Bar Association Review

N.S. Vol. 1. December 1981

1981 — 1982

BAR COUNCIL

Ashton Chase	—	**President**
Doodnauth Singh	—	**Vice President**
Lloyd Joseph	—	**Vice President**
Robin Stoby	—	**Secretary**
Charles Ramson	—	**Asst. Secretary**
Clarence Hughes	—	**Treasurer**
B. O. Adams, S.C.	—	**Member**
Benjamin Gibson	—	"
Ayube McDoom	—	"
Ralph Ramkarran	—	"
Lalta Ramgopal	—	"
Sam Shury	—	"

Returned at Elections held on April 24, 1981

Auditor

C.L. Walters

EDITORIAL BOARD

C.W. Hamilton — Convenor/Editor

David DeCaries

C.M.L. John

L. Ramgopal

Miss. C. Luckhoo

with Mr. Mahendra Ramgopal as its Secretary; and Ashton Chase, President G.B.A. (ex officio).

INTRODUCTION

For too long the Guyana Bar has been without a publication of its own.

Clause 3 (e) of the objects of the Guyana Bar Association requires us **"to sponsor lectures and discussions and print and publish periodicals or other documents on any aspect of the law."**

The law is a living thing. The development of the law including its reform, the thirst for knowledge and the critical examination of the law can hardly proceed satisfactorily without a vibrant publication by legal practitioners themselves.

In this effort to carry out one of our objects, all legal practitioners are invited to make a contribution. I congratulate those who have made the initial contributions and hope that this publication will inspire others to do likewise or even better. It is a burden which we must all share. Our intellectual horizons must be expanded and what better way there can be than by articulating our thoughts and views in print.

Let me hope this will not be a mushroom effort. Lawyers must be capable of greater discipline than that. We have named this effort 'BAR', and just as a practising bar will endure so long as there is rule of law, I trust this BAR will survive the vicissitudes of the future and remain serviceable and in the best interests of the practising bar for the forseeable future.

May the pleasure be yours.

Ashton Chase
President
Guyana Bar Association.

BAR ASSOCIATION REVIEW

CONTENTS

Editorial

I. K. M. GEORGE — NEW CHIEF JUSTICE

Notwithstanding the eloquent expressions of welcome and congratulation accorded the Hon. Justice Kenneth George on a massive Full Court occasion last month by the eminent President of the Guyana Bar Association, Mr. Ashton Chase, the BAR (Bar Association Review) feels it would be remiss in its duty if, in this, its inaugural publication, it did not say its own words of welcome and felicitation to the new head of the High Court of the Supreme Court of Judicature.

Justice George joins a new line — a Guyanese line — of judges who have moved up from the position of Puisne Judge to what until the creation of the Chancellorship and the Guyana Court of Appeal, (now, and since approximately a decade ago the final appellate Court of the territory) was the highest office of the judiciary.

Mr. Chase in his speech of welcome listed an almost frightening compendium of responsibilities, woes, deficiencies and objectives for the new Chief Justice's attention, consideration and implementation, but the Honourable K. M. George is no timorous soul to be facilely terrorised or even overawed, and he is bound to be comforted by the fact that the requirement could never be that he achieves single-handedly, or cleans the Augean stables unaidedly, but rather with the assistance, initiative and co-operation of all members of the Bench — of whatever level — and Bar, and indeed all who are engaged in the fundamental task of the administration of justice and the effectuation and maintenance of law and order, and the vindication and enforcement of constitutional rights.

The President of the Bar Association was at pains to point out that many of the problems that the new Chief Justice will face — as his predecessors have faced — are "societal" problems, problems that inhere in a society in a state of development, of transition and even in a state of crisis. Much of what has just been said may be categorised as cliche or truism, but it has never been truer that the part cannot be greater than the whole, and that only combined action by the relevant authorities, functionaries and others of their ilk, tending to get hold of indigenous difficulties by the scruffs of their necks can modify or bring success to long-standing problems, paving the way for systematic resolution and progress.

The Honourable Justice George has come up in a manner of speaking, the hard way, He has been private practitioner, Legal Adviser, State (formerly Crown) Counsel, Magistrate, Registrar, High Court Judge and more recently Justice of Appeal. This adds up to a wealth of experience. As a student and scholar of the law he merits the highest esteem, and we look forward to decisions by him as Chief Justice and an ex-officio member of the Court of Appeal that are redolent of eminence and erudition in his best personal tradition and that of the pertinent tribunals. To all this he will add the approachability for which he has become well-known, and the robust judicial aggressiveness which, at its best, may indicate that he does not suffer fools gladly.

In circumstances and times of commendation and congratulation such as this, it is prudent not to overconcentrate on the achiever to the exclusion of his (her) forebears. Mr. George ascends the Chief Justiceship from a background of humility, and has acceeded to the top by the ambitions of his antecedents and his own commitment and exertions.

He belongs to the grass-roots breed of our Guyanese and Caribbean evolution and revolution who has grasped with both hands the historical opportunities to rise tall above the surrounting shrubbery.

Like other departments of State the judiciary is burgeoning with this bread.

There are more where those of this breed came from, but we cannot let them get away from us in the migration stampede that is becoming more and more disconcerting.

II. CONTROVERSIAL LECTURE BY CHANCELLOR CRANE

The point about the second lecture in the Guyana Bar Association series is that only a handful of readers — professional and lay — have had the opportunity of seeing, or reading, let alone studying, it in context. The topic was "The Functions of the Courts in Contemporary Guyana", and was delivered by the Chancellor of the Judiciary, the Honourable Victor Emmanuel Crane, O.R., C.C.H., LL.B.

The expletive, "controversial", tends to be tacked, in these situations, to expressions of opinion which vary from some predetermined or accustomed norm, and with

which persons or groups of persons, professional, or non-professional are unfamiliar. Not many people, after all (or perhaps one should say, swimmers) like swimming against the tide. But in a strictly metaphorical sense, swimming against the tide is the very **raison d'etre** of change. Properly marshalled, the propounding of unfamliar, but relevant opinions is a manifestation of courage. Even if considered wrong by some, the criteria are honesty and an applicable intellectuality.

It is against this backdrop that the lecture by the Chancellor must be judged. However, it is essential that the speech in its entirety is read in order that fair criticism may be levelled and valid views formed. It is regretted, therefore, that Mr. Crane's speech cannot, for reasons of space, be published **verbatim** in this issue.

As a lecture it cannot be faulted for its relevancy, its range, or the arguments it is bound (or ought) to generate. The Chancellor was dealing with a difficult subject in difficult times. These are times of transition, of strange phraseology, of imprecise nomenclature, of ideological ambiguity and political dominance (a word other than dominance has been studiously avoided). Mr. Crane's address was directed mainly to lawyers, but the non-legal public are equal consumers. Mostly, matters of law and of politics are quintessentially the concern of the public.

The Honourable Chancellor quoted (or referred) profusely and importantly from the new Constitution which is the primal law of the land, and in this connection he could hardly escape the frequent use of the substantives and epithets, "socialism" and "socialist". These are still words that put the backs of lawyers, and non-lawyers alike, up. Lawyers, paradoxically, are the most traditional and conventional of professional persons.

Much of what is said is unexceptionable, but the puristic and the unpuristic alike will be perplexed by what are apparent contradictions, and if there is one organ of the State that needs to know what it is about, it is the Judiciary. After all, the Chancellor himself, quoting Britain's Lord Denning, said, (on p. 12 of his typescript, "We regard the judges as standing between the individual and the state, protecting the individual from any freedom which is not justified by law".

Earlier, the Chancellor had said, "A judge must always have the courage of his convictions irrespective of whether he is right or wrong in what he decides. It sometimes requires a great deal of courage to give judgement

in some criminal cases involving the public interest, and in civil cases between the State and the subject, involving the liability of the State in regard to the rights and interests of the citizen, also in cases involving the invocation by the Court of its control and jurisdiction over the Executive in the exercise of ministerial or statutory powers or functions . . ." (What, if one may ask, are the facts before the court, what are the law, and the applicable rules of evidence?) The Chancellor goes on, "unlike its counterpart in England, **the Judiciary is a constitutional arm of State apparatus** and is guided in the discharge of its functions by the principles and bases of the political and socio-economic system of 'The Organic Law'."

The learned Chancellor continued, "There is no longer any theory as there is in England, about a judge in a co-operative socialist State 'standing between the State and the citizen' because, under socialism, it cannot be envisaged that the State and the citizen can never be in conflict; they ought never to be if they are pursuing the same goals towards socialist democracy and co-operation . . .". Really !

Students, and lawyers, academic and professional, will find the comments of the Chancellor on case law and the doctrine of precedent as they relate to Guyanese and Commonwealth Caribbean and other Commonwealth jurisdictions interesting; more than that, worthy of the most infinitesimal scrutiny. There is much that the profession and even members of the Judiciary other than the Chancellor will agree with, and much with which they will almost certainly disagree. Moreover, there may be much that they do not even understand. The address was, without doubt, a scholarly one. References on p. 10 to Herodotus, The Greeks, Shakespeare, Goethe, Chekho and Moliere, to Dickens, and Gilbert and Sullivan are highly meritorious.

But in its content, spectrums and equivocations, the Chancellor's address needs to be debated. The Bar Association along with academic lawyers and other qualified persons ought to undertake this exercise.

The question, among other questions, of how independent can be the Judiciary in a "socialist" society is of more than passing importance.

C.W.H.

A Problem in Immovable Property in Guyana – The Application of Roman Dutch Law

By DAVID DE CAIRES

If a wife has contributed to the purchase of a property, title to which is in the name of her husband, does she have an interest in that property recognised by law which she can assert against a mortgagee who has taken a mortgage on the property from the husband as security for a loan to him? The answer to this question depends on whether equitable interests in land exist in Guyana and, if so, whether the wife would lose her rights if she failed to oppose the mortgage.

When the Civil Law Ordinance was passed in 1916 to introduce the English common law, it was stated that all questions relating to immovable property should be construed and enforced according to the principles of the common law of England applicable to personal property but the law relating to mortgages and oppositions was retained as well as the existing system of conveyancing. It was also stated that land may only be held in full ownership. I will start by considering the relevant provisions of the Civil Law Ordinance in some detail and will give my interpretation of them. I will then refer to the case law. Finally, I will give my opinion on the present state of the law.

Though the Civil Law Ordinance (now Act) was passed 64 years ago it is no exaggeration to say that the judiciary as a whole and the legal profession have never really come to terms with it. Lawyers trained in the English law have naturally not been keen to confront another system with which they are not familiar and there has been a tendency, on some occasions, to apply English law willy nilly, despite the provisions of the Act. The tendency does not decrease as time passes. But for Dr. Ramsahoye's book "The Development of Land law in British Guiana" published in 1966 the plight of practitioners today would be severe indeed if not hopeless.

ARTICLES OF CAPITULATION

Up to 1916 Roman Dutch Law applied in British Guiana as a result of the provision in the Articles of Capitulation in 1803, that "the laws and wages of the Colony shall remain in force and be respected" and as a result of

the rule of constitutional law laid down by Chief Justice Mansfield in Campbell v Hall (1774) 1 Cowper 204. Though there was some doubt in legal circles about the capacity to change the legal system without the approval of the Dutch because of the treaty obligations, the pressures created by the difficulties faced by lawyers trained in the English legal system in administering another system were such that in 1916 the Civil Law of British Guiana Ordinance was passed to "codify certain portions of the Roman Dutch Law of the Colony and in other matters to substitute the English Common Law and Principles of Equity, along with certain English Statutory Provisions for the Roman Dutch Law."

Section 2, 3 and 12 (now 11) of that Ordinance are referred to.*

Section 50 of the Trustee Act 1893 was next referred to.*

As indicated above, I will attempt to interpret those provisions without reference to the decided cases. I will then consider the main cases chronologically. Though this approach is unusual I believe it is justified by the inconsistency that exists in the decisions. An attempt to view the act unencumbered by these decisions, so to speak, may give us some prospective with which to approach the cases.

ORDINANCE

The Ordinance enacts:—

a) That the law relating to fideicommissa, trusts, movable and immovable property shall cease to be Roman Dutch Law.

b) That the common law of the colony shall be the common law of England at that date including "the doctrines of equity."

c) That the English common law of real property shall not apply to immovable property in Guyana and all questions relating thereto shall be determined according to the principles of the common law of England applicable to personal property provided that immovable property may be held in full ownership which shall be the only ownership recognised by the common law and the title to property shall not vest in any purchaser or other transferee unless and until the transfer has been registered in accordance with any Ordinance or Rules now or hereafter dealing with such registration.

The first comment that may be made is that there

was never a Roman Dutch Law of trusts properly so called. See, for example, Morice on "English and Roman Dutch Law" 5th., edition pp. 324 ff. for the difference between the trust and the fideicommissum which was the nearest comparable institution known to the Roman Dutch Law. It is true, however, that before 1917 certain aspects of the law of trusts had been accepted into our law by judicial decision. Not surprisingly, Judges trained in the English law had begun to introduce and use English equitable concepts. Dr. Ramsahoye gives a description of this process in his book at pp 275 ff. Yet as late as 1920 Dalton CJ, the Judge that was most familiar with the Ordinance, the Roman Dutch Law and the problems of the transition (see his well known book "The Civil Law of British Guiana") could make the following statement in re Young: in re French 1920 LRBG p 133 at p. 135:

> "There is no justification for the inference that the English law of trusts has, either here, prior to January 1st, 1917, or anywhere else where Roman Dutch Law is the common law, in any way been grafted on to Roman Dutch Law, see McDonald's Trustees v. Estate Kemp (1914) C.P.D. 1084 and (1915) FT.D 491."

The Ordinance, therefore, starts with a questionable assumption when it states that the Roman Dutch Law of trusts shall no longer apply. However, that is now only of academic importance. What is important is whether the English law of trusts was effectively introduced by the Ordinance and to what extent it is compatible with other provisions of the Ordinance and our Statute Law. On the face of it, the law of trusts was clearly introduced. The doctrines of equity which were expressly applied by s. 3 (2) include the whole apparatus of trusts which was one of the main creations or developments of the law of equity. In addition, the recognition of equitable interests in property is also originally part of the doctrines of equity and not a part of the law of property as such though equitable interests are now clearly recognised by the law of Property Act 1925. Legal doubt still exists as to the nature of such interests which started out as mere rights in personam but have graduated into a kind of hybrid position (see Snell's Principles of Equity 23rd., edition pp 26 ff.).

RAMSAHOYE

Dr. Ramsahoye suggests in his book that the latter portion of subsection 3 (2) namely "and the Supreme Court shall administer the doctrines of equity in the same

manner as the High Court of Justice administers them" implies that only equitable remedies, as distinct from equitable rights were being considered as there would be no other reason for confining the administration of equitable doctrines to the Supreme Court. It would seem that this proposition cannot be sustained. In the first place, the basic objective of the Act was to introduce the English common law as a whole. Parts of that law e.g. criminal procedure and the laws of evidence had been introduced piecemeal prior to 1917. The idea in 1916 was to tidy up and bring in the entire common law subject only to certain provisos concerning immovable property. In addition. Dr. Ramsahoye himself quotes an article of Professor Lee to the effect that "whenever the common law penetrates, it carries with it its younger sister equity along with the whole apparatus of trusts and the distinction of legal and equitable ownership, things utterly incomprehensible to the civilian mind." It may even be, therefore, that the law of trusts as part of the doctrines of equity would have been brought in with introduction of English common law even without express reference to those doctrines.

The real answer, though, is that the reference to the Supreme Court must be seen in the context of the Judicature Act 1873 which had amalgamated all the Superior Courts in England (Queen's Bench, Exchequer, Common Pleas, Chancery — which became the High Court) and the Court of Appeal into one Supreme Court of Judicature which was directed to administer both law and equity. The inferior courts had no jurisdiction in equity except such as conferred by statute (see the County Courts Act 1934). Similarly, our inferior courts have no jurisdiction in equity — see the Summary Jurisdiction (Petty Debt) Act Chapter 7:01 section 3. Seen in that context, the legislature was merely attempting to equate the equity jurisdiction of our Supreme Court with that of the High Court in England. It was not limiting the application of the doctrines of equity.

DOCTRINES OF EQUITY

Do the "doctrines of equity" include statutory modifications of equitable doctrine? Is Maraj v Bhuklal 1925 LRBG p. 83 the equitable remedies of rectification and specific performance permitted by section 24 of the Judicature Act 1873 were granted to the plaintiff. Dr. Ramsahoye argues that this is only authority for the view that where an English statute relates to the actual administration of equity it is applicable and is authority for nothing more than that. He states at p 281 of his book "In

any event the variation of equitable doctrine by statute takes the variation out of the doctrines of equity into the category of statute law and for that reason the Civil Law Ordinance cannot apply to the variation. This argument is supported by the observations of Prof. Hanbury who has observed that "in the field of real property, the process of fusion has been aided by the legislature, who have welded legal and equitable doctrines together into a body of statue law." The effect of the ommission to enact specific provisions in the English statutes is that these would not generally apply. Indeed, there is no enactment in British Guiana similar to that in England providing that where the rules of law and the rules of equity are in conflict, the rules of equity are to prevail."

The issue is a complex one and must be decided, in the final analysis, by an interpretation of the wording of s. 3 (2) of our Act. However, it is not crucial to the problem here as equitable interests in land were clearly recognised by the courts in England before the Law of Property Act 1925 which "welded legal and equitable doctrines together into a body of statute law."

It seems clear, therefore, that the doctrines of equity apply in Guyana. It can be noted here that the doctrine of implied for resulting trusts supplies to pure personalty as well as land (see Snell p. 125 and Re Scottish Equitable Life Assurance Society 1902 1 Ch 282 and is not a doctrine of the English law of real property but a doctrine of Equity. It is therefore not excluded by s. 3 (3) of the Act.

