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BAR ASSOCIATION REVIEW

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Editorial

RETRENCHMENT AND THE ADMINISTRATION OF JUSTICE

The shock waves of the massive retrenchment exercise in the public sector have been felt within the lower and higher Courts of law as they have been felt elsewhere in the Republic.

The groans of the workers in the Courts on whom the axe of summary disposal has fallen have echoed in the hearts of all of us who have to deal with the relevant staff in our professional functions.

Suddenly, one morning we went to the courts to find that there were no magistrate's clerks, or that one clerk had to serve two or three courts, and that the clerk retained, deputed or appointed had no experience whatever, or very little experience, if any.

One inveterate practitioner pointed out that a court is not properly constituted without a clerk.

The dislocation and consequential chaos deepened and burgeoned as the days and weeks passed, and at the time of writing, nothing has happened to cushion the shock despite the valiant attempts at readjustment and adaptation by those concerned.

Seemingly, things will get worse before they get better, if they ever get better at all, and the optimists and dreamers are reminded that, according to announced policy, there is more retrenchment to come.

The quality and range of the retrenchment exercise as they relate to the departments in the administration of justice reveal features so absolutely reprehensible that they could do credit to no administration, past, present or future. One is inclined to ask in the provincial, as in the larger, national perspective, what investigation of an expert nature had been made into the strength, superfluity and sufficiency of staff precedent to the actual retrenching, had the kind of service for which the particular departments were responsible been taken into account? Was there any order of priority or primacy established in terms of the essentiality of the services performed by the several Ministries and their indispensability to the public weal? There are other pertinent considerations but they are not for the main purposes of this article of contiguous concern.

In any priority or primacy rating in any properly constituted society Law and Order and the Administra-

tion of Justice must place very high. Like Health and Education and the so-called "essential services." Truncation and depletion are arrived at after due deliberation and inqniry. This is not all. The most highly placed person in the Republic remarked ex-cathedra on a public occasion that from facts brought to his attention the retrenchment exercise manifested a woeful lack of imagination.

As reflected in the act and the consequences so far as they affect the Departments involved in the administration of justice, the functionaries who perpetrated the executions must be among the most unimaginative in any public service. Office clerks, court clerks, cleaners were swept away without rhythm, rhyme, or reason, higgledy-piggledy in a deluge of administrative incompetence. The retrenchers. whoever they are, wherever they are, should themselves be retrenched.

Competence and experience and expertise as criteria for extirpation seem never to have been heard about, much less utilised.

As the legal profession and its clientele strive to contain the logical repercussions of an administrative exercise that has displayed neither mercy nor dexterity, the "Review" records its sympathy and solidarity with the sacked workers whether they served in the departments involved in the administration of justice or elsewhere.

It is unthinkable that a tragedy of the same or even approximate magnitude can be enacted again.

II. NAMELESS COUNSEL

The days of expansive, extensive, and perhaps expensive reporting of court cases have gone forever. Journalism and reportage, particularly in these parts, have had to give way to pressures of cost, space, and, of course, policy; in fact space and policy have always been essential constraints. In some ways, meeting these constraints has produced a better product — succinctness, a lack of verbiage, and a concentration on, and a getting at, the heart of the matter are praiseworthy features. But a good thing, like a bad thing, like anything, can be overdone, and the courts, lawyers and laymen, appreciating the educative value of good reporting of the courts' business, tend, in so many instances, to be nostalgic about the times when happenings in the courts were more profusely and

purposefully documented. They long for the days when court stories — or some of them, anyway — like other stories were followed up.

The Courts are still, indeed will always be, a great repository and clearing-house of humanity with all its virtues and foibles, with the permutations and combinations of humour and staidness, and the playing out of the tragic and comic of recurring life-situations.

Whatever the limitations imposed on newspapers in our Republic (and we are reminded that there is now only one daily, and it does not appear on Mondays), it is difficult to understand why reports of cases have been appearing in the Press with the names of counsel representing the parties omitted. Space could not be the problem. How much space could be consumed by adding a name or two to a report on a case?

There must be deeper reasons esoterically hidden in the breasts of the policy-makers, whoever they are, wherever they are.

If the journalistic objective is a fair and accurate report of proceedings in Court, the report is — at least — arguably inaccurate if some important detail that the public would normally be expected to be informed about, which is not legally offensive is omitted. It is submitted that the name of counsel appearing is such a detail. Wherefore, therefore, this anonymity? Both tradition and practice in this and similar jurisdictions support the contention that reports of court cases should include the names of counsel when they appear. Any deviation from what can reasonably be called a norm calls for a very cogent explanation.

Many years ago the tendency to omit the names of counsel in reports of cases in court had evoked comments of disapproval from the legal profession and from the newspaper readership. Fitfully, gradually, grudgingly, the status quo was restored, but we are back to namelessness again.

It was said at one time that some practitioners were abusing and subverting the tradition of naming counsel appearing, and omission of counsel's name was the sanction applied by the newspaper authorities.

Precisely what was the nature of the abuse and the subversion has never been quite clear, but what can be more unexceptionable and professionally unimpeachable than that a reporter personally attends court, observes the proceedings, gets the arguments clarified where necessary, and reports the story, including the names of the

tribunal and those who constitute it, the names of the parties and witnesses, and the names of counsel appearing?

But — and this needs to be stressed — a report is a report, and a fair and accurate report will indicate in whose favour the decision, judgment or verdict went, and by implication in whose favour it did not go. Counsel who are affected must take the rough with the smooth and reporters are not expected to discriminate in this regard between lawyers of so-called eminence and those of obscurity. Even lawyers cannot eat their cake and have it.

At the time of writing this we have before us a report of a High Court case in which the name of counsel for the defence is spelt out in no uncertain terms, or perhaps one should say, characters.

Is this a signal that the newspaper pundits have began to resile, or is it the one that got away?

We would like to think that it is the former. Sensibly!

Henry Britton Fraser– A Link between the 19th & 20th Centuries

By CLEVELAND HAMILTON

What is it that makes them tick — these phenomena of the human species who transcend the biblical three score and ten and instinctively, spontaneously, opt for, and attain the metaphorical Methuselahn. These men and women who bypass, or are bypassed, by the dreaded, horrendous killers — heart and circulatory diseases in all their forms and complications, cancer in all its frightening permutations and combinations, diabetes, degeneration of all the body's vital organs by sheer wear and tear, the death-dealing agents which, paradoxically, are our modern-day mobile benefactors. What make(s) these people survive in the jungle of fateful and fatal probabilities?

Ask Henry Britton Fraser ("Uncle Harry" to his lawyer colleagues) and he will tell you in his own paternal or avuncular way with a brevity that is indifferent and exclamatory — "I don't know".

This is no boast of vanity or subdued pomposity. H.B. Fraser, 91 years 4 months old, at the time of writing, really does not know. He has no formulae to propound or pontificate upon. "There is longevity in the family," he says, in a marigolden afterthought. "I am not the eldest surviving child of my parents". You wait for the rest in the intensity of your personal alarm. And then undramatically, the priceless, evergreen nonagenarian brings it out, "I have a married sister, also a Fraser, who is 94."

"My father died in his 80's, my mother died much earlier." You are left to ponder the influence and effectiveness of heredity on long living, and trace, if you like, the chronology of your family tree. If you look and/or feel older than Uncle Harry, you begin to despair. Henry Britton Fraser was born in New Amsterdam in 1890, in the month of December, to James Edward (a veterinarian) and Catherine Fraser. One year later New Amsterdam was made a town.

HUMILITY

The Right Honourable Viscount Gormanston was Governor (the 13th) of British Guiana. Five years after the birth of Henry Britton Fraser, President Grover Cleveland of the United States appointed a Commission to investigate the boundary dispute involving Venezuela and Great Britain over British Guiana and two years later the arbitral award was made. In the present historical upsurge, Henry Britton Fraser has not only spanned the chasm between the nineteenth and the twentieth centuries, but has parallelled the disputations in their fitful death and resurrection ranging from one end of a century to that of the other. Such is the measure of the vivacious antiquity of this man who, seemingly, is cruising unostentatiously towards his own hundred. The runs, it appears, just come. "How do you score them ?" I once asked "Uncle Harry" in a figurative mood. Replying, almost chidingly, he said as though anyone ought to know better, "in singles of course !" When seven years after Henry Britton Fraser was born, Rudyard Kipling had writeen for Queen Victoria's Diamond Jubilee his controversial "Recessional", the renowned English poet may well have incarnated H.B. Fraser in the lines so well-known by the elder among us — "Still stands thine ancient sacrifice/a humble and a contrite heart".

Henry Britton Fraser has always been the personification of humility; to hear him apologise in court for any mistake he has made affecting judge, magistrate, counsel, solicitor or client is to listen to a laconic, eloquent essay in contrition.

For all his years, sixty odd of them, as Solicitor and Attorney at Law, he stood, and still stands, as a figure of eminent decorum, antediluvian or modern. He is the exemplar that has outlived the years, the modes, the fashions and the fads.

He is a model of friendliness and genuine cordiality who has bridged the generation gap contemptuously and contemptibly, and if there is any one cause that, as much trait as anything else, has kept him all these decades, it is an equanimity which, like the cup of Budha, never dries up.

Early in the morning with his cheerful optimism, he greets anyone of his colleagues (all younger, of course) who is handy at the time — "How're you, me bhwoy? You

make a ten dollar fuh the day yet?" "No Uncle Harry". "Never mind, day young yet. But your health good." "Yes, Uncle Harry". Uncle Harry's health has been good for a long time. Few of us ever think of reciprocating by asking Uncle Harry how much he had made for the morning or the day. That would be an unpardonable assault on the venerability of the **eminence grise**. But if, out of sheer temerity he were asked, he would say, "me bhwoy, a mek a five dollar".

H.B. Fraser did not embark upon a legal career at the very start. Probably, but only probably, because his father was a veterinarian he relished the nature and care of plants as a filial complement: he chose Agriculture.

HONOURED GUEST

He was sent to the Agricultural and Technical (A and T) College at Greensboro, North Carolina, United States of America to qualify. He travelled to the States in 1915, and returned home only a year later. His return had nothing to do with the first World War, which was then raging in its second year. It had to do with the colour bar in the United States, the discrimination on the grounds of colour in schools and colleges and universities, in churches, in social services, in human and constitutional rights. "I could not stand it any more than I could stand the cold," the indestructible lawyer said.

Back home he entered into articles of clerkship to qualify as a Solicitor of the Supreme Court of British Guiana. By 1921 he had completed his articles with Barrister-Legislator A. B. Brown, and passed his examinations and admitted to practise. Last year was the 60th year of his admission, and the Guyana Bar Association acknowledged his diamond jubilee and the quality of his service and contribution to the profession and his clientele, past and present, by making him the Guest of Honour at the Association's Annual Dinner.

Before he completes his innings one hopes that he will be embraced in the compendium of distinction of those "whom the State deliteth to honour."

It will be nonsense to honour a man who lived so long posthumously. Reflecting on his brief sojourn in the United States in search of a professional label, he remembers the Deputy Principal of his college — a West Indian, Professor S.B. Jones, of Anguilla. "I tend to remember the far away things and persons, more than those nearer",

Uncle Harry states. Perhaps because those were the fundamental and formative years and things, and in a less ceremonial sense, the very important persons. H.B. Fraser recalls the years of paucity and penury associated with the depression of the twenties and thirties. "Because it was happening all round" he said, "the profession was affected, I had to get out — and fast". The wispy strands of white hair lay unanimated on the small brown head, and the narrow face which had weathered the trials, tribulations and triumphs of nearly a century indicated its age, residual zest and authority.

POLITICAL FIGURES

"I applied to the municipality of New Amsterdam, was successful, and became Town Clerk." "Salary, Uncle Harry." "One hundred and sixty dollars per month." He remembers two mayors of New Amsterdam, Berbice town, as we called it in our boyhood in the villages. A.C. Broughton, an Englishman was one, and the father and uncle of the elder Luckhoos, E.A. Luckhoo, himself a solicitor, was the other. His Worship Mr. Luckhoo, was Mayor of New Amsterdam several times, and H.B. Fraser likes to think of him as a dapper, immaculate man. From 1928 Mr. Fraser was Town Clerk of New Amsterdam for a decade or so, and "I can never forget the political figures of what was an important and epoch making period which saw the disratement of the Constitution — Brigadier-General Sir Frederick Gordon Guggisberg, K.C.M.G., D.S.O., Governor, Honourable Eustace Gordon Woolford, Edmund Fitzgerald Fredericks, Joseph Eleazer, Joseph Alexander Luckhoo, the father of a former Chief Justice of Guyana". By his linearity (I have never known this man to weigh an ounce, or it is a gram—more than he weighs now) the grace of God, and a beneficent, selective genealogy he has survived them all. He is grateful for longevity, and to watch him sign legal documents with his special kind of dexterity, unspectacled eyes close up to the papers, is an experience of unspeakable wonderment. In his more active years he not only signed the documents he typed them himself. Indeed, he still types.

Naturally, in the passing parade of clients, lawyers and the whole magisterial and judicial hierarchy he has met some of the finest—and the worst — of all men and women in the community of the law, and of his world.

He confirms what I have been told of the legendary Jamaican-born Attorney General who possessed a qualification, rare in those times in this part of the world. He

was Master of Laws of Cambridge, a Bachelor of Arts of the same University, and a King's Counsel. He was, of course, a member of the then Legislature, and a distinguished speaker. About Hector Josephs there have been all sorts of stories. Didn't they say that he was the man who calmly smashed the colour bar at the Park Hotel by just walking in and demanding to be served? When they told him some nonsense about being black, he is said to have promptly replied, "Of course I am, but I am Attorney General of this country."

THE GREAT

H.B. Fraser speaks of the great, the near-great and the rest. He speaks of the barristers he instructed for well over half a century, and the important cases he was involved in. There is a special place in his heart for the magnificent oratory and advocacy of the imperious, leonine legislator and solicitor turned barrister who has made such a significant contribution to legal literature in Guyana, A.V. Crane, Sydney J. Van Sertima, the scholar advocate, probably the "daddy of them all", Edgar Mortimer Duke, the legendary legal (British Guiana, Barstow and David Hume) Scholar who lacked the oratory of Van Sertima; Joseph Alexander Lukhoo whom he thought the greatest of the cross-examiners," and A.B. Brown, the lisping barrister who told a Colonial Secretary (or was it a Governor?) in the Court of Policy that he (the Englishman) was "falling into fits and paroxysms of rage." But what of Eustace Gordon Woolford, King's (or Queen's) Counsel for many, many years before his death, the doyen legislator. Chairman of sundry Committees, Speaker of the House of Assembly? I remember an expression reportedly issuing from his mouth when he was leading a recall movement against a former Governor of British Guiana, Sir Walter Egerton (1912-1917). Sir Eustace had said of his Excellency — "He has proved himself to be more of a reactionary politician than a constructive statesman."

H.B. Fraser attributes to Sir Eustace Woolford, a member of the Legislative Council for New Amsterdam until Ruddy Kendall beat him at elections in 1947, elegance, craftiness, skill, urbanity and a whispering eloquence. And, as many would agree who knew the man who latterly became a Knight Bachelor, he had the gift of "looks"; they called him "the colt" when he was young

I asked "Uncle Harry" which of all the cases he has been involved in, or listened to, touched him most. "The Molly Schulz case"; "Uncle Harry" unhesitatingly replied.

that was a case of murder. A European child was lured, then brutally killed because her eyes were needed for a "supernatural" purpose. In an age of verbatim reportage the trial gripped the interest and imagination of the entire colony. The murderers were convicted and hanged. In his later years H.B. Fraser has effected a phased withdrawal from a long, varied and very active practice, particularly on the civil side. His is a life of recounting and reminiscence. He continues to be white-suited as he has been all his life. At no time did the dignity, elegance and grandeur of men and women growing old gracefully look more handsome than when he was being honoured last year by the members of the Bar. He is as mentally alert as ever and the spring in his steps belies his age. "Do you think you will make the hundred, Uncle Harry?" "You never know, me bhwoy", he says in that tone of merry, fatalistic cynicism. "But my sister is nearer to it than I", he adds with a little less indifference. In that kind of cricket who stays longest at the wicket scores most runs.

His sister is the mother of the Director of the Norman Manley Law School in Jamaica, and a former High Court Judge of British Guiana and a former Justice of Appeal of Trinidad and Tobago. "Uncle Harry" had been instructing solicitor to his nephew, then a practising barrister, for many years. Mr. Aubrey Fraser, from an intensely personal and pardonably partial perspective must be watching the play and the scoring by his mother and his uncle in life's panoramic cricket field. As "Uncle Harry" would say, when badgered about the rationale, alchemy and sheer mystique of bristling, long life, "One run at a time me bhwoy, one run at a time".

THE COMMON LAW CAN'T BE SO EASILY CAST ASIDE — Pollard

Mr. Brynmor Pollard, formerly Chief Parliamentary Counsel in the Chambers of the Attorney General, making his contribution to the Bar Association Lecture Series at the Victoria Law Courts on Tuesday, 24th November, 1981, in an in-depth, and a searching and scholastic presentation, said, after congratulating the G.B.A. for the lecture-series idea, that "The profession may not be at one with him (the Honourable the Chancellor of the Judiciary) that the common law can be so easily rooted from our legal system and cast aside...." This is a view which was editorially dealt with in the last **Review**.

