15

Judgment 15, 1971

IN THE PRIVY COUNCIL **35 OF 1969**

ON APPEAL
FROM THE COURT OF APPEAL OF THE
SUPREME COURT OF JUDICATURE

B E T W E E N :-

OLIVE CASEY JAUNDOO,
in her capacity as
Executrix of the
Estate of WILLIAM
ARNOLD JAUNDOO,
deceased, Probate
whereof was granted
by the High Court
on the 17th day of
November, 1965, and
numbered 613,

(Applicant) Appellant,

- and -

THE ATTORNEY GENERAL
OF GUYANA,

(Respondent) Respondent.

RECORD OF PROCEEDINGS

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- and -

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RECORD OF PROCEEDINGS

NO. 1

ORIGINATING NOTICE OF
MOTION.

In the High Court of the Supreme Court of Judicature

No. 1

Originating Notice of Motion 20th July, 1966.

1966 No. 1621 DEMERARA

IN THE HIGH COURT OF THE SUPREME COURT

OF JUDICATURE

20 CIVIL JURISDICTION

In the matter of an application by OLIVE CASEY JAUNDOO in her capacity as executrix of the Estate of WILLIAM ARNOLD JAUNDOO, deceased, Probate whereof was granted by the High Court on the 17th day of November, 1965, and numbered 613

-and-

In the High Court of the Supreme Court of Judicature

No. 1

Originating Notice of Motion 20th July, 1966.

In the matter of Articles 8 and 19 of the Constitution of Guyana

- and -

In the matter of the Rules of Court, 1955.

TAKE NOTICE that this Court will be moved by FENTON HARCOURT WILWORTH RAMSAHOYE Counsel for the applicant OLIVE CASEY JAUNDOO in her capacity as executrix of the estate of William Arnold Jaundoo, deceased, on the 25th day of July, 1966 at the hour of 9.00 o'clock in the forenoon or so soon thereafter as Counsel may be heard for orders pursuant to the provisions of Articles 8 and 19 of the Constitution of Guyana that:-

(1) the Government of Guyana be restrained from commencing or continuing road building operations either by themselves or by persons employed by them for that purpose on the following described property, to wit:-

"a piece of land, part of the northern portion of Plantation Soesdyke, situate on the east bank of the river Demerara in the county of Demerara and colony of British Guiana, said northern portion of the said Plantation Soesdyke, having a facade of two hundred Rhynland roods by a mean depth of seven hundred and fifty Rhynland roods as laid down and defined on a diagram of said northern portion of said plantation made by John Peter Prass, Sworn Land Surveyor, dated the 19th day of July, 1884,

"and deposited in the Registrar's Office of British Guiana, on the 10th day of February, 1885, said piece of land having a facade of 44 (forty-four) roods running southward from the centre draining trench of said northern half of said plantation by the entire depth of said plantation, and on the buildings and erections that may be erected thereon during the existence of this mortgage the property of the mortgagor, save and except an area of land part of the said piece of land measuring 5 (five) rods in facade by 30 (thirty) rods in depth commencing from the south western boundary (Demerara) and extending north 5 (five) rods in facade by a depth of approximately 30 (thirty) rods east to the western edge of the public road to be transported to Bennie Jhaman, and also save and except an area of land measuring 3 (three) rods in facade commencing from the south western edge of the drainage trench adjoining the Demerara River, and extending 3 (three) rods south by the full depth of 750 (seven hundred and fifty) rods, to be transported to Anrup and Sookeah jointly the said area of land measuring 3 (three) rods, being however, subject to a right of drainage through the said drainage trench in favour of the other owners of the said piece of land having a facade of 44 (forty-four) roods except the said area of land measuring 5 (five) rods to be transported to Bennie Jhaman the said right of drainage to be exercised by the digging of drains not exceeding 6 (six) feet in width, and at intervals of not less than 100 (one hundred) rods, running south to north and north to south to and from the said drainage trench leading to the Demerara River ....."

