, you are one of the managing committee of the newspaper in question, and therefore responsible for whatever appears in its columns, his Lordship would have felt that he was fully justified, under the power vested in him for the wisest purposes by the charter, had he forthwith directed your name to be erased from the rolls of the Court, "without assigning any reason whatever. . ." You are also to understand that the Recorder, does not, nor ever will, complain of newspaper comments on the proceedings of Court of Justice, when such comments are made in a fair and candid spirit and do not transgress the bounds of truth.

The unhappy Carnegy, so unjustly involved, replied on the same day. "I have to disavow concurrence in the charges and imputations contained in the anonymous letters," he wrote, "as also a sincere regret that any asser-

tions derogatory to [the Recorder's] character, conduct or feelings should have appeared in the *Pinang Gazette and Straits Chronicle*". But, he continued, these letters "were never submitted to the consideration of the committee of management for sanction or approval, and consequently . . . as an *individual* member of that committee it was not within my power to have prevented their insertion." He added that he would withdraw from the committee and, "as a further satisfaction to his Lordship I beg to state that it is my intention, as soon as circumstances will admit, also to dispose of my interest in the paper as one of the shareholders."

These sweet words satisfied Norris. Also on the same day came a further letter from Kerr to Carnegy, in which the Registrar was directed "to express his Lordship's entire satisfaction with the explanation you have given." The letters, formally published on 14 June, seem (probably on the Recorder's orders) to have been given a wide currency as soon as they were exchanged: so that, while the Recorder was enjoying the "entire satisfaction" of an apparent victory, another and more formidable authority was about to enter upon the scene.

The *Singapore Free Press* was a newspaper that did not favour the vesting of arbitrary power in judges. Of course, it has now ceased to exist: but a study of its columns indicates that the journalists of the early days of Singapore were made of stouter stuff than their successors. Under the heading "Results of Judicial Tyranny", the *Singapore Free Press* of 14 June carried a report on the proceedings in Penang:

That such a power [to strike off a practitioner] is vested in a judge of the Court by the Charter, is by no means a proof that it was given "for the wisest purposes", as the said Charter has been already declared by a late professional judge of the same Court\* to be framed with "very little wisdom" — and when the party in whom that arbitrary power is vested commands the wisdom that bestowed it, the world feels generally more than ever disposed to doubt that it could have been given "for the wisest purposes". But besides that it cannot be considered very seemly in an English judge to speak in favourable terms of an arbitrary and irresponsible power placed in his own hands, that in question is one which the constitution of this Court can scarcely permit him to exercise, seeing that the other judges of it will at least require *some reason* to be stated to them by a colleague before they will join in excluding a practitioner, when such a proceeding is appealed against — so that after all this boasted anti-reason giving power may be sometimes rendered inoperative.

Inevitably, the *Pinang Gazette* of 30 June was happy to report that its "able contemporary" concurred with the *Gazette* in the opinion "that matters have been carried by the Registrar. . . on the Hon'ble the Recorder with too high a hand."

It seems that the Recorder learnt nothing from all these events. When delivering judgment in a case in which two commercial gentlemen gave evidence, the Recorder said that in their evidence they had shown "that

\*Probably Sir Benjamin Malkin

want of candour characteristic of British Merchants." The merchants protested, writing on 25 June to the Registrar to assert that they could not "permit such opinions to be expressed without refutation." Merchants, indeed! On 6 July, still smarting from "Justitia", "Blue Light", the *Pinang Gazette* and the *Singapore Free Press*, the Recorder replied, saying that he could not believe that "the letter was written with a deliberate intention to insult the Court of Judicature, and to brave the consequences to which in that case they would have rendered themselves liable." The incident is reported in *Kyshe* (I, lxxxii); and presumably the wise merchants, having made their points, remain silent.

Sir William Norris was Recorder of Penang from 1836 to 1847. He retired to England, and died there in 1859. His behaviour in the Hornsby affair should not, I consider, be held to his discredit, for as a judge he seems to have been exemplary: indeed, after his call to the bar of the Middle Temple in 1827, he went on to a successful practice in India, then to Ceylon as a puisne judge and, later, Chief Justice: from which post he became Recorder of Penang. It often happens that a pompous judge makes a good judge.