The Legal Consultant went on to discuss the Harmonisation of Laws, a Regional Court of Appeal and Legal Education in the Commonwealth Caribbean.

An edited form of Mr. Pollard's intensive and extensive lecture, the inability to publish the whole of which ıe **Review** regrets, follows :

Intra-Regional Co-operation as it affects Lawyers

By

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LEGAL CONSULTANT
CARIBBEAN COMMUNITY SECRETARIAT

"Mr. President, Mr. Attorney-General and Minister of Justice, Your Honour, Members of the Executive of the Guyana Bar Association, Members of the Legal Profession, Ladies and Gentlemen.

"It gives me great pleasure and I consider it a privilege to have been invited by the Association to take part in this series of lectures sponsored by the Association. I must congratulate you, Mr. President, and your Executive for having conceived this idea. Earlier, this year, I was privileged to have been invited to be a Member of the Team of Consultants under the Chairmanship of Professor Roy Marshall, Vice-Chancellor of the University of Hull and for Vice-Chancellor of the University of the West Indies, to assist the Joint Committee on Legal Education in making recommendations to the University of the West Indies and the Council of Legal Education for a review of the system of legal education in the Commonwealth

Caribbean after its first ten years of operation. Among our recommendations was the need to organise a system of continuing legal education for the profession in the form of workshops, seminars and lectures. It was recommended that the responsibility for devising such a system of continuing legal education should be that of the Council of Legal Education, the Faculty of Law of the Univercity, OCCBA, the CARICOM Secretariat and local organisations of lawyers It was suggested that the seminars and workshops could be organised to last over long weekends and to be held throughout the Caribbean Community and not only in the main centres of legal education. Mr. President, your Association's programme of lectures is, in my view, a step in the right direction and I must congratulate your Executive in implementing the recommendation of the Team of Consultants, whether by design or otherwise."

CHANCELLOR'S PROPOSITIONS

"A new Constitution for the Co-operative Republic of Guyana was promulgated on 6th October, 1980, introducing into our legal system a number of novelties. In my travels in the Caribbean, I have been assailed with questions as to the attitude of lawyers in Guyana to the innovations and whether reviews of, and commentaries on, the Constitution can be expected from our lawyers, in particular, our University teachers. It would be a pity if the initiative were to be taken by our legal colleagues outside this country."

"I did not have the privilege of being here when the Chancellor delivered his lecture in this series. He chose what has turned out to be a very controversial subject— The Role of the Courts in Contemporary Guyana. It is no secret that the Chancellor's presentation has caused quite a stir in legal circles here and in the Caribbean. **The question which has been asked is the extent to which the profession supports or disagrees with the Chancellor's propositions. Without doubt, there will be disagreement among us but this in itself highlights the challenges which now face the legal profession in grappling with concepts unknown to the system in which we were trained, including those who have received their legal training at our own legal institutions in the Caribbean — Legal training which was intended to help in creating a Caribbean jurisprudence.**

"The Chancellor adverted to the future role of the common law as he saw it. The profession may not be at one with him **that the common law can be so easily rooted from**

our legal system and cast aside. The enforceable fundamental rights in the Constitution itself — the supreme law — are in many respects declaratory of the common law — for example, **Article 139** guaranteeing the right to personal liberty, Article 143 guaranteeing protection against arbitrary search or entry of premises and **Article 144** intended to make provisions for securing protection of the law. **Exhortation to the profession to resort to citing local and West Indian cases may not be the complete answer, for many of those decisions are repetitive of the decisions of the English courts enunciating principles of the common law.**

CONSTITUTION

"If I may impose on your patience for a while, I would like to mention some of the issues arising from the Constitution and which at this point in time must be engaging the minds of some of you. These issues may already have confronted you in your practice of the law. What, for instance, is the legal effect of Chapter II of the Constitution — the Principles and Bases of the Political, Economic and Social System. The language of the Articles is couched in mandatory terms. **Article 8** of the Constitution declares the supremacy of the Constitution over any other law. **Article 39** enjoins Parliament, the Government, the courts and all other public agencies to be guided in the discharge of their functions by the principles set out in the Chapter. The very Article, however, goes on to state that Parliament may provide for any of those principles to be enforceable in any court or tribunal. How, for instance, is a court to deal with **Article 30** of the Constitution which purports to confer equality of treatment on children born in and out of wedlock? I venture to express the opinion that the principles enunciated in Chapter II should be regarded in the same manner as the Directive Principles under the Constitution of India providing directions of policy for the State and its organs, but that more may be needed to be done, for example, by way of legislation, in order to give effect to them.

"As an example of a new concept which we will have to face as a profession and provide a meaning for ourselves and the nation, I wish to refer you to **Section 6** of the **Local Democratic Organs Act 1980**, the enactment which ushered in the new system of local government. Section 6 lists a number of duties of each local democratic organ and in paragraph (h) of that section, the duty is "to consolidate socialist legality." If any question were to arise before our courts as to the meaning of that pro-

vision, it would be enlightening to see what meaning will be attributed to it. An interpretation of that provision can easily arise on a question as to whether or not a local democratic organ was acting **intra vires** or **ultra vires.**"

"Having regard to the fact that, under the Treaty establishing the Caribbean Community, Member States have undertaken to make every effort to co-operate **inter alia**, in the harmonisation of their laws and legal systems about which I propose to speak later in more detail, reform of the law in one jurisdiction in the community must be of interest particularly to members of the legal profession in other jurisdictions in the Community.

INTEGRATION AND ADVANCEMENT

"The subject which I have chosen for this evening's discourse is "Intraregional Co-operation as it Affects Lawyers." I have chosen this subject against the background of the continuing efforts which are being made with the institutional arrangements which have been set in place for the purpose of promoting the deeper integration of our Caribbean States. It is, therefore, my intention to deliver my presentation to you within the context of the establisment of the Caribbean Free Trade Association (CARITA) and the successor organisation, the Caribbean Community (CARICOM). As many of you well know, the disillusionment resulting from the demise of the West Indies Federation in 1962 spurred West Indian politicians to make another attempt at bringing the territories together again in some form of association which had the potential of benefitting them individually and collectively. Their efforts were regarded with the establishment of CARIFTA in 1968 with Guyana being one of the founder members. CARIFTA was essentially an economic unit — a free trade area. The whole thrust of the movement for closer integration was then essentially one of economic integration and advancement. The need for deepening the integration movement was recognised and spurred on by the need to enter into meaningful relationships with the European Economic Community and the advantages to be gained by negotiating as a unit; the Caribbean Free Trade Association ripened into the Caribbean Community with functions more extensive than those of the predecessor organisation. The Caribbean Community came into being on 1 August 1973 with the entry into force of the Treaty of Chaguaramas which established the Community together with the Caribbean Common Market."

FUNCTIONAL CO-OPERATION

"The idea of integration, particularly as it applies to very small developing countries, is that through integration and co-operation they can together achieve a total result in economic development which is greater than the sum of their individual efforts acting alone. This is achieved both through the intensification of trade and other economic transaction among the countries participating in the integration scheme and through the benefits achieved from joint actions in trade and economic relations with countries and even private entities outside the integration scheme or arrangement.

Caribbean integration, however, is not about trade and production alone. It extends to closer co-operation and common services in many functional areas — education (including legal education), health, industrial relationship and transportation to name a few.

The objectives of the Caribbean Community as set out in Article 4 of the Treaty establishing the Community are as follows :—

(a) the economic integration of the Member States by the establishment of the Common Market;

(b) the co-ordination of the foreign policies of Member States; and,

(c) functional co-operation.

Functional co-operation is described in the Treaty as including —

(i) the efficient operation of certain common services and activities for the benefit of the peoples of the Community;

(ii) the promotion of greater understanding among the peoples of the Community and the advancement of their social, cultural and technological development; and,

(iii) activities in certain fields of endeavour specified in the schedule of the Treaty.

One of the areas of functional co-operation specified in the Schedule to the Treaty and which concerns and is of importance to the legal profession is the Harmonisation of the Laws and the Legal Systems of Member States of the Community."

HARMONISATION

"In pursuance of this objective of the Harmonisation of Laws, under Article 42 of the Annex to the Treaty (which contains the legal provisions relating to the Common Market), Member States of the Caribbean Community 'recognise the desirability to harmonies as soon as practicable such provisions imposed by law or administrative practices as affect the establishment and operation of the Common Market in the following areas :

(a) companies;
(b) trade marks;
(c) patents;
(d) designs and copyrights;
(e) industrial standards;
(f) marks of origin;
(g) labelling of food and drugs;
(h) plant and animal quarantine restrictions;
(i) restrictive business practices;
(j) dumping and subsidisation of exports.

"Since the entry into force of the Treaty establishing the Caribbean Community in 1973, other subject areas for the harmonisation of legislation of Member States of the Community have been identified. These include legislation relating to civil aviation and merchant shipping so as to replace with our own indigenous legislation, United Kingdom legislation on these topics which still form part of the law of most of the CARICOM States, for example. the Civil Aviation Act 1949 and the Merchant Shipping Act 1894. as amended from time to time. There are also mandates for harmonised regional legislation relating to labour and the removal from the statute books of Member States of discriminatory provisions affecting women. Article 42 of the Annex contemplates periodic review of the subject areas for the harmonisation of legislation in that paragraph 2 of that article provides that the Common Market Council "shall keep the provisions of this Article under review and may make recommendations for the achievement of this objective." **Article 40** of the Annex is also worthy of note in this area of harmonisation of legislation. In paragraph 1 of that Article, Member States undertakes to "seek to harmonise such legislation and practices as directly affect fiscal incentives to industry."

"Under paragraph 2 of the Article, Member States also undertake "to seek to establish regimes for the harmoni-

sation of fiscal incentives to agriculture and tourism with appropriate differentials in favour of the Less Developed Countries" and in paragraph 3 they "agree to study the possibility of approximating income tax systems and rates with respect to companies and individuals." The objective of the harmonisation of legislation in the Caribbean Community may well have been inspired by comparable provisions in the Treaty of Rome establishing the European Economic Community.

HARMONISATION AND UNIFORMITY

"What does Harmonisation of Laws involve ? The uncertainty of the term "harmonisation" has been advertised to by several writers communicating on the Treaty of Rome ("The Harmonisation of European Company Law (1973) by C. M. Schmitthoff" — "The Approximation of the Laws of Member States under the Treaty of Rome by T. W. Vogelaar" (1975) C. M. L. Rev. 211-230 and references at page 212 n.2). It seems fair to conclude that the word "harmonisation" as used in the Treaty establishing the Caribbean Community equally lacks precision. Most writers have recognised, however, that "harmonisation" is not synonymous with "uniformity." "Uniformity" implies identical legal solutions if, perhaps, not quite common legal forms, whilst the former suggests the absence of conflict or disparity between different legal solutions and forms adopted to secure a common objective. Harmonisation recognises the necessity to make adaptations to suit particular circumstances and needs, while retaining the essential principles common to the scheme in the context of the objectives of the Common Market and the Community. However, a harmonisation objective may not always be attainable except through the adoption of common legal solutions.

"Other integration movements, notably the EEC, have experienced a tendency for some of their proposals for harmonisation to call for uniform legislation.

UNIT

"In order to implement the obligations under the Treaty in connection with the Harmonisation of Laws, a Unit for the Harmonisation of Laws was established within the Caribbean Community Secretariat in October 1976 with Professor Keith Patchott, former Dean of the Faculty of Law of the University of the West Indies as its head and financed by the Commonwealth Fund for Technical Co-operation in London. Other experts were

associated with the work of the Unit. During the period 1976 - 1978 the Unit prepared —

(a) a comprehensive analysis of the situation relating to copyright and neighbouring rights in the Caribbean Community together with a package of draft up-to-date legislation on the subject;

(b) a comparative analysis of patent legislation in Member States;

(c) proposals relating to trade marks and industrial designs;

(d) proposals with legislation providing for the deposit of publications with designated libraries.

All of these studies were circulated to the Governments of Member States during the latter part of 1978 for examination and comment by their appropriate officials.

COMPANY LAW

"The harmonisation of Company Law was begun as a project in 1972 under CARIFTA with the establishment of a Working Party comprising representatives of Member States, the University of the West Indies, the Caribbean Development Bank, the Caribbean Association of Industry and Commerce and the Secretariat. The Working Party held ten meetings between 1972 and 1979 when I succeeded Professor Patchatt. The Unit for the Harmonisation of Laws which came into existence in 1976, apart from its other activities, serviced the Working Party on the Harmonisation of Company Law. The Company Law report together with the draft companion legislation has been printed and is now on sale at the cost of $100—a reasonable price having regard to today's costs. It is hoped that the Report will be given as wide a circulation as possible and, as a result of the responses and reactions to the recommendations in the Report, a consensus will emerge as to the harmonised up-to-date legislation relating to companies which should be enacted in Member States.

"I ought to mention that Mr. Martin Stephenson, Attorney-at-law at the Bar of this country, made a sterling contribution to the work of the Working Party in his capacity as a consultant on Company Law.

"Harmonisation of legislation within the Community is not a speedy process even though all of the Attorneys-General of Member States have expressed to me their support for the programme and their recognition of its use-

fulness in the integration process.

"There are constraints, the most important being the shortage of experienced legal draftsmen in the legal departments of most of the Member States and the difficulty in giving priority in the legislation programmes of Member States to these admittedly long-term exercises. Nevertheless, most useful work has been done in Jamaica, Barbados and Trinidad and Tobago and it is hoped that they will set the lead for the others to follow.

EXPENSIVE

"With regard to novelty examinations, the CARICOM research reveals that only the legislation of Guyana and by implication, that of Jamaica requires novelty examinations to be made. The lack of adequate provision, if any, for novelty examinations presumably lies in the fact that the capability of Member States to undertake novelty searches and determining whether the conditions of patentability exist require procedures which are complex, protracted and expensive. At the seminar on patents held in Barbados the proposal for the establishment of a Regional Documentation Centre to cater for the needs of Member States and as an aid in the carrying out of searches was mooted. In the case of industrial designs, a scheme for CARICOM-wide protection raises not dissimilar issues for consideration. Should registration in one CARICOM State automatically give protection in other CARICOM States? Alternatively, should an applicant be entitled to select in which CARICOM States to seek protection and, if so, should the option include the right to select certain, or all, the other CARICOM States? It is possible that a particular design is unlikely to have a market outside the State in which it originates and there might be some justification in giving applicants the right to decide whether or not to seek protection outside the State of origin, the consideration being that the fees and other costs for a registration limited to one State would be significantly less than the fees and costs for CARICOM-wide protection.

"The other alternative of giving the applicant the option of selecting which other CARICOM State to which the protection should extend has less to commend it. This could have the effect of introducing an undesirable element of uncertainty and possibly unproductive litigation into the business sector concerned with commercial or industrial application of designs.

"With regard to objections, should the upholding of an objection to registration in one CARICOM State remove

protection in other CARICOM States? This seems undesirable; the effect of the objection should be limited to the State in which the objection was made and upheld. The CARICOM Report declares that there seems to be no reason why other CARICOM States should lose the commercial or industrial stimulus which might result from the use of a registered design, simply because the design was not registerable in one of them.

OBJECTIONS

"Again, where in a regional system, should objections be heard? **Firstly,** all objections could be transmitted to, and adjudicated upon, (first by the Registrar, and on appeal, by the High Court) in the State where the application is filled. **Secondly,** all objections could be considered in the State to which they relate. **Thirdly,** there could be established regional and sub-regional registries dealing with applications and objections according to groupings based on geographical location, e.g. a sub-regional registry situated, perhaps, in Barbados for the purpose of the adjudication of all objections emanating from the LDCs. If a regional scheme for CARICOM-wide protection is to be established, the administrative procedures and cost implications must, obviously, be carefully considered.

"In all CARICOM States, other than Jamaica and Trinidad and Tobago, there is provision for the automatic registration of United Kingdom registered designs.

"In **Trinidad and Tobago,** United Kingdom registered designs are entitled to be re-registered in the State. In **Jamaica,** since 1975, there is no longer automatic protection for United Kingdom registered designs which must now be registered in the normal way if they are to enjoy protection in Jamaica.

"In the harmonisation and up-dating of regional legislation these aspects raised in the CARICOM Report must necessarily be given consideration.