It is my opinion, however, that though because of the application of the doctrines of equity equitable interests in land can, prima facie, exist, they are incompatible with certain other provisions of the Civil Law Ordinance and with the provisions of the Deeds Registry Ordinance and the system of conveyancing and land registration that has prevailed in Guyana prior to and since 1917 and should, therefore, in principle and based on a proper interpretation of the Civil Law Act not be recognised. Unfortunately, this view, as we shall see later, has not been upheld by the courts which have repeatedly recognised and enforced equitable interests in land.

ROMAN DUTCH LAW

Section 3 (4) of the Civil Law Ordinance stated that questions relating to immovable property shall be adjudged "as far as possible" according to the principles of the common law of England applicable to personal pro-

perty provided that (a) immovable property may only be held in full ownership (b) the law and practice relating to conventional mortages and the right of opposition shall be the law practice "now administered in those matters by the Supreme Court of British Guiana" i.e. Roman Dutch Law and (c) title shall not vest in any transferee until the transfer has been registered in accordance with any Ordinance or Rules now or hereafter dealing with such registration.

Prior to 1917 there had been a system of advertisement and registration of title. "By a special law of the colony all mortgages, transports, conveyances or encumberances of real estate must be registered at the secretary's office in the colony, and previously advertised in the Official Gazette three times at stated intervals ...." (see Dalton's "Civil Law of British Guiana" p 16). The Deeds Registry Ordinance was passed in 1919 to adopt, amend and reinforce that system. Sections 12, 17, 18, 22, 28, 29 and 32 of that Ordinance are referred to.*

The term "full ownership" is discussed by Professor Lee in his "Introduction to Roman Dutch Law" 5th., edition at pp. 121-2 (and see too Van Leeuwen's Roman Dutch Law Vol. 1 pp. 154-5). He states that full ownership means that one person has the right to possess, use and enjoy and alienate. If these rights are divided between more than one person, that is if any person has by contract or otherwise acquired any of these rights, the ownership is restricted. In English law, two kinds of ownership may co-exist concurrently namely legal and equitable ownership.

Taken together, the concept of full ownership and the provisions of the Deeds Registry Ordinance, which reinforced the system of registration that previously existed suggest that equitable interests in land are incompatible with our system of title and conveyancing. The scheme of the Ordinance is seriously weakened if people holding unregistered equitable interests can establish them against a mortgagee.

I will now consider some of the decided cases in chronological order and will then offer a conclusion on the present state of the law. In only a few of the decisions has there been any systematic attempt to construe the Civil Law Ordinance and English law has sometimes been applied erroneously. One can sympathise with, if not excuse, the Judges. The Civil Law Ordinance is a flawed work torn between the desire to introduce the new law and to preserve existing rights. Many of its key provisions are

not clearly expressed. It has variously been described as "unprecedented" and "a singular legislative experiment".

DRAFTSMEN

The problem that faced the draftsmen, and which faces any conqueror, I suppose, is that certain types of right in one system are unknown in the other and that the introduction of a completely new system creates problems of transition. On the other hand, the retention of the old system, as happened here for over a century, means that the new administrators, businessmen and judges are dealing with a system of law with which they are unfamiliar and which may not even be properly available in their own language. Small wonder if accretions from the new system creep in. When the transition lasts as long as it has here a kind of syncretic or hybrid system develops which is a lawyer's nightmare and tends to be imprecise. On balance, one might surmise, it is always better in the long run to do away completely with the old system, after a transitional period, and to adopt a new system. That this was not done here with out land law is to be regretted and accounts for the present confusion. It is no doubt partly due to the fact that the Roman Dutch system of title and conveyancing was considered far simpler than the English system of land tenure and coveyancing and the mercantile community had become accustomed to it. Nevertheless, it would have been infinitely superior if our own land law had been drafted if the English system had been considered undesirable. The introduction of the English law of personal property and the continued engrafting of English concepts is anomalous and unsatisfactory.

I will now refer to some of the case law on the subject. I have included quite a number of cases to give some idea of how the courts have approached the matter. I have also included a few pre 1917 cases obtained from Dr. Ramsahoye's book to give an indication of the way that English law had been fused with or imposed upon Roman-Dutch law before the Civil Law Ordinance.

PRE 1917

Muller v Elliott Beaumont CJ and Beete J. 1864 LRBG OS II p. 238

Execution had been levied on ⅔, shares in land which had been bought by 50 subscribers but title in name of 3. These 3 tried to sell remaining 1/3rd. One subscriber opposed on basis that holders of title were

trustees for himself and others. Court upheld opposition. As Dr. Ramsahoye points out, according to Roman Dutch Law the subscribers would have had, at most, a mere contract with the holders of title. Here we get the engrafting of trust concepts into our law 50 years before the Civil Law Act.

Vanuvel v Clarkson Beaumont CJ, Crosby J. Bette J 1866 — unreported — see Minutes of Supreme Court March — December 1866

Judges clearly indicated they would recognise equitable interests in land and used concepts like legal owner, equitable owner and bare trustee.

Napoleon v Higgins 1867 — unreported — see Minutes of Supreme Court January — June 1867

Title holder who acquired legal interest at execution sale under arrangement with subscribers deemed a trustee.

Re: Estate of Douglas Ex Parte Antonio Frank (sub nom. GIP-LI-KING v Administrator General 1884 Goldney ACJ and Northcote Ag. J — unreported

Held that the effect of an agreement of sale was to vest in the purchaser a beneficial interest in equity, the Vendor being a trustee for the purchaser. When vendor became insolvent Administrator General ordered to pass transport to purchaser. It appears that English authorities were freely quoted.

Re Andrews, Ex Parte The Attorney General 1901 Bovell A.C.J. — reported Official Gazette 28.9.1901 p 737

In direct contrast to foregoing decision the court held that a contract of sale conferred no more than the right to compel the Vendor to complete. This right continued if the Vendor became insolvent provided the rights of the Vendor's creditors are not interfered with. The Court remarked that the decision in re Douglas was based on the assumption that the law in the colony with respect to sales of land was the same as in England. It is interesting that within a span of 20 years two courts can display such widely different attitudes and awareness of the legal position.

St. Kitts v Massiah 1901 Lucie Smith J. LJ 30.12.1902

A bought property from B, wife of C. B married to C by antenuptial contract and property purported to be gift by C to B in consideration of marriage. C had bought

property from D but had not got transport. It was levied on for C8s debts. A opposed. The Judge concluded that the Plaintiff (A) who stood in the place of the co-defendant's wife was entitled to oppose.

Dalton comments on this decision:

"It does not appear in this case if the court ever considered the fact that if A's title was ever to be completed the title of the husband, C, must first be completed by transport. The wife could not pass transport to A until she had herself received transport from her husband C who was himself to get transport. There is no doubt that on the transport from C to his wife being advertised opportunity would be given for claimants to enter opposition."

Paraboo v Mc Neil 1913 LJ 30.12. 1913

Court allowed opposition proceedings against holder of legal title who sought to convey land to someone other than previous purchaser. Equitable interest of purchaser recognised.

Post 1917

Gangadia v Barracot 1919 Dalton J LRBG 1919 p 216

All the decisions of Dalton J. display a full awareness of the Roman-Dutch inheritance and the Civil Law Act. If it were possible to isolate his decisions the position would be much clearer. In this case, he held that a purchaser cannot oppose an execution sale at the instance of a judgement creditor of the defendant. Under the old R.D. law purchase of land not completed by transport did not stop a creditor levying. Civil Law Ordinance had not changed this. Section 3 (4) (c) provides that title shall not vest until transfer is registered. Rules in force for record of transfer by Registrar contained in part II Order II Rules of Court 1900. They are the ordinary transport rules in force under the common law when Persaud v Narvole & anor. L.J. 3.3.1903 and Junkie v Gangadin L.J. 4.11.1906 were decided. Though the old common law had been abrogated it was still necessary for a sale to be completed by transport to defeat a creditor.

Gillis & Ors. v Seequar 1920 Charles Major C.J. LRBG 1920 p 35

Held that "shareholders" in land could oppose execution sale. Case settled on appeal after counsel for appellant cited Gangadia v Barracot (page 8) and other cases.

Re Young in Re French 1920 Dalton A.C.J. LRBG 1920 p 133

The Judge remarked, obiter, that though the term trustee is frequently used it is incorrect. "This is no justification for the inference that the English law of trusts has, either here, prior to 1917 or anywhere else where R.D. law is the common law in any way been grafted on to R.D. law. see Mc Donald's Trustee v Estate Kemp (1914) C.P.D. 1084 and (1915) A.D. 491."

Re Sampson — Ex Parte Official Receiver 1922 Dalton J. LRBG 1922 p 133

The Judge held that a deposit of title deeds as security for a loan does not create an equitable mortgage. This is incompatible with the Deeds Registry Act which required registration of mortgages. He quoted de Villers CJ in Kellar's Trustee v Edmeades 3. S.C. 25 and refers to the difference between the English law of real property and R.D. law and points out that to follow English law "would be repugnant to the general policy of the law which, for the information and protection of creditors requires that a deed creating any real right, whether proprietary or hypothecary, in respect of land shall be executed coram lege loci, and which regards registration in the case of immovables as an equivalent for delivery in the case of movables." The Judge points out in his decision that he was involved in the drafting of the Deeds Registry Ordinance and a proposal for creation of equitable mortgages by deposit of title deeds was expressly rejected.

Resaul Maraj v Bhuklal 1925 Barkeley Ag. C.J. LRBG 1925 p 83

Held that the provisions of section 24 of the Judicature Act which enable Judges to grant "all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim .... so that, as far as possible, all matters in controversy .... may be determined ...." have been adopted by S. 3 (2) of the Civil Law Ordinance as part of the doctrines of equity and Court has power to decree specific performance of a written contract with a parol variation. See comments on this decision in the foregoing text.

Parikhan Rai v La Penitence Estates Co. 1926 Appeal Court Furness CJ, de Freitas CJ, Walton acting CJ, LRBG 1926 p 142

Covenant in transport binding proprietor A to pay drainage charges. A sold to C but did not pass transport.

Held "proprietor" means owner by transport — refers to Van de Spuy v Maddison 1877 Buch 97 "and other South African cases."

Obermuller v Obermuller 1927 Douglas J. LRBG 1927 p 71

Defendant held to be trustee of land for plaintiff. Judge states that ideas derived from the English law of trusts have by practice and judicial decisions been engrafted in R.D. law. The Doctrines of equity can be applied to transactions relating to immovable property. Limitation period does not apply to an action to recover land from a trustee under an express trust, may be bar in constructive trust. Trustee cannot rely on s. 3 (4) (e) of Civil Law Act — absence of writing.

Khan v Maraj 1930 Savary J. LRBG 1930 p 9

Held that a person in possession of land for 12 years does not lose his rights if he fails to oppose a transport of which he does not have actual notice. Judge refers to decision in 1882 of Chalmers CJ in petition of Van Kinshot who adopted passages from Van Leeuwan, Matthaeus and Burge. Burge's Commentaries on Colonial and Foreign law Volume II p 581 states: There are some cases in which the right is preserved notwithstanding there has been no opposition in the sale interposed. Thus it need not be interposed where the right of the third person is manifest. in oculis omnium incurrit; or if the right be established by the general law and known to attach to the property. Neither can the omission to make his opposition prejudice the person who is in actual possession of the property on his own behalf."

Mangru v Kalla 1936 de Freitas J (Ag) LRBG 1931-7 p 417

Judge said:

1) No transfer of land unless perfected by transport
2) Doctrines of equity apply subject to sections 12 and 21 of Deeds Registry Ordinance which retain old law.
3) Purchaser who abandoned opposition to execution sale cannot seek injunction.
4) Executor assented to devise when he advertised transport to two beneficiaries. Even if he had not assented he would be holding property on trust for himself and other beneficiary and his half could be levied on.

Coltress v Coltress 1937 Verity J. LRBG 1931-7 p 523

Judge held that a wife held property on trust for her husband and ordered her to transport it to him. It is

worth quoting in full his discussion of the legal position which illustrates clearly the nebulous and ambivalent attitude of the courts in accepting practices which appear to be contrary to the law on the basis that they are prevalent.

British Colonial Film Exchange Ltd. v S.S. de Freitas 1938 Verity J. LRBG 1938 p 33

Held that the doctrines of equity apply here in so far as they do not operate to make effective English law of real property or any incident attached exclusively to land tenure or to estates in land in England, such as the creation of equitable estates in land. Therefore relief from forfeiture of lease could be granted. Equitity acts in personam and does not proceed on a distinction between real and personal estate "as is sometimes erroneously supposed" -- see story of Equity. I would comment here that in my opinion. as indicated above, equitable interests are not, originally at least, part of the law of English real property but are a creation of equity. The Judge seems not to have realised that in the Coltress case he had in fact enforced an equitable estate in land in favour of the husband.

Madray v Sealey 1940 Camacho C.J. LRBG 1940 p 124

Transport by owner of 1st. depth of 2nd depth of Crown Land which was owned by Crown did not bind Crown. Crown was deemed to be in possession and did not have actual notice as advertisement did not refer to 2nd depth. It is not clear whether Crown would have been held to have had notice if advertisement referred to 2nd depth even if there was no evidence of actual notice.

Sooknanan v Surichery 1942 Duke J. (ag) LRBG 1942 p 280

Court upheld opposition by cestui que trust to conveyance of property bought for him. The full title conferred. by S. 21 Deeds Registry Ordinance does not extinguish trusts which exist but enures for cestui que trust. When Roman Dutch Law was the common law here the designation of trustees was familiar in legal practice here. Proviso (d) to S. 3 of the Civil Law Ordinance requiring writing does not apply where cestui que trust has been in possession of land from inception of trust. Laches inapplicable where person in possession.

This judicial definition of "full" ownership seems to ignore the definitions given by Lee and others and to be unacceptable. No authorities are quoted, the Judge merely makes a bare statement which is in conflict with the

text books. It is worth noting that this was an implied not an express trust.

Even if express trusts are recognised because of the application of equitable principles, should an implied trust be recognised in the light of our Ordinance?

Khan v Nisa and Rahaman 1946 Duke J. (ag.) LRBG 1946 p 146

Declaration of Trust made in favour of plaintiff against defendant though no written document.

Greenheart Producers Ltd. v Sutton 1951 Worley CJ LRBG 1951 p 72

Plaintiff claimed declaration that it was beneficial owner of licence and permission to cut wood owned by Sutton and sold to plaintiff but not transferred in accordance with Crown Lands Reg. 2nd defendant had levied. Held title had not vested in plaintiff until transfer passed. English common law and equity apply unless prevented by statute law of Guyana as in this case. Therefore, levy could proceed and case dismissed.

Ishriprasad v Jaikaran 1951 Ward J. LRBG 1951 p 86

In the worst example of its type. the judge referred entirely to English authorities and held that an option to purchase land given in a lease confers on the lease an equitable interest in the land. He further held that such an interest does not run with the land and, on the evidence, there was no valid exercise of the option.

There was no reference to R.D. law though Mr. S.L. Van B. Stafford appeared for the plaintiff.

Bacchus v Sobers 1952 Stoby J. LRBG 1952 p 132

Plaintiff bought property in name of lady friend. No presumption of advancement. Judge held there was a resulting trust for the plaintiff though no writing and though we do not have the equivalent of S. 8 of the statute of Frauds.

Dalton states at p 22 of his book that our proviso (e) to s. 3 (4) adapts the Statute of Frauds which he sets out in full including S. 8. I do not believe this is correct and proviso (e) must be interpreted on its own merits. It is interesting to note that in England the position was made quite clear by section 8 that writing was not needed in the case of implied trusts. If we think for a minute this has to be so as by definition there can never be any writing. Our proviso (e) certainly does not bring out this distinction. Stoby J. did not accept that our proviso had ef-

fectively adapted S. 8 but held nevertheless that writing was not necessary.

Seeram Singh v Darian Singh 1955 Phillips J. LRBG 1955 p 62

Judge held plaintiff had "equitable interest" in land as tenant at will which had been determined by implication. He therefore had no right to oppose.

Madray v Cameron 1956 West Indies Court of Appeal LRBG 1956 p 8

Court held that T deceased held 2 roods in trust for plaintiff and plaintiff could oppose sale by executor of T's estate.

Simpson v Yhap 1960 Fraser J. LRBG 1960 p 326

The Judge held that for extinction of possessory rights, person in possession must have had actual notice of conveyance. A mortgage in Guyana is not a conveyance as no property passes so the principle of actual notice does not arise where the land mortgaged is subject to a possessory interest, A mortgage does not affect the claims of a person with a possessory interest even if he had notice; but if such a person fails to oppose he might later be met with a plea of acquiescence.

It is not entirely clear from the Judgement whether the Judge would limit this reasoning only to persons having a possessory interest in land or might have been willing to extend it to persons holding "equitable interests." Though a mortgage in Guyana is not a conveyance as in England (a lease with an equity of redemption) nevertheless it can be opposed and it seems dangerous to hold that certain types of persons need not oppose even though they have actual notice. This is in conflict with other decisions (not dealing with mortgages). The Judge cited no authorities in support of his decision on this point.

Joseph v Joseph 1960 Federal Supreme Court LRBG 1960 p 392

This was an appeal from Date J. who had held that a wife who had contributed to the purchase of a property had an equitable interest in that property and could oppose a transport by her husband. The question of her interest could be decided when raised in the proper way. The Appeal Court held that the opposition did not fail because the wife had not established the quantum of her interest.

Dias v Cornette 1960 Date J. LRBG 1960 p 215

C agreed to buy land from M. M became insolvent. Official Receiver sold to D. C agreed with D to vacate but did not do so for some time. D sued C for mesne profits. Held that a purchaser of property prior to transport is not the equitable owner as in U.K. and his right could be defeated by an execution creditor. S. 39 (5) of the Insolvency Act clearly supports this. It states "no contract for sale .... shall give preference unless completed by transport."