In the High Court of the Supreme Court of Judicature

No. 1

Originating Notice of Motion 20th July, 1966. (Contd.).

unless and until adequate compensation in the sum of $250,000.00 (two hundred and fifty thousand dollars) or such other sum as the Court may consider just is paid to the applicant in respect of the compulsory acquisition by the Government of Guyana of part of the said property;

(2) a survey to be undertaken on behalf of the applicant and the Government of Guyana jointly of crops growing on the said property and being part of the assets of the estate of the said WILLIAM ARNOLD JAUNDOO, deceased, with the right of the representatives of the applicant and the Government of Guyana to submit separate reports to the Court;

(3) Payment be made by the Government of Guyana to the applicant promptly of such compensation as may be assessed by the Court in respect of the compulsory acquisition of the said land;

(4) such further or other orders and/or directions as the Court may make or give to enable the applicant to be promptly paid adequate compensation in respect of that part of the aforesaid property being compulsorily acquired by the Government of Guyana and before any evidence of crops or other assets on the said property is destroyed by road building operations; and

(5) the Government of Guyana do pay to the applicant her costs of this motion.

AND FURTHER TAKE NOTICE that in support of this application the applicant will rely upon the grounds set out in the affidavit filed herewith and will seek leave of the Court to call other evidence in support hereof.

AND FURTHER TAKE NOTICE that it is intended to serve a copy of this motion and the affidavit in support thereof on the Attorney General for Guyana.

H.B. Fraser
Solicitor for Applicant.

This Notice of Motion was issued by H.B. Fraser, Solicitor for the applicant whose address for service and place of business is at his office lot 7 Croal Street, Georgetown, Demerara, Solicitor for the applicant who resides at 9, Commerce and Longden Streets, Georgetown, Demerara and whose address for service is at the office of the said Solicitor.

Georgetown, Demerara,
This 20th day of July, 1966.

To:- The Attorney General of Guyana,
Attorney General's Chambers,
Main Street,
GEORGETOWN.

In the High Court of the Supreme Court of Judicature

No. 2

Affidavit in support of Motion 20th July, 1966.

NO. 2

AFFIDAVIT IN SUPPORT OF MOTION

I, OLIVE CASEY JAUNDOO of 9, Commerce and Longden Streets, Georgetown, Demerara, having been duly sworn make oath and say as follows:-

1. I am the applicant herein and I am executrix of the estate of WILLIAM ARNOLD JAUNDOO, deceased, probate whereof was granted on the 17th November, 1965 by the High Court and numbered 613.

2. Prior to the death of the deceased the Government of Guyana decided to acquire compulsorily for road building purposes a part of the property described in the Notice of Motion herein and full and free possession of which is at present enjoyed by me on behalf of the estate of the said deceased.

3. Notice of intention to build a road from Atkinson to McKenzie was published in the Official Gazette of the 5th, 12th and 19th June, 1965.

4. Since the death of the deceased I have made efforts to ascertain the extent of the land forming part of the estate of the deceased which the Government wished to acquire and to ascertain the amount of compensation if any which the Government of Guyana proposed to pay me as representing the estate of the deceased but no satisfactory reply has been received from the Ministry of Works and Hydraulics or from any department under that Ministry.

5. On the 22nd June, 1966 my legal adviser wrote to the Chief Engineer, Roads Division in the following terms:-

"Mr. P.A.D. Allsopp,
Roads Division,
Ministry of Works and Hydraulics,
Georgetown,
DEMERARA.

Dear Sir:

Estate W.A. Jaundoo, deceased, Plantation Soesdyke.

Please let me know whether any compensation and if so how much it is the intention of Government to pay in respect of the appropriation of lands forming part of the above plantation for purposes of the construction of a new road.

My clients are becoming apprehensive and I shall be grateful for the information which will permit me to tender advice about their future course of action.