UNIFORM LEGISLATION

"While on this subject of harmonisation of legislation which must be of interest to, and involve, the lawyers in the Community, I would like to mention to you a proposal which was tabled by the then Attorney-General and Minister of Legal Affairs of Barbados at the First Meeting of CARICOM Ministers responsible for Legal Affairs held in Antigua in May, 1979. The proposal was that, perhaps, the Caribbean Community could institute some-

thing similar to the Uniform Law Conference of Canada. The Conference meets periodically and is attended by lawyers (including law teachers) from the Canadian provinces to consider proposals for uniform legislation for Canada on certain chosen subjects. It was suggested that the Canadian exercise was a useful one which could be adopted in the Caribbean Community with inputs from the universities, the practising bar represented by the Organisation of Commonwealth Caribbean Bar Association (OCCBA) and Law Officers (particularly Parliamentary Counsel). This matter was not pursued having regard to the question as to whether or not it was necessary to have more meetings of this kind in view of the fact that Meetings of CARICOM Law Reform Agencies should meet annually. It was decided at that First Meeting of Ministers Responsible for Legal Affairs that Meetings of Parliamentary Counsel should be convened prior to the Meetings of Ministers Responsible for Legal Affairs. At the Meeting of Ministers of Legal Affairs in Saint Lucia in September of this year a proposal put forward by the Government of Guyana for the holding of periodic meetings of Commissioners of Police was adopted."

PRINCIPAL ORGANS

Mr. Pollard went on "As most of you may be aware, the two principal organs of the Caribbean Community are the Conference of Heads of Government and the Common Market Council. The primary responsibility of the Conference is to determine the policy of the Community. It is the duty of the Council to ensure the efficient operation of the Common Market and its development. Under Article 10 of the Treaty, a number of bodies are created known as the Institutions of the Community.

"Standing Committees of Ministers responsible for the subjects of Industry and Transport have also been established."

"You may well be wondering at the absence of any reference to an Institution relating to legal matters, having regard to the fact that the Attorneys-General were deeply involved in the drafting of the Treaty. I am pleased to say that efforts are being made with a view to securing a consensus so as to enable a Standing Committee of Ministers Responsible for Legal Affairs to be established. In the meantime, however, Ministers Responsible for Legal Affairs have met (not as a Standing Committee under the Treaty) in May 1979 in Antigua, and in Saint Lucia in July of this year. It was decided at this Meeting in Saint Lucia that the Ministers Responsible for Legal Affairs

"The implications of this for the continuation of the Caribbean scheme of legal education is well recognised. It was given consideration by the team of consultants on the review of legal education, by the Ministers Responsible for Legal Affairs at their meeting in Saint Lucia in July, and by the Council of Legal Education at their meeting here in Georgetown in September. It was decided that the matter required the entering into dialogue between the appropriate authorities in Trinidad and Tobago and a representative group of Attorneys-General of other CARICOM States parties to the Agreement establishing the Council, hopefully to arrive at some consensus on what should be done to achieve once more a uniform approach on the matter.

In any discussion of this subject of intraregional cooperation as it affects lawyers in the Caribbean, reference must be made to the proposals which have been discussed for the establishment of a regional Court of Appeal as a final appellate court. Discussions on this matter began as a result of views expressed at the Sixth Conference of Heads of Governments held in Jamaica in April 1970 that it was desirable that Caribbean countries should move towards the termination of appeals to the Judicial Committee of the Privy Council. Of course, in respect of Guyana, this process began with the promulgation of the Republic in 1970 when the jurisdiction of the Judicial Committee in civil and criminal appeals was established. The last vestige of that jurisdiction — appeals in constitutional matters—was abolished in 1973."

Mr. Pollard then went on to the subject of a Regional Court of Appeal, the Caricom Consultant said, "Guyana, although recognising the possible desirability of having a regional Court to replace the Judicial Committee of the Privy Council for those territories that had no separate Court of Appeal, did not consider that such a Court was a necessary pre-requisite to the termination of appeals to the Judicial Committee. Basically, the position of Guyana then was for the establishment of a regional Court of Appeal within the framework of a regional political association. Guyana, however, was willing to explore all possibilities of meeting the needs of other territories. This matter of the establishment of a regional Court of Appeal is now dormant."

In conclusion, Mr. Pollard quoted the Secretary General of the Commonwealth Secretariat thus :

> "It is my personal view that if our integration movement is to succeed, the bonds that exist

should meet biennially and that Meetings of senior law officers should be held annually. The next meeting of the Ministers is likely to take place in 1983 prior to the Commonwealth Law Ministers Meeting scheduled to take place then in Sri Lanka. It is considered desirable that CARICOM Law Ministers should have the opportunity to meet together and formulate common positions preparatory to the larger Meeting of Commonwealth Law Ministers."

LEGAL EDUCATION

Mr. Pollard then touched on the topic of **"Legal Education"**

"In the sphere of legal education, an event of great significance for the legal profession in the Commonwealth Caribbean occurred with the entry into force in 1971 of the Agreement establishing the Council of Legal Education ushering in our own system of legal education which was considered to be eminently desirable. The scheme which was devised is too well-known to you to need repetition. I wish, however, to refer to the transitional provisions which are contained in Article 6 of the Argeement. Those provisions catered for those persons (nationals of the Caribbean) who were then undergoing legal studies in the United Kingdom. If they were engaged or enrolled in their courses of legal studies on or before 1 October 1972 and qualified by 31 December 1980, they were eligible to practise law in the Caribbean; otherwise, they would have to obtain the Legal Education Certificate of the Council of Legal Education as a prerequisite for practice. In 1976, the Parliament of Trinidad and Tobago enacted legislation whereby the first qualifying date of 1 October 1972 was no longer applicable and a national could be admitted to practice law in that country if he were called to the English Bar by 31 December 1980. It seemed that a number of law students from Trinidad and Tobago had enrolled in England after 1 October 1972 and it was sought to accommodate them. It was later discovered that nationals of CARICOM countries were similarly affected. After protracted discussions, there was substantial agreement within the Council of Legal Education that the date of 1 October 1972 should be altered to 31 December 1976 and that the Governments of those States parties to the Agreement should be requested to amend the Agreement accordingly.

— possession of the Council of Legal Education Certificate; or

— the qualification to practise at the English Bar.

between our peoples must be cemented by the law in our Member States. That law must reflect our common goals and ideals, and must give binding effect to measures we adopt for co-operation and co-ordination. But what is more, in some cases the law must lead; it must point the way to where we ought to be going innovatively, creatively, anticipating and institutionalising our aspirations and mechanisms for realising a common destiny."

"Proper Standards too Critical to be left to Parents" – Chief Justice

Opening the 98th Annual Conference of the Guyana Teachers' Association in April this year was the Chief Justice of Guyana the Honourable Kenneth Montague George, C.C.H.

The Chief Justice, in a wide-ranging address, held the attention of the assembled teachers at their Woolford Avenue Hall for more than one hour, it is reported, and must have amazed them with his enormous capacity for research, and the knowledge he displayed of the history of education and the teaching profession in this country.

The **Review** regrets its inability, due to constraints of space, to publish the Chief Justice's speech verbatim, but the following extracts, it is hoped, will indicate the quality of the presentation.

Calling on the teachers and their representative body for a reprint by 1984, when the Guyana Teachers' Aossociation celebrates its century, of "A History of the British Guiana Teachers' Association" by G.H.A. Bunyan, that distinguished Buxtonian school master, the Chief Justice acknowledged the book as a source from which he drew heavily for his address.

MOTIVATION

He said: "The contemporary Mexican philosopher and poet, Octavio Paz made this comparison between the attitude of the average American and Mexican to work. He said of the latter. 'Even today in Mexico at least in the small cities and towns, work is the antechamber of the fiesta. The year revolves on the double axis of work and festival, saving and spending.' Of the traditional American attitude he had this to say — 'The origins of American democracy are religious. 'The United States has not really known the art of the festival except in the last few years with the triumph of hedonism over the old protestant ethic .... A society which so energetically affirmed the redemptive value of work would not help but chastise as depraved the cult of the festival and the passion of spending." I think the average Guyanese is more like his Mexican rather than his American counterpart. We work not because working is good but mainly for the enjoyment which the economic and financial fruits of work can bring. In other words we work to spend and so long as we have sufficient to spend then work becomes a burden. It must therefore cease or take second place while we enjoy ourselves whether at the fete or otherwise. Therefore it would appear that we need to fashion a more fundamental motivation if we are to encourage increased production and productivity, and this can best be done through the child, during its formative years. Although the idea may be difficult to implement the prescription is a simple one. It is a love for labour and an enjoyment of work, and of working, a belief and conviction that work as a therapy is in itself is good and stimulating, and is a pleasure and a joy; and that the fruits of such work, although important, are incidental to one's love for work itself and a belief in its intrinsic value. For if we could inculcate this belief in the goodness of work, then each member of the community cannot but produce more, and such increased productivity would be the most lasting insurance for a higher standard of living. I am told, Cde President, that in all the more economically progressive societies of the world the enjoyment of work itself has been the fundation for their economic successes. Take the case of Germany whether East or West, or Japan or Korea; and as regards the latter it would appear that their juche principle is premised on this assumption.

SELF RELIANCE

The Chief Justice went on: "There is another facet of the work ethic of the individual to which I think needs

to be highlighted and possibly critically examined. It relates to the concept of self reliance. We have heard repeated statements made about the need for Guyana as a country to be and become as self reliant as possible, but I sometimes wonder whether this commendable statement of purpose is not being stultified by the all too readily acceptable view which seems to be held by so many parents, and, indeed teachers, that the primary purpose of the formal education process is to ready the child to be employed, as distinct from a self employed member of his community. It would appear that with the possible exception of the community high school programme very little effort is directed to inculcate in the child the likely virtues and benefits of being self-employed. As I see it the person who is self-employed i.e. one who has the ability to provide for his own economic well being, especially by productive effort, must necessarily be a more self reliant person; and the more the spirit of self reliance is made to pervade the society the more readily attainable would become our goal of national self reliance. Indeed the approach which emphasises the job filling capacity of the child to the neglect of his job creating capabilities may well be counter-productive of our efforts to foster the co-operative as the main vehicle for the financial and economic upliftment of the mass of the population. For a necessary attribute of the co-operative and a **sine quo non** for its success must be the spirit of self reliance of the individuals who make up the grouping. I would therefore like to urge that in the preparation of the child for his future role as a useful and productive citizen, greater attention should be devoted to instilling in him the habit of self reliance. It would tend to make him a more confident person, more capable of reacting positively to life's vicissitudes and vagaries and not to be daunted, discouraged or overwhelmed by its temporary misfortunes."

RELIGIOUS TEACHING

In a reference to the behavioural patterns of the society and falling standards, His Honour adverted to the abolition of religious teaching in schools. He said, "The third and final area in which I think your association can usefully interest itself is in the encouragement of greater efforts to the upliftment of the moral and ethical tone of the society. Before the schools had become secular it was primarily the various religious denominations under which the several schools fell which undertook to oversee as an adjunct of their religious instructions, the function of imparting acceptable moral and ethical standards to children of primary schools. But for reasons which we

all know and understand the teaching of religion in the schools has been abolished. The critical question, however, must be whether any substitute, formal or otherwise, has been devised in the teacher training curriculum to inculcating in the child the importance of adequate and acceptable standards of moral and social behaviour and the proper conventions by which this society is to live. As far as I have been made to understand this must be answered in the negative. I think that proper standards of behaviour ought not be left to the parent alone. Indeed it is of too critical an importance to the life blood of a nation itself to be left to the individual parent, and ought to form an integral part of the formal educational process in all schools. In recent times our attention has been focused on the dramatic decline in these standards. Too many of us have become too brash and unsympathetic, too selfish and uncaring, and we seem to have lost the facility for courtesy and good manners. The increased incidence of dishonesty and crime in general especially among the youth, and the growing tendency to disobey even such conventional laws as the proper rules of the road, all seem to point to the need for immediate remedial action; and I would like to think that the school, by the necessary adjustments to the teacher training curriculum can play a positive and decisive role."

The former Justice of Appeal concluded, "In closing I can do no better than repeat what had been said by Lord Brougham many years ago concerning the importance of the teacher in the community, and which was adverted to on a similar occasion as this some years ago. He said — 'Their calling is high and holy: their fame is the property of the nations; their renown will fill the earth in after ages in proportion as it sounds not far off from our own times. Each of those teachers of the world possessing his soul in patience performs his appointed work, awaits in faith the fulfilment of the promises and resting from his labours bequeaths his memory to the generation whom his works have blessed, and sleeps under his humble but inglorious epitaph, commemorating one in whom mankind lost a friend and no man got rid of an enemy' "

EDITOR'S NOTE : The hope is that the learned Chief Justice's strictures on the content of moral teaching in the school system and the vacuum created by the withdrawal of religious instructions, will spur the teaching profession to suggest and devise a substitute for a curriculum area that is categorically indispensable.

Where is the product of the corporate creativity and imagination capable of devising a Code of conduct or a compendium of moral rules suitable for the young and are a distillation and a meeting point of the precepts of Christianity, Hinduism, Mohammedanism, and the rest, while being religiously or denominationally anonymous The only cause of the undesirable perpetuation of the vacuum is the unconcern of the teaching profession itself.

The Right To Work Versus Dismissal At Pleasure In the Cooperative Republic of Guyana

By MAHENDRA RAMGOPAL*

> "To speak of the right of the Crown to dismiss its servants at pleasure is to use a lawyer's metaphor to cloak a political reality."
>
> Per Lord Diplock in **Endell Thomas v. Attorney-General of Trinidad and Tobago** (1981) 3 W.L.R. 601.

Article 22(1) of the Constitution of the Co-operative Republic of Guyana provides that every citizen has the right to work. Article 22(3) provides that the right to work is guaranteed, **inter alia**; by socialist labour laws, socialist planning, development and management of the economy and by sustained efforts on the part of the State, Co-operatives, Trade Unions and other socio - economic organisation and the people working together to develop the economy in order to increase continuously the country's material wealth, expand employment opportunities, improve working conditions and progressively increase amenities and benefits.

In an address on "**The Functions of The Courts in Contemporary Guyana**" by Chancellor V. E. Crane to the Guyana Bar Association on the 28th October, 1981, the honourable Chancellor stated :

> "Now that Guyana has a Constitution into which are entrenched the principles and concepts of socialism, the courts are faced with the challenge, even more than 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 stand-point, 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".

The honourable Chancellor continued :—

> "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....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 inseparable and organic part of our national ethos."

QUESTION

The question is whether the prerogative power to dismiss at pleasure, which the Crown could have exercised before Guyana attained Republican status, is now vested in the State of Guyana, and is not of mere academic interest. The question is of some concern when one takes into consideration that, in Guyana today, a public servant is not in a position to file suit against a Government department for the tort of wrongfull dismissal. As was pointed out by Crane J. A. in **Deonarine Singh v. Transport & Harbours Department.** (1976) 22 W.I.R. 284 at p. 293 :—

> **"Bitter pill as it might be at the present day to many constitutionalists, the fact remains that government departments are still not under the law generally; they are immune from suit and cannot be sued in our courts of justice unless permission is granted by statute to the citizen to do so. Meanwhile, a lead on this vital matter is awaited, particularly in view of the new social order that has come about since Independence. Until then, it means that a citizen who is seriously injured by the fault of a government department can recover as of right no compensation save by way of an ex gratia award."**

FAIR PLAY

It is doubtful whether it could be considered fair play that after Guyana has celebrated its 12th anniversary as a Republic, the State remains immune from tortious liability. At present, there is no legislation in Guyana to compare with the Crown Proceedings Act, 1947, of the United Kingdom, of the State Liability and Proceedings Act, 1966, of the Republic of Trinidad and Tobago. It is respectfully submitted, that the lead on this vital matter tnat Chancellor Crane was awaiting since June 1976 is now long overdue, and that Parliament ought not to remain inactive on this issue any longer.

NATURAL JUSTICE

Before Guyana attained independence, in the case of **Cunberbatch v. Weber** (1965) L.R.B.G. 408. Archer P. in the British Caribbean Court of Appeal, held that a sergeant of police, was a public servant dismissible at pleasure and that consequently the rules of natural justice (alleged to be violated) did not apply. Shortly after Guyana attained Independence, in the case of **Nobrega v. A-G. of Guyana** (1967) 10 W.I.R. 187 before the Guyana Court of Appeal, counsel for the appellant Nobrega conceded that a Crown servant in Guyana was dismissible at pleasure. Luckhoo and Cummings, JJ.A. agreed with this view. But Stoby C. stated (at p. 193) :

> **"Suffice it to say that in a case occurring after May 26, 1966, having regard to Art. 96(1) of the Constitution of Guyana the position of Crown Servants may have to be re-examined and determined afresh. The reasons which impelled the U.K. Government to arbitrarily dismiss her servants on grounds of public policy no longer represent modern thinking and may not be valid in those countries with a written Constitution."**

In **Re The Application of Gerriah Sarran** (1969) 14 W.I.R. 361 no issue as to a right to a hearing under article 96(1) of the Constitution was raised, so that the judicial observations on this point were **obiter dicta**. Crane J.A. in his judgment at p. 365 stated :

> "Under art. 96 no domestic tribunal is directed, but implied in the power to remove from office is the power to hold an enquiry in fulfilment of that power of removal. This must necessarily be so, I think, because natural justice demands that a man may not properly be removed from office unless he is given an op-

portunity to be heard." Later (at p. 366) the learned judge referred to Sarran's "property right" to remain in her occupation. Cummings J.A. in his judgment, concluded that "In exercising their powers of removal and discipline under the constitution the Public Service Commission perform judicial or quasi-judicial acts and they enquire into charges in accordance with rules of procedure which provide for the hearing of both sides and finding of fact upon a consideration of the evidence after which they make decisions and orders."