Kitty and Alexanderville Village Council v Vieira 1961 Luckhoo CJ, LRBG 1961 p 88

Judge held that restrictive convenants as such are not known to our law since they would constitute equitable interests in land whereas only legal interests are recognised; a condition in a transport not to carry on a business is a registered interest and by virtue of S. 23 (1) of the Deeds Registry Ordinance is enforceable by those in whose favour the interest was registered against the transferee and those holding lessor interests under him. The conditions created reciprocal servitudes between individual lot owners where certain conditions applied.

Nisbet v Nisbet 1961 Unreported decision of Luckhoo CJ, referred to by Ramsahoye at p 282 note 45

It seems that in that decision the deserted wife's right to occupy the matrimonial home was recognised sub suentio. Dr. Ramsahoye comments that this can only be a mere equity as it is not based on contract and is not capable of being recognised as an equitable interest.

Mc Garrell v Demerara Co. Ltd. 1962 Federal Supreme Court LRBG 1962 p 292

Court held that immovable property here is governed by the English common law of Chattels real. The Appellants could only be co-owners by transport and there was no evidence of a trust, or of prescription.

The Court give no good reason for applying the law of chattels real as distinct from the law of pure personality. This is indeed one of the problems created by the Civil Law Ordinance when it stated that the law of personal property shall apply.

The present state of the law is, clearly, unsatisfactory. Equitable interests have repeatedly been recognised and enforced in practice despite statements such as those of Luckhoo CJ in the Kitty and Alexanderville Village Council case as recently as 1961. If this issue ever comes to be decided by the Appeal Court there is a line of cases headed by the decisions of Dalton CJ that can be put forward in support of the argument that implied trusts and

equitable interests in land are incompatible with our system of ownership and registration. On the other hand, there are many decisions which would enable the Court to hold that the wife has an equitable interest in the property where she contributed part of the purchase price. It is hard to say which way the Court would go if the case were fully argued but there is a real possibility that the equitable interest would be upheld on the basis of an argument similar to that of Douglas J. in the Obermuller case that ideas derived from the English law of trusts have by practice and judicial decisions been engrafted on to our land law.

Assuming, therefore, that the equitable interest would be upheld, could a wife, if she did not oppose a mortgage by her husband, later establish her rights against a mortgagee or oppose an execution sale at the instance of the mortgagee? If the wife knew of the mortgage and did not oppose, it seems she will be deprived of her rights as against the mortgagee, though not against her husband. It may be possible to distinguish between oppositions to transports and oppositions to mortgages as Fraser J. did in Simpson v Yhap. It is true he was dealing there specifically with a person who had a possessory interest and did not oppose. Yet it is also true, as the Judge pointed out, that in Guyana a mortgage is not a conveyance in the normal sense in that no property passes and it is possible that a case could be made for distinguishing the law of opposition to mortgages from that of opposition to transports. However, I will not examine that in detail here as even if that were so, as Fraser J. himself recognised, the person who failed to oppose despite actual notice could later be met with a plea of acquiescence, or possibly estoppel.

The position is more difficult where the wife did not have actual notice. I have found no authority to the effect that the advertisement in itself is constructive notice and it is submitted that the English equitable doctrine of constructive notice cannot apply here in opposition proceedings in the light of the retention of the old Roman-Dutch law of opposition. Accordingly, on the strength of Madray v Sealey, it would seen that her rights would be preserved. Could she, then, oppose an execution sale at the instance of the mortgage or seek a declaration of ownership which would bind the mortgagee? It seems to me that she could not. In the first place, let us consider briefly the nature of the local mortgage. "Under the Roman-Dutch law a mortgagee had no legal dominium over the property charged to secure the obligation although he had a ius in rem (Ramsahoye p 237). It is clear that mortgagees have always enjoyed a right of preference in respect of their

capital and interest. Dr. Ramsahoye records that the Court of Justice of Demerara and Essequibo decided in 1766 that mortgages are preferent claims and the principles of preference are enshrined in the provisions of the Deeds Registry dealing with execution sales and in the Insolvency Act.

It is true in equity the basic rule is that estates and interests rank according to the order of creation. The wife's right was created before that of the mortgagee. However, the wife's right is an equitable interest whereas the mortgagee has a legal interest. In Cave v Cave (1880) 15 Ch D 639 a trustee used trust funds to buy land in breach of trust and took the conveyance in his brother's name. The brother created a legal mortgage in favour of A and an equitable mortgage in favour of B. Neither A nor B knew of the trust. It was held that A's legal mortgage had priority over the equitable mortgage. Similarly, if equitable principles were applied here the legal mortgage should have priority over the equitable interest of the wife.

However, as the old Roman-Dutch law of mortgages has been expressly retained this would seen to leave no room for the intrusion of equitable principles. The upholding of the equitable interest of a wife against a mortgagee would, in effect, upset the settled expectations of preference and security that have prevailed in the community for over 200 years. It would represent a radical weakening of the Roman-Dutch concept of the mortgage and its advertisement and passing before a Judge or Registrar and I believe a local court would hold that it would be incompatible with our system of mortgages to allow an equitable interest to be upheld in priority to a mortgage. The wife would, of course, retain any rights she may have against her husband.

It is my opinion, therefore, that even if the courts are willing to recognise the equitable interest of the wife, mortgages would be protected from any claim by a wife to an equitable interest in the property mortgaged of which they had no notice at the time of the mortgage. Are they under a duty to enquire about the existence of such interests? I would submit, once again, that as the old Roman-Dutch law of mortgages has been retained equitable doctrines have no place and the mortgagee is entitled to rely on the mortgagor's title or transport and is under no duty to go behind it looking for equitable interests.

*The writer had set out the sections in full, but due to pressure of space, the Editor, with regret, has had to delete them.

†Mr. De Caires has practised as a Solicitor for over 20 years. ED.

Excerpts of Address on Law Refrom in Guyana

BY
DR. THE HON. M. SHAHABUDDEEN
TO THE
GUYANA BAR ASSOCIATION ON 21.9.81

"Law reform is concerned with the processes whereby the law on a given subject is measured for its suitability to currrent needs on society and is amended and otherwise modified so as to bring it in conformity with those needs.[1]

Lying at the root of law reform is the need for change. As professor O.R. Marshall, one of our foremost West Indian jurists, says "... change is not merely to be tolerated but is essential for the continuance of progress."[2] Various factors activate change in law. John Farrar puts them this way :[3]

> In the words of Pound. law must be stable and vet it cannot stand still.[4] The principle forces in societv which activate change vary from time to time in nature and effect but in modern society there are government and the political parties; public opinion stimulated by the mass media; pressure grouos of differing size and influence; the permanent officials in the government departments; the more forward looking members of the practising and academic legal professions and lastlv the official law reform bodies. Ranged against these are forces which have also varied. In 1952 Professor Goodhart[5] identified them mainly as particular attitudes of mind shared by lawyers and laymen alike: natural conservatism and fear of change: the claim that a particular change is contrary to the spirit and traditions of the law: lack of knowledge of what can be done and then, lastly, lack of adequate machinery.

---

1 Indeed, there is a view that law reform should be concerned not merely with modifying the law in response to changing social needs but also with being "an initiator and innovator of social change, even where public opinion is not vocal and in some cases where it may even be opposed to such reforms." See C.-A Kelstek, The Machinery of Law Reform, mimeo, 1978, para. 6.

2. O. R. Marshall, The Law Commissions (1967) 20 Cur. Leg., Probs., 64, at p. 65.

3. J. H. Farrar, Law Reform and the Law Commission, 1974, p. 2.

4. New Paths of the Law, p. 1, 13.

5. Law Reform — address to the Holdsworth Club, pp. 9 et seq.

These then are some of the opposing forces out of which change comes, and with change, the need for law reform.

Law reform includes codification. Codification must of course be distinguished from compilation of existing statutory materials collected, edited and placed in some systematic sequence or order. This is the business of a law revision commission. Codification. by contrast, seeks to analyse the great mass of materials scattered on any given subject either wholly in judge-made law or wholly in statute law or partly in judge-made law and partly in statute law. to deduce from this material precise principles, and to make these accessible to all concerned by stating them systematically, with or without some measure of reform, but always with certainty and clarity.[1] Codification is likely to become increasingly important — in the absence of it we may all one day die under the accumulating weight of our law books.

Examples of codification are furnished by translation into legislation of the digests by chalmers of the law of bills of exchange, sale of goods and marine insurance, and of the digest by Sir Frederick Pollock of the law of partnership.[2] The first programme of the English Law Commission established in 1965 included a plan to codify the law of contract, parts of the "basic law" of landlord and tenant, and the family law.[3]

For completeness it may be useful to attempt a distinction between law reform and law revision. Law revision is concerned with the processes whereby we consolidate living legislation on a given subject which may have become fragmented and disjointed by **ad hoc** amendments passed in the course of years. This is done for the convenience of the legal profession, administrators and the general public, the idea of course being to save readers the inconvenience of having to piece out the current state of legislation on a particular subject from scrutiny and comparison of what may often turn out to be a whole legislative jig-saw, the parts of which are to be found scattered in the labyrinthine pages of the statute book from year to year. Consolidation is far from being as mechanical as it may sound.[1] Certainly, the need for it is

1. Dennis Lloyd, Codifying English Law, (1949) 2 Cur. Leg. Probs. 155, at p. 159, and H. R. Hahlo, Codifying the Common Law (1975) 38 M.L.R. 23, at p. 28.
2. Cecil Carr, The Mechanics of Law-Making (1951) 4 Cur. Leg. Probs. 122, at p. 135.
3. (1965) 116 N.L.J. 230, and A.L. Diamond, Codification of the Law of Contract (1968) 31 M.L.R. 361.
4. Farrar, op. cit., p. 57.

real, if we may judge by the anguish with which Mackinnon L.J. once complained of the Rent and Mortgage Interest Restriction Acts 1920 to 1939 when he said:

> Having once more groped my way around that chaos of verbal darkness, I have come to the conclusion, with all becoming diffidence, that the county court judge was wrong in this case. My diffidence is increased by finding that my brother Luxmoore has groped his way to the contrary conclusion.[1]

Sometimes the two expressions, namely, law revision and law reform, are confused in use. Mr. F.O.C. Harris, S.C., who revised the current edition of **The Laws of Guyana**, has, for example, made the point that the 1934 U.K. Law Revision Committee and the 1969 U.K. Criminal Law Revision Committee would certainly be regarded today as embracing functions of law reform.[2] But perhaps this is not difficult to understand. Almost inevitably some incidental law reform is undertaken in the course of law revision.[3] Likewise, law revision could form part of the work of a Law Reform Commission. Here in Guyana law revision was entrusted by the Law Revision Act 1972 to a separate Law Revision Commission. But whether or not the two functions are handled by the same body, they remain different in essential nature.

The need for law reform machinery

The second question concerns the need for some special machinery to facilitate law reform. Why is special machinery thought to be needed?

The need to keep the law adjusted to changing social conditions is not a new one. It has existed in various degrees at all times in the course of our history. In older times, both here and in England, it was fulfilled basically in two ways, first, by judicial law making, and, second, by ad hoc legislation. Unfortunately so far as law reform is concerned both methods suffer from certain limitations.

First, as to judicial law making. This method, which

---

1. Winchester Court Ltd. v. Miller (1944) K.B. 734, cited by Gavin Drewry, Renton—Another View (1975) 125 N.L.J. 663.
2. F.O.C. Harris, Law Revision, First Law Conference of Trinidad and Tobago, 23-27 July, 1973, Port-of-Spain, Trinidad, p. 1.
3. H.H. Marshall, Law Reform and Law Revision in the Commonwealth, Commonwealth Law Conference, Nigeria, 1981, p. 1 and 3.

Sir Leslie Scarman has aptly described as "the artifice of the lawyers who, through the medium of the courts, make the rules,"[1] suffers from the merited criticism that the changes which it effects, being retrospective in character, carry unsettling consequences on vested rights and interests.[2] Further the doctrine of **stare decisis** imposes obvious inhibitions. These two handicaps notwithstanding, the courts still exercise some power to mould the common law to the changing needs of society.[3] **D.P.P. v. Shannon** (1975) A.C. 717, H.L., and **The State v. Sharma and Williams** (1977) 25 W.I.R. 166, G.C.A., suggest that some judges are prepared to be more adventurous than others. But however, that may be, what really matters here is that, as it has been remarked, the "courts do not see it as their function to mould statute-law or to adapt it to our changing society,"[4] such judicial creativity[5] as may be ventured in respect of interpretation of statutes being, however activist, too limited to serve as a mechanism of basic or systematic reform.

Paradoxically, notwithstanding the seemingly fixed nature of the written code of law, such as the code Civil of Napoleon, it may well be that under it a civil law judge, in exercise of the interpretative faculty, has in some respects a power of developing the law to meet new situations which may be somewhat larger than that of his common law brother. Article 4 of the Code Civil, for example, prohibits a judge from refusing to decide a case "on the pretext of the silence, obscurity or insufficiency of the Code." Speaking even more positively, article 1 of the Swiss Code of 1907 provides that, in the absence of an applicable rule of law or custom, the judge shall decide the case in accordance with such rules as he would have established if he were required to legislate to meet the case.[6]

DENNING AND SIMONDS

With that we may well compare the more austere position in English law as illustrated in **Magor and St. Mellons Rural District Council v. Newport Corporation** (1952)

1. Sir Leslie Scarman, English Law — The New Dimension, 1974, p. 6.
2. See, for example, the powerful dissenting opinion of Black J. in **Hole v. Rittenhouse** (1885) 25 Pa. 491, at 502, referred to by R.E. Megary, A. Second Miscellany-at-Law, 1973, at p. 141.
3. See **Persaud v Plantation Versailles and Schoon Ord Ltd** (1971) 17 W.I.R. 107, G.C.A., and M. Shahabuddeen, The Legal System of Guyana, 1974, pp. 237 ff.
4. A.L. Diamond, Codification of the Law of Contract, (1968) 31 M.L.R. 361, at p. 381.
5. For judicial creativity in statutory interpretation, see J.A.G. Griffith, **The Politics of the Judiciary**, 1977, chapter 8.
6. Dennis Lloyd, Codifying English Law, (1949) 2 Cur. Leg. Probs 155, at p. 162.

A.C. 189, H.L. In the Court of Appeal Lord Justice Denning (as he then was) had dared, in the course of a dissenting opinion, to say: "We sit here to find out the intension of Parliament and of Ministers and to carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.' In the shattering rejoinder from the House of Lords, Lord Chancellor Simonds considered this tantamount to a statement that "what the legislature has not written, the court must write," and righteously denounced it as "a naked usurpation of the legislative function under the thin disguise of interpretation." Lord Denning, ever unrepentant, showed later signs of slipping back into his original sin in the **Ministry of Housing and Local Government v. Sharp** (1970) 2 Q.B. 223, at p. 264. But there is little doubt that, with the possible exception of cases in which English law is affected by continental jurisprudence brought in by the Treaty of Rome,[1] an avowed doctrine of interstitial judicial legislation, though favoured in some other jurisdictions, has not succeeded in gaining acceptance in English law.[2] In the result, the capacity of the courts to act as an informal law reform agency is likely to diminish with the passage of time.[3]

So far as **ad hoc** legislation to meet law reform needs is concerned, reliance on this is at best uncertain. It is subject to preoccupations of the ordinary governmental and legislative machinery with matters of immediate policy concern and suffers the disadvantage of a lack of systematic approach.

Given these limitations on the unassisted capacity of the courts and of Parliament to keep the law responsive to changing conditions, recognition not unnaturally came to be given to the need to identify some other agency which could promote the discharge of that function on a systematic basis.

Sir Francis Bacon saw this clearly as far back as the

---

1. "But when we come to matters with a European element, the treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Per Lord Denning in **Bulmer Bollinger S. A.** (1974) 2 All E.R. 1226, H.L. at p. 1231.
2. See Douglas Payne, **The Intention of the Legislature in the Interpretation of Statutes** (1956) 9 Cur. Leg. Probs. 96, at pp. 102 ff.
3. See M.D. Kirby, **Law Reform in the Commonwealth of Nations, Commonwealth Law Conference, Nigeria, 1981, pp. 10-12.**

end of the 16th century.[1] Much later the demand arose "for a continuing body to serve as a liaison between the courts and the legislature — to observe the operation of the judicial process and to make recommendations to the legislature whenever the need arises."[2]

It is sufficient to conclude this part with the general submission that, regardless of the particular shape which may be thought best in any given case, there is almost certain to be in every country of today's world a need in principle for some institutional agency to promote law reform other than the courts and the legislature.

TAKE INP. 37 "A"

OTHER COMMITTEES

Contrary to expectations the new committee never really functioned. Nevertheless, within recent times there have been other committees concerned with law reform.

The Labour Code Commission established in 1974 completed its work in April this year.[3] A report on land reform has just been submitted by the Kennard Committee. As many may know, there is at work at this time a Committee under the chairmanship of Justice Bernard on the status of women and children born out of wedlock.

In many cases the reports of these various ad hoc committees were followed by implementing legislation. In some cases draft Bills were attached. This was so, for example, in the case of the Report of the Common Law Commission 1914. Lawyers were almost always included as members of these committees. And they did good work.

There seems to have been universal recognition, however, both here and in other territories, that however valuable **ad hoc** committees may be, they are incapable of keeping up with the pace of development in more modern times. It would seem that there is need to look for more suitable machinery.