I am,
Yours faithfully,
SGD. F.H.W. RAMSAHOYE."

6. On the 11th July a letter in the following terms was received in reply:-

"Dear Sir,

Estate W.A. Jaundoo, deceased. Plantation Soesdyke.

I am directed to refer to your letter of the 22nd June, 1966, on the abovementioned subject, addressed to Mr. P.A.D. Allsopp, Chief Engineer, Roads, and copied to me, and to inform you that the Compensation Committee's assessment

In the High Court of the Supreme Court of Judicature

No. 2

Affidavit in support of Motion - 20th July, 1966 (Contd.).

"of compensation due to the Estate of W.A. Jaundoo, deceased, will not be available before September, 1966.

2. The Committee's recommendations will have to be presented to the Cabinet for ratification before payment is effected.

Yours faithfully,

?

Permanent Secretary. "

7. On the 19th July, 1966 I learnt that machinery and equipment were being transported to the land and that bulldozing would commence thereon forthwith. Thereupon a letter in the terms following was written to the Chief Engineer, Roads Division, Ministry of Works and Hydraulics:-

"The Chief Engineer,
Roads Division,
Ministry of Works and Hydraulics,
Kingston,
GEORGETOWN.

Sir:

Estate of W.A. Jaundoo, Soesdyke.

I am instructed that contractors and/or servants of the Government of Guyana intend to commence road building operations today on the land at Soesdyke forming part of the estate of W.A. Jaundoo, deceased.

So far I have been unable to get from the Ministry any information concerning the amount of compensation which will be paid and I shall be grateful if you will act at once to

"prevent any operations taking place on the land until I am told of the amount of crops which the Ministry admits to be on the land, the value of the sandpit through which the road is to run and the amount of compensation recommended. My client Mrs. O.C. Jaundoo, the executrix of the estate estimates that compensation should be in the vicinity of $250,000.00 (two hundred and fifty thousand dollars) on the assumption that the sandpit could no longer be worked after the compulsory acquisition of the land.

Unless some effort is made to resolve this question my client will be obliged to approach the Courts for redress.

I am,
Yours faithfully,
Sgd. F.H.W.Ramsahoye.

8. Later in the day I met the Chief Engineer in his office at the Ministry of Works and Hydraulics and re-asserted the fears expressed in the said letter and I observed in particular that the destruction of crops on the land without any any agreement between the Government of Guyana and myself concerning their quantity and whether the land acquired included a sandpit, would cause great difficulty in any subsequent litigation with respect to the assessment and payment of compensation. I expressed the wish that operations should not commence until the quantum of compensation was settled but I was prepared to agree to the operations commencing if there could be agreement on the quantity of crops and on my claim that the land acquired included a sandpit or part thereof. It was

In the High Court of the Supreme Court of Judicature

No. 2

Affidavit in support of Motion - 20th July, 1966 (Contd.).

agreed that a person representing me should visit the area with a representative of the Government to assess the amount of crops and to examine the terrain, through which the road is to pass to ascertain whether it passes through a sandpit. The Chief Engineer informed me that road building operations would commence on the land during the current month.

9. Early today I learnt from the Department that bulldozing was to commence on the land immediately even though I have not been able to secure the services of Mr. W. Lee a civil engineer whom I wish to represent me he being in Essequebo and he not being available before tomorrow the 21st July, 1966.

10. I am advised by Counsel and verily believe that the acquisition of land forming part of the estate of the deceased could only be effected upon the prompt payment of adequate compensation and that the destruction of growing crops on the land without agreement with the Government as to their quantity will prejudice my rights in subsequent litigation.

11. My growing crops on the land include 1200 growing orange trees and 375 banana trees which I value respectively at $24,000.00 (twenty four thousand dollars) and $3,750.00 (three thousand seven hundred and fifty dollars).