SUBORDINATED

In **Evelyn v. Chichester** (1969) 15 W.I.R. 410, the Guyana Court of Appeal held that a deckhand of the Transport and Harbours Department was a Public Servant and had a statutory right to be heard before the General Manager could properly dismiss him. Crane J.A. stated (at p. 446-47)

> "I can conceive of no authority more drastic or arbitrary and falling within the sphere of the prerogative, than the right claimed by the administration to dismiss the Crown Servants at will, without notice or without assigning cause or reason. But in our sphere, we are happy to say today, even the exercise of the Crown prerogative is subordinated to our Constitution, the supreme law of Guyana."

The Guyana Court of Appeal examined the question of dismissal at pleasure, albeit **obiter**, in the light of the particular facts that arose in **Sheikh Mohamed Hyder Ali v. The Public Service Commission** (Civil Appeal No. 37 of (1974) where the appellant who was a public officer was dismissed from the Public Service by the Public Service Commission. The appellant's complaint was centred mainly around the argument that there was a breach and violation of the rules of natural justice in the course of the inquiry which led to his dismissal. An order of **certiorari** was sought in the High Court to have the decision of the Public Service Commission quashed. The trial judge, **Massiah, J.**, held that there was no legal justification or basis for seeking to have the rules of natural justice applied. In the words of the trial judge :

> "The plain, unvarnished truth which may be anathema to some and surprising to others is that at present once a public servant has been dismissed by the Public Service Commission itself, and there has arisen no question of a lack of jurisdiction, he has no redress at law, whether or not an inquiry was held or even where an inquiry was improperly held."

The Court of Appeal, affirming the judgment of the trial judge, held that, on the evidence of the appellant himself and on the undisputed facts, there was no denial of natural justice. In arriving at this decision the Court of Appeal did not consider it necessary to make a definitive pronouncement on the dismissal at pleasure question. But, it should be considered worthy of note that Luckhoo, C, considered it relevant to refer to the important utterances of Lord Wilberforce in **Malloch v Aberdeen Corpn.**, (1971) 1 W.L.R. 1580 where His Lordship said (p. 1597) :

> **" The rigour of the principle is often, in modern practice mitigated for it has come to be perceived that the very possibility of dismissal without reason being given—action which may vitally affect a man's career or his pension — makes it all the more important for him, in suitable circumstances to be able to state his case and, if denied the right to do so, to be able to have his dismissal declared void. So, while the courts will necessarily respect the right for good reasons of public policy, to dismiss without assigning reasons, this should not, in my opinion, prevent them from examing the framework and context of the employment to see whether elementary rights are conferred upon him expressly or by necessary implication, and how far these extend."**

TRANSMITTED

Persaud, J.A. in his judgment stated that:

"One must not assume that the right to dismiss at pleasure which, even though it came to be regarded as part of the common law of England, but which clearly had its origin in the prerogative powers of the Crown, was automatically transmitted to the State of Guyana in 1966 upon our independence."

"There is nothing to indicate that the power to dismiss at pleasure was passed on, or that any enactment of the Guyana Legislature provided that such a power shall be exercised by say the President as was done in the Indian Constitution, art. 310 (1) of which provides that 'except as expressly provided by this constitution a person who is a member of the civil service holds office during the pleasure of the President and it is expressly provided by art. 311(2) that no 'such person aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity to be heard' ... In other independent Commonwealth States, provisions have been specifically made for the appointment, discipline, and dismissal of civil servants. In Ghana there is a civil Service Commission, and legislation relating to the appointment,

discipline and dismissal of civil servants, but the civil service Act vests the right of dismissal in the President; while in Nigeria such powers are vested in a Public Service Commission by virtue to the Constitution of Nigeria."

"Thus it will be seen" continued Persaud, J.A., "that in each of the instances I have referred to, all previous colonial territories — there has been a specific vesting of the powers of discipline and dismissal, which leads one to believe that it must have been accepted that it was not to be implied that the right to dismiss at pleasure, based as it was on the royal prerogative, was automatically inherited by an ex-colonial territory upon its becoming independent. My conclusion on this point therefore is that s. 5(1) of the Guyana Independence Order, 1966, does not vest the prerogative right of dismissal of civil servants in anyone. To say that it does is to reach that conclusion by implication which seems to be excluded by the very language of the section, i.e. that all laws shall be construed with such modification, adaption, qualification, and exceptions as may be necessary to bring them into conformity with the Guyana Independence Act 1966, and the Order itself."

FAIR

Persaud J.A further stated that article 96(1) of the Constitution did not vest the prerogative power of dismissal at pleasure in the State, and "in the absence of any clear language to that effect, I would not be prepared to hold that the Public Service Commission has the right to dismiss at pleasure ... I concede that the State should be free to terminate the services of a public officer who is an embarrassment, or who, is an obstructionist to State policy and aspirations; but, on the other hand, unless there is a clear enactment, a public officer should be heard before he is either dismissed or reduced in status. If one is to be fair to the public service, it is impossible to see it in any other light."

Haynes J.A. refrained from expressing his opinion on the dismissal at pleasure question because he considered that in any event it would have been **obiter dicta** only. It must be considered a real loss to the dismissal at pleasure debate, that Haynes, J.A. did not consider it necessary to record his opinion.

In **Endell Thomas v. Attorney General of Trinidad and Tobago** (1981) 3 W.L.R. 601 the plaintiff was a police Officer in the Trinidad and Tobago police force. In 1972 he was charged with three offences against discipline. The

Police Service Commission dismissed the plaintiff from the police force. He brought an action against the Attorney-General in the High Court claiming a declaration that he was still a member of the police force or that he had been wrongfully dismised and was entitled to damages. In the High Court, Maharaj, J., certified three preliminary questions of law for the consideration of the court, one of which was whether the plaintiff was a Crown servant dismissible at pleasure. Braithwaite, J. at first instance held that the plaintiff was not dismissible at pleasure. The Court of Appeal reversed that decision by a majority, Phillips J.A. dissenting. On the Plaintiff's appeal to the Privy Council it was held inter alia: that the Police Service Commission's power "to remove" a police officer was a power to remove him for reasonable cause of which the commission was the sole judge, that, since the right of the Crown to dismiss its servants had not been transferred to the commission and was inconsistent with both the constitution of 1962 and the present constitution a police officer was not a servant of the Crown dismissible at pleasure. The judgment of their Lordships, delivered by Lord Diplock stated at p. 607, "To speak of the right of the Crown to dismiss its servants at pleasure is to use a lawyer's metaphor to cloak a political reality. 'At pleasure' means that the Crown servant may lawfully be dismissed summarily without there being any need for the existence of some reasonable cause for doing so, in other words 'at whim'. Under a party system of government such as exist in Trinidad and Tobago and was expected to exist after independence in other Commonwealth countries whose constitutions followed the Westminster model, dismissal at pleasure would make it possible to operate what in the United States at one time became known as the 'spoils' system upon a change of government, and would even enable a government, composed of the leaders of the political party that happened to be in power, to dismiss all members of the public service who were not members of the ruling party and prepared to treat the proper performance of their public duties as subordinate to the furtherance of that party's political aims. In the case of an armed police force with the potentiality for harassment that such a force possesses, the power of summary dismissal opens the prospect of converting it into what in effect might function as a private army of the political party that had obtained a majority of the seats in Parliament at the last election." The whole purpose of Chapter VIII of the Constitution (similar to title 7 of the Constitution of the Co-operative Republic of Guyana) which bears the rubric 'the Public

Service' is to insulate members of the civil service, the teaching service, and the police service in Trinidad and Tobago from political influence exercised directly upon them by the government of the day."

EQUALITY OF TREATMENT

"In their Lordships' view there are overwhelming reasons why 'remove', in the context of 'to remove and exercise disciplinary control over', police officers in section 99(1) and in the corresponding sections relating to the other public services must be understood as meaning 'remove for reasonable cause' of which the commission is constituted the sole judge, and not as embracing any power to remove at the commission's whim. To construe it otherwise would frustrate the whole constitutional purpose of Chapter VIII of the Constitution which their Lordships have described. It would also conflict with one of the human rights recognised and entrenched by section 1(d) (similar to Article 149 of the Constitution of the Co-operative Republic of Guyana) of the constitution, viz., 'the right of the individual to equality of treatment from any public authority in the exercise of any functions.' Dismissal of individual members of a public service at whim is the negation of equality of treatment."

In the light of the foregoing it is respectfully submitted that the preservation in Guyana of the historic legal doctrine of dismissibility at pleasure of public officers is iniquitous and out of tune with the present constitution of the Co-operative Republic. It is repugnant and irreconcilable that on one hand the State of Guyana should cling on to a prerogative power that was formerly vested in the Crown, and that on the other hand hold herself out as a Republic. It has already been pointed out that Guyana's present Constitution expressly provides for the right to work. To dismiss a public officer at the whim of the State, when the supreme law of the land guarantees the right to work is contradictory, unreasonable, unjust and unsatisfactory. The time is now ripe for the legal profession to accept the challenge thrown out by Chancellor Crane and to invite the Courts in the exercise of their "constitutional interpretative functions" to positively declare that the common law notion of dismissal at pleasure has been abandoned as being incongruous and inconsistent with the supreme law of the Co-operative Republic of Guyana.

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Stare Decisis in the Toils

By S. Y. MOHAMED

Precedent has been succinctly put in the words of counsel, who about six centuries ago, told a judge 'I think you will do as others have done in the same case, or else we do not know what the law is'.[1] Like cases must be decided alike. Where the facts of an earlier case are indistinguishable from that of a later case the court in that later case is bound to follow the decision of the earlier case. In England, the House of Lords is the highest court. It is bound by its previous decisions. Its decisions, which bind all inferior courts, can only be reverved by an Act of Parliament. Relying on the doctrine of precedent a lawyer can advise his client precisely as to what the law is. If there is no precedent he would not be able to do this.

Precedent has a distinct advantage of being final both in the sense that it puts an end to the litigation between the parties and in the sense that it establishes the principle embodied in the ratio decidendi. Consequently it provides a firm foundation on which commercial, financial and fiscal arrangements could be based. Also it marked a definite step in the development of the law, irreversible, except by Act of Parliament. This distinct advantage of finality should not be frittered away by too ready use of the recently declared liberty to depart from previous decisions.'[2] Lord Eldon once said it was 'better that the law should be certain than that every judge should speculate upon improvements'.[3] Certainty is a desirable feature in any legal system. The courts would refuse to allow a matter to be reopened and reargued when the law touching that matter was decided before.

BINDING FORCE

Precedent dates from time immemorial. It is the lifeblood of legal systems, whether primitive, archaic or modern.[3a] In Babylon, in 2000 BC, judicial decisions were recorded so that they might be used as material for giving advice.[4] The binding force of precedent was emphasised with felicity and vigour by Lord Halsbury LC in London Street Tramways Co. Ltd. v London County Council[5] as follows :

> "My Lord, it is totally impossible, as it appears to me, to disregard the whole current of authority upon this subject, and to suppose that what some people call

an "extraordinary case," an "unusual case", a case somewhat different from the common, in the opinion of each litigant in turn, is sufficient to justify the rehearing and rearguing before the final Court of Appeal of a question which has been already decided. Of course I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience — the disastrous inconvenience — of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal ? My Lords, "interest rei publicae" that there should be "finis litium" at some time, and there could be no "finis litium" if it were possible to suggest in each case that it might be reargued, because it is "not an ordinary case," whatever that may mean. Under these circumstances I am of the opinion that we ought not to allow this question to be reargued."

PRACTICE STATEMENT

The doctrine of precedent has been criticised as being too rigid; it hinders the proper development of the law and produces in some cases manifest injustice. To ease this rigidity the House of Lords issued the following Practice Statement :[6]

"Their Lordships regard the case of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordships nevertheless recognised that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlement of property and fiscal arrangements have been entered into and also the especial

need for certainty as to the criminal law. This announcement is not intended to affect the use of precedent elsewhere than in this House."

CRIMINAL LAW

In Guyana, the Court of Appeal is the highest Court of the land. It is, like the House of Lords, a Court of last resort and bound by its own previous decisions. Its decisions bind also all inferior courts. In Seepersaud v Port Mourant Ltd.[7] the Court of Appeal approved the Practice Statement of the House of Lords, It has, however, unlike the House of Lords, used the Practice Statement to depart from a previous decision when it appears right to do so.

The Practice Statement pellucidly speaks of the 'especial need for certainty as to the criminal law'. In Knuller (Publishing etc) Ltd. v Director of Public Prosecutions[8] the House of Lords refused to overrule an earlier decision in relation to the criminal law in Shaw v Director of Public Prosecutions[9] which held, inter alia, that a conspiracy to debauch and corrupt public morals was a common law misdemeanour and was indictable as such. Three of the five Law Lords, Lord Reid, Lord Morris and Lord Simon, held that even if Shaw's case was wrongly decided it must stand and apply to cases reasonably analogous unless or until it is altered in Parliament.[10] Lord Reid went on to say 'that our change of practice (Practice Statement) in no longer regarding previous decisions of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in law we must be sure that there is some very good reason before we so act'[10a] He went on to say that Shaw's case did not cause any manifest injustice and that it had been acted upon in at least thirty convictions.[11] Lord Morris gave the following reasons for refusing to overrule Shaw's case : (1) 'The decision constituted a clear pronouncement of this House as to what the law was and had been; (2) It was a decision in relation to the criminal law where certainty is so desirable; (3) The decision has been acted upon and many criminal prosecutions have been based upon the authority of it; (4) The decision was one which attracted public attention and which on different occasions has been brought particularly to the attention of Parliament; (5) The Parliament has not altered the law; (6) . . .[11a]

The Court of Appeal, on the other hand, held that a previous decision in relation to the criminal law was a

proper decision within the terms of Practice Statement that could be reopened and reargued with a view to have that decision overruled although the Practice Statement emphasised the 'especial need for certainty as to the criminal law.' In State v Gobin and Griffith[12] the Court, consisting of five Justices of Appeal, by majority, after considering Knuller's case, overruled an earlier decision in the State v Fowler[13] which settled the question as to the admissibility of a confession statement made by the accused and the State v Ramsingh[14] in which the Court, consisting of five Justices of Appeal, by majority, approved of the decision in Fowler's case. The Court held that the previous decisions in Fowler's case and Ramsingh's case were wrong and should be overruled, whereas in Knuller's case the House held that even if the previous decision in Shaw's case was wrong it should stand until altered by Parliament.

CONSTRUCTION OF A STATUTE

The decision on the construction of a statute is generally not to be reconsidered and reargued. The construction of a statutory provision 'depends largely on an impression as to the meaning of words in their context, and often different minds have different impressions so that a divergence of opinion results.'[15] In Jones v Secretary of State[16] the House of Lords held that its previous decision in Minister of Social Security v Amalgamated Engineering Union (re Dowling)[17], in which the construction of a certain provision of the National Insurance (Industrial Injuries) Act 1946 was determined in respect of a claim by a claimant to disablement benefit, was not a proper decision for reconsideration within the terms of the Practice Statement. The House therefore refused to overrule its prvious decision. Four of the seven Law Lords, Lord Reid, Lord Morris, Lord Pearson and Lord Simon held that even if Dowling's case was wrongly decided it should not be overruled, Lord Reid held that if the previous decision was causing administrative difficulties the Minister was in a position to seek an amendment of the Act.

OVERRULED

In Fitzleet Estate Ltd. v Cherry[18] the House of Lords again refused to overrule a previous decision in Chancery Lane Safe Deposition and Offices Co., Ltd. v Inland Revenue Commissioner[19] which held that certain interest charged to capital was exigible to income tax under the Income Tax Act. The House held that the procedure under which it could review and depart from an earlier

decision did not permit an appellant to argue that an earlier decision of the House should not be followed merely because it was wrong.

The Guyana Court of Appeal, on the other hand, in Seepersaud v Port Mourant Ltd.[20] overruled an earlier decision in Demerara Sugar Estates v Abbiraj[21] which settled the interpretation of a certain provision of the Workmen's Compensation Ordinance. In Munisar v Bookers Sugar Estates Ltd. and Attorney General[22] the Court again overruled an earlier decision in Demerara Bauxite Co. Ltd. v Hunte[23] which settled the length of notice an employer can give to the Commissioner of Police to dismiss a supernumerary constable under the Police Act. Crane and RH Luckhoo JJA both held that the decision in Hunte's case was wrong, manifestly unjust and productive of injustice and should be overruled. Haynes, C. also held that the decision was wrong but would not overrule it. The method of terminating the services of supernumerary constables, as stated in Hunte's case, was subsequently adopted by employers of supernumerary constables. The decision was also followed in Telbert Clement v Austin, Commissioner of Police and Reynolds Guyana Mines Ltd.[24] The Court, therefore, in overruling Hunt's case failed to 'bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into.'[25] In both Seepersaud's case and Munisar's case the Court was constituted of three Justices of Appeal.