---

1. J.H. Farrar, Law Reform and the Law Commission, 1974, at pp. 3-4 and Sir William Holdsworth, A History of English Law, vol. 5, pp. 485 ff.
2. J.W. MacDonald, The New York Law Revision Commission (1965) 28 M.L.R. 1, at p. 2.
3. The Chancellor presumably had in mind similar decisions by the Lord Chancellor of England, but for significant differences between the responsibilities of the two offices see the references to ministerial responsibility in the concluding remarks, **infra**.
4. For the idea of the Commission see M. Shahabuddeen, Towards Industrial Justice in Guyana, Georgetown, 1974.

Possible law reform models

My fifth question accordingly concerns possible models of law reform agencies.

In the commonwealth there are over three dozen law reform agencies of one kind or another. The Commonwealth Secretariat gives valuable services in coordinating their activities and particularly in facilitating exchange of information. In 1977 the Secretariat sponsored a useful conference of Commonwealth law reform agencies.[1]"

After tracing law reform in the Commonwealth Caribbean and more particularly in Trinidad and Tobago, Barbados and Jamaica; the Attorney General dealt with the English experience in this field, and underscored the importance of a permanent establishment, full time officers, and research. On the criteria for choice of a model, he said: "So we have before us the experience of ourselves and of other territories to be guided by, as well as a variety of law reform models from which to choose. In choosing a model we will need to consider a number of factors. Some of these concern size and manageability of the body, composition and qualification of members, whether they should serve full-time or part-time; whether they should include lay members; the extent to which members should be independent of the government of the day; staffing, including provision of services of experienced parliamentary counsel; mode of operation and subject areas of responsibility. I can only advert to relevant considerations at this stage. I do not event pretend to notice all of them, much less essay an answer as to any particular model to which they point. All of this will be for consideration at the proper time. But we can now start to think."

Next he offered some general considerations indicative of specific topics for future law reform.

"On the civil side several branches present themselves.

Family law, for example, will require attention more particularly in the light of the provisions of Chapter II of the Constitution relating to the position of women and children born out of weldock. Discrimination is prohibited against these categories. Are these provisions self-executing so as to entitle such a child to share with his legitimate siblings on the intimacy of their father? Or would legislation have to be enacted ? If so, what form

1. Commonwealth Law Bulletin, (1977) vol. 3. p. 711.

should it take ? And how far back into the past should it reach ?

Do we need to review our matrimonial laws more particularly in respect of the permissible grounds for dissolving a marriage ? We may wish to consider the relevance of the concept of a matrimonial offence as compared with the more modern concept of marriage breakdown and the ideas of treating property on dissolution of marriages in such a way as to facilitate the economic re-adjustment of all concerned.

A related aspect, with a slightly different import, has to do with consent orders for maintenance payments on dissolution of marriages. It is not often, I believe that parties willingly agree to substantial figures. Unless my information is incorrect, I understand than in some cases within recent times orders have been made by consent for payment of unusually large amounts, more particularly in cases where the recipient is resident abroad. My understanding is that, after a while, there is a tendency for the parties to reunite abroad. Meanwhile a great deal of funds would have left the country. In some countries fictitious marriages are a problem. It may be that in ours there is a problem concerning fictitious divorces arranged for purposes having little to do with the soundness of the marriage. Interesting, but disturbing, if true.

Do we need legislation along the lines of the English Inheritance (Family Provision) Act 1938 restricting the freedom of a parent to decline to provide for members of the family ? In this respect we may look even further afield, say, to traditional Islamic law, under which only one-third of his assets of a person could be disposed of by will,[1] the remainder devolving in any event on his legal heirs.

The possible need for a special family court also presents itself for thought. The Canadian Law Reform Commission in its Report on Family Law has proposed the setting up of a unified family court so as "not only to avoid legal fragmentation of family problems among several courts but also to provide a single legal institution specifically designed to deal with the family as an organic whole."[2]

---

1. A.A. Qadri, Islamic Jurisprudence in the Modern World, Lahore, 2nd ed. 1973, p 440, and J. Schacht, An Introduction to Islamic Law, Oxford, 1964; p. 174.

2. Report on Family Law by the Canadian Law Reform Commission, March 1976, p. 8.

With respect to immovable property, we may need to consider the position relating to non-beneficially occupied lands, and the opportunity cost to the society of allowing them to remain that way.

The law governing civil proceedings between the State and the citizen also needs to be looked at. Something in the nature of a Crown Proceedings Act seems called for.

I would mention briefly some other areas of substantive law. For example, reciprocal enforcement of judgements, tissue transplants, the doctrine of common employment, environmental pollution, crown privilege, contempt of court and sovereign immunity.[1]

Then there is the legal profession itself. Last year after a protracted gestation period we finally fused the two branches of the profession. In doing so we made use of the omnibus type of construction provision to mesh the new law with other laws which may be affected by the change. It may be that there will be need to look back upon our experience since the commencement of fusion with a view to determining whether there is need for specific amendment of particular provisions of other laws so as to achieve a perfect reconciliation between them and the new system.

Thought may also be given to the need for a code of ethics[2] which may take account in particular of the implications of fusion for the conduct of members of our now unified profession. In like manner there may be need to consider the implications of fusion relating to the differential way in which the law of negligence applied as between the branches of the profession as it earlier stood. Costs and legal aid may also deserve consideration.

Again, we may need to consider how well articulated are our court arrangements to the new local democratic system being set up. Do we need more simplified machinery to deal expeditiously with relatively small claims and

1. Report of the Meeting of Commonwealth Law Ministers, Winnipeg, August 1977, pp. 173 ff, 229 ff and 581 ff.

2. A Bar Association may, on a domestic basis, establish rules of conduct for subscribing members in the same way as a club may. But a Code of Conduct having statutory force may be promulgated under section 29(2) (a) of the Legal Practitioners Act, Cap. 4:01, which provides that "the Chancellor may, with the concurrence of the other members of the rule making Authority make rules (a) for regulating in respect of any matter the professional practice, conduct and discipline of legal practitioners and providing for the making of complaints to the (Disciplinary) Committee in respect of any failure to comply with any of the rules so made".

complaints? The need for the establishment of small claims tribunals has been under consideration in other jurisdictions within the Commonwealth. In most of Australia small claims are dealt with by a referee constituting a tribunal which is not bound by the formal rules of evidence but may inform itself in any manner it thinks fit. In general no costs are awarded. The court may sit anywhere and has even done so in a claimant's house, the circumstances presumably justifying what ordinarily would seem a strange course. In Queensland the tribbunal was empowered to order work to be performed.[1]

Then there is by extension a further point as to whether the strictly judicial machinery for the settlement of civil issues might not with advantage to the public will be supplemented by facilitating recourse to procedures by way of conciliation and arbitration. Similar ideas have been receiving thought in other parts of the Commonwealth.[2]

Members of the profession will of course understand that I am only surfacing ideas for consideration, not advancing positive proposals.

"On the civil side several branches present themselves. occur to your minds. I will mention some.

First, though not in any order of importance, there is the law of conspiracy and the particular rule to the effect that if two persons are tried together on a charge of conspiring with each other and no one else the acquittal of one entails the acquittal of the other. That was always understood to be the common law on the subject. In **D.P.P.** v. **Shannon** (1975) A.C. 717, H.L. an attempt was made by some of the members of the House of Lords to "redirect" the common law rule on this point so as to allow for the conviction of one even where the other was acquitted, asuming, of course, that that course was justified by the admissible evidence.

---

1. Report of Meeting of Commonwealth Law Ministers, Lagos, February, 1975, pp. 90 ff. and 323 ff. See also Commonwealth Law Bulletin, (1978) vol. 4, p. 485.

2. In India the Committee on Legal Aid appointed with Mr. Justice P. H. Bhagwati and Mr. Justice V.R. Krishna Iyer, both of the Supreme Court of India, as chairman and member respectively, had in 1977 recommended that conciliation for settlement of disputes should be encouraged and that every applicant for legal aid should agree to conciliation before legal aid was allowed to him. Conciliation boards were establishetd in Sri Lanka by the Conciliation Boards Act. Reference to a conciliation board was compulsory in all civil disputes before the parties sought redress through court. In specified criminal matters recourse to a conciliation board was likewise required. The act was later repealed.

On grounds of logic it seems to be generally recognised that the proposed change has a great deal to commend it, but, as Oliver Holmes in an inspired moment said.[1]

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governmed.

Holmes was echoed in **Shannon** when Lord Salmon said. "This may not accord with strict logic. The law does not, however, rest wholly upon logic but more upon experience and common sense."[2] And so, dealing with the common law rule on conspiracy, we find Chancellor Haynes arguing in the **State** v. **Sharma and Williams (1977), 25** W.I.R. 166, G.C.A., at p. 175, that "its historical explanation apart, there is, possibly, a measure of juristic basis for the rule", and adding (at p. 176) that, even if the court had jurisdiction to change the rule, he was "not disposed ... to carry out that bold judicial exercise."

George J.A., giving a separate judgement that the received rule should apply, agreed, but observed (at p 186) that the decision of the House of Lords in Shannon's case "clearly pronounces for change in direction and, although the judges were not unanimous as to the extent of that change, they were at one that the rule, which is admittedly forensically unsound, needed to be substantially modified." So perhaps here is something that may be thought at least worthy of a serious look.

Then I would refer to the decision of the Court of Appeal given in September 1980 on a reference by the D.P.P. in the case of the State v. Owen Alleyne concerning the right of the State to reply at a trial at assizes. The right to the last word had been given to the Crown by s. 154 of the Criminal Law (Procedure) Ordinance 1893. The justification for the right was in fact questioned by the Secretary of State over forty years ago. He consented reluctantly to its continuance but did not request the Attorney General, through the use of his power to give directions under s. 9 (3) of the Ordinance, to

1. O.W. Holmes, The Common Law, London, 1968, p. 1.
2. D.P.P. v. Shannon (1975) AC. 717, H.L., at p. 772.

more steps to ensure that the privilege is used with discretion."[1]

Dealing with what seemed to be substantially the same issue, but now presented in strictly legal garb, our Court of Appeal in **Alleyne's** case came to the view that the State has a right of reply in a case where the accused in his defence makes an unsworn statement from the dock and counsel for the defence declines to sum-up the evidence. But towards the end of his judgement our learned Chancellor had occasion to say:

> "By way of epilogue it is a happy augury that this matter has been referred to us for our opinion if for no other reason than the fact that it exposes the antediluvian character of our procedural law, namely, the right of reply and the fact that it is ripe for revision."

George, J.A. expressed a similar view. In a very learned article by the Chancellor, the matter has since been presented to a wider public in the West Indian Law Journal.[2] So here again is something we may look at.

Then there is the question of sentencing and rehabilitation of offenders. Other jurisdictions are experimenting with various kinds of non-pecuniary and non-custodial sentences. such as reporting orders. residence orders and community service orders.[3] We may wish to examine the value of these corrective measures the extent to which they can competently be imposed under existing law and the need, if any, for enabling legislation.

In this connection we may also consider the need for a measure to remove old convictions for relatively minor offence from the records or convicted people who have been living reformed lives since conviction."[4]

I may also refer to matters such as those relating to capital punishment. theft, white collar crime. evidence, compensation of victims of crime, rendition of fugitive offenders and transfer of convicted offenders as between one country and another.

Perhaps I should add that some of the matters referred to above have in fact been receiving attention from

1. M. Shahabuddeen, The Legal System of Guyana, 1973, p. 310.
2. Justice V.E. Crane, The Prosecution's Right of Reply in Jury Trials in Guyana, W.I.L. 1981, vol. 4, p. 38.
3. Report of the Law Reform Commission of Canada on Dispositions and Sentences in the criminal Process, January 1976, pp. 21-23.
4. Cf. the U.K. Rehabilitation of Offenders Act 1974.

the Law Officers. In some cases draft Bills are under preparation. Many aspects have also been coming up for discussion at Meetings of Commonwealth Law Ministers as well as at Meetings of Caricom Law Ministers."

He concluded:—

"Law reform is important. It is precisely because of its importance that we need to move off on the right foot. There may be many areas of doubt awaiting clarification. But there is one certainty that I do have: progress, when we move, will be a function of the measure of co-operation among the relevant parts of the whole process. I do believe that our Guyanese experience is sufficiently forward looking and statesmanlike to yield every co-operation requisite for success. And in this I think the legal profession can be fully counted on. Its contribution can be important. Its help will indeed be welcome.

END.

PREVIOUS LAW REFORM METHODS IN GUYANA "A"

My fourth question concerns the methods whereby we in Guyana have so far tried to deal with law reform.

The answer is that law reform in Guyana has in general been carried out as an undifferentiated part of the work of the Attorney General's Chambers, save for cases in which assistance was had from **ad hoc** committees appointed to consider the state of some particular area of the law.

The need to undertake a general measure of law reform in this country has been sensed by the imperial Dutch authorities towards the end of the 18th., century. That expression of concern remained unsatisfied up to 1824 when the British Government appointed Commissioners to inquire into the legal system. Their report, which remains to this day one of our most valuable legal records was submitted to the House of Commons in 1828.

A number of important reforms followed. The criminal law was completely recast between 1829 and 1846. The English laws of evidence were introduced in 1834. The age of majority was reduced from twenty-five to twenty-one in 1832. Changes were likewise made in the

1. E.C.S. Wade, The Machinery of Law Reform (1961) 24 M.L.R. 3, at p. 4.

law of defamation in 1846. English company law was introduced in 1845.

REPORTS

Some kind of a statute law revision commission was established in 1838 and it was apparently also intended to undertake a measure of law reform. Little came out of this. Meanwhile however there was submitted in 1834 the Report of a Select Committee of the Court of Policy on the establishment of the Registrar's and the Marshall's office. Similar reports by a Select Committee of the Court of Policy on the office of the Registrar were submitted in 1852 and 1919. The law relating to the indentureship system was the subject of a Report of the Commissioners of Inquiry into the Treatment of immigrant Labourers 1871. The workings of the office of the Administrator General were the subject of a report submitted in 1882. Similar reports were submitted on the workings of the office of Official Receiver in 1905 to 1906 and again in 1920 to 1928. The Reports of the various Titles of Land Commissions should be well known.

The most celebrated ad hoc law reform committees of this century were those concerned with the fundamental legal changes which took place in 1916. These were preceded by the Report of the British Guiana Common Law Commission 1914 and the Report of the British Guiana Statute Law Committee, 1916.

I would also refer to the Report of the Landlord and Tenant Committee, 1939, the Report of the Rice Farmers (terms of Tenancy etc.,) Committee, 1942, the Report of the Rice Farmers (Security of Tenure) Committee 1953, the Report of the Land Tenure and Registration of Titles Committee, 1954-1955, the Report of the Land Registration Committee, 1957-1958, and the Report of the Rent Restriction Committee 1967.

Our first law reform committee to be so called was establish in 1951."

* The Attorney General, who is also Minister of Justice, holds the degrees B.Sc. Econ, LL.M and Ph. D of the University of London.

Address of Welcome to the Honourable Kenneth M. George Chief Justice

BY
ASHTON CHASE
PRESIDENT OF THE GUYANA BAR ASSOCIATION

On the 13th., October 1981, at a special sitting of the Full Court of the Supreme Court of Judicature at which there was a capacity attendance of the Bar, the Chancellor, the Attorney General and the Bar Association congratulated the Honourable Kenneth M. George on his appointment as Chief Justice. Mr. C.L. Luckhoo, S.C. added his compliments.

Speaking for the practising bar, Mr. Ashton Chase, President of Guyana Bar Association, stressed the importance of the rule of law and in relation to administrative matters, he dealt with attire in Court, cleanliness of Courts, postponements and unpunctuality, Magistrates, service of processes and general re-organisation, missing files, recording security in matters of execution, law reports, library and buildings and the police lock ups. In regard to certain of these administrative matters, Mr. Chase said:—

> "I think, your Honour, that some of these matters on which I have touched are societal problems, but what we in the Bar Association feel is that within the confines of the law these matters ought to be investigated and if the problem is one outside of the 'law', then the problem must be referred to those who have the authority and the capacity to rectify it."

He proceeded:—

INFLUENCE

As I have hinted, your Honour, I have chosen this occasion to refer to matters of administration. It would have been my preference if time had permitted to treat with aspects of the law on which your judicial authority and influence will be weighty because it is quite clear that the Chief Justice of this country does have or should have a great deal of influence and authority in the areas and agencies concerned with the law. In relation to your judicial influence, I would have wished to refer to the question of law reform. We listened a few weeks ago to a very

fine lecture by Dr. Shahabuddeen, our Attorney General.

We in the Bar Association, your Honour, are concerned that many areas of our law are far behind and do not appear to keep pace with changing times. Our company law, for example, refers to practice in the first quarter of this centry. In the field of trusteeship, and copyrights, and in the field of shipping some of our laws go back to the last century and, your Honour, if we do not get up and do something about it, the twenty-first century will catch us still dealing with nineteenth century legislation. So many social and economic changes have taken place the world over and, indeed, in our Republic there have been so many significant social and economic changes that these laws cry out for immediate reform. I repeat what I said on the occasion of the address of the Honourable Attorney General that the Bar Association stands ready, willing and able to play its part in the area of law reform.

STATE PROCEEDINGS ACT

The other matter to which I wish to refer is the question of honouring of judgements of the High Court. Your Honour, we do not have a State Proceedings Act in this country as other Commonwealth countries have. Consequently, some difficulties arise with regard to procedural matters in which the State is involved. We find that many judgements of our courts are not honoured by the State.

It is our view, your Honour, that the law must be respected not only by those who are at the bottom, but it must be respected by those at the top and it is the top which must give the example in this area of respect for the law. It is the essence of incongruity that a republican government should be insulated by royal prerogatives and it is even more anomalous when we consider that many of these royal prerogatives have already been shed long ago by the country from which we inherited them.