12. The acquisition of the sandpit which could be worked for an indefinite number of years and is a substantial producer of income from the property could be compensation only by a substantial sum.

13. I estimate the value of the sandpit or the part or parts thereof through which the road is intended to pass and the crops on the land to be in all $250,000.00 (two hundred and fifty thousand dollars).

14. I am advised by Counsel and verily believe that the act of the Government of Guyana by compulsory acquisition and taking of possession of part of the property herein referred to without prompt payment of adequate compensation and causing the said land to be used by contractors acting for or on behalf of the Government or by the direction of the Government are respectively violations of the provisions of article 8 of the Constitution of Guyana providing protection from deprivation of property. I am further advised by counsel that no other law permits the grant of an injunction or other coercive order against the Crown and that I have no other means of redress than that whereby I may make application to this Honourable Court pursuant to the provisions of article 19 of the Constitution of Guyana.

15. The Government of Guyana intends to commence road building operations forthwith and unless restrained will enter the land and will destroy or cause to be destroyed the growing crops thereon and will deprive me of possession thereof.

16. The acquisition of the land compulsorily and in particular the taking of possession thereof will cause me irreparable harm, loss, and damage.

In the High Court of the Supreme Court of Judicature

No. 2

Affidavit in support of Motion - 20th July, 1966 (Contd.).

17. Wherefore I pray that in exercise of powers vested in this Honourable Court pursuant to article 19 of the Constitution of Guyana and in pursuance of any other law grant the relief prayed in terms of the Notice of Motion herein.

18. I hereby authorise Mr. HENRY BRITTON FRASER to act as my solicitor herein and to do all acts and things necessary therein and to receive all moneys payable to me in my aforesaid capacity in connection therewith and give receips therefor on my behalf.

19. This affidavit was drawn by HENRY BRITTON FRASER, Solicitor herein at my request.

Sgd. Olive Casey Jaundoo.

Sworn to at Georgetown, Demerara
This 20th day of July, 1966

Before me,
Ulric Fingall
A Commissioner of Oaths to
Affidavits.

NO. 3

AFFIDAVIT IN ANSWER

In the High Court of the Supreme Court of Judicature

No. 3

Affidavit in Answer - 26th July, 1966.

I, PHILIP ANDERSON DESMOND ALLSOPP of 16 Enachu Street, Section K, Campbellville, East Coast Demerara, being duly sworn make oath and say as follows:-

1. I am the Chief Engineer of the Roads Division of the Ministry of Works and Hydraulics of the Government of Guyana and I am duly authorised to make this affidavit for and on behalf of the Attorney General and the Government of Guyana.

2. I have read the affidavit of the applicant Olive Casey Jaundoo filed in support of the purported Originating Notice of Motion herein, and I admit paragraph 1 thereof.

3. Paragraph 2 of the applicant's affidavit is admitted, save that I am advised by Counsel and verily believe that the decision to construct a public road over the property of the deceased's estate does not constitute a compulsory acquisition of any part of it.

4. Paragraph 3 of the applicant's affidavit filed herein is admitted.

5. With respect to paragraph 4 of the applicant's affidavit, the applicant communicated with the Ministry of Works and Hydraulics for the first time by way of a letter from her counsel dated the 29th April, 1966, concerning the eligibility of the deceased's estate for compensation. She was informed that the matter was being examined by a committee established for the purpose. Such examination has not yet been concluded.

6. I know of my own knowledge that before his death the deceased consulted the plans setting out the proposed road and that as a result of this and of discussions with me he was aware of the extent to which his land might be affected by the construction of the road. The applicant has likewise been referred to the said plans for any information she desired as to the extent to which the lands of the estate might be affected by the construction of the road.

7. Paragraphs 5 and 6 of the applicant's affidavit are admitted.

8. Paragraph 7 of the applicant's affidavit is admitted insofar

as it concerns the letter therein set out.

In the High Court of the Supreme Court of Judicature

No. 3

Affidavit in Answer - 26th July, 1966 (Contd.).