Still, there may have been something in the air of Penang that created a tender sensitivity on the part of those engaged in the judicial process. Let us, in a final glimpse of the Penang of those days, read an extract from the *Pinang Gazette and Straits Chronicle* for Saturday, 31 August 1850, when it was reported that "a highly improper and very unexpected affray occurred in the Marine Magistrate's Office on Monday last — we refer to the assault made on a rate-payer by the collector of assessment who is also a magistrate." The report continued:

The case has been before the Police Court and the collector has been fined in, we are told, the highest amount the Magistrates have authority to award. We need not enter upon the particulars of this unhappy matter. It is sufficient to observe that the attack was fierce, very unseemly and, on the occasion, altogether unprovoked. We have no doubt that the collector regrets the circumstance more deeply than anyone else, on account of the disgrace it attaches to him individually, to his office as Collector of Assessment, and to the Society in which he moves, as well as on account of the injury inflicted to Mr. Farrao [?Ferras], the rate-payer alluded to, which last, is fortunately not very serious. But we regret to learn that Mr. Farrao is not satisfied with his criminal prosecution, having simultaneously commenced a civil action laying damages at \$3,000, and not only this but placing the whole matter before the Governor — this, we cannot suppose, with a view to the benefit of the party who so unhappily forgot himself for the moment. It looks unmerciful: and Mr. Farrao ought to know that the object of English Courts is to administer justice not to encourage malice, spiteful suits, and such like. . . [h]aving had judgment in the police court he ought to remain content, and be satisfied with the fine imposed upon, and the reprimand read from the Bench to the party who so unfortunately committed himself. He may rest assured there will be no repetition of the like again.

The observant reader will note that, ample as the report is, the culprit in question is not mentioned by name. Any doubt in the matter is resolv-

ed, however, by reference to a letter of 4 September 1850, addressed by the Governor to one T. Braddell Esquire, later to become the first Attorney General of the Straits Settlements. Wrote the Governor:

It is with great pain, that I have the honour to inform you of my intention to apply to H.M. Court of Judicature, to cancel the Commission appointing you Justice of the Peace for P.W. Island, Singapore and Malacca consequent upon your having been found guilty. . . of throttling and violently attacking Mr. Thomas Ferras in the Master Attendant's Office at Penang on the 26. Ultimo [August 1850]

In consequence, Butterworth, the Governor, on 9 October directed the Court of Judicature to supersede and determine "the Commission of J.P." of 9 January 1849 of Mr. Braddell, "for certain reasons", the reasons being unspecified. Fortunately for the history of the Straits Settlements, the cancellation of Braddell's commission was no more than a suspension, for on 19 February 1851 Butterworth again wrote to Braddell, and the legal history of the Straits Settlements (and, for that matter, Malaysia) was thereby changed. "It is so far a source of gratification to me to receive the exclusive recommendation of the Resident Councillor [at Penang] in your favour and it confirms the estimation in which I hold your qualifications for Government employment," wrote the Governor. "I am assured that the momentary forgetfulness of what was due to the office of Justice of the Peace, to your own self and to the authorities in whose immediate proximity the assault on Mr. Ferras was made, had been sincerely deplored by you, and cannot again occur. . . while I trust your future bearing will be in all respects, becoming." The wording here may be slightly corrupt (microfilm is not so easy to decipher, on occasion) but the sentiment is clear enough. Braddell was appointed Deputy Superintendent of Police, Provice Wellesley; coroner for Penang; and Commissioner of the Court of Requests for Penang. On 12 June he was appointed to act as a Justice of the Peace for Penang and on 10 August went off to Malacca as Magistrate, Commissioner of the Court of Requests, and Superintendent of Police. There were no problems about separation of powers in those days, in spite of efforts of the worthy Norris to detach the executive from the judiciary.

At which point we can leave Braddell, and Penang. These several events are, no doubt, no more than part of the chaff of history. The winds of time winnow, blow away these trifles of human behaviour, leaving for our admiration and edification the solid judgments of Norris, the epochmaking drafting of Braddell. Yet, trivial as they are, these incidents illustrate something important in the way of judicial behaviour. In the case of *Regina v. Hornsby* we can see a minor event, a tiff on Penang Hill, culminating in a rebuke from the press and a reaffirmation of the principles of natural justice; and in the case of Braddell we can observe, with all the clarity of an Aristotle, that law must "direct the conduct of the magistrate in the execution of his office" (*Politics*, Bk. 4) and that not even so exalted a person is above the law.



So, in conclusion, we can meditate upon the fact that even these solemn figures of Malaysian legal history were, after all, human. To know that the first law officer of the Straits Settlements had a conviction for assault does not diminish his stature as a lawyer nor, indeed, his likeability as a man (Mr. Ferras does, after all, seem to have been a very exasperating ratepayer). And to discover that even a distinguished Recorder, a former Chief Justice of Ceylon, can err in the way of natural justice when his baser feelings are involved is to discover, yet again, the need for a fair legal system and, if I may be forgiven for stressing the point, an active, fearless and independent press, prepared to call to account for their tantrums even the high and the mighty.

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