Your Honour, I would have wished at this stage to have directed my discourse to an evaluation of the Administration of Justice Act, particularly in relation to the new burdens placed on Magistrates and on the administrative machinery of this country, but time does not permit.

May I now turn to the last of what I wish to say and that is to extol your Honour's personal attributes in respect of your new appointment. Good things are often left for the last. Your Honour is fully qualified and well-fitted to hold the high judicial position of Chief Justice. You have had the advantage of training on both sides of

the Atlantic. You also had the advantage of serving in all possible positions that could lead to the grooming of an individual for the post of Chief Justice. You have not only been a busy practitioner at the Bar with, I can recall, pockets bulging .... (laughter) .... but you served as State Counsel, Magistrate, Registrar, Judge of the High Court and as a Justice of Appeal of our Court of Appeal all of which, it seems to me, have groomed your Honour for this new office that you now hold.

We feel you have dignity. We feel you have the stature. We feel you have the integrity. That we feel no one can dispute. You have given a number of judgements in both your offices as Judge and Justice of Appeal and a judgement of yours has been tested in the Privy Council and it has come out honourably. In these days when we have legal institutions of learning not only here but around the region, we would like to see the judgements of our courts so erudite and sound that when the lecturers and professors at the universities and law schools take them up they will comment favourably and not pull them to shreds.

Your Honour will find that because of certain circumstances over which none of us has any control a number of causes touching on human rights and fundamental rights under the Constitution will come to your notice and attention. You have a reputation as a Judge, when you sat in criminal cases, for holding the scales evenly. Legal practitioners who appeared before you in criminal cases have spoken highly about your reputation for fairness.

FAIR HEARING

We hope that you will continue to hold the scales evenly in these new causes — new causes of action in the new areas which will come before you. In particular, we hope that State Counsel and Counsel on the other side will be treated equally in your Honour's court and in the several courts of the Republic. When a private practitioner makes submissions before the court, perhaps because of the way in which he puts them, or perhaps because the court has never heard of the proposition before, those submissions are pounced upon; while on the other hand when there is some bizarre submission by State Counsel, there is no reciprocity of treatment. This is not fair to all concerned. We feel that in matters of punctuality, preparedness and submissions both sides should be treated equally.

Now, your Honour, let me say that we expect no miracles from you. We are sensitive of the limitations of the society in which we live, but yet we feel that there is a

good deal that can be accomplished and we hope that your era will be marked by significant accomplishments in the areas which I have mentioned.

DIGNITY, EMINENCE

If I may synopsisize the points I raised, they are four: First, to restore the dignity and eminence of our courts. On reflection I do not wish to retract any of those words. Secondly, that you uphold the independence of the legal profession. It is my respectful submission that the profession is interwoven and inextricably bound up with the rule of law and the pre-eminence of the law. Many people are very jealous of lawyers because of the position we occupy. Let me say that the position which we occupy is but illumined by the light that is shed by the pre-eminence of the law. The independence of our profession is pivotal to the rule of law. It is no personal privilege for us. Heaven knows the burdens which we carry, and we do not complain about them. A lot of the things to which I referred are matters in which the public itself is fully involved.

Next, I shall ask you to judge fairly — or shall I say — to continue to judge fairly, wisely and fearlessly. We do not expect that you will make no mistakes. Many a reputation on this side has been built through errors of law made on that side. After all, the system of our law provides machinery for correction of mistakes that are made. What we hope is that in your Honour's judgements there will be no ill-will, vindictiveness, or impetuosity. And fourthly, we ask you to uphold the rule of law and the Constitution; to bear in mind that those streams and components of the law to which I referred earlier must remain unpolluted and clean if law is to have the respect which it deserves.

Finally, on behalf of the Bar Association, I again extend to you a hearty welcome to your high office. I trust that you will have the health and strength to carry out your heavy duties; and pray that you will continue to receive from your wife and family that comfort which is necessary for the due discharge and execution of your duties. We hope that this is not the final niche in your career and look forward to your reaching even greater heights in what must now be described as an illustrious career.

As I take my seat I am conscious — very conscious — that I have said a number of things with which I am sure you will disagree. If I may take a few flights down from Voltaire, may I end by saying that although you will disagree with several of the things that I have said I hope you will defend to the hilt my right to have said them.

Excerpts of Address on the Functions of the Courts in Contemporary Guyana

BY
THE HONOURABLE V.E. CRANE *
(CHANCELLOR OF THE JUDICIARY)
TO THE
GUYANA BAR ASSOCIATION
ON THE 28th., OCTOBER, 1981

Having made preliminary observations in which he established that the aim was to achieve greater social justice for all, the Chancellor proceeded to examine this from three standpoints — i) maintenance of the rule of law; ii) the administration of justice and iii) the development of the law. He continued: —

1. MAINTENANCE OF THE RULE OF LAW

"The rule of law remains a principle of our Constitution notwithstanding its recent transformation and socialist orientation. In its clearest connotation **the rule signifies the absence of arbitrary power in the State** and has come to be regarded as the hall-mark of a free society. In all democratic constitutions, the rule of law is identified with the liberty of the individual in a free society. In the Universal Declaration of Human Rights, 1948, it is laid down that **the end of the rule of law is the attainment of justice and consequently of order and freedom.** A breakdown of it necessarily leads to tyranny, oppression, rebellion and anarchy.

In Guyana, the rule of law is very necessary so as to provide the right environment for socialist orientation and nation building which are the dominant preoccupations of Parliament, the Government of the Co-operative Republic of Guyana the Judiciary is now a necessary and integral part of the political, economics and social system, and the Judiciary must look upon itself as having a crucial role to play in this task by ensuring that in the all-important field of socialist development, basic values like the rule of the law and, consequently, justice, are to be maintained. This is, without any doubt, one of the most important of the Judiciary's functions in contemporary Guyana.

Art. 32 makes it obligatory that the rule of the law shall prevail by insisting that "it is the joint duty of the State, the society and even citizen **to combat and prevent**

crime and other violations of the law, and to take care of and to protect public property." This clearly means that since the Constitution imposes a duty of the aforesaid entities in art. 32, then there must be a corresponding legal right to seek redress in the courts available to those persons with violated rights. A conjoint reading of articles 32 and 39 makes this quite clear. And though the expression 'rule of Law' is not expressly mentioned in the present as it was in the preamble to the previous Constitution the object is very much the same — to secure the citizen's rights and freedoms "in a democratic society founded upon **the rule of law.**"

THWARTING POLICY

But specific reference to the expression, "the rule of law", in the preamble of the last Constitution and its absence from the present has caused the uninformed and certain agents of destabilisation to say that means an end to the rule of law; that the universality of the rule of law has been abolished in Guyana. Nevertheless, as I have shown, the object is the same in the old as well as in our new socialist Constitutions. The rule of law in Guyana is quite alive and continues unabated and guaranteed to the subject just as it always used to be. Art. 40 dealing with fundemental rights and freedom of the individual, and articles 138—151, inclusive, providing for the protection of these rights, are all indications of the existence of the rule of the supremacy of the law, notwithstanding that expression is not repeated in the present Constitution. Integrally connected with the rule of law are the judicial officers of the State.

Judicial courage is closely associated with judicial independence. A judge must always have the courage of his convictions, irrespective of whether he is right or wrong in what he decides. It sometimes requires a great deal of courage to give judgement in some criminal cases involving the public interest, and in civil cases between the State and the subject involving the liability of the State in regard to the rights and interests of the citizen; also in cases involving the invocation by the Court of its control and jurisdiction over the Executive in the exercise of ministerial or statutory powers or functions; so much so that Dr. Nwabueze, not likely to be tacitly suffered by politicians, especially politicians in a hurry to develop and modernise a backward society laid waste by years of colonial exploitation and neglect. It does not matter that the judge might have been perfectly honest and impartial." See his "Judicialism in Commonwealth Africa", p. 267.

This, of course, does not mean that the Judiciary should be pressurised by the Executive, only that the Judiciary ought not to see itself up in opposition to that organ of Government. On the contrary, I have shown, and will illustrate further, that under our Constitution arm of state apparatus and is guided in the discharge of its functions by the principles and bases of the political and socio-economic system of 'The Organic Law'.

But while the approach of the Judiciary in Guyana should be to march in step with the aspirations of the people and the Government, it must not hesitate, if the occasion ever warrants it, courageously to demonstrate the principle of its independence. Sometimes this principle is performed in the interpretation of the Constitution and may involve the very life of the Government. I shall have more to say about it later on.

II THE ADMINISTRATION OF JUSTICE

'Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man....Whatsoever therefore in consequent to a time of war, where every man is enemy to every man, the same is consequent to the time wherein man live without other security than what their own strength and their own invention shall furnish them withal....In such condition there is no place for industry...no arts, no letters, no society, and, which is worst of all, poor, nasty, brutish, and short." (Hobbes, Leviathan, Chap. 13).

ADMINISTRATION

Hobbes, however, was not altogether right. Philosophers have disputed the correctness of the above statement and the point whether it has even been really the true nature of man to live continuously at war with his fellowman. However, while on this aspect, I need not delve too deeply into the necessity for institutionalised law enforcement. The need for it must be self-evident to us all. But suffice it to say, lying beneath the veneer of civilisation is the ever present danger that man is wont to resort to force or violent extrajudicial self-help to settle grievances with his rivals. This tendency is not new, and to arrest it, in medieval times the Statute of Marlborough in the days of King Henry III decreed that — "All persons as well of high as of low estate, shall receive justice in the King's Court, and none from henceforth shall take revenge or distress of his own authority wthout award of Court." (52 Hen. III C. 1). But this is not unusual for all early

codes demonstrate the gradual method in which the voice and force of the State become the exclusive instrument of declaration and enforcement of justice.

The chief function of the Judiciary, however, is the administration of justice. It is essentially concerned with adjudication, i.e., the resolution of conflicting rights and interests. It is intended to highlight a few major problems of administration of justice that Guyana has in common with some New Commonwealth countries of which I have been speaking and which I have considered necessary to compare with Guyana in illustration of our topic.

Delay

No matter where trials take place, it seems there will always be complaint of delays in hearing.

It has been rightly said of "the law's delays that they have become proverbial. It is neither new nor peculiar to any peroid in history nor to any country. It has been the characteristic of all countries and is, perhaps, as old as the law itself. One can read of it in Herodotus. It confronted the Greeks (Athenians) who appointed six men to overhaul their legal system. It stared the Romans in the face, and they appointed ten men, the Decemvirs, to tackle the problem. It has been the theme of tragedy and comedy. Hamlet included law's delays among the seven burdens of man. It made Goethe change from law to letters. Chekhoo and Moliere wrote tragedies based on it; Dickens memorialised it in 'Bleakhouse'; and Sullivan and Gilbert summarised it in song."

Quite recently too, following on strictures and accusations of laziness from the Lord Chief Justice of England, judges at the Old Bailey in London, devised a scheme to defeat the law's delays by beginning daily sitting half an hour earlier. Instead of starting work at the traditional hour of 10.30 a.m. they began at 10.00 a.m. The results were startling. It was calculated that the extra 30 minutes per day worked by 23 courts effectively provided the Old Bailey with the equivalent of an additional two working judges each week, and a back-log of 1,200 cases had been reduced to under 800 within the space of three weeks. But whatever the contributory causes of the delay in dispensing justice, it cannot be denied that "justice delays is justice denied."

After pointing to the independence of Judges and Magistrates under our Constitution and to the English principle that Judges should be absolutely independent of the Government, he continued:—

"But, it appears to me, the difference between English and Socialist viewpoints springs from historical antecedents. The English Judiciary was not always in the same pre-eminent position in which it finds itself today. As one eminent writer expressed it, far from being as they are today, "lions **beside** the throne", in the days of the Stuart Kings, they were merely "lions **beneath** the throne". And it was only after the Act of Statement, 1701, that the English Judiciary can be said "to stand between the Executive and the subject", and that an end was put to the claim of the monarchy that judges held office during the King's good pleasure. Henceforth, they could no longer be removed at will. In former days, right up to the close of the 17th. century, the Executive in England was suppressive of the rights of the subject. It was the work of the Glorious Revolution of 1688 that achieved their independence. This was how the Judiciary in England became a referee, so to speak.

On the contrary, a judge under a co-operative socialist-type constitution, whilst maintaining his independence, must needs work in conjunction with, and not inseparably from the Executive. There is no rigid sphere of constitutionally assigned jurisdiction with regard to the judiciary. There is no longer any theory, as there is in England, about a judge in a co-operative socialist State "standing between the State and the citizen" because, under socialism, it cannot be envisaged that the State and the citizen can even be in conflict; they ought never to be if they are pursuing the same goals towards socialist democracy and co-operation. The courts are in duty bound, just like Parliament and the Government, to be guided in the discharge of their functions by the principals and based on the political and socio-economic system (art. 39): and so it is the duty of the socialist judge to work in unison and co-operatively with the Administration in furthering these principles.

CO-OPERATION

The high point of the present-day arrangement is that while he maintains his judicial independence and conscience, the Guyanese judge works in co-operation with the Administration for the advancement of socialism; but the courts are not mere mouthpieces of government policy, because the courts are quite competent to try issues because the State, the society and the citizenry under their joint duty under art. 32 and adjudge either the State or other entity to be in default of duty. Judicial

independence, however, does not mean that a judge in contemporary Guyana should stay aloof from the realities of life and the **modus vivendi** of Guyanese citizenry as he used to do. Rather, he must further their interests whenever possible, in accordance with the principles as set out in Chapter II ('The Organic Law') wherein are set out a number of national goals or objectives, and directive principles for achieving them.

In Guyana there was never a problem of administration concerning an indigenous legal system such as exists in places like Africa and Asia when the English common law was received as part of our legal system in the year 1917. Speaking about this topic Dr. Shahabuddeen in his work "The Legal System of Guyana", p. 190, tells this story: "In British Guiana the conditions were very different. Since its colonisation in the 17th, century and, more particularly, since its surrender to the British in 1803, it possessed a highly organised flexible system of common law which, but for the special conditions of the colony, would have proved as suitable for all commercial and social requirements as a similar form of jurisprudence and done for the larger and more important British and Dutch settlements in South Africa and Southern Rhodesia."

On the development of the law, he stated:—

III THE DEVELOPMENT OF THE LAW

"Now that Guyana has a Constitution into which is entrenched the principles and concepts of socialism, the courts are now faced with the challenge, even more before in the evolving constitutional experiment, to develop it by judicial exposition and analysis and to apply those principles to such factual situations as are brought before them. From the legal standpoint, this is how the principles and bases of the political socio-economic system will develop. In the exercise of their constitutional interpretative functions, courts will make positive declarations on rights and duties. However, the courts cannot declare on rights and duties unless they are specifically asked to do so and, in some cases, unless enabling legislation is enacted as an aid to enforceability. That this is the intention of the Administration is to be seen from what it has in prospect—the establishment of two committees headed by two eminent experts in their own field — former Minister of Agriculture Gavin Kennard and Justice Desiree Bernard.

COMMITMENT

And this is where I think the Bar as protectors of the rights of the citizens can render an invaluable service to

the community in helping to build the system under which we now live. It behoves every lawyer to exercise a greater sense of commitment to the country's socialist ideology and to spare no pains to have the principles of socialism tested and expounded by the courts. But just how are they to condition their minds to the tasks? I would respectfully suggest to practitioners they should abandon all previous common law notions and approaches, to continuously fix their eyes on the Constitution and to begin to think individually, collectively, imaginatively and consistently about socialist democracy that is now an inseperable and organic part of our national ethos. I have already referred to the need for cooperation between Bench and Bar as a **sine quo non** for furthering, developing, aiding and co-ordinating the work of the courts. And though it is very necessary for both Bench and Bar to continue to inform themselves from Commonwealth and other law reports in particular, and other legal periodicals in general, on the progress and development of the law, we must learn to think for ourselves, to be self-reliant and to look for solutions to problems locally and within the ambit of our Constitution.

When deciding cases our judges, in point of principle, ought first to pay regard to local law reports on what has already been decided in Guyana and in West Indian jurisdictions. Our own reports date from about 1865, i.e., during the days when the old Roman-Dutch Law was the common law of Guyana. And it will be of interest to note that Dr. Shahabuddeen has raised practically the same point I now seek to make about the duty of our courts to pay regard to local decisions in the preface to his work "The Legal Systems of Guyana", p. ix.

FOREIGN AND LOCAL

In Singh v. McLoggan, (1961) L.R.B.G. 38, the Federal Supreme Court has brushed aside counsel's reference to Roman-Dutch Law when it was informed of the rule that execution could not levy on immovable property when movables were still available. Admittedly, Roman-Dutch Law did not apply to the case, but the fact that there was a similar rule applicable in Guyana some two hundred years old, apparently meant nothing to the Court. The judges in **Singh v. McLoggan** (Rennie, Archer and Wylie, JJ.). all expatriates, evidently had no incentive to record that fact, and that was why the learned author hoped a wholly national judiciary would be more watchful of the lines along which the future will tend to rise out of the past.

So only if there is no help forthcoming from within, will a local judge be justified in referring to and considering foreign cases and judicial pronouncements on what has been decided on facts and circumstances non-Guyanese.