9. With reference to paragraph 8 of the applicant's affidavit, I admit meeting the applicant at my office. I informed her that the crops, if any, would be examined and assessed. As regards her claim to a sand pit, I informed her that the deceased never made any such claim during his life-time, and the first time I was aware of any such claim was when her solicitor Mr. H.B. Fraser spoke to me about two weeks ago. I also told her that construction operations were scheduled to commence on the 28th July, 1966, and that I did not know whether the proposed road would pass through the sandpit. Subject to the foregoing, paragraph 8 of the applicant's affidavit is admitted.

10. The particulars stated in paragraph 11 of the applicant's affidavit are not admitted, but the applicant was informed by me that these aspects would be investigated.

11. Paragraphs 12 and 13 of the applicant's affidavit are not admitted. In particular, the applicant's estimate of the value of the sandpit and the crops as $250,000 is irreconcilable with the fact that for estate duty purposes the entire estate was valued on 30th October, 1965, in the gross sum of $85,707.22, while the whole of the deceased's property through which the road is to pass was valued in the sum of $40,000. This is shown by the attached copy (marked A) of the papers filed on behalf of the applicant when applying for probate of the deceased's will. Further, by

transport No. 284 of 1962 the deceased owned only 64 undivided 90th parts or shares of and in the land described in the aforesaid purported originating notice of motion.

12. In relation to paragraph 15 of the applicant's affidavit, I am advised by counsel and verily believe that as a matter of law no compensation is or can be due to the estate of the deceased. Notwithstanding this, however, steps are being taken on an ex gratia basis to compensate the estate for any crops which on examination may be found likely to be lost through the construction of the road, and the applicant is aware of this.

13. I am advised by Counsel and verily believe that paragraphs 10, 14 and 16 of the applicant's affidavit are unsound in law. It is also denied that the applicant is likely to suffer irreparable harm, loss, and damage.

14. In accordance with s. 18 (3) of the Roads Ordinance, Cap. 277 after considering all objections to the construction of the road, the Governor, acting in pursuance of the powers vested in him by the said subsection and of all other powers enabling him in that behalf, determined on the 9th February, 1966, that the road should be constructed; and I am advised by Counsel and verily believe that all the necessary legal steps have been taken to enable Government to proceed forthwith with the construction of the road.

15. The construction of the road is a work approved by the Legislature as an essential part of the 1966-1972 Development Programme for Guyana. In relation to the road, the Programme reads as follows:-

In the High Court of the Supreme Court of Judicature

No. 3

Affidavit in Answer - 26th July, 1966 (Contd.).

"Atkinson Field/Mackenzie Strip:

22. This 47-mile road stretch would link Atkinson Field already connected to Georgetown, with the bauxite town of Mackenzie. The road passes through the white sands area for most of its length. It will give access to the riverain lands of the Demerara. It opens up a first direct access from Georgetown into the interior. The Ituni-Ebini-Kwakwani survey referred to later will assist in determining further road needs in relation to the long term agricultural development programme. The estimated Capital Expenditure is put at $11,000,000 ".

16. The construction of the road is a matter of national urgency and importance, and considerable public funds are involved. The lands of the deceased's estate lie at the northern end of the road. This is the natural point of commencement of operations and the basis on which all plans have been made for construction of the road. It would now be impracticable for construction to commence elsewhere. Construction was scheduled to commence on the 28th of July, 1966, and delay would involve grave damage to the implementation of the entire programme relating to the road with resulting prejudice to the economic development of the country and serious financial losses to the Government and its contractors.

17. I am advised by counsel and verily believe that -

(i) the procedure adopted by the plaintiff in moving this Honourable Court is unknown to the law of Guyana and a nullity;

(ii) this Honourable Court is without jurisdiction to entertain the applicant's purported motion or to grant any of the reliefs sought by her;

(iii) the applicant is not entitled to any of the reliefs she seeks.