DIFFERENCE OF APPROACH

The Guyana Court of Appeal, in its own right, has advisedly not followed the path pursued by the House of Lords in the following circumstances :—

1. The Court of Appeal has overruled a previous decision in relation to the criminal law which it considered wrong notwithstanding the importance placed by the Practice Statement on the especial need for the certainty as to the criminal law'. It has reversed such a decision and will not wait on Parliament to do so. (Fowler's case and Ramsingh's case). But the House of Lords has not overruled a previous decision in relation to the criminal law even if it considered that such a decision was wrong. It held that such a decision could not be reopened and reargued as it was not within the terms of the Practice Statement. Such a decision must stand until reversed by Parliament — (Shaw's case).

2. The Court has overruled a previous decision although that decision was followed in a later case. (Fowler's case was followed in Ramsingh's case and Hunte's case was followed in Telbert Clement's case.) Conversely, the House has not overruled a previous decision which was followed in a subsequent case. (Shaw's case was acted upon in about thirty cases).

3. The Court has overruled a previous decision based on the construction of a statute (Abhiraj's case and Hunte's case). The House of Lords has not overruled a previous decision which settled the interpretation of a statutory provision. (Dowling's case and Chancery Lane's case).

4. The Court has held that a previous decision which appears in all respects to be final and constituted a clear pronouncement of what the law was, and had been, can be overruled by a differently constituted Court which finds that decision was wrong. (Abhiraj's case, Hunte's case, Fowler's case and Ramsingh's case). The House has considered it wholly inappropriate to overrule such a previous decision. (Shaw's case, Dowling's case and Chancery Crane's case).

5. Since the declaration of the Practice Statement by the House of Lords in 1966 the Court has considered five of its previous decisions and has overruled all of them.[26] This resolute stand by the Court supports Crane JA's observation that the Court's jurisdiction is a continuing one to overrule previous decisions that are wrong.[27] The House of Lords on the other hand, has considered three of its previous decisions and has refused to overrule any of them.[28]

FLOODGATES

The Court of Appeal has opened the floodgates to allow previous decisions which have all the appearances of finality to be reopened and reargued before a differently constituted Court. The Court will find in extremely difficult to close the floodgates. 'If a tenable view taken by a majority in the first appeal could be overruled by a majority preferring another tenable view in a second appeal, then the original tenable view could be restored by a majority preferring it in a third appeal. Finality of decision would be utterly lost'[29]. This course weakens the certainty of the law rather than permits the development of the law. This is an undesirable and regrettable development.

A litigant would be alarmed to know that a lawyer cannot precisely advise him as to what the law is. The Attorney cannot say beforehand what the Court will

do; whether it will or will not overrule a previous decision. Conversely, if a litigant is told that the Court may overrule a prevision decision he will take the chance to litigate his cause, when otherwise he would not have done so.

DISRUPT

Precedent is the law of the land and no court ought to disrupt it except Parliament. A court must not usurp the functions of Parliament. The functions of a court are to find out the will of Parliament. If a court does not reflect that will in its decision Parliament will surely pass a law to reverse that decision. If Parliament does nothing, it shows that Parliament is prepared to allow that decision to stand. 'Where Parliament fears to tread it is not for the courts to rush in.'[30]

To overrule an earlier decision is to defeat the expectations of those persons who had acted on the unshakable belief that the earlier decision had settled the law. If the present tendency of overruling previous decisions continues the Court of Appeal will eventually destroy the doctrine of precedent. The Court still has plenty of time to save this now ailing law of stare decisis. Let not this doctrine degenerate into a 'worthless ruin'.

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1. Bollers CJ State v Gobin & Griffith 23 WIR 256 at 303.
2. Lord Pearson Jones v Secretary of State (1972) 1 All ER 145 at 174.
3. Lloyd Introduction to Jurisprudence 3rd ed 714.
3a. Ibid 703.
4. Dias & Hughes Jurisprudence (1957) 52.
5. (1898) AC 375 at 380. Radcliffe v Ribble Motor Services Ltd. (1939) AC 215 at 226, 235 and 238; Nash v Tamplin & Sons Brewery Brighton Ltd. (1952) AC 231 at 250.
6. (1966) 3 All ER 77.
7. 19 WIR 393.
8. (1973) AC 435.
9. (1962) AC 220.
10. (1973) AC 435 at 455, 463, 466, 484 and 489.
10a. (1973) AC 435 at 455.
11. (1973) AC 435 at 455.
11a. (1973) AC 435 at 466.
12. 23 WIR 256.
13. 16 WIR 452.
14. 20 WIR 138.
15. Lord Pearson Jones v Secretary of State (1972) 1 All ER 145 at 174,
16. (1972) 1 All ER 145.
Lord Reid at 149.
17. (1967) 1 All ER 210.
18. (1977) 3 All ER 996.
19. (1966) 1 All ER 1.
20. 19 WIR 393.
21. (1970) Civil Appeal No. 42 of 1970 (unreported).
22. 26 WIR 337.
23. 21 WIR 109.
24. (1975) Civil Case No. 34 of 1975 (unreported) Munisar v Bookers

Sugar Estates Ltd. 26 WIR 337 at 352.

25. Practice Statement (1966) 3 All ER 77.

26. Abhiraj, Fowler, Ramsingh, Hunte and Telbert Clement. Sarju v Walker (No. 2) 21 WIR 193 the Court was not asked to overrule an earlier decision; it was asked by motion, to vary the order of that earlier decision. Glen v Sampson 19 WIR 237 did not directly overrule Dhanrajie v Baijnauth (1965) LRBG 269 which was given per incuriam.

27. State v Gobin and Griffith 33 WIR 256 at 294.

28. Shaw, Dowling and Chancery Lane cases. Miliangos v George Frank (Textiles) Ltd. (1975) 3 All ER 801 where the House held that there was a change of circumstances from that of an earlier decision in Re United Railways of the Havana and Regla Warehouses Ltd. (1960) 2 All ER 332. The facts were distinguishable. The question of overruling therefore did not properly apply. Addie v Dumbreck (1929) AC 358 in which there was a change of physical and social condition distinguished in British Railways Board v Herrington (1972) 1 All ER 749.

29. Lord Pearson Jones v Secretary of State (1972) 1 All ER 145 at 174.

30. Lord Reid Shaw v Director of Public Prosecutions (1962) AC 220 at 275.

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[Mr. Mohamed is a Principal Counsel in the Chambers of the Attorney General .—ED.]

The Mortgage as a Judgment

By H. N. ("RALPH") RAMKARRAN, Attorney-at-Law

E. M. Duke in his invaluable work, **A Treatise on The Law of Immovable Property in British Guiana,** defines a mortgage as a judgment. He states at page 47:

"A mortgage is a formal act passed before a Judge. In addition it is a judgment."

This unequivocal statement made in 1923 is not supported by authority, but most likely reflects the inclusion in mortgage deeds for some considerable period prior to 1923, of a clause which containts a "willing and voluntary condemnation" of the mortgagor in the amount secured by the mortgage. This clause is quoted in full by Duke and is included in a similar form in all mortgage deeds registered in the Deeds Registry.

The willing and voluntary condemnation has its origin in Roman-Dutch Law which governs mortgages in Guyana by virtue of Section 3 (c) (ii) of the Civil Law of Guyana Act, Chapter 6:01. However, from those texts which are available there is no indication that a mort-

gage in Roman-Dutch Law was considered to be a judgment on the basis that they usually contained a willing and voluntary condemnation.

At least since 1774, voluntary condemnations were recognised in Guyana. Section IV of the **Regulations for the Administration of Justice in the Rivers Essequibo and Demerara**, reads as follows:

> **"Also before the Commissioners of the Court all deeds of mortgage shall be passed, and all voluntary condemnations with all contracts in which the parties shall suffer voluntary condemnations."**

The earliest available case which deals with a willing and voluntary condemnation is **Macaulay v. G. Marks 1858 L.R.B.G. 85.** The facts in this case are not reported in the decision but it appears from the report that there was an action for the renewal of a willing and voluntary condemnation in a mortgage which had expired by effluxion of time. Part of the decision reads as follows:

> **"That as a general rule the only defence to an action for the renewal of a sentence, and a willing and voluntary condemnation is a sentence, is payment."**

WILLING AND VOLUNTARY CONDEMNATION

In the case of **British Guiana Electric Lighting and Power Co. Ltd.. v. Conrad and Anor. 1897 L.R.B.G. 115.** the Court, dealing with a preliminary argument by the plaintiff for an account with respect to a mortgage given to the defendant, said:

> **"The mortgage in question is in the usual form. In it the now plaintiff company admits that it is justly and truly indebted to Conrad Son and Company in the sum named. being for goods sold and delivered by the said Conrad Son and Company to the said now plaintiff company. It states that the company renounces 'all pleas and exceptions known in law or equity which if availed of might lessen or invalidate either wholly or in part the true intent and meaning force and effect of these presents, and that the appearer, the now plaintiff company, requested the judge to condemn the said company in the payment of the capital sum named and interest, and in the performance of the several conditions stated in the mortgage, the appearer 'full consenting to such condemnation (Judgment)'. Then comes the judgment itself: 'Wherefore His Honour the said judge hath condemned as he doth hereby condemn' the now plaintiff company in such payment and performance**
>
> **In this document it will be seen that there are two distinct parts, the mortgage and the willing and voluntary condemna-**

tion as it is called. The latter part by its very terms, is a sentence, and if there were need of authority the Full Court laid it down in Macaulay -v- Marks that 'a willing and voluntary condemnation is a sentence!' "

Prior to the publication of Duke's Treatise in 1923, two more relevant cases were reported, namely, **In re The Demerara Turf Club Ltd., British Guiana Mutual Fire Insurance Co. Ltd. v. The Demerara Turf Club Ltd. 1917 L.R.B.G. 191**, and **Tinne and others v. Tebbutt 1921 L.R.B.G. 84**, both of which confirmed the propositions laid down in the earlier cases.

It appears then that since at least 1897 when **British Guiana Electric Lighting and Power Co. Ltd. v. Conrad and Anor.** was decided that the "usual" form of a mortgage included a willing and voluntary condemnation.

The effect of the willing and voluntary condemnation is the same as that of a judgment of the court. According to **Macaulay v. Marks** the only defence is that of payment or an application for the setting aside of the judgment on the ground of fraud. **British Guiana Electric Lighting and Power Co., Ltd.** quoted **Macaulay v. Marks** with approval and goes on to state at page 120:

"The sentence remains on the record of the Court. It has never been revoked or rescinded or set aside or annulled. The debt dealt with by it is therefore res judicata. To reopen the questions as to which it has decreed while it stands unrevoked would be contrary to the principles which govern not only our own but every system of jurisprudence. There would be no end to litigation, no finality in the administration of justice if parties, notwithstanding an existing judgment, could bring actions which directly or by a side wind would raise again issues which had already been solemnly judicially determined by that judgment."

However, Stafford J. in **Demerara Storage Co., Ltd. v. Demerara Wharf and Storage Co., Ltd. 1941 L.R.B.G. 82**, while specifically agreeing with some of the earlier decisions, indicated that:

"Under the modern English practice adopted in this colony, the principles governing the setting aside of such a sentence or judgment are wider in their scope, and such judgment can now be set aside on any ground on which an agreement in like terms could be set aside but the setting aside necessitates a fresh action for that purpose."

Whether or not Stafford J. is correct, in view of the fact that Section 3 (c) (ii) of the Civil Law of Guyana Act,

Chapter 6:01, aforementioned, preserves not only the law but also the practice of Roman-Dutch Law in relation to mortgages, is a matter for debate. His view reflected the creeping influence of English law despite the provisions of the Civil Law of Guyana Act which was passed in 1916. His first error of applying English law compounded by equating a judgment in Roman-Dutch Law with an agreement in English law. If **Macaulay v. Marks** correctly reflects the Roman-Dutch position that a willing and voluntary condemnation can only be set aside for fraud, which stafford J. appears to accept on the basis of **Van Leeuwen**, a writer on Roman-Dutch Law, who confirms that principle, then Stafford J. fell in error in expanding the basis on which a willing and voluntary condemnation can be set aside.

REDRESS

The nature of the redress in the event of a breach of the terms of mortgage deed also reflects the nature of the mortgage as a judgment. In **Re The Demerara Turf Club Ltd. British Guiana Mutual Fire Insurance Co., v. The Demerara Turf Club Ltd.**, Major C.J. said at page 193 :

> **"By the law of this colony a mortgagee has a right, upon failures of his debtor to observe and perform any of the covenants, stipulations and conditions contained in the instrument of mortgage, to take proceedings against the debtor to enforce the security given for his so doing. The proceedings take the form of an action for ascertainment (where that is necessary) of the amount of the debt and for a decree that the mortgaged property be declared liable to be taken in execution and sold to satisfy same."**

This position is confirmed by Duke and also by Dr. Ramsahoye in his work. **The Development of Land Law in British Guiana.**

All the reported cases, and Duke as well as Ramsahoye deal with instances where a willing and voluntary condemnation clause was contained in the mortgage deed. An issue which arises is whether the court would hold that a willing and voluntary condemnation is necessarily incidental to a mortgage. For example, the Agricultural Loans Act, Chapter 68:06 provides for the issuing and registration in the Deeds Registry of a Loan Certificate to persons who take loans from certain institutions for agricultural purposes under the Act. Section 10 (2) provides that a loan certificate shall, as from the date on which the lien conferred by that loan certificate takes effect —

"(a) have the like effect in relation to the farmers' interest in the immovable property and any other property or interest therein comprised as if it were a mortgage passed under the Deeds Registry Act or in the case of Registered Land as if it were a mortgage created in accordance with the provisions of the Land Registry Act."

Neither the Agricultural Loans Act, the Deeds Registry Act nor the Land Registry Act defines a mortgage. Would it therefore be held that a Loan Certificate, by implication, contains a willing and voluntary condemnation ?

INTERPRETATION

The aids to interpretation are rather limited in this case. There appears to be no reported case which specifically states or even hints that, as a matter of law, a judgment is incidental to a mortgage even though not specifically provided for in the mortgage deed. Of course, a mortgage is a contract and each contract is defined by its specific terms. Such an interpretation in the case of a particular mortgage deed which does not contain a willing and voluntary condemnation may very well be stretching the rules of interpretation beyond judicially acceptable limits.

This, however, would not be the case with respect to a Loan Certificate under the Agricultural Loans Act which is defined as having the effect of a mortgage without the terms being specifically set out. If at least by 1897 the usual form of a mortgage contained a willing and voluntary condemnation clause and this continues up to the present time, a court may well be persuaded to sustain the argument that, by implication, a Loan Certificate is a judgment containing a willing and voluntary condemnation.

Call for Commonwealth Caribbean Human Rights Convention — Bar Association President Speaks of

Legalistic Violations of Human Rights in the practice of some Commonwealth Caribbean States

(Excerpts of a paper delivered to the Caribbean Symposium on Human Rights on 29th January, 1982, at Mona, Jamaica.)

by

ASHTON CHASE*

Human Rights have a wider connotation than Fundamental Rights; but nearly all of the latter are within the conceptual matrix of the former. Human Rights are those universally recognised criteria that appear to be automatically and unquestionably conferred on man as an incidence to his existence as a natural person and which are intended to enhance the dignity, worth and well-being of the human person. They are held by some to be God-given, but more recently they have been propounded in international instruments beginning with the United Nations Universal Declaration on Human Rights. Fundamental Rights (Freedoms), on the other hand, are those basic to democratic existence and which as part of a bundle of recognised legal rights have invariably been inscribed in constitutional instruments and normally insulated against change by ordinary legislative process in recognition of their crucial role in the pursuit of justice, equality and the rule of law. They are subject to suspension in times of emergencies.

Commonwealth Caribbean territories acceding to Independence have certain fundamental rights and freedoms enshrined in their Constitutions. From a legal standpoint, these rights have been held to be declaratory of common law rights [1]that existed before independence, with the special significance that they cannot be abridged or abrogated except in accordance with the special formulae set out in the Constitutions, and interference with, or violation of, them can only be justified if it comes within the parameters of the provisions enunciated in the Constitutions.

JUDGES

Parnell J. (as he then was) in **Banton v. Alcoa Minerals of Jamaica Incorporated and others** [2] put it succinctly

when he said:—

> **"The fundamental rights and freedoms entrenched in the Constitution are not different from those which were known and observed prior to independence**
>
> **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".[3]**

The Judges, lawyers and the general populace have a role to play in relation to the observance and respect of fundamental rights and freedoms. A heavy burden rests on Judges and lawyers in particular.

Dr. Akinola Aguda, [4]had this to say in his paper on **Judges in developing Countries.** "I would rather prefer to look at another aspect of his (the judge's) job, namely that of interpreting the Constitution and providing a judicial refuge for any citizen in the face of repressive and excessive abuse of power by the Executive. If the judges in the developed countries, especially in England and the older Commonwealth countries, have become complacent and have decided to place implicit confidence in the good senses of the Legislature and the Executive, they probably have good reason for that, but a judge in a developing country operating under a written Constitution cannot afford that luxury if he is to faithfully serve his people and his conscience. A judiciary which too much reminds itself that its power is limited by the dogmas of Parliamentary responsibility may lose the will to exercise this great historic function. The power of Parliament and its Executive, in theory unqualified, will in practice be limited by the Constitution as currently expounded and by the public opinion which can be mobilized to reinforce it. In this area there is no organ so competent to expound, and so potent to mobilize public opinion as the judiciary. If the judges are complaisant towards governmental power, Government will, of course, take what it is given. If the judicary is prepared to provide leadership, its voice will be listened to with respect and gratitude."