Practitioners, too should always cite local cases in perference to foreign ones, if they can. Quite recently in **Persaud v. Barran,** (1981) G.C.A. Crim App. No. 36 of 1980, dated June 22, 1981, I had occasion to speak out against this tendency of our judges to review copious citations and **dicta** in foreign authorities in support of legal principles when those principles are already amply illustrated by locally-decided cases. I referred to the habit as a backward tendency and suggested that if our Supreme Court in 1955 had only thought it fitting to consider our local decision of **Williams v. Sancho,** (1917) L.R.B.G. 137, which laid down the principle of justice for conducting a view of the **locus in quo,** an appeal for the advice of Her Majesty in Council on that matter would hardly have been necessary in our local cases of **Karamat** and **Tameshwar.** I say without fear of contradition that this nostalgic reverence for, and attachment to, English and other foreeign precedents by our national court of final instance in the face of Act No. 14 of 1970, abovementioned has been one of the chief obstacles to the development of the law in Guyana

A good example of what I mean is the attitude until recently, adopted by our own final Court of Appeal to the admissibility of confession statements. Until the recent decision of the Privy Counsel in **The State v. Adjoda & Chandree et al,** our Court of Appeal and those of the several jurisdictions of the West Indies consistently presisted in refusing to accept the self-evident truth that "in all cases where an accused denies authorship of the contents of a written statement, but complains that the signature or signatures on the document which he admits to be his own were improperly obtained from him by threat or inducement, he is challenging the prosecution's evidence on **both** grounds and there is nothing in the least illogical or inconsistent in his doing so." See **The State v. Adjoda & Chandree et al.** It had to take a decision of the Privy Council to convince the Trinidad & Tobago and the Guyana Courts of Appeal that this was the right view to take, and that it was wrong to have changed the view it previously held on the matter in **Lindon Harper v. The State,** (1970) 16 W.I.R. 353. Had our Court of Appeal held firmly to what it decided in **Lindon Harper's** case and not reneged on it by faulty destinctions in **The state v. Fowler** (1970) 16 W.I.R. 453, neither the appeal in **Dhannie Ramsingh** nor **The State v. Gobin & Griffith** would have

been necessary, and I venture to say even that of the Privy Council in **Ajodha & Chandree** (above); but this is all history now."

In conclusion, he said:—

"In summing up I will be very brief. The central theme of my address has focussed on the effort of the alternation of the 'Westminster Model' of constitutional government insofar as it affected the work of the courts. What has been achieved by that alternation in 1978 should leave you in no doubt about the sort of role the courts are called upon to play in contemporary Guyana. It is, however, not true to say that since the change-over to socialism the courts have become mouthpieces of government policy. But it is not possible for the courts, if they are to be faithful to the Constitution, to ignore the political bases of the economic and social system of the State; they must guide themselves thereby in the evolving constitutional experiment, it is evident courts must work co-operatively with the Government and other public agencies in the pursuit of the principles of socialist democracy as set out in Chapter II of the Constitution, and insofar as the role the courts are expected to play in contemporary, i.e., socialist Guyana, art. 39 gives the clue to it."

RELENTLESS

I have also acquainted you with the relentless struggle for economic and social development that existed before independence and which continues to exist in our society; also with the aims and aspirations of our peoples for better standards of living and a more prosperous way of life, and gave you some idea of the role the Judiciary could meaningfully play in maintaining the rule of law, in the administration of justice and in the development of the law in our present situation. I have also apprised you of how development of the law can take place by your unswerving devotion to our Constitution for ideas and inspiration, and have explained the need for both Bench and Bar to think locally for solutions that may be obtained from locally-decided cases, and gave you some specific examples of how best we, by concerted action, can achieve that end.

Members of our noble and learned profession, I have come to the end of my discourse. I will have been deeply honoured if you should have derived at least some benefit from it. You may, however, rest assured that it has been a pleasure to address you this evening. Before I take

my leave of you, however, I will offer this bit of advice: that it is only by dint of diligent application and research that your contribution to the constitutional interpretative role of the Judiciary will be of value to the progress and development of the law. See to it that you are equal to the task."

* The Chancellor of the Judiciary is also Chancellor of the Anglican Diocese. He is a former Magistrate in British Guiana and Nigeria, and until recently was Chief Justice of Guyana.

He flew with the Royal Air Force in World War II.

ED.

Bail or Jail

By C. .R. RAMSON*

The rights of every man are diminished when the right of one man is threatened : **A thousand Days,** by ARTHUR M. SCHLESINGER Jnr.

In a society where institutions proliferate, it is not surprising to find that recognised concepts are gradually dismembered until seemingly acceptable substitutes become the norm. No one can over-emphasise the importance of the issue of bail in a situation where defendants/accused suffer premature penalties while awaiting trial. Lest this exposition be condemned as legalistic and not realistic, it is intended to re-awaken the spirit of freedom not infrequently found lacking in some Magistrates and, to a lesser extent, some judges, who have themselves become quasi-institutions, insulated by the tapes of parochiallism and free from the scrutiny normally experienced by the ordinary citizenry.

This article is limited to the three main areas in the practice of Criminal Law, where one treats with this issue via (a) pre-trial; (b) Police/State Prosecutions and private Criminal matters; (c) post-trial.

PRE-TRIAL

On the arrest without warrant of a person by the Police certain preliminary considerations come into focus in an effort to secure the release of that person. Two fundamental principles of the Common Law apply, viz— (1) A man is presumed to be innocent until proven guilty by a Court of competent jurisdiction, and (ii) A man is entitled to a fair trial i.e. fair not only to the prosecution but equally to the defendant/accused. Enshrined in Arts 40 (1) (a) and 139 (1) (a) — (e) of the Constitution of the Co-operative Republic of Guyana is the right to personal liberty subject to certain exceptions. Under the general law provision is made for his release on bail, the effect of which is not to set him free but to release him from the custody of the law into the custody of his surety who is bound to produce him to answer on his trial at a specified time and place (see 2 HAWK P.C. c 15 S.3). Bail is obligatory in summary cases and in all misdemeanours except those which are also classified as felonies (infra).

Specific Statutory provisions are made to guide the authorities in their approach to the issue of bail. A person detained is required to be taken before a Magistrate as soon as practicable after detention provided that any member of the Force for the time being in charge of a police station may enquire into the case and —

(a) **except when the case appears to such member of the force to be of a serious nature,** may release such person upon his entering into a recognisance with or without sureties for a reasonable amount, to appear before a Magistrate at the time, date and place mentioned in the recognisance; or

(b) if it appears to such member of the force that such enquiry cannot be completed **forthwith,** he may release such person, on his entering into a recognisance, with or without sureties for a reasonable amount, to appear at such police station and at such times as are mentioned in the recognisance : S. 21 of the Police Act CAP 16:01.

STATION BAIL

Commonly known as "Station Bail", this is the first step in the process of setting "free" the detained person who has contravened the Law. Not infrequently the source of the power of the police is overlooked or not sufficiently apprehended in the pursuit of routine investigations. Any "Criminal" practitioner will have experi-

enced the situation where his client is detained consequent upon an oral report by someone, whether he is the victim of or a witness to alleged criminal conduct: S. 17 (1) (c) of the Police Act CAP 16:01. However an important enjoiner to the arresting officer is that the person making the report must be "willing to accompany the member of the Force effecting the arrest to the Police Station and to enter into a recognisance to prosecute such charge" (proviso to S. 17 (1) (c)). Quite often, most, if not all. police officers seem to be unaware of this provvision despite repeated references to it when applications are made for bail at Police Stations. Where such a person does not satisfy the requirements of the section (supra) it is my respectful submission that the Police Authorities would not be protected if the detention is subsequently challenged. No question of bail should arise; the immediate release of the person detained would be imperative.

STATUTORY PROVISION

Further statutory provision is found in S. 71 of the Summary Jurisdiction (Procedure) Act CAP 10:02 in relation to "summary conviction offences". Here too the detained person "shall be taken before a magistrate as soon as practicable after he is taken into custody". Any officer of police or non-commissioned Officer may enquire into the matter and he may act as he would under S. 21 of the Police Act CAP 16:01. On occasions one finds that a person is detained for days by the police who seek shelter behind the fact that both provisions require that the detained person be taken before a magistrate **"as soon as practicable"**, phraseology nebulous enough to protect them against any allegation of undue detention. Similarly shelter is sought behind the fact that the officer need not release the person if the case appears to him to be **"of a serious nature"**. Because of their lack of definitive meaning both clauses are open to misuse, if not abuse, and quite often one finds that the subordinate officer in charge of a police station refuses or is reluctant to exercise his discretion in the most trivial matters. The writer is aware of the situation where a person accused of disorderly behaviour (a trivial offence) was detained at 11.00 a.m. on a particular day and would have been kept in Police custody overnight, had it not been for the intervention of the Commissioner of Police. In fact, no evidnce was subsequently offered against this defendant.

Further it is submitted that S. 71 (supra) must be read in the light of the common law principle that bail in summary matters is obligatory, notwithstanding the

use of the word "may" therein. Section 81 of the Criminal Law (Procedure) Act CAP 10:01 (where provision is made for the release of a person charged with a misdemeanour punishable by fine or with imprisonment for a term not exceeding 2 years (infra)) must be read conjointly with S. 21 of CAP 16:01 and S. 71 of CAP 10:02. So read, one can only conclude that a person is **entitled** to be released on bail by the Police except where he is charged for an offence falling outside the scope of S. 81 (c).

SERIOUS MATTERS

In "serious matters" the Police ought not to detain an accused for an unlimited time simply because they can not produce the CHALLAN in time (see SOONAVALA: A treatise on the Law of Bails) — the liberty of the subject is not to be trifled with. Even in Soviet jurisprudence, measures to secure the appearance of the defendant can be used only if there is sufficient evidence to show that the accused might try to avoid an inquiry, investition or trial (p. 17 **Crime Prevention and Law** by Khiil Sheinin) — Perhaps, a more convenient procedure would be to set out in detail offences which are bailable and those which are non-bailable as embodied in the Code of Criminal Procedure in India. Personal considerations seep into the question of bail and some standardisation of the criteria for the release of persons detained ought to be established in accordance with the aforementioned statutory provisions, and it is the writer's experience that some persons are denied bail on the ground that "the investigating rank is not available" or that "the enquiries are not complete". Police Officers need constantly to remind themselves that their duties are investigative and preventive, and not judicial in so far as the guilt or innocence of the defendant/accused is concerned. Too much power is assumed by those responsible for investigating crime and because no specific guidelines exist, principles contemplated by the statutory provisions have become polluted by the desperate infusion of idiosyncratic considerations.

TRIALS (Summary and Indictable)

The right to be at liberty is a valuable right, and when an application is given for bail, it is this valuable right which the accused person seeks from the Court (see **RATAN SINGH — NIHAL SINGH -vs- STATE** A. I. R. (1959) M.P. 216). Whatever may be its ideological under-currents the interests of Society as a whole

are entitled to protection when considering the liberty of person against whom the processes of the law have been put in motion. A concomitant caveat where such a conflict exists is, or ought to be, that the fundamental human rights of the individual should be restricted only where this is necessary to protect that society from a greater evil — i.e. the likelihood that justice would not be done if the person charged is released.

As pointed out by Russell J. in the leading English case of in **re Charles Rose** 14 TIMES L.R. 213, bail is not intended to be punitive, but only to secure the attend ance of the prisoner at the trial. When faced with this undoubted dilemma, a Magistrate should only remand a person charged as a last rsort, as Mukerji J in the **Emperor vs Hutchinson** A:I.R. (1931) ALLAH 356 said—

> "on general principle the grant of bail should be the rule and the refusal of bail should be the exception."

FACTORS

It is submitted that factors to be considered by Magistrates would be:—

1. The likelihood that the **person** charged will attend his trial.
2. The probability that the person charged will commit similar offences while he is on bail.
3. The prevalence of the offence.

While the principal enquiry should be as stated at (i) supra, it is the net result of all the factors which must ultimately decide the matter. While factors (ii) and (iii) are relevant in the consideration of the release of the person charged they are not the over-riding factors. The General policy of the law is to allow bail rather than refuse it, and bail should not be withheld as a measure of punishment or for the purpose of putting obstacles in the way of the defence, (see **Kishan Singh** -vs- **Punjab State** A. I. R. (1960) PUNJ 307 and see **Ram Chandra** -vs- **State** A.I. R. (1952) M. B. 203). Quite often a person charged is placed on bail in a sum inconsistent with his means or which may amount to a refusal of bail. It is not unknown for some Courts to impose bail in sums ranging from $125,000 to $5,000.00 in respect of some cases where the penalty imposed by the statute is less severe. It was held in the Indian case of **IQBAL SINGH** -vs- **STATE** A. I. R. (1960) PUNJ 512 where the maximum penalty was one month imprisonment or a fine of Rs 100, that even the sum of Rs 500 was excessive. In fact the appellate tri-

bunal reduced it to Rs. 100. A common practice that has developed in our local courts is the imposition of bail for minor offences; e.g. Traffic; radio licence offences; disorderly behaviour; assault and City Council offences. This leads to the suspicion in some quarters that the primary objective is to solicit a "guilty plea" from the person charged and in effect negating his right to a fair trial, guaranteed by the Constitution. The argument that the defendant may not attend his trial if he is placed on bail in a small sum pales into insignificance when one considers that the relevant statutes make provision for ex-parte trials and the estreat of any security lodged. The writer is also aware of a case where a person was charged under the National Security (Miscellaneous Provisions) Act CAP 16:02 for unlawful possession of arms and ammunition, a very serious offence indeed, and was initially refused bail by a certain Magistrate but was fined $250.00 (two hundred and fifty dollars) by the said Magistrate on a subsequent occasion when he indicated his willingness "to adopt a certain course". Surely the whole substratum of the consideration used to deny bail to the person charged disappears in such a case. Furthermore very seldom does a Magistrate impose bail on a person charged, not by the Police but on a private complaint. On the surface there should be no discernible difference in the two approaches.

TEST

No exhaustive or inflexible test can be laid down for disposing of bail applications but arising out of the primary enquiry as set out above are the following :

(a) the nature of the accusation **R. -vs- Baronet** (1853) 1 El and Bl. [1]DEARS C.C. 51;

(b) the nature of the evidence in support of the accusation. **Re — Robinson** (1859) 23 LJ G.B. 286; **R --vs BUTLER** (1881) 14 Cox C.C. 530

(c) the severity of the punishment which conviction will entail. Some of these principles are embodied in a Practice Note dated 6th July, 1964 issued by Sir Joseph Luckhoo, the then Chief Justice of British Guiana.

However, where the person charged can afford it or where he is strong enough to pursue his right it is apposite to note that a Magistrate may be indicted if he refuses bail from improper motives or sued if he does so maliciously. (See SOONAVALA: A treatise on the Law of Bail p. 46 and Stones Justices Manual 1971 VOL. 1 p. 399).

Even when an accused is being tried for an indictable offence which is a misdemeanour punishable with a fine, or with imprisonment for a term not exceeding two (2) years, he is **entitled** to be admitted to bail but if such misdemeanour attracts a greater penalty or where the offence is a felony, the Magistrate has a discretion whether or not to admit the accused to bail, except where the offence charged is treason, misprison of treason, treason felony or murder, (see S. 81 of Criminal Law (Procedure) Act CAP 10:01) In any case the quantum fixed by the Court must not be excessive (see S. 89 (1)). This latter provision is of particular importance when a comprehensive overview is taken of the elements and principles attaching to the grant of bail as particularised above. S. 89 (3) makes an exception in the case of the married woman or an infant who is admitted to bail. Neither is required to enter into the recognisance. Magistrates are given a discretion in some cases but are **obliged** to grant bail in others consistent with the express provisions of the Statute which are designed to ensure that the liberty of the subject is not unnecessarily curtailed. Such discretion must be exercised judicially.

PENDING APPEALS

Upon conviction by a Court of Summary Jurisdiction a person sentenced to any term of imprisonment has a right of appeal and upon the exercise of this right he may be released on bail pending his appeal. The practice is that an application be first made to the Magistrate and if unsuccessful, to a Judge in Chambers by way of Summons. An Appeal on conviction on indictment, the locus classicus in Guyana is **State -vs- Lynette Scantlebury** No. 26/76 in which Chancellor Haynes, as he then was, explored and explained the principles applicable in such cases leaving little room for equivocation or ambiguity. This petition was heard on the grounds, inter alia, that there was a real likelihood that the appeal will come on for hearing after the sentence imposed was served. In the course of the judgement Chancellor Haynes said —

> "Undoubtedly this Court has jurisdiction to admit an appellant to bail pending the determination of an appeal. It is accepted law that **it is a matter of discretion.** An appellant has **no common law or Statutory or constitutional right to bail.** But like all other discretionary powers it must be exercised judicially" (underscoring mine).

According to the learned Chancellor, the authorities are clear that the circumstances must be "exceptional"

to justify the grant of bail to persons convicted by juries. It was his considered opinion that there must be special circumstances which made it the "just thing" for granting bail as in the case of **R. -vs- Rudolph Henry** (1975) 13 J. L. R. 55 where on the face of the papers before the Court the appeal had every prospect of success. Although no reference was made to **R. -vs- Marsh** 9 W. I. R. 58 this case shows that the Appellate Court would not lightly find that an exceptional circumstance existed. The President of the Court held that the long vacation was not in itself an exceptional circumstance although the Petitioner had already served 5 months of his sentence of 36 months. In the instant petition it was clear that it would have been administratively impracticable to have the appeal heard before the expiration of the sentence and consequently the Chancellor admitted the applicant to bail in the sum of $2,000.00. But he was quick to point out that the sex of the Petitioner had nothing to do with his decision. Other functionaries ought to be guided by the quantum fixed in this case as a fair and reasonable sum in matters as serious as, or less serious than, the one under consideration.

More recently, Chancellor Haynes in an extensive judgement in the **State -vs- Sedley Phoenix:** Criminal Appeal No. 42 of 1979) set out three conditions without which the discretion may not be exercised. **Firstly** the Court must be satisfied that it has jurisdiction to hear the matter. Secondly, there must be before the Court sufficient material for a just adjudication at this stage; and **thirdly,** the appellant must convince the Court that his appeal had every prospect of success, i.e. that it ought to succeed.

Every effort should be made to minimise the erosion of tried and tested principles designed to resist encroachment upon the liberty of the subject. Institutionalisation, like a bridleless steed, may get out of control and as Sir Leslie Scarman said : "The need for control, and control according to law, will remain so long as men believe that uncontrolled power is an evil to be eradicated from civilised Society" (p. 26 English Law — The New Dimension).