18. This affidavit was drawn by the Crown Solicitor on my instructions.

(Sgd.) P.A.D. Allsopp.

Sworn to at Georgetown, Demerara
This 26th day of July, 1966

Before me
H. Bacchus
A Commissioner of Oaths to Affidavits.

Stamps .50¢ cancelled.

In the High Court of the Supreme Court of Judicature

No. 3

Affidavit in Answer - 26th July, 1966 (Contd.).

NO. 4

AFFIDAVIT IN REPLY

I, OLIVE CASEY JAUNDOO of 9 Commerce and Longden Streets, Georgetown, Demerara, having been duly sworn make oath and say as follows:-

1. Except where specifically admitted herein I join issue with the several allegations in the affidavit in answer in so far as this does not admit the facts and matters to which I deposed.

In the High Court of the Supreme Court of Judicature

No. 4

Affidavit in Reply - 27th July, 1966.

In the High Court of the Supreme Court of Judicature

No. 4

Affidavit in Reply - 27th July, 1966 (Contd.).

2. I admit that the deceased WILLIAM ARNOLD JAUNDOO had transport for only 64/90 of the land at Plantation Soesdyke subject to these proceedings but at the time of his death he was in the course of acquiring another undivided part or share thereof while his daughter VERA WIIG the wife of GERALD WIIG was acquiring a further undivided share thereof so that the remaining 26/90 thereof will in due course be acquired by the beneficiaries of the estate and the said VERA WIIG. Nevertheless, I the deponent on behalf of the estate enjoyed and still do enjoy except for the interference by the Government of Guyana full possession and use of the portion of land through which the road is intended to pass which portion is of a facade of not less than 180 (one hundred and eighty) feet commencing from the Public Road and so far as I am aware extends through the depth of 750 (seven hundred and fifty) rods of the said land or a substantial part thereof.

3. I am advised and verily believe that the quantum of the interest of the deceased in the said land would affect only the quantum of compensation payable to the estate but not the right to compensation which the Crown disputes.

4. I am also advised and verily believe that the valuation of land for estate duty purposes is irrelevant to the valuation for the assessment of compensation under present circumstances and that the valuation for purposes of compensation depends on many circumstances including the value of growing crops, the value of sand of which

the estate will be deprived, the future use to which the land could be put and the likely increase in the value thereof since the death of the deceased.

5. I am further advised and verily believe that the Government of Guyana is to acquire or take possession of an area of sand 180 (one hundred and eighty) feet or thereabout in facade by not less than 300 (three hundred) feet deep and by the depth of the estate or a substantial portion thereof, the value of the sand to be appropriated being not less than $1.00 (one dollar) for 7 (seven) cubic yards and that the amount of $250,000.00 (two hundred and fifty thousand dollars) mentioned and referred to in my affidavit is a conservative valuation which is likely to increase upon further inquiry into the technical details of the acquisition and/or taking possession.

6. The Government of Guyana have already sent bulldozing machines on to the land and were about to commence work by their servants and/or agents on the day the affidavit in support of the motion herein was sworn.

Sgd. Olive Casey Jaundoo.

Sworn to at Georgetown, Demerara,
This 27th day of July, 1966.

Before me,
Ulric Fingall
A Commissioner of Oaths to Affidavits.

NO. 5 - NOTES OF TRIAL JUDGE

In the High Court of the Supreme Court of Judicature

No. 5

Notes of Trial Judge - 28th July, 1966.

Dr. F. Ramsahoye (instructed by Mr. H.B. Fraser) for the Applicant.

Mr. M. Shahabuddeen Q.C. with Mr. S. Rahaman (instructed by the Crown Solicitor for the Respondent.

