

A Distant Mirror

– Reflections on half a century in the Law –

Half a century ago, when I entered the legal profession in Hong Kong as a barrister, the sun was still high over the British Empire. There was a Colonial Legal Service which filled the ranks of the judiciary throughout Her Majesty's realms; and the Chief Justices of Hong Kong and Singapore had automatic status in the Supreme Courts of the two colonies¹. The seal of the Supreme Court bore an impression of the Royal Arms and all writs and other processes issuing out of the Supreme Court had such a seal. The powers and duties of the Registrar included those assigned to the Queen's Remembrancer in England: that is to say, with responsibility to collect debts due to the Crown².

The Opening of the Assizes in September 1960, at the end of the Long Vacation that year, was a most impressive affair, attended by the entire legal profession in court attire. It took place in what was then called No. 2 Court: Now the Legislative Council chamber. It was presided over by the Chief Justice Sir Michael Hogan, flanked on the Bench by the heads of the three armed Services, the Navy, Army and Air Force in full dress uniform. At the end of the Bench sat a frail old gentleman in a scholar's long gown, the senior Justice of the Peace. He had been

¹ See s.13 & 15 Supreme Court Ordinance, Cap 4 (1950 edition)

² See s.17 Supreme Court Ordinance, Cap 4 (1950 edition)

helped onto the Bench by two retainers and fell promptly asleep. The Chief Justice gave a long discourse, at the end of which the Attorney-General was congratulated and the Registrar was ordered to present to him a pair of white gloves to signify the fact that there were no prisoners awaiting trial during that session of the Assizes.

Civil proceedings in the Supreme Court were governed by the Code of Civil Procedure, borrowed largely from the Indian Civil Code. There was then no Legal Aid as such. But Order XXI of the Code of Civil Procedure enabled a person to sue as a pauper: By lodging a petition supported by affidavits from two “householders” to the effect that he did not have property to the value of more than five hundred dollars, his “wearing apparel and the subject-matter of the proceeding only excepted”³. No fee was payable by a pauper to his counsel or solicitor, but costs recovered from the other side could be taxed by the Registrar and paid as fees to such counsel or solicitor⁴.

The Supreme Court had extensive powers to require defendants to give security for claims, whether for liquidated sums or for damages at large. Under Order XXVI of the Code, headed “Arrest and Attachment Before Judgment”, the court was

³ Ord. XXI v.1(2). Note: Aaron Salomon who gave his name to the iconoclastic case *Salomon v. Salomon & Co. Ltd* [1897] AC 22 – giving rise to group companies in today’s business world – appeared in the House of Lords as a pauper.

⁴See Ord. XXI r.5(2): A form of contingency fee sanctioned by the Code.

empowered to issue a warrant to the bailiff to bring the defendant before a Judge to show cause why he should not give security for the plaintiff's claim: And to keep the defendant under detention until security was provided. These provisions, more or less intact, later became Order 44A of the Rules of the Supreme Court: Stoutly defended by Blair-Kerr SPJ in *Lincoln International Ltd v. Seymour Feldstein* [1973] HKLR 299 at 318. The world, said the learned senior Puisue Judge, was "shrinking", and "the jumbo jet to San Francisco" was a much more effective way of evading one's creditors than "the night boat to Canton"⁵. He thought that these provisions for security, whilst opposed by the "over-sensitive minority in our midst to whom such catch phrases as 'the liberty of the subject' meant so much", were nevertheless much valued by the business community of Hong Kong. The arrest and detention of "absconding defendants" has now gone from the statute book, but the power to prohibit a party from leaving the jurisdiction before judgment remains.⁶

In the 1960s junior barristers were often briefed to appear in the Tenancy Tribunal on what were called 'exemption cases'. These were cases where owners of buildings erected prior to World War II sought exemption from the provisions of the Landlord and Tenant Ordinance, Cap. 255, which gave security of tenure to sitting

⁵ This was an allusion to Sir Francis Piggott CJ's judgment in *Sun Ming Shan v. Movat* [1910] 5 HKLR 216 where, at 218, he described the provision of the code as "a barbarous practice, a relic of the dim ages of jurisprudence, only preserved in the Colony on account of an unfortunate habit among Chinese defendants of taking the night boat to Canton when litigation is pending against them".

⁶ See s. 21B(1) of the High Court Ordinance, Cap. 4 and Ord. 44A of the RHC.

tenants, to enable them to redevelop the sites. In the vast majority of cases, by the time the barrister appeared at the Tribunal's door, the question of compensation for the tenants had been settled between the clerks/interpreters on both sides. The presence of barristers was a form of insurance in case things went wrong at the last minute. No intellectual challenge was involved in these briefs.

The 1960s in Hong Kong were uncertain times. Across the border there was famine and unrest caused by the failure of the Great Leap Forward policy of the Central government. Bank failures in Hong Kong in 1965 were followed by riots in 1966 and 1967. A not-infrequent brief to young barristers was one to appear before a Puisne Judge for the discharge of imprisoned debtors under Order 17 rule 75 of the Code. These applications seldom succeeded as the applicant was required under the rules to give a full account of "all property of whatever nature" belonging to him which then became liable to attachment by his creditors. Under Order 17 r. 70 the maximum period of imprisonment was one year.

I became a Queen's Counsel in the year 1970; more or less coinciding with the establishment of the Law Department at Hong Kong University. The department was lodged then in the old Police quarters along Caine Road in the Mid-Levels. Among the young law teachers who staffed the new department was John

Rear who had previous experience of law publishing in England. And so it was that the Hong Kong Law Journal was born. I was privileged to serve as its Editor-in-chief from the beginning for 22 years, until my appointment to the Court of Appeal in 1992. Through the glass darkly we progressed. In good times and in bad we never faltered. Every issue came out as scheduled. Thus it has been ever since.

Our footprints may fade in the sand. The Hong Kong Law Journal will leave an indelible mark on the legal history of Hong Kong for all time. I congratulate the Editorial Board and everyone whose name appears on the title page for their fine efforts.

Hon. Mr Justice Litton

GBM, CBE, Non-Permanent Judge, Court of Final Appeal.