* LLB (Hons.) (London), a practising Attorney-at-Law. —ED.

The Nature of Fundamental Rights and Freedom in the Commonwealth Caribbean

S. Y. MOHAMED*

A constitution is a selection of legal rules which regulate the government of a country.[1] It may either be written or unwritten. Where the legal rules are embodied in a document, the country it said to have a written constitution. All Commonwealth Caribbean countries have written Constitutions. A written constitution often prescribes a special process by which it is to be amended. The special process of amending it is elaborate. It cannot be amended except in the manner laid down in the constitution itself. This kind of constitution is called a 'rigid constitution.' Not all written constitutions are rigid. New Zealand appears to be an exception to this general rule. **That country has a written constitution which can be changed through the same process as any other law.**

FUNDAMENTAL

The English Constitution is unwritten in the sense that there is no one document or series of documents which may be pointed to as 'the constitution'. The English Constitution is a collection of legal rules and non-legal rules which govern the government in England. The legal rules are embodied in statutes. The non-legal rules are customs or conventions. An unwritten constitution can be changed by the legislature in the same way as the legislature makes an ordinary law. There is no special process to follow to change it. This kind of constitution is called a 'flexible constitution.' In an unwritten constitution there is no code of fundamental rights and freedoms.

All the Commonwealth Caribbean countries have enshrined in their Constitutions, which have been enacted and handed down to us by the Imperial Parliament, certain fundamental rights and freedoms. They are called 'fundamental', because while the ordinary rights may be changed by the legislature in the ordinary process of legislation, a fundamental right cannot be eroded by the legislature except by the adoption of certain specified

procedures. Rights and freedoms can never be truly called fundamental if they can be abrogated by the legislature in the same way the legislature makes or unmakes an ordinary law.

LEGAL RIGHTS

A fundamental right differs from a legal right. A fundamental right is guaranteed by the constitution of a state and it can only be altered in the manner specified in the constitution. A legal right is protected and enforced in the courts by the ordinary law of the land and it can be altered like any other law. There is no specific procedure to follow to alter a legal right. Fundamental rights and freedoms are inserted in a constitution in order to impose limitations upon the powers of the legislature. They are designed to establish a limited government. This concept of limited government is what the Americans know as 'a government of laws, and not of men'.[2]

ENTRENCHMENT

The purpose of the entrenchment was described by Lord Diplock in Hinds v The Queen[3] as follows:—

> The purpose served by this machinery for 'entrenchment' is to ensure that those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitution, should not be altered without mature consideration by the parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws.

In Banton et al v Alcoa Mineral et al Farnell, J puts it thus :[4]

> If the right was not enforceable in a court of law, it was to some extent protected by the force of public opinion, e.g., refusing to employ a man, otherwise suitable, on the ground of his race or the district he was born. What the Constitution has done is to entrench the right which had already existed, not for the purpose of enlarging its content or its area but for the purpose of making it difficult for a Parliament to abrogate, vary or otherwise interfere with these rights unless it should pass a special Act amending the Constitution and following the elaborate procedure laid down by the Constitution itself in s. 49.

lative procedure. The Constitution of the Commonwealth of Australia,[15] an Act of the Imperial Parliament, also contains certain rights and freedom, but no comprehensive guarantees are contained in it.[16]

The Privy Council has described fundamental rights and freedoms guaranteed by the various constitutions of the Commonwealth Caribbean countries, as a restatement of the common law or existing law. In the Director of Public Prosecutions v Nasralla, Lord Devlin spoke on the Constitution of Jamaica as follows :[17]

> This chapter. . . proceeds on the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions.

CONFLICT OF INTEREST

Fundamental rights and freedoms are not, however, absolute or unqualified. If everyone is to have absolute rights and freedoms there would certainly be chaos.[c] There would always be a conflict of interest. There must be a limit to rights and freedoms if the rights and freedoms of others and the interests of the community are not to be contravened. In Jang Bahadur v Principal Mohindra College, Teja Singh, CJ, said that the right to move freely throughout the territory of India did not confer the right to walk over other people's property.[18] In Brandt v The Attorney General of Guyana et al Crane JA observed[19] —

> Fundamental rights are not, however, absolute or unqualified; they are subject to such limitations as are contained in the entrenched provisions themselves; limitations which operate in defeasance of those rights, so as to make their guarantee to the individual enure only so long as he does not prejudice those rights and freedoms of others or the public interest. If he does so, the individual cannot lay claim to fundamental rights for every person must so restrain himsellf in their enjoyment as not to infringe upon the enjoyment of those rights and freedoms of others.

BALANCE

The limitations imposed by the entrenched provisions imply that the fundamental rights and freedoms shall be subject to the exceptional provisions and that

GUARANTEED RIGHTS

The fundamental rights and freedoms, which we now enjoy under our respective constitutions. are called liberties in England.[5] These liberties are highly prized. Lord Ellenborough CJ once said that "the law of England is a law of liberty."[6] Some liberties are contained in four great charters or statutes namely Magna Carta.[7] the Petition of Right (1627); the Bill of Rights (1688) and the Act of Settlement (1700). Certain other liberties are contained in the United Nations Universal Declaration on Human Rights[8] and the European Convention for the Protection of Human Rights and Freedoms.[9] The right not to be deprived of property without due process of the law, the right to personal liberty and immunity from wrongful detention originated in the Magna Carta. The right to life is guaranteed by legislation.[10] But these liberties are not guaranteed rights such as are guaranteed to the citizen of a country which has a written constitusion. The Parliament in England is sovereign and these liberties can be abridged any time by ordinary legislative process, thus the Magna Carta was extended but more frequently curtailed more than thirty times between the reigns of Henry III and Henry IV.[11] The English court cannot declare an Act of Parliament unconstitutional on the ground that the Act has infringed any of these liberties. Judicial review of Acts of Parliament is unknown in England. But in a country which has a written constitution in which there are enshrined fundamental rights and freedoms the courts will unhesitatingly declare an Act of Parliament void if it violates any of those rights and freedoms.[11a]

CANADA AND AUSTRALIA

Not all written constitutions have enshrined in them fundamental rights and freedoms. The Constitution of the Dominion of Canada, which is the product of an Imperial statute,[12] contains no explicit fundamental guarantees comparable to the fundamental rights and freedoms enshrined in the constitutions of the Commonwealth Caribbean countries. It merely safeguards certain denominational schools against encroachments on their privileges by provincial legislatures and provides for the equality of the English and French languages for specific purposes.[13] In 1960 the Federal Parliament enacted the Canadian Bill of Rights [14] which recognised certain rights and freedoms. The Act was not passed in the form of an amendment to the Constitution and it is, therefore, capable of being amended or repealed by ordinary legis-

any law made by the state in relation to these exceptional provisions shall be valid even though that law may be inconsistent with or in contravention of the fundamental rights and freedoms. This is exemplified in Attorney General of Antigua v Antigua Times[20] where the impugned laws provided that before anyone could publish a newspaper he should pay a licence fee of $600 and a deposit of $10,000 with the Accountant General to satisfy any libel judgement. The Privy Council held that the impugned laws were prima facie unconstitutional because they hindered the respondents' right to their enjoyment of freedom of expression guaranteed under section 10 of the Constitution of Antigua. They, however, upheld the constitutional validity of the impugned laws on the ground that the impugned laws came within the limitations of the entrenched provisions. The licence fee was a tax reasonably required to be raised in the interests of the defence and for securing public safety, public order, public morality or public health and the deposit was also reasonably required for the purposes of protecting the reputations, rights and freedoms of other persons.

It is submitted that even if there were no limitations or exceptions to the fundamental rights and freedom guaranteed by a constitution the court would nevertheless be bound to declare that fundamental rights and freedoms are not absolute or unqualified. The Constitution of Trinidad and Tobago, which is modelled after the Canadian Bill of Rights,[21] has no limitation provisions corresponding to the limitations, which are found in the entrenched provisions of the several constitutions of the other Commonwealth Caribbean countries.[22]. Yet in Collymore v The Attorney General of Trinidad and Tobago Wooding CJ observed.[23]

> My first observation is that individual freedom in any community is never absolute. No person in an ordered society can be free to be antisocial. For the protection of his own freedom everyone must pay due regard to the conflicting rights and freedoms of others. If not, freedoms will become lawless and end in anarchy. Consequently, it is and has in every ordered society always been the function of the law so to regulate the conduct of human affairs as to balance the competing rights and freedoms of those who comprise the society.

The various constitutions of the Commonwealth Caribbean countries have guaranted us certain fundamental rights and freedoms which can be taken away in certain exceptional cases. This permissible curtailment of

our fundamental rights and freedoms is reasonably required for the continued existence of a civilised society. Fundamental rights and freedoms are, therefore, in Burke's words a 'regulated freedom.'[24]

* Mr. Mohamed is a State Counsel in the Chambers of the Attorney General.—ED.

---

1. JDB Mitchell Constitutional Law Second Edition 10, KC Wheare Modern Constitutions (1975) 1-5 and 14-17.
2. Basu Commentary on the Constitution of India vol 1 Fourth Edition 11-12.
3. (1976) 1 All ER 353 at 361.
4. 17 WIR 275 at 304.
5. Halsbury's Laws of England vol 8 Fourth edition para 827 et seq. .....
6. R v Cobbett (1804) 29 State trial at 49.
7. Edward 1 (1297) C 29 The Magna Carta was first assented to by King John in 1215
8. 1948 (Cmnd 7662).
9. 1950 (Cmnd 8969).
10. See 28 Ewd 3 c 3 (Liberty of Subject) (1354).
11. Halsbury's Laws of England vol 8 Fourth edition para 908.

11.a See s. 48(2) Constitution of Sri Lanka (1972) where the court cannot question the validity of any law of the National State Assembly.

12. The British North America Act 1867 (30 & 31 Vict c 3).
13. S A deSmith the New Commonwealth and its Constitutions (1964) 170 et seq.
14. An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms (8 & 9 Eliz II c 44) (1960).
15. (1900) 63 & 64 Vict c 12.
16. S A deSmith The New Commonwealth and its Constitutions (1964) 171.
17. (1967) 2 All ER 161 at 165.

c Your right to swing your arms ends where my nose begins — Mr. George Roberts until recently American Ambassador to Guyana.

18. Per Luckhoo C Jagan v Burnham 20 WIR 114
19. 17 WIR 448 at 514.
20. (1975) 3 ALL ER 81 Francis v Chief of Police (1973) 2 All ER 251.
21. Collymore v the Attorney General of Trinidad & Tobago 12 WIR 5 at 8 and 21.
22. Section 10 of the Constitution of Antigua note 20 supra.
23. 12 WIR 5 at 9.
24. Lord Wright Liversidge v Anderson (1942) AC 206 at 260.

Touts and the Law

By Lalta Ramgopal.

The mischief of touting in our legal profession is considered such an evil that Parliament of Guyana saw fit to impose measures for its suppression.

The Legal Practitioners Act Chapter 4:01 Section 2 defines a "TOUT" as:—

> "A person who procures in consideration of any remuneration moving from any legal practitioner or from any person on his behalf, the employment of such legal practitioner in any legal business, or who proposes to any legal practitioner to procure in consideration of any remuneration moving from such legal practitioner or from any person on his behalf, the employment of the legal practitioner in such business, or who for purposes of such procurement frequents the precints of the Court or any Court subordinate thereto and includes a person declared by the Registrar to be a tout in pursuance of section 13".

Section 16 provides that:—

> "Any person who procures any legal business for a legal practitioner shall, unless he proves to the contrary, be deemed to have procured such legal business in consideration of remuneration moving from the legal practitioner if that person is employed by and is in receipt of emoluments of any kind from the legal practitioner."

Accoding to Justice of Appeal, Victor E. Crane, as he then was, in **John Leonard -vs- Stanley Erskine, 17 W.I.R. 157,** "the object of the Legislature was not merely to prevent the waylaying of unsuspecting clients whose cases are enticed from them by touts in favour of particular legal practitioners," but "to clean up the mal-practice of touting in the profession, **an evil which every lawyer knows had been progressively assuming alarming proportions** and bismirching the name of the honourable profression of the law for many years now."

In pursuance of this object, provision is made in the Legal Practitioners Act for the prosecution of touts and for the discipline of those legal practitioners who encourage the practice of employing touts. It being fully recognised that there would be no touts, if touts were not en-

couraged by legal practitioners.

Section 11 of the Legal Practitioners Act — confers upon the High Court the power to suspend from practice or to strike the name of a legal practitioner from the Court roll on reasonable cause being shown on petition or motion.

Section 12 of the said act states that any person who acts as a tout shall be liable on summary conviction to a fine of $250.00 and to imprisonment for six months.

By Section 13 the Registrar is empowered to publish in the Gazette the name of any person who has acted as a tout unless cause is shown to the contrary, and the **Chief Justice** may by order prohibit any such person from entering the precincts of the Courts.

Despite these provisions and despite this unique piece of legislation in Guyana, touting in the legal profession has proliferated, being encouraged and nurtured by some legal practitioners who proudly refer to the touts as "field clerks."

Several known touts can be seen in Croal Street and around the precincts of the Courts daily. Who pays them? From early in the morning, like kites, these touts can be seen openly soliciting, cajoling, coercing and sometimes intimidating unsuspecting clients. By divers surreptitious malicious and false representations, they malign other legal practitioners, while they fraudulently extol and often exaggerate the virtues and qualifications of the practitioners who are their patrons; all in their attempts to entice, induce and entrap innocent clients.

These touts would speak derogatorily of the ability of legal practitioners of clients' choice, saying for example, that these practitioners were no good, that they (the clients) would certainly be jailed or lose their cases if they were to engage the legal practitioners of their choice or that the practitioners were not in Guyana and had gone to reside abroad. By the time the concerned and worried clients discover the truth they are already in the grasp of the touts' nominees who like veritable boas only wait to lay hold of their prey. In the end when the clients do not obtain the representation they justly deserve they become frustrated and bitter about all legal practitioners and the legal profession in general.

While many lawyers uphold the dignity of the profession and never condescend to low practices some members of the fraternity undoubtedly indulge in abhorrent and crooked methods. Although touting and advertising were unknown in the legal profession as late as the mid 19th.,

century, the legal practitioners who employ touts claim that touting existed in Guyana from the dawn of the legal profession. They argue that experienced and senior practitioners encourage and thrive upon the service which, above all, enhances their income.

All legal practitioners must be aware that the law and ethics of the profession forbid touting. Ours is a **profession** not a business. We need no hawkers to sell our wares. Our services and principles should so shine that clients will need no other solicitation, coercion or enticement to engage our services.

This principle is upheld everywhere by the ethics of the Legal Profession. According to **Professional Ethics by Sir Thomas Lund** published by the International Bar Association, "Every lawyer owes a duty at all times to maintain the honour and dignity of his profession and to deal honourably, frankly and fairly with all his colleagues." By paragraphs D2 and D3 a lawyer will fail in his duty if he seeks professional business to himself unfairly or accepts instructions to take proceedings from any person who has been introduced to him as a result of solicitation.

Similarly, the **Standards of Professional Etiquette and Professional Conduct** for Attorneys-at-law, prescribed by the **General Legal Council (UWI), states in Canon II (b):—**

> "An Attorney should not permit in the carrying on of his practice, or otherwise, any act or thing which is likely or intended to attract business unfairly or can reasonably be regarded as touting or advertising."
> **And in Conduct and Etiquette at the Bar by W.W. Bolton:**
>
> "It is contrary to professional etiquette for an (Attorney-at-law) to do, or cause or allow to be done, anything for the purpose of touting, directly or indirectly, or which is likely to lead to the reasonable inference that it is done for that purpose."

The Guyana Bar Association cannot continue to be oblivious to the existence of touting and its evils in our legal profession. And it is now facetious to distinguish between feigned and genuine legal business as was done in Leonard's case. The Association should therefore take active and positive steps to have the law and ethics regarding touting enforced. The Association should be bold and courageous to invite, urge and co-operate with the police to clean the streets and the profession of touts. They are an abomination to society, a disgrace to the profession, and no less than parasites on an unsuspecting community.

To Judge Or Not To Judge...?

BY
VIDYANAND PERSAUD*

"Justice is impartiality. Only strangers are impartial."
— George Bernard Shaw, Back to Methuselah.

Dr. Shahabuddeen in "The Legal System of Guyana" [1] made the observation that the history of our legal system shows a continuing concern on the part of the imperial administrators with the possibility of locally recruited judges being embroiled in local connections in a small society. He however opined that local recruitment of the whole judiciary raised a presumption that our society and judges are sufficiently mature to operate under traditional English rules.

Recent trends show clearly that the concern is not the prerogative of the imperial administrators.

Perhaps the most popular legal dictum was that uttered by Lord Hewart C.J. in **R v Sussex JJ., Ex p. McCarthy,** [2] that it is "of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done."

In **R v Camborne JJ., Ex p. Pearce** [3] the question for determination was the interest in judicial or quasi-judicial proceedings which the law regarded as sufficient to incapacitate a person from adjudicating or assiting in so doing on the ground of bias or appearance of bias.

Justice Slade reviewed the state of the authorities and had no hesitation in declaring that any direct pecuniary or proprietary interest in the subject matter of a proceeding, however small, operates as an automatic disqualification. In that case the law assumes bias. Difficulties arise when one seeks to determine what interest short of that will suffice.

BIAS

It was urged upon Slade J that a reasonable suspicion of bias is enough. He however rejected that contention (although dicta and passages in judgements lent some colour to it) and adopted the words of Blackburn J in **R v Rand** [4] as being representative of an almost universal requirement:—

> "..... a real likelihood of bias must be proved to exist before proceedings will be vitiated on the ground that a person who has taken part in or assis-

ted in adjudicating them was in law incapacitated by interest from so doing."