Solicitor General states that in this case the applicant complains that the constitutional guarantee put by Article 8 around his client's property rights has been violated and accordingly he moves for redress in groping for this purpose. The original jurisdiction vested in the Court by paragraph (2) of Article 19 of the Constitution. If he succeeds in his contention the consequence will be that a project which is to be reckoned in millions of dollars and which stands close to the economic development of the country will be halted or considerably retarded. This will not from a jurisprudential point of view be too great a price to pay for the vindication of the applicant's fundamental rights. These are important rights so it will not be too great a price and the Court's powers to protect these rights are correspondingly great.

It seems clear that the high powers are intended to be exercised with cautiousness associated with all reserved powers. It is with this spirit that the respondent will raise certain criticisms of the applicant's method of procedure and not to take any purely technical objections for the sake of mere technicality.

Under Article 19 there is reference to the general jurisdiction of the court to entertain any case in which a fundamental right may be involved. There is also a special original jurisdiction conferred by paragraph 2 of the Article in the High Court. This classification has been in existence since 1961 "then without prejudice to any action" means any ordinary case in which a fundamental right may be involved.

Under paragraph 2 there is provision for the High Court to have original jurisdiction for breach of any fundamental right.

This is the first attempt since 1961 to invoke the original jurisdiction of the Court vested in the Court by Article 19 (2) of the present constitution or Article 13 (2) of the previcus constitution. Proceedings have been instituted by way of originating Notice of Motion and the substantive relief sought is an injunction restraining commencement of operations until compensation is paid.

First time that originating Notice of Motion has been resorted to in seeking an injunction. Article 19 (6) speaks of the practice of these matters. Parliament has not acted under 19 (6) (a) and has not made provisions with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred upon it by or under this Article. Matter is controlled by last sentence of Article 19 (6) "and subject to any provision so made etc."

In the High Court of the Supreme Court of Judicature

No. 5

Notes of Trial Judge - 28th July, 1966 (Contd.).

The Rules of the Supreme Court now continue in force.

The Judicature Order 1966.

Order 1 Rule (2).

This rule must govern all proceedings taken in the High Court irrespective of the source of the jurisdiction. The Legislature is constantly speaking. Rules would be subject to provision made by Parliament if any.

Order 1 Rule (3).

These rules are not silent on the question of the applicable procedure.

Order 2 Rule (2).

There is no Ordinance which permits this Motion. Neither does the Common Law or any rules permit this Motion.

Examination of Plaintiff's case discloses that she is seeking to enforce a legal right to compensation.

Order 3 Rule (1).

Every action shall be commenced by a Writ of Summons.

This is a novel procedure adopted.

A.P. 1965 p. 1268.

A.P. 1965 - 46-50 Order 5 Rule 5.

You must find a Rule which tells you specifically that you may so do.

Assuming there is a lacuna in our Rules, one would have to look at the Rules currently in force in England.

These Rules clearly exclude this Motion unless one can point to a statute or a specified Rule which authorises it.

Procedure of Originating Notice of Motion p. 1268 based on a dictum in re Meister which is a 1914 case.

Order 5 Rule 5 was introduced in 1962.

Order 5.

(Rules of Supreme Court (Revision)) 1962.

Pierre v. Mbanefo 1964, 7 W.I.R. 433.

In this case we do not know whether the R.S.C. (T) contain provision corresponding to the R.S.C. (Guyana) and it appears that the Honourable Chief Justice did not consider how the Re Meister principle stood to be affected by Order 5 Rule 5 (U.K.).

(1) 28 Atkins Court Forms, 2nd Edition p. 162.

Originating Motion.

One cannot claim an injunction unless one has first filed a Writ of Summons indorsed with a claim for an Injunction.

(2) 21 Halsbury's Laws of England 3rd Edition, p. 410-412.

In the High Court of the Supreme Court of Judicature

No. 5

Notes of Trial Judge - 28th July, 1966 (Contd.).

1.30 p.m.

The first step is to file an action in the ordinary way by a Writ of Summons paragraph 560. You can claim