ROLE OF LAWYERS

As to the role of lawyers, Professor Van Niekerk [5]commenting on the infamous and barbaric Terrorism Act, No. 83 of 1967, may have been directing his call to lawyers in the developing countries. He said ".... and

yet our lawyers, the guardians of our nation's legal heritage, have done so very little to mitigate its crudities. What then, you ask, can our lawyers do? In the very first place our lawyers, all our lawyers from judges downwards, can make their voices heard about an institution which they must surely know to be an abdication of decency and justice. No doubt they will tell you, it is not their function to criticize the law, but to apply it. . . . But we must surely ask these lawyers, when will a point ever be reached when their protests would become justified? Surely we have reached the stage that we are no longer merely dealing with a nicety of jurisprudence but with the essential quality of survival of justice itself! Surely also lawyers should realise that by remaining silent at the helm of their clinking cash registers they are not only perpetrating these palpable injustices, but they are also lending them the aura of respectability.

Above all, they should realise that by remaining silent in the face of what they know to be inherently unjust, cruel and punitive, they are indeed sullying themselves and the reputation of their profession. . . .".

Some of the fundamental rights and freedoms provisions in the Constitutions of the Commonwealth Caribbean States have been subjected to judicial interpretation by our Courts. It is fair to say that the general approach has been conservatively constricted by legal exactitude in interpretation, and a generous liberal construction extending to an embrace of the human rights conceptualisation is patently lacking.

In the result, the promulgation of the fundamental rights and freedoms in the constitutions of the Commonwealth Caribbean states has been illusory or negative.

When in **Collymore and et anor. v the A.G. of Trinidad and Tobago**[6] it was felt that fundamental freedom to form and belong to trade unions included the basic human right to 'strike', the Trinidadian Courts and later the Privy Council scotched any such ideas arising or conceived elsewhere.

Similarly, it can now be concluded, also from **Banton's** case (supra) in Jamaica, that the freedom to associate in trade unions does not carry any guarantee that the trade union will be recognised by the employers, regardless of the results of a poll or consensus of the workers.

In **Hope et anor. v. the New Guyana C. Ltd.** (supra) the fundamental right to freedom of expression was held not to include any right of access to newsprint. The promulgation of the right, therefore did not include the pre-

sumption that the right was accompanied with what was essentially necessary to make the grant of the right effectual.[7]

The raising of revenue in the **Antigua Times** case,[8]. although amounting to a prohibition to certain publishers is not legally regarded as undermining the fundamental right of freedom of expression.

Moreover, under all the transitional arrangements and the 'saving' Articles in the Constitutional laws existing prior to the promulgation of the independence Constitutions are saved even though they may be inconsistent with the fundamental rights and freedoms provisions of the Constitutions. Concomitant with this, is powers 'saved' under those laws can be exercised in the post independence era notwithstanding any inconsistency with the Constitutions. So that things done under those powers and acts cannot be violative of the fundamental rights and freedoms even though **prima facie** they collide with them.[9]

FAIR AND FREE ELECTIONS

The fundamental rights and freedoms should be contrasted with the broader rights whose recognition spells for greater justice and freedom of the Commonwealth Caribbean man. These include the human right to (1) Participate in public affairs; (2) Collective Bargaining and the withdrawal of labour; (3) Protection of Family Life; (4) fair and impartial Justice and the Independence of the Legal Profession; (5) Work; (6) Legal Representation; (7) Health; (8) Education; (9) The equal rights for women; and (10) The right of children to protection.

Number one has been so productive of administrative and political abuse in some quarters of the Caribbean that it is worthwhile examining its scope and operation.

The human right to participate in public affairs encompasses fair and free elections if this right is to be effectively enjoyed by every adult citizen. The onus is usually placed on Parliaments to prescribe effective procedures for regulating elections and for the avoidance of corrupt and unfair practices. In every case, there is constitutionally created an Elections Commission.

In the case of Guyana, legislative erosion of the powers of the Elections Commission has now reduced this body to a toothless, spineless robot. The Legislation itself is a legalistic violation of the human rights of citizens to procedures and regulations to ensure fairness.

Difficult though the burden of proof of fraud in elections now is in Guyana, since, though proved, it matters not one iota unless the aggrieved party can go on to establish that the fraud substantially affected the final result of a proportional representation elections, petitions were filed but through the flagitious agency of administrative ploys they were not heard. This runs foul of another principle of the right to a hearing before the Court.

It is a strain on a small community to equitably man commissions and other agencies for the free and fair conduct of elections, even if the legal procedures and regulations were otherwise proper. In this regard a Commonwealth Caribbean Elections Commission for the smaller communities while remaining individual sovereign states, and structured on the same foundation of an 'outside' Appellate Court, can be voluntarily entrusted with the conduct of elections in indivdual states. Such a Commonwealth Caribbean Elections Commission should be constituted of men and women above reproach.

It will remove the injured feeling of being "cheated but not defeated" which is gaining momentum in the Region. It will restore respect for the Electoral system and turn the aggrieved away from the grave consequences that flow from a rejection of electoral process as an agency for change. Acceptation of results with a fair opportunity to change them peacefully in due course can contribute to stability and the general well-being of all in the long run.

After alluding to the International Covenant on Civil and Political Rights at Article 19, Mr. Chase went on to state that throughout the Caribbean, there was far too great an intolerance of basic human rights. "There is legislation in certain Commonwealth Caribbean States that clearly inhibits the very right on which the preservation of our democratic societies hinges", the President of the Guyana Bar Association said.

Mr. Chase went on to state that "like petty tyrants who seek to suppress incisive contrary views, to silence pungent public criticism one way or another. . . . We inflict a political stranglehold on the media. In so doing we are guilty of barbaric and legalistic violations of the human right."

DEPENDENCY SYNDROME

"In the final analysis the individual human being has to be imbued with the lofty ideals of freedom, justice and dignity before respect and recognition of human rights are maintained. Courts, tribunals and other machinery can help, but it is crucial that a passion for lib-

erty should invest and inspire the Region." Because of what Mr. Chase describes as a "dependency syndrome" that seems to be part of the Commonwealth Caribbean man. this passion for liberty may have to be cultivated, starting with the young .

Mr. Chase went on

"In these days in the Commonwealth Caribbean, when Ministers are being more and more subjected to criminal prosecutions and detentions, it is apposite that we should bear in mind basic human rights requirements in this area. Because prison conditions are generally depressed in our Region and rank low in the order of priority for improvement, persons detained or imprisoned have had to face some appalling conditions. Police brutality and atrocities have even been repetitively perpetrated, and similarly condemned on all levels."

"The treatment for the accused should be standard in our Region. It is a violation of human rights and an assault on the dignity and worth of the individual to keep him incarcerated in sub-human conditions."

After citing Article 10 of the International Covenant on Civil and Political Rights which speaks of the rights of the accused and the juvenile accused, Mr. Chase went on to add that "it is difficult to foresee in the present scheme of things normal legislative or constitutional enactments making way for purposeful correction of the violation of these and other human rights provisions. Often it is the Government itself which is answerable for the alleged violations. (Our Ombudsman institutions can well be strengthened)."

"The answer to this problem raises issues of interstate relationships and the creation of machinery that straddles national boundaries. The dilemma is that if the machinery is to be truly effective, by virtue of the smallness of the Commonwealth Caribbean States, it will of necessity be some composite machinery that transcends national frontiers.

"What has to be settled for in the final analysis is machinery that will receive the honourable and honoured respect of all concerned within the national boundaries. What readily commends itself to us here is the machinery established in Europe for the protection of human rights through the European Convention.

"Led by Jamaica, some Commonwealth Caribbean states have ratified and/or signed the following international instruments on human rights:— The Convention on Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights. and Optional Protocol and the International Covenant or Civil and Political Rights.

"It now remains for some inexpensive, yet easily accessible procedures to be formulated to give to the Commonwealth Caribbean man the means of protecting those basic human rights that will enhance his dignity as a human person.

Mr. Chase concluded that in most, if not all, of the Caribbean Commonwealth Nations now independent, the British have left a legacy of basic institutions for good government, the maintenance of law and order and for the inculcation, preservation and propagation of freedom. It is an invaluable infrastructure not to be prostituted or destroyed. Amendments, emendations and adaptive devices will obviously be called for in many differing situations and circumstances, but the quintessence, the core, the soul must always remain the pivot and lynchpin. In necessary efforts of adaptation the baby must not be thrown out with the bathwater.

Freedom under the law in Anglo-Saxon jurisdictions, has a special meaning in these bailiwicks to members of our profession. But we know that it has a wider connotation than ordinances, Acts of Parliament and Rules of Court in application to individual matters or causes before the court.

We, as lawyers, allying ourselves with other groups in the society who have the will, the courage and the expertise, must teach our people about freedom and its constituents — its rights, its obligations, its responsibilities. After all, our larger clientele, our potential clientele, which is the total populace can only reflect a proper proportion of our own freedom as responsible and endowed citizens. As Professor Van Niekerk says, we cannot frustrate freedom and justice "by remaining silent at the helm of (our) clinking cash registers."

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1. Crane J. A. in **Hope and A.G. of Guyana v. The New Guyana Company Ltd. et enor. C/A 33 of 1976.**
2. (1971) 17 W.I.R. p 275 at p 304.
3. See also **Olivier v. Buttigieg** (1966) 2 All E.R. at p 461: **D.P.P. v. Nasralla** (1967) 2 A.C. at p 247; **Lasalle v. A.G. of Trinidad and Tobago** (1972) 19 W.I.R. at p 395.
4. Dr. Aguda O.F.R., LLM., Ph.D. (Lond.) Barrister, Director Nigerian Institute of Advanced Legal Studies. Paper Delivered in May, 1980, in Sydney, Australia, at the Second International Conference of Appellate Judges.
5. University of Natal, South Africa
6. 12 W.I.R. p 5.
7. Vide Broomes Legal Maxims 10th Ed. p 309.
8. (1975) 3 All E.R. p 31.
9. Vide the triology of cases; **Gordon v. The Queen** (1969) 15 W.I.R. p 359; **Queen v. Wright** (1972) 18 W.I.R. p 302; **Baker v. The Queen** (1975) 3 W.L.R. p 113; see also **Beckles v. Dellamare** (1965) 9 W.I.R. p 299; **De Freitas v. Benny** (1976) A.C. p 239; and **Demba v. Hunte** (1974) Guyana Court of Appeal.

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*Mr. Chase was recently re-elected President of the GBA. —ED.

Quotable Quotes

1. **"Hard cases,"** says Dr. Potter in his QUEST OF JUSTICE (at p. 51), "make bad law, because either the law is broken to meet the hard case, or the law ceases to be law and becomes private judgment."

(Quoted by Bollers C.J. in **Enmore Hope District Council v. Shaw** 21 W.I.R. at p. 295.)

2. **On summing Up:** "An appellant is not permitted to lift snippets of a judge's summing up from here and there, and to argue that the summing up is inadequate, when the summing up as a whole puts the issues clearly to the jury." (Per PERSAUD J.A. (Ag.) in **Queen v. Parsram Persaud Criminal Appeal 25 of 1966.**)

3. **Who is a Guyanese reasonable man:** "In England the **"reasonable man"** is "the man on the Clapham omnibus", in the United States of America he is "the man who comes home from work in the afternoon, rolls up his sleeves and mows the lawn". There is no definition of the reasonable man in Guyana and this is not difficult to understand when one considers that we are a young undeveloped nation only recently detached from the apron strings of the metropolitan power. Further, we are not a homogenous race but, in fact, belong to at least 5 different ethnic groups, religions and cultures. We are only approximately 700,000 in numbers, the vast majority of whom are agricultural and industrial labourers. This makes it very difficult to arrive at a happy medium, but, nevertheless, I think we can say with a certain amount of accuracy that **the** average **Guyanese Juror** may be considered as the average responsible, intelligent, fair-minded Guyanese citizen and thus, the reasonable man in Guyana. I realise that I am sticking my neck out somewhat and will be criticised even perhaps by my brother Judges but it is important in this day and age that we have some idea of what the reasonable man in Guyana looks like even though he or she is merely an abstract figure." (Per VIEIRA, J. (as he then was) in **Clifton Mortimer Llewellyn John v. Peter Taylor & Co., Ltd. (Action No. 2224 of 1966, Demerara).**

"Like my brother Vieira J. I desire to contribute an attempt to remove the reasonable man from the Clapham omnibus, to give him a Guyanese personality and locate him on the terra firma of Guyana. Without necessarily disagreeing with Vieira J. I prefer to regard the reasonable man in Guyana as being typified by the ordinary working man in the crowd on Bourda Green who hears

out the speakers then agrees or disagrees with what they have said."
(Per J. C. GONSALVES-SABOLA J. (as he then was) in **Sultan v. Guyana Graphic Limited. (Action No. 1356 of 1969, Demerara.)**

4. **On Juries** : "Juries are not such fools as they are often thought to be" on the other hand, it is right to remember that, as Devlin, J. said in **Kennedy and Nuttagh**, (1955) 39 C.A.R., at p. 83: "The jury are not lawyers. To a lawyer it (the direction challenged) might mean one thing, to a layman another. The situation should be made plain to the jury as laymen."
(Per HAYNES J.A. (as he then was) in **State v Rudolph Doris 23 W.I.R.)**

5. **On Visual Identification:** "In **R. v. Long** Lawton L.J. (57 C.A.R. pp. 877-878). In our judgment the law does not require a judge in this kind of case to give a specific warning about the dangers of convicting on visual identification; still less does it require him to use any particular form of words. In these cases, as in all, a judge should sum up in a manner which will make it clear to the jury what the issues are and not what is the evidence relevant to these issues. Above all he must be fair; and in cases in which guilt turns upon visual identification by one or more witnesses it is likely that the summing up would not be fair if it failed to point out the circumstances in which such identification was made and the weaknesses in it. Reference to the circumstances will usually require the judge to deal with such important matters as the length of time the witness had for seeing who was dong what is alleged, the position he was in, his distance from the accused and the quality of the light. If the witness had made mistakes on the identification parade or at any other relevant time, fairness requires that the jury should be reminded of them. Above all the jury must be left in no doubt that before convicting they must be sure that the visual identification is correct."
(Cited with approval by GRAHAM-PERKINS J.A. in R. v Wright 21 W.I.R. at p. 460).

[Extracted by Ramraj Jagnandan, Attorney-at-Law, Clerk to the Chancellor].

Kenneth Barnwell Joins the Judiciary

Mr. Kenneth Barnwell on the occasion of his accession to the Judiciary on the 18th February, 1982, said, **inter alia** :

I thank the Solicitor General (Mr. Julian Nurse) and Mr. Llewellyn John for the kind things they had said about me; then went on to say :

It would, I suppose, be true to say that in the pursuit of a legal career, of all the offices to which a young lawyer most aspires, none holds a greater promise than that of, one day, sitting on the bench as a Judge of the High Court.

And, I might add that in my own particular case, that fulfilment is greater enhanced by reason of the fact that long before I ever dreamed of setting my sails upon the sea of the law, I had the good fortune of entering the Civil Service, as it then was, in the Registry and there to learn of courts and cases, of law and lawyers and of being nurtured, so to speak, in the very bosom of the law.

I know of nothing else.

In fact, all of my 35 years in the Public Service were, in one way or another, whether it be in the position of the most junior clerk or in the highest office as Registrar, spent here within the curtilage of these very courts of law.

To put the matter squarely, we must admit that sitting in the judgment seat is one thing, but being anything near a Daniel is a horse of quite a different colour.

And so, now that the moment of truth has arrived and I must come to grips with the nitty gritty of the day-to-day do's and don'ts of office; I must confess that it is not without some apprehension as to my ability to carry out the responsibilities that I face this mighty task which has been entrusted upon me.

All I can say here today, and that, with no small sense of humility, is that I will try my very best to uphold the noble traditions of that long line of my illustrious predecessors and to faithfully perform my duties as a Judge.

But you know, I am not dismayed by the difficulties that lie in wait.

Fortunately, in our adversary system of jurisprudence, even though I sit here literally perched high and must forever avoid descending into the arena, one usually finds that one is never really alone. For under the compendious umbrella which that system affords in the

overall administration of justice, the game permits of other players whose roles, I venture to say, though opposite, are never in opposition, but always complementary to the one I am called upon to play in the overall attainment of that high common purpose of upholding the law and of ensuring that justice is done.

I refer, of course, to you down there in the well of the Court — you, the members of the legal profession. Surely, we're all in this thing together; we're all concerned with the same prime goals of letting justice with all its ramifications; not only be done, but also manifestly appear to have been done.

Further, I say that in pursuance of this noble objective, we are all conjoined into an integrated cohesiveness of indivisible oneness.