Applying the above test Slade J, 'in **Pearce's case,** found no impropriety' in the fact that the Clerk to the Justices was a member of the Council which brought the charge and that he retired with and advised the Justices.

Slade J endorsed the dictum of Lord Hewart CJ (supra) but cautioned that its continued citation in non-applicable cases might lead to the erroneous impression "that is more important than justice should appear to be done than that it should in fact be done."

A quarter of a century after Blackburn J propounded the "real likelihood of bias" test the echo was heard across the Atlantic when the United States Court of Appeal in the case of **Carr v Fife** [5] declared :

> "It would be mere weakness on the part of a judge to refuse to perform the functions of his office merely because of the insinuations against his ability to act impartially."

The old approach exemplified by Lord Esher M.R. in **Eckersley v. Mersey Docks & Harbour Board** [6] where he spoke of the "doctrine of suspected bias" in relation to judges was emphatically put to rest.

In **R (Donaghue) v County Cork** JJ [7] Lord O'Brien C.J. unequivocally rejected Lord Esher's doctrine as going too far. He expressed the view that it was an unconsidered judgement which made use of loose expressions and declared that judicial action in Ireland should not be regulated by the "mere vague suspicions of whimsical, capricious and unreasonable people" and that "mere flimsy, elusive, morbid suspicions should not be permitted to form or ground a decision."

JAGAN v. BURNHAM

The English Law Reports are replete with cases where justices who expressed adverse views to the claims of a party were held not to be disqualified when subsequently called upon to sit and determine such claims. The Windward and Leeward Islands Court of Appeal in the case of **Nathaniel Joseph v. R** [8] held that a committing magistrate is not disqualified although in another capacity he had advised further investigations into the complaint against the accused and had advised a prosecution. However, the Court's decision seems to have turned on the limited nature of a preliminary enquiry.

There is divided opinion in both English and American legal circles concerning the propriety of a judge per-

mitting a close relative to practice before him.

In the local case of **Jagan v Burnham** [9] the Court of Appeal delivered a ruling which was much criticised. The Court overruled the objection that a judge ought to be disqualified from sitting on the ground that leading Counsel for the Respondent was his brother.

In another local case a trial judge was invited to disqualify himself since he had been a candidate of a particular political party and the accused persons were members of a rival party. Not only was the invitation rejected but the unfortunate lawyer who made the application was cited for contempt by the trial judge and almost found himself in the jaws of prison!

In the case of **State v Larry Layton** [10] the defence objected to Bollers C.J. presiding at the trial on the ground that the Chief Justice and his family were close friends of a member of a cult who was allegedly murdered by another member of that cult. Layton was also a member of that cult.

The Chief Justice remarked that no objections were raised when a member of the defence team stood trial before another member of the team who was then an acting judge. In that case the accused and judge were well known to each other.

The Chief Justice, in language reminiscent of that of Lord O'Brien declared that "..... only a person with a distorted mind or twisted mentality anxious for the sensational 'affaire de scandale' could arrive at such a conclusion." He however quashed the indictment on another ground.

Guyana is a small society and all our judges are recruited locally. The safeguard of the traditional English rules (which in view of the present Attorney General will commend themselves to the maturity of our judges) is being threatened with erosion.

Future developments in this area of the law will be looked at with interest and anxiety.

---

1 Guyana Printers Ltd. 1973 p. 372.
2 (1924) 1 K.B. 259.
3. (1954) 2 All. E.R. 850
4. (1866) L.R. 1Q.B. 233
5 28 U.S.C.A. 469 (1891).
6. (1894) 2 Q.B. 667.
7 (1910) 2 I.R. 275.
8 1 W.I.R. 365.
9 Guyana Court of Appeal 1973
10 Guyana High Court 1/79

* Attorney at Law.

Case Review

By R. Jagnandan

IN THE GUYANA COURT OF APPEAL
CIVIL APPEAL No. 17 OF 1980

BETWEEN :

VICTOR JOHNSON,

Appellant
(Plaintiff)

and

STERLING PRODUCTS LIMITED

Respondents
(Defendants)

BEFORE :

Hon. Mr. R. H. Luckhoo, P.; Hon. Mr. K. M. George, Hon. Mr. C.J.E. Fung-A-Fatt, J.A.

1981 : July 21, 22,

Mr. Ashton Chase with Mr. Dabi Dial for appellant.
Mr. Edward Luckhoo with Mr. F. R. Dias for respondents.

In 1976 the Appellant/Plaintiff, then 26 years, suffered injuries in an accident when operating a machine in the Respondents/Defendants factory. His right hand was crushed and had to be amputated in hospital, in an action against Respondents / Defendants for (a) negligence and (b) breach of statutory duty to guard dangerous machinery under reg. 3(1) of the Factories (Safety) Regulations Ch. 95:02, the learned trial judge awarded damages in the sum of $10,343.00. On appeal, it was contended by the Appellant/Plaintiff that the meaure of damages was so inordinately low as to warrant adjustment upwards.

Held : Award varied from $10,373.00 to $29,500.00

George, J.A. (as he then was) dealth with the following issues at length :—

a) Circumstances which would impel an appellant court to intervene in order to rectify a judge's award of damages.
b) Assessment of pre-trial loss of wages.
c) Mitigation of loss.
d) Deductions of disability benefits under the National Insurance and Social Security Act, Cap. 36:01.
e) Loss of prospective earning capacity.
f) Heads of general damages as enunciated by Wooding, C.J., in **Cornilliac v St. Louis (1964) 7 WIR 491:**

IN THE COURT OF APPEAL OF GUYANA
CRIMINAL APPEAL No. 37 OF 1980.

BETWEEN :

BHUPAL PERSAUD, Det. Const. 7402,
Appellant
(Complainant),

and

1. DANESHWAR RAMSUMEER
2. THAKUR PERSAUD
3. LOAKNAUTH c/d CUTTIE

(Respondents
(Defendants),

BEFORE :

The Hon. Mr. V. E. Crane—Chancellor. Hon. Mr. C. J. E. Fung-A-Fatt, Justice of Appeal. Hon. Mr. C. M. Baburam Additional — Justice of Appeal.
Mr. C. W. Weithers, Ag. Deputy D.P.P. for Appellant.

The issue confronting the Court of Appeal in this matter was the exercise of the judicial discretion of magistrates.

At the Wakenaam Magistrate's Court, a request was made by the prosecutor for a postponement in order that he might produce two persons as witnesses at the next sitting of the court as they were vitally necessary for the conduct of the prosecution's case.

The reason given for requesting the adjournment was that one of the witnesses Dharamdeo Mohan had not yet been served with a subpoena to attend court, and that another, Detective-Inspector Jagmohan, was busy attending another court in Georgetown as a witness.

The magistrate ordered each of the names of the absent witnesses to be called out three times, and when no reply was forthcoming, he recorded "Case for Prosecution" in his note-book. The matter was then dismissed on a no-case submission by defence counsel.

On appeal to the Court of Appeal by the Director of Public Prosecutions under s. 32 A of the Court of Appeal Act Chap 3:01 as amended by s.8 of the Administration of Justice Act 1978, it was contended that the decision was erroneous in point of law in that the learned magistrate exercised his discretion injudiciously when he dismissed the case on improper and/or insufficient grounds.

Held: Appeal allowed and the case remitted to be dealt with **de novo** by another magistrate.

Crane C :

"Failure of the magistrate to grant the prosecution at least one adjournment to produce both the absent witnesses, was a denial of justice and an error of law of his own creation. Everyone knows how busy magistrates are; they work continuously under sustained pressure. It is understandable they are very anxious to dispose of their cases so as to present reasonably good returns to the Chief Justice each month, but they are not to do so at the expense of justice."

Editor's Note : Save for the fact that the forum was a lower one, much the same problem arose in the **State v Douglas James.**

Criminal Appeal No. 4/80 C.A.

IN THE GUYANA COURT OF APPEAL

STATE v NOLAN COLLINS

(CRIMMINAL APPEAL No. 1 OF 1977)

BEFORE :

C. J. E. Fung-A-Fatt, P.,; J.C. Gonsalves-Sabola; J.A.; G.A.G. Pompey, additional Justice of Appeal.

Mr. S. Insanally for the State.

Mr. B. O. Adams, S.C. for the Appellant.

Appellant, a former member of the Guyana Police Force was convicted at the Demerara High Court on 16th December, 1976 for the offences of (a) wounding with intent, (b) discharging a loaded firearm with intent. On count (a) appellant was fined five hundred dollars ($500.00) or in default six months imprisonment and on count (b) he was reprimanded and discharged and ordered to pay compensation in the sum of five hundred dollars ($500.00) to the virtual complainant. Appellant complied with the orders of the learned trial judge and

subsequently left the jurisdiction.

On the hearing of the appeal, the appellant did not appear, and Senior Counsel's locus standi was questioned. He urged the Court that there were over forty (40) misdirections in the judge's summing up and there was every possibility of the appeal being allowed. But there was no evidence that the appellant had instructed him to proceed with his appeal..

Held : Appeal struck out for want of prosecution.

(Rv Flowers (1966) 50 C.A.R. 22 cited with approval)

IN THE GUYANA COURT OF APPEAL ..
CRIMINAL APPEAL No. 36 of 1980

BETWEEN :

MAHINDRA PERSAUD c/d VISHNU BERNARD DA SILVA,
Appellants,

and

KENNARD BARRAN, DET. CPL. 9189,
Respondent,

BEFORE :

Hon. Mr. V. E. Crane, Chancellor; Hon. Mr. C. J. E. Fung-A-Fatt, J.A.;
Hon. Mr. C. M. Baburam, Additional Justice of Appeal.

1981 : June 22.

Doodnauth Singh, Attorney-at-Law for the appellant.

C. W. Weithers, Acting Deputy Director of Public Prosecutions, for the respondents.

The central issue which had to be determined in this case was in what circumstances should the magistrate conduct a view of the **locus in quo**?

Briefly, the facts of the case are that the appellants

were charged under s (57) (a) of the Criminal Laws (Offences) Act Chapter 8:01 with the indictable offence of wounding with intent to maim disfigure or disable one Yagendra Kishore.

The Magistrate elected to hear the matter summarily and convicted the defendants.

It was the defence contention that the virtual complainant sustained his injury through an accidental fall from a steep perpendicular drop about seven inches on the parapet from the bitumen surface of the public road. The learned magistrate in his memorandum of reasons said he paid a visit to the scene of the incident and saw for himself that nowhere on the Maria's Lodge public road was there any perpendicular drop of seven inches on to the parapet from the bitumen surface of the road.

This led to a ground of appeal that the learned magistrate erred in conducting a view all by himself in the absence of, and without the consent of, either party and that by so doing the trial was vitiated. . .

Held: Appeal allowed, conviction and sentence set aside.

Crane C. said:

"Every court of trial has a discretionary power to conduct a view of the **locus in quo**. It is a power that is inherent in every court and one which it must necessarily exercise in appropriate cases subject to certain precautions in the interests of justice, particularly when conducting it with a jury, care must be taken to see no one approaches, and/or put any improper suggestions to them. A magistrate of course, sits without a jury. He performs at one and the same time both magisterial and jury functions; nevertheless, in the light of the authorities, no view can ever be said to be properly conducted by a judge or magistrate if the person charged is not given an opportunity to be present with his attorney-at-law if he is represented, and if the prosecution and such witnesses for the prosecution and the defence as may be deemed material are not also invited to attend."

In this case the local authority of Williams v Sancho (1917) L.R.B.G. 137 was cited with approval. Other local authorities referred to are Karamat v The Queen (1955) L.R.B.G. 213, (1956) 1 All E.R. 415; 40 C.A.R. 13 Tameshwar v The Queen (1957) L.R.B.G. 56; [1957] 2 All E.R. 41 C.A.R. 161 [1957] A.C. 476.

Bar Association News

From the desk of Secretary, Robin Stoby

PAST PRESIDENT

The Association wishes to express its gratitude to Mr. B. O. Adams who stepped down as President after 2 years tenure of office, during which time the Association faced many difficult problems. Thanks in no small measure to 'B.O.' we were able to overcome many of these problems and to forge a new sense of unity and purpose in the Association.

CONGRATS

During the month of May, the Association lost the services of that stalwart worker Odel Adams. He has taken up an appointment in Barbados in the Chambers of the D.P.P. We wish him every success in that position.

On the occasion of the ascendancy of Mr. Justice Gonsalves-Sabola to the Court of Appeal, warm congratulations of the Association were tendered by Mr. Ashton Chase, its President.

COMMITTEES

The Association started an Editorial Board to produce this Magazine, we hope; once or twice a year, and contributions are always welcome.

We have also set up a committee to draw up a code of conduct for lawyers. The expectation is that the code will be ready during the new year. We look forward to its efforts and trust that all lawyers will give it support. Perhaps a code of conduct for State and Police Prosecutors will be forthcoming too.

The Committee is headed by B. O. Adams, S.C. and includes J. A. King, S.C., Ayube McDoom, L. Osborne, Vidyanand Persaud and Michael Hamilton.

FIRES

This year has been very unfortunate for Members of the Profession and the Judiciary. Fire has destroyed the home of Justice Churaman and caused damage to the home of Justice Harper, and to the offices of Messrs. Alvin Holder, James Patterson, Martin Stephenson, and Frank John, Attorneys-at-Law. The Association is most concerned at the losses suffered by our brethren and wishes them courage in their efforts to rebuild.

VANDALS

What about break-ins to Lawyer's chambers and the resulting theft and vandalisation of equipment and papers? This continues unabated and particularly seems to affect those of our members who may be involved in sensitive legal actions. Is it co-incidence, we wonder? A greater awareness of the need for safety at our premises is needed, especially in the light of obvious attempts to disturb our working life.

LECTURE SERIES

The Association has sponsored a lecture series, the first of which commenced on 21st September, 1981 and was delivered by the Honourable M. Shahabuddeen, Attorney General and Minister of Justice. It was entitled "Law Reform in Guyana". On the 28th October, 1981, the Honourable V.E. Crane, Chancellor delivered the second lecture in the series "The Functions of the Courts in Contemporary Guyana".

Other lectures are fixed for:

24th November, 1981 — "Intra Regional Co-operation as it affect Lawyers" by B. T. I. Pollard, S.C.

15th December, 1981 — "The Metric System as it affects the Legal System" by Dr. P. A. Munroe.

26th January, 1982 — "The Heights of Collective Bargaining and the Trade Unions" by Mr. Gordon Todd.

16th February, 1982 — "Crime and the Police" by Hon. Stanley Moore, Minister of Home Affairs.

These lectures are held at the Law Courts, Georgetown, and commence at 7.30 p.m. Members of the public are invited.

OBITUARY

On Friday the 25th September, 1981 a special sitting at the Supreme Court of Judicature was held to pay tribute to the memory of the late Mr. J.L. Wills, who was a former Magistrate and High Court Judge in the Caribbean. The Bar Association was represented by Mr. Ashton Chase, who spoke on behalf of the Bar. Other speeches came from Mr. C.L. Luckhoo, S.C., Mr. B.O. Adams, S.C., Mr. Julian Nurse and the Hon. V. E. Crane, Chancellor.

Members are reminded to be careful as they make their way around the High Court Building. Repairs are in progress. After over a decade of neglect, the Law Courts are being given some attention. We see this as an omen of good things to come in the field of the Administration of Justice.

REPRESENTATION

The Bar Council met the Chancellor in May, 1981. It made representation on a number of matters concerning practice at the Bar and offered several suggestions for improvements. A full report was subsequently made to a meeting of the Association.

CONFERENCES

The Association's representatives at the Council of Legal Education Conference held at the Pegasus Hotel, Georgetown, on September, 1981 were Messrs. B. O. Adams, S.C. and Lloyd Joseph.

STOP PRESS

On the 26th, November, the Bar Association through its President paid tribute to the late Sir Donald Jackson at a special Full Court sitting at the Court of Appeal.

Here and There

WELCOME AND CONGRATULATIONS

The "Review" welcomes to the magistracy —

Mr. Baljit Etwaroo — Court 9 Georgetown and the Interior

Mrs. Clarissa Riehl — Court 4, Georgetown
(a former State Counsel)

Mr. L.L. Doobay — Court 3, Georgetown

Mr. Kenneth Benjamin — Court 5, Georgetown, and

Mr. Durga Prasad — Essequibo

It offers its congratulations to their worships, and hopes that their work will redound to the credit of the administration of Justice in the Republic.

We also hail the return from holiday of Mr. Hilbert Homer, Principal Magistrate, West Demerara and Mr. R. L. Millington, Magistrate (Georgetown ii) and Chairman of the Rice Assessment Committee.

We hope Mr. Millington is fully restored to health

The "Review" further welcomes and congratulates Mr. Joaquin Gonsalves-Sabola, formerly Solicitor-General on his appointment as a Justice of Appeal. ("Water finds," it is said, "its own level"), Mr. Prembishaul Persaud, formerly Principal Magistrate, on his elevation to the Judiciary, ("All good things come to those who wait") and Mr. Julian Nurse, now acting Solicitor-General.

CONDOLENCE

To Mr. Justice Aubrey Bishop and family on the death of his mother-in-law.

SYMPATHY

With Mr. Justice Ivan Churaman and Mr. Rudolph Harper and their families on the destruction and damage to their homes, by fire.

FAREWELL

To Mr. Jameer Subhan (formerly of Court 9) Magistrate, upon his retirement, and Mr. Dhanessar Jhappan (formerly Chief Justice), who has taken up the appointment of Ombudsman.

—C.W.H.—

Printed by New Guyana Company Ltd., Ruimveldt Greater Georgetown. For Guyana Bar Association, Georgetown.