In fact, if I may be permitted to indulge in a popular colloquialism, and I hope not to do any injury to the dignity of this court by any such excursions, I do not think that in the particular context I would be far wrong, if I were to say, "all a wee is one." Therefore, as I perceive this oneness in the legal profession with its many personages, I see no real objective differences, no diversity in direction, no divisiveness, but a syndrome functioning of Judicial integers; in effect, a variation on the single harmonious theme between Bench and Bar in the doing of justice.

CONFIDENCE

"Is it not equally true that we have each of us been spawned in the same crucible of learning in the law, so that today any one of us in this great legal fraternity could be called upon to take his seat on this side of the bar table, tomorrow on that side, and for that matter, on this very side of the bench where I am now seated?

"But in trying to identify the membership of this conglomerate in the dispensation of justice we must not forget the man out there, that ordinary member of the public; the little man, perhaps the real man, who comes before us here to vindicate his rights; who comes here to see fair play. What of him ? How does he come into the picture ? Perhaps, I can best illustrate what I think of him by referring to an incident that occurred long ago when I was a clerk to one of their Lordships. As I recall, it was the trial of a civil matter, but as usual the losing party did not understand that in litigation there is always the victor and the vanquished, one wins and the other loses. So, as he and his supporters wended their way down the staircase, I overheard the lament "Dem unfair a wee". At the time

I said to myself, "after all, it was a fair trial" and dismissed the matter with the thought that you can't please everybody. But in the soberness of the years to come, I realised that that man, that litigant, that member of the public is not to be dismissed lightly. For the placement of that little man's confidence in the workings of these courts, indicative as it is of the wider public confidence, it as equally an integral component as any, which in their totality go to make up the whole system of the administration of justice. Indeed, as has been well said, public confidence is the cornerstone upon which the very foundation of this great structire is rooted and for all our strivings, we will have achieved but nought if, not in substance but in form. we appear to him to be unfair." His Honour continued :

"And now, as is customary, I must turn to the question of what do I ask of you and what do I promise in return. As to the first question I would like to refer to the admonition given by Mr. Justice Stuart in the case of Jagnandan -v- Petee (1941) L.R.B.G. as to what may be regarded as the nature of the duty owed by practitioners who appear before the Court :

> **"All Barristers and Solicitors are officers of the Court and are all under an obligation, if they wish to deserve and retain the respect of the Court, to give a clear statement of the whole law with proper research and knowledge generally directed to the point in issue".**

SKILL

"But in the application of these precepts, If I am to be guided, as I must. by what I read in the decision of Mr. Justice Massiah, J.A. in **Teekah -v- The Guyana Company** and I quote :

> **"Judges do not claim for themselves any predominance or monopoly of wisdom. We are grateful therefore for whatever assistance Counsel may offer. Sometimes, unfortunately, none or very little is proffered. In this case the measure of assistance offered us has been great and for such invaluable help, I feel immensely grateful. I think I ought to say also that Counsel on both sides attained moments of forensic brilliance, but that apart, I wish to congratulate them for their scholarship, the cogency and skill of their arguments and the industry that made possible their rich and almost inexhaustible harvest of authorities".**

"All I need to say on this aspect of the matter is that if that is the measure of assistance to be given, if that is the scope and extent of the co-operation which exists between

Bench and Bar, then I can have no fear from that quarter.

"As to the second question, I would gladly adopt the words of Lord Justice Fry when he sought to lay down a guide to judicial conduct, referred to on the occasion of the assumption of the latest member of that very Court. These precepts are well known and were so prominently displayed that they would hardly have escaped the attention of practitioners who did business in the Chambers of that Judge when he was down here. Accordingly, I need not repeat them.

"Above all, I shall strive to do my duty to the best of my learning and skill in the law, never fearing, never favouring, without affection or ill will, and as to pace, never protracting, never delaying, nay not a Chancellor's foot, nor conversely and perhaps more importantly not too quick, but like Lord Justice Fry, **festine lente** always upholding the Constitution of Guyana and fervently hoping that in my labours I will do that in which justice shall appertain. In short, I intend, with all my might to faithfully keep the oath I took."

"And so, finally, when I shall have left this place and, perhaps, taken my place among the host of judicial personages on the other side of the Styx, and thereat seek to rest in greater peace. I would need no greater commendation from you on this side than that which signifies that I tried my best."

Mr. Justice Barnwell was born at Enmore on the East Coast of Demerara, where he still lives, and brought up at Mahaicony.

At Mahaicony on Sunday, 4th April, 1982, he was guest of honour at a function to eulogise him on his elevation to the Bench. An appreciative cross-section of villagers, and representatives of the Bar and the Magistracy attended. The new Judge was presented with a gift. He replied suitably to congratulatory speeches.

— C.W.H.

Bar Association News & Here and There

FROM THE DESK OF SECRETARY ROBIN STOBY

ELECTIONS :

The Association held its Annual General Meeting on Friday the 30th April, 1982. At the meeting the members expressed satisfaction with the present Bar Council and re-elected the entire Council for another term of office. The Bar Council therefore consists of :

PRESIDENT	MR. A. CHASE
VICE-PRESIDENT	MR. D. SINGH
VICE-PRESIDENT	MR. L. A. E. JOSEPH
SECRETARY	MR. R. M. S. STOBY
TREASURER	MR. C. A. F. HUGHES
ASST. SECRETARY	MR. C. R. RAMSON

COMMITTEE MEMBERS :

MR. B. O. ADAMS, S.C.
MR. B. E. GIBSON
MR. M. A. A. MC DOOM
MR. L. RAMGOPAL
MR. H. N. RAMKARRAN
MR. S. S. A. SHURY
with MR. C. L. WALTERS as Auditor

PRESIDENT'S STATEMENT :

In his address to the Association's Annual General Meeting, the President said, inter alia :—

"....Consultation still has to be elevated to a meaningful level and room exists for greater co-operation."

"....We have taken the point of view—which I feel is unquestionably correct — of placing the legal profession and its independence first and foremost. Party and political considerations, and indeed irrelevant ones like race and religion, we insist should not divide us in matters pertaining to our profession. It is our resolve that divisive factors be relegated to the scrap heap and that issues be treated with objectively bearing in mind the pivotal role of the legal profession as a whole."

DINNER :

The Association held its annual Dinner on the 19th February this year. The venue was the Hotel Tower, and the attendance was quite good. Speakers were :— Mr. L. A. E. Joseph, His Honour the Chancellor Mr. Victor Crane, Mr. B. T. I. Pollard, S.C., Mr. B. O. Adams, S.C., Mr. C. W. Hamilton and His Honour—Mr. Justice F. Vieira, with the President as Master of Ceremonies.

LECTURE SERIES :

The lecture series came to a conclusion with the final lecture on the 16th February, by the Honourable Stanley Moore, Minister of Home Affairs on the topic of CRIME AND THE POLICE. The attendance was very good, with good support from the Home Affairs side. It is hoped that a new series of lectures or seminars can be commenced soon.

ROBING ROOM:

The Robing room is being repaired and put into order. It will be between Courts 5 and 6 at the Law Courts. We hope that by the end of May members will be able to obtain full use from its facilities.

GUYANA SOCIETY :

The Association is trying to effect full membership rights of this professional Society. The Society is opening a centre in Almond Street where it is hoped that all members will be able to participate in the affairs of the Society and come into closer contact with other professional groups. The Centre will have a library, conference room, secretariat and refreshment facilities.

MEETING WITH C.J. :

The Bar Council met with the C.J. during December. There were three sessions of which the Council and the C.J. were able to come to some agreement in — matters of civil procedure such as interpleaders and Appeals from Magistrates and Judge in Chambers. Much still remains to be done and some matters are becoming increasingly difficult to operate. For example, the service of process, hearing of inquests and the entering and certifying of Orders, to name but a few.

It was agreed with the C.J. that we would nominate some one to sit on an ad hoc rules Revision Committee with the Judiciary, and consequently we have nominated Mr. David De Caires.

FIRES AGAIN :

Some more of our members have suffered losses resulting from fire. In February this year the building housing Messrs. F. Ramprashad, S.C., D. Dial, M. Ali and Vernon Persaud was destroyed by an early morning fire. The loss to those members was great, not only in terms of books, documents and files but in the disruption caused to their practice and the difficulty of obtaining alternative locations. We would like to advise members to keep their fire insurances up to date and to take all steps necessary to ensure that they do not expose themselves unnecessarily to the result of loss or damage by fire.

DEPARTURES :

L. Osborne — as Magistrate to Dominica.

DEATHS :

Hugh Hanoman — Magistrate.

Vernon Bhairam — Senior member of Berbice Bar.
Our sympathies go out to their families.

RETURN :

Stanley Moore — To Private Practice and Law Lecturing.

Welcome back Stanley !

Kenneth Benjamin — From the Magistracy to private practice. Hearty welcome ! Well done !

MAKING HISTORY :

Following fusion of the profession in 1980, two former Solicitors were and have so far been appointed to the Judiciary. They are Miss Desiree P. Bernard and Mr. Lennox Perry, being the first appointees from the original ranks of Solicitors. Miss Bernard was elevated from private practice and has the added distinction of being our first Woman Judge. Mr. Perry was elevated from the office of Commissioner of Land Title. Although very belatedly, the **Review** extends its best wishes to both of them.

BOOKS :

Two legal practitioners — Messrs. Ashton Chase and Jainarine Singh, Snr.,—have produced two books which, it is hoped, will be reviewed in our next issue. First "Industrial Relations" by Mr. Chase, and secondly — "Diplomacy or War" by Mr. Singh.

CONGRATS :

To Mr. Robert Ramcharran on his elevation to the Magistracy on 17th May, 1982, Mr. A. McDoom represen-

ted the Bar Association at His Worship's first sitting at Providence Magistrate's Court on 18th May, 1982.

Mr. Vernon Persaud (Leonora), Mr. S.D.S. Hardyal (Berbice) and Miss Claudette La Bennet (Georgetown, 6) have also been appointed Magistrates.—ED.

Release From The Guyana Bar Association

It has been brought to the attention of the GUYANA BAR ASSOCIATION that the human rights of prisoners in detention or serving sentences of imprisonment are being consistently and persistently violated by the Police.

The Association learns that persons in detention or under arrest are being denied the right to consult counsel, and in a recent case in Berbice a lawyer was himself arrested and detained when, in response to a request from relatives and friends of detained persons, he went to a Police Station to see and speak to the detainees.

The Association further learns that the Police attitude is particularly truculent and uncivilised in respect of persons held as suspects in, or convicted of, so-called political offences.

Recently, complaints have been made to members of the Bar that atrocious acts of torture have, as a matter of systematic Policy, been committed on imprisoned persons, and the feeling grows that the Police are on a rampage in a regime of their own imposing on hapless prisoners a regimen of police vintage.

Prisoners, the Association is told, are denied the right to light, space and reasonable comfort, quite apart from having to endure physical infliction and psychological inquiry, and only a few weeks ago a prisoner was reportedly beaten to death, with so far, no pertinent public inquiry mounted.

The Guyana Bar Association, speaking on behalf of its members and their clientele registers its protest at this intromossion of barbarity in police methods, and warns the proper authorities that torture and the unjustified invasion and violation of the rights of all persons, at liberty, or in detention, are unconstitutional.

Further, it advises with all the vehemence at its command, that Police excesses of the kind complained of can be as counterproductive as they are inhuman, and result in the creation of embarrassing, even explosive situations.

President,
5th March, 1982.

Caribbean Symposium on Human Rights Working Together For Justice

28 - 30 JANUARY, 1982

THE DECLARATION OF MONA, 1982

The Caribbean Symposium on Human Rights on the theme "Working Together for Justice" held at Mona, Jamaica, from the 28-30 January, 1982, and sponsored by the Caribbean Association for Regional Integration Studies and the Inter-American Commission on Human Rights.

Acknowledging the need for greater respect for the dignity and worth of the human person and the rights attached thereto

Conscious of the importance of concerted effort and action in working together for justice at the national, regional and international levels

Recognising that this Symposium represents the collective expression of persons and entities of several disciplines, ideologies and persuasions in the Commonwealth Caribbean and the Americas

Convinced that a common understanding exists among the peoples of the Commonwealth Caribbean and the Americas of the need to protect and maintain the inalienable and inviolable rights and freedoms stated and enshrined in the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the American Convention on Human Rights and the constitutions of States of the Commonwealth Caribbean and of the Americas.

Convinced also that all human beings are born free and equal in dignity and rights, that they are endowed with reason and conscience and should act towards each other in a spirit of brotherhood.

SOLEMNLY DECLARE this 30th day of January, 1982 that :

1. There is need in the Caribbean Region to enlighten the consciousness of its peoples on the nature and importance of Human Rights and fundamental freedoms by

— incorporating these rights and freedoms in the curricula and instruction processes of all educational institutions
— incorporating Human Rights perspectives in the national communication media
— accepting and respecting the language and culture of all persons, especially in the application of the teaching and learning process in eductional institutions.

2. The right to freedom of association of workers is inseparably linked to the right of workers to freedom from victimisation by employers.

3. Labour and trade union organisations are entitled to acquire information from employers as a pre-requisite to productive negotiation and conciliation.

4. There is need for the existence and establishment in each Caribbean territory of indigenous national, non-governmental human rights organisations which should, where desirable and possible, work closely with appropriate government institutions and which should be integrated into a cohesive and comprehensive inter-regional structure.

5. Caribbean states which have not yet done so, should be called upon to become parties to the American Convention on Human Rights, the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, the International Convention on the Elimination of all forms of Racial Discrimination and all other international and regional instruments which exist and are concerned with the protection and preservation of human rights and fundamental freedoms.

6. The need exists for standardising national legislation on human rights throughout the region and for restructuring courts and other institutions and procedures in order to obtain more effective enforcement of human rights.

7. The achievement of continuing progress and development of States of the Caribbean and of the Americas and peoples depend on concurrent employment of civil and political rights and of economic, social and cultural rights.

Case Law

Recent Decisions

IN THE GUYANA COURT OF APPEAL
CIVIL APPEAL No. 69 of 1979

BETWEEN :

Chooraman Sookraj
Plaintiff
(Respondent)

v.

Khemlall Sookraj
Defendant
(Appellant)

BEFORE :

Hon. Mr. V. E. Crane, Chancellor; Hon. Mr. J. C. Gonsalves-Sabola; Hon. Mr. K. S. Massiah, J.J.A.

1982 : March 2nd
April 5th

Mr. Jainarayan Singh (jnr.) for the Appellant/Defendant
Mr. Mahendranauth Poonai for the Plaintiff/Respondent

At the commencement of the hearing of this appeal Counsel for the appellant/defendant sought leave for an adjournment on the ground that he was only retained the previous day, and as such he was unprepared to present his arguments and was unable to read the relevant authorities.

The Honourable Chancellor, speaking for the Court said that within recent times there have been numerous requests for adjournments at the Court of Appeal, some on flimsy and some on unfounded grounds. He emphasized that the Court of Appeal, as the highest legal forum of the land, would only entertain applications for adjournments on grave and extreme unforeseen circumstances e.g., death of counsel, serious accident to Counsel.

The learned Chancellor stressed that the Court of Appeal is not like the Magistrate's Court where another matter can be heard when an adjournment was granted. He stated that at the Court of Appeal level one matter is fixed for a day or sometimes two or three days and whenever an adjournment is granted the entire work schedule is disrupted. He urged legal practitioners to co-operate in having justice administered speedily and quoted the well known maxims "Justice delayed is justice denied"

and "Justice is sweetest when freshest". He further urged that lawyers must come fully prepared and armed with authorities to do justice to their clients' cause.

In the instant matter, an adjournment was granted in the interests of justice and moreover Counsel was making his maiden appearance at the Court of Appeal. Costs was awarded to the Plaintiff/Respondent in the sum of $150.00.

IN THE GUYANA COURT OF APPEAL
CIVIL APPEAL No. 31 of 1981.

BETWEEN :

REPUBLIC SODA FACTORY LIMITED,
Appellants
(Defendants).

— and —

C. R. JACOB & SONS LIMITED,
Plaintiff
(Respondents).

BEFORE :

Hon. Mr. R. H. Luckhoo; Hon. Mr. C.J. E. Fung-a-Fatt; Hon. J. C. Gonsalves-Sabola, J.J.A.

1981 : September 16th
November 20th
1982 : January 11th.

Mr. F. Ramprashad, S.C., for Appellants.
Mr. D. Dial for Respondents.

This was an application **by way of motion** to the Full Bench instead of **by way of summons** to a Judge in Chambers for an extension of time to file a notice and grounds of appeal against the decision of a High Court Judge. It must be noted that judgment at the High Court was delivered on the 9th day of March, 1981 and the **notice of motion** was filed on the 12th day of May, 1981 i.e. within one month after the expiration of the 6 weeks prescribed by Order 2 Rule (3) (3) of the Court of Appeal Rules — (Summons to Judge in Chambers). But appellants/defendants came under Order 2 Rule 3 (4) (motion to Full Bench).

The Plaintiff/Respondent Company in their affidavit in answer to the motion contended :

(a) the application by motion was made without any authority under the Court of Appeal Rules

(b) the court had no jurisdiction to adjudicate in the application

(c) it was not competent for the applicant to bring application in this manner and form (by Motion) .

Counsel for the appellants / defendants contended that he was in the right forum but followed the wrong procedure, and in the interests of justice the Court should depart from these Rules (Order 1 Rule 8). Alternatively, he urged the court to remit the matter to a Judge in Chambers to be dealt with as if it were a summons.
HELD : matter referred to a Judge in Chambers to be dealt with as if it were a summons.

Hon. Mr. Justice Gonsalves-Sabola J.A. in delivering the judgment of the Court said : "Order II rule 18(4) allows an application by summons to be adjourned for hearing in open court and under rule 18(5), where an application made by summons is heard by the Court, it shall be treated as if it were a motion and heard in open court. True, there is no similar provision expressly allowing a motion to be adjourned for hearing by a single judge and allowing the motion to be treated as if it were a summons. But the absence of such a specific rule does not determine the matter even if one assumes that the omission to make such a rule indicates that such a procedure was not considered when Rule 18 was drafted. Under the wide provisions of Order I rule 8 the Court may direct a departure from the Rules in any way required in the interests of justice. The Court, therefore, subject to the two provisos written into Order I rule 8, has full control of all matters of procedure in cases coming before it."

IN THE GUYANA COURT OF APPEAL
CRIMINAL APPEAL Nos. 40 & 41 of 1980

BETWEEN :

KWAME APATA

Appellant
(Defendant)

— and —

MORRIS ROBERTS, P.C. 7763
Respondent
(Informant)

BEFORE :

Hon. Mr. V. E. Crane, Chancellor; Hon. Mr. R. H. Luckhoo, J.A.; Hon. Mr. C. J. E. Fung-a-Fatt, J.A.

1981 : November 30.
1982 : January 8.

M. Stephenson for the Appellant/Defendant.
G. H. R. Jackman, Deputy Director of Public Prosecutions, for the Respondent/Informant.

On 28th April, 1980 Appellant was convicted of being in possession of a firearm and ammunition without lawful authority, contrary to s. 23 (1) of the National Security (Miscellaneous Provisions) Act Cap. 16:02. He appealed to the Full Court of the High Court and that Court declined jurisdiction to hear the matter and gave leave to the appellant to withdraw the appeal. Appellant then filed notice of motion addressed to the Court of Appeal seeking extension of time to file and serve notice of appeal.

The question of jurisdiction arose as to whether the Court of Appeal was competent to adjudicate on the matters before it, and whether the right forum for an appeal from the conviction of a Magistrate for an offence falling under s. 23(1) of the National Security (Miscellaneous Provisions) Act. Cap. 16:02 should not be the Full Court in view of the provisions of s. 2 of the Criminal Law Act No. 4 of 1980 which became law on the 1st April 1980. As the Hon. Chancellor puts it in his judgment, "I think this point of our jurisdiction to entertain these applications is of the utmost importance. It must necessarily be settled once and for all in view of the dilemma in which the procession is caught since the passing of the Criminal Law Act, 1980. In order to make doubly sure they have invoked the jurisdiction of the right forum, lawyers are now filing appeals from magisterial decisions both in the

Full Court of the High Court and in the Guyana Court of Appeal. That, however, will not do; we must find the correct answer to their problems."

HELD: (Hon. Mr. V.E. Crane, Chancellor): the Guyana Court of Appeal is quite competent to entertain these applications. In all cases where convictions are obtained on summarily instituted charges of hybrid offences, appeals therefrom will lie to the Full Court of the High Court; while in all cases where there have been summary trials of **any indictable offence**, including hybrid laid indictables, as in the instant case, or those under the Criminal Law (Offences) Act, Cap. 8:01, appeals therefrom from magisterial decisions given after November 2, 1978, when the Act of 1978 came into force will lie, in accordance with s. 7 of the Act of 1978, to the Guyana Court of Appeal."

HELD : (Hon. Mr. C. J. E. Fung-A-Fatt J.A.) : "s. 2 of the Criminal Law Act of 1980 refers only to summarily laid hybrid offences, and does not in any way relate to, or affect, indictably laid hybrid offences, whether tried indictably or taken summarily by the Magistrate. I am, therefore, of the view that an appeal from the decision of a Magistrate in respect of an indictably laid (hybrid offence) which is tried summarily lies to this Court."

HELD : (Hon. Mr. R. H. Luckhoo J.A.) : "I am of the view that this Court is not competent to adjudicate on the application before it, and I find myself respectfully having to decline jurisdiction."

[What really did the highest Court in this Republic decide on this quintessential issue?—ED.]

IN THE GUYANA COURT OF APPLEAL
CIVIL JURISDICTION

BETWEEN:

EMANUEL ALEXIS ROMAO
ERNEST ALBERT ROMAO
Applicants

and

His Worship MR. JAMEER SUBHAN
His Worship MR. CLINTON WONG
His Honour MR. JUSTICE C. FUNG-A-FATT
His Honour MR. JUSTICE FRANCIS VIERIA
Defendants.

BEFORE:

Hon. Mr. V.E. Crane, Chancellor; Hon. Mr. J.C. Gonsalves-Sabola J.A.; Hon. Mr. K.S. Massiah J.A.

1982: February 26th.,

Mr. S.Y. Mohamed with Miss C. Singh for the Defendants.
Mr. Ernest A. Romao in person.

This motion which is of paramount importance to the legal profession surrounded the question whether a litigant (plaintiff or defendant) is entitled to be represented in the Courts by anyone of the litigant's choice, and if the litigant chooses a layman as his advocate, that layman MUST be heard by the Court.

This matter culminated in the Court of Appeal, after years of confrontation between the No. 2 applicant, self-styled "Advocate of the No. 1 applicant", and Judges and Magistrates as to his right to sit at the Bar Table to address the Court. The applicant alleged in his affidavit in support of motion that on his "various appearances" before the High Court and Magistrates' Courts he was told that he had no **locus standi**, he could not sit at the Bar table to represent "his client" or to take notes, that he was a layman and could not sit at the Bar table to address the Court.

At the commencement of the hearing of his motion at the Court of Appeal, the No. 2 applicant, unrobed but armed with legal authorities, took up position at the Bar table. He was promptly informed by the Honourable Chancellor that the Bar table was reserved for qualified lawyers and he should argue his case from the alternative accomodation provided.

As the application for Extension of time to appeal out of time was made 32 months after the alleged incidents, the No. 2 applicant failed to show "exceptional

circumstances" under Order 2 Rule 4 of the Court of Appeal Rules Cap. 3:01, so his motion was accordingly dismissed.

Note: It must be noted that it is proper for any person, whether he be a professional person or not, to attend as a friend of either party, take notes, and quietly make suggestions and give advice. See **Collier v. Hicks** (1831) 2B & Ad at p. 669 and **McKenzie v. McKenzie** (1970) 3 A.E.R. 1043. In a Practice Direction issued by Chancellor E.V. Luckhoo dated 16th, September, 1975; the Honourable Chancellor said: "It is well-known that clerks of counsel and solicitors have been permitted time and again to sit in the High Court and in the Magistrates' Courts and take notes of evidence without objection from the Court. It is directed that this is an entitlement of a party to legal proceedings in open Court and of his lawyer. Where the note-taker should sit is a matter over which the Court will exercise control bearing in mind that to be of assistance to the party or his lawyer the note-taker should be in a position to hear the evidence, and if necessary to communicate quietly and unobtrusively with the latter. All of this is of course subject to the note-taker conducting himself in Court in a manner which is proper and decorous and does not interfere with the orderly conduct of the business of the Court."

The Practice Direction follows: —

(Editor)

THE SUPREME COURT OF JUDICATURE OF GUYANA
PRACTICE DIRECTION

This Practice Direction is issued to clarify the position in relation to a question which arose recently, during the hearing of a criminal matter in the Court of a magistrate in the Georgetown Judicial District. This question involved the legality or propriety of a defendant being permitted to have with him in Court a person (not his counsel or solicitor) to take notes of any part of the public proceedings for the benefit and use of the defendant. After due consideration it is directed that a defendant, and indeed any party to any legal proceedings in open Court, is entitled to such assistance. There is no statutory enactment, rule or regulation prohibiting this practice. And, in this regard, there is the observation of Lord Tenderden C.J. [in Collier v. Hicks (1831) 2B & Ad at p. 669] that: "any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions and give advice"; approved of recently in England in the Court of

Appeal [McKenzie. v. McKenzie (1970) 3 A.E.R. 1043], where Lord Justice Sacks said of this dictum: "that statement of the position has never been criticised since." This reflects the correct practice in courts of summary jurisdiction, and all magistrates are directed accordingly. It is well-known that clerks of counsel and solicitors have been permitted time and again to sit in the High Court and in the Magistrates' Courts and take notes of evidence without objection from the Court. It is directed that this is an entitlement of a party to legal proceedings in open Court and of his lawyer. Where the note-taker should sit is a matter over which the Court will exercise control bearing in mind that to be of assistance to the party or his lawyer the note-taker should be in a position to hear the evidence, and if necessary to communicate quietly and unobtrusively with the latter. All of this is of course subject to the note-taker conducting himself in Court in a manner which is proper and decorous and does not interfere with the orderly conduct of the business of the Court. It is expected that in future all magistrates will act in accordance with this direction.

Directed by me this 16th, day of September, 1975.

EDWARD V. LUCKHOO
CHANCELLOR.

IN THE GUYANA COURT OF APPEAL
CRIMINAL APPEAL No. 60 of 1978.

BETWEEN :

STATE
Respondent

v.

RICARDO SOLOMAN
Appellant

BEFORE :

Hon. Mr. V. E. Crane, Chancellor; Hon. Mr. J. C. Gonsalves-Sabola; Hon. Mr. Francis Vieira J.J.A.

1981 : November 13th
1982 : February 12th, 18th, 25th
March 31st
April 8th

Mr. M. Codette for the State.
Mr. Lionel Luckhoo, S.C., with Mr. C. Lloyd Luckhoo, S.C., for the Appellant/Defendant.

Appellant appealed against the conviction and sentence of six (6) years' imprisonment imposed by High Court Judge for the offence of Possession of paper with impression of currency note, contrary to action 273 (c) of the Criminal (Offences) Act, Chapter 8:01.

One of the issues which arose at the hearing of this appeal was that on October 16, 1978 i.e. three days after the judge passed sentence on the appellant, learned Counsel wrote the trial judge recording Counsel's recollection of the main features of the trial, drawing the Judge's attention to his frequent interruptions in the course of the trial, omission and defects on the record etc.

In dealing with these matters in his judgment the Honourable Chancellor said : "there is an increasing tendency on the part of counsel to write the trial judge complaining about various aspects of the trial which has concluded, about which he, Counsel, is not satisfied. Such matters may concern some statement or other which is being suggested to the Judge he did or did not record; or something said or some act done by the Judge, or other incident during the course of the hearing. It is invariably asserted that the information is required for the reason that it will be necessary to give it to the Court of Appeal later on.

To err is human, and Judges not being superhuman are not exempt from this universal truism. It is for this reason that legal procedure is made available to the aggrieved for correcting the wrongs, real or imaginery, of Judges, although the process of correction must halt at some level. But it is a fact that neither our Rules of Court nor Courts of Justice have ever laid down the procedure to be applied to prevent the occurrence of what has been alleged in this case, although it has been known to occur from time to time. It is within my recollection, however, that we have in time past uttered oral guidelines on the matter."

The Honourable Chancellor went on to set out the procedure to be followed when record of proceedings are defective; he said: "there is clear authority for the course learned Counsel ought to have adopted in this matter but did not, after his receipt of a copy of the record of proceedings and his discovery of the deficiencies and other defects on the record of which he complains. While it is a fact that learned Council did furnish proof, as we have seen, that he had informed the Judge of the nature of his objections and what he considered to be judicial mal-func-

tionings and other instances of unjudicial discretion, and although he did so very early after the trial, there is no indication on the record that State Counsel, Mr. Parvattan, who conducted the case for the prosecution, was ever asked by Defence Counsel for his recollections of what transpired at the trial. It was most important that defence Counsel should have done so in order that any matters on which there were agreements or disagreements could have been put before the trial Judge for his own recollections and/or approval or disapproval. This was a fundamental and fatal slip on learned Counsel's part which the trial Judge may well have observed by reason of the fact that he did not reply to Counsel's letter above, even though he was in receipt of the advice it contained, well before vacating the Bench some three years later." The Honourable Chancellor cited three authorities in support of the foregoing procedure in **Flax v. Legal Assistant,** (1958) 1 W.I.R. 61 at p. 63 **Pitman v. Southern Electricity Board,** (1978) 3 All E.R. 901, at pp. 905-906, and **Foster v. Outred & Co.,** (1982) 1 W.I.R. 86.

In Pitman v. Southern Electricity Board, Megaw, L.J. said (1978) 3 All E.R., at pp. 905-906: "there are cases where one party or the other, or both, may regard that note of the judge as being incomplete, or even inaccurate. If so, they are entitled to take steps to try to have it added to or corrected. The way in which that should be done, assuming that counsel were present on both sides in the county court, is that they should check their respective notes of the evidence and seek to agree, if they can agree, on any addition to or emendation of the county court judge's note of evidence. If they agree on it, well and good. But it must then be submitted to county court judge in order that he may have the opportunity of considering it, because (and this is a matter which I shall come back to) it is by no means unheard of that, although experienced and competent counsel are agreed, nevertheless their agreement is not right as contrasted with the original note of the judge. At any rate, as it has been sought by appeal to reverse the decision of the judge, it is not merely a matter of courtesy, but a matter which is inherent in the process of justice, that he should be given the opportunity of considering what it is that is alleged to have been erroneous or incomplete in his note of the evidence. That is something which ought to be done at the earliest possible moment, when it has been decided to appeal and the notice of appeal has been given. The reasons are obvious. If it is allowed to remain for months, then the judge cannot be expected, in the course of a busy life with many other cases intervening, to remember what it was that was said

in evidence when it is suggested that his note is wrong."

On the question of communicating with the trial Judge the learned Chancellor said : "it is most desirable that communications should be addressed to the trial Judge **through the court registrar** and his replies, if any, should be monitored **through the court registrar**. The proper thing to do is to insulate him by the services of the registrar lest he should become personally involved in the litigation. Also, the Judge must be asked for his recollections on what transpired at the hearing and on what Counsel on both sides have agreed to or disagreed on. If not, a situation would arise as it did in **The Editor, The Evening Post, Post Papers, Ltd. v. Satrohan Singh,** (1978) 26 W.I.R. 75, where allegations of an unfair trial and other imputations formed the grounds of appeal which was served on him."

"APPEAL DISMISSED. CONVICTION AND SENTENCE AFFIRMED".

By RAMRAJ JAGNANDAN

[Mr. Jagnandan, Clerk to the Chancellor, was recently admitted to practise in the Courts of this country. He is a former Magistrate's clerk—ED.]

COURT OF APPEAL
CIVIL APPEAL No. 68 1978

BETWEEN :

BADRI PRASAD
Appellant
(Plaintiff)

and

THE DEMERARA MUTUAL LIFE ASSURANCE SOCIETY LTD.
Respondent
(Defendants)

BEFORE :

The Hon. Mr. V. E. Crane—Chancellor, Hon. K. M. George and Hon. C. J. E. Fung-A-Fatt, J.A.

1981 : May 12,
July 18, 25,
November 19.

Sir Lionel Luckhoo, S.C., with Miss C. Luckhoo for Appellant.

Mr. J. A. King, S.C. for the Respondents.

During her life time Chandroutee Prasad took out two life insurance policies with the Respondents for $25,000. Chandroutee died on September 25th 1971, and her husband and executor, the Appellant, sought to recover the amount due under the policies. Being unable to settle with the Respondents, the Appellant issued a writ to recover the $25,000 on the 11th April, 1975, 3 years and 7 months after the death of his wife. The Respondents contended that (a) The action was statue barred as it fell under s.6 of the Limitation Act, Cap. 7:02 being a contract governed by the said Act, and not by s. 3 under which there is a limitation period of 6 years;

(b) that the **ejusdem generis** rule applied under s. 3 so as to exclude insurance policies, as they did not fall under the same genes as bills of exchange of promissory notes; and that

(c) The deceased had made certain untrue statements in her proposal forms which entitled the Coy. to avoid the policies.

Held : (i) Life Insurance Policies fell under s. 3 of the Limitation Act resulting in the Appellant being well within the time of limit.

(ii) S. 6 of the Limitation Act with its 3 years period will apply to contracts in which unliquidated damages are claimed if there is some fact yet to be made clear in court. Where however, the amount is liquidated and nothing is left to be ascertained so as to render it due and payable it shall be brought within 6 years after it becomes due.

(iii) The general words "or other writing has become due" in s. 3 of the Act, must in view of s. 5(1) of the Interpretation & General Clauses Act Cap. 2:01 be construed disjunctively. Therefore an insurance policy ought not to be excluded because it was not similar as a bill of exchange or promissory note.

(iv) The respondents failed on all points that the proposed forms contained materially untrue statements.

Appeal allowed with costs.

Lopes v. Santos (1897) L.R.B.G. 39 overruled.

B.G. Rice Marketing Board v. Sukhai (1957) (unreported) affirmed.

(C.L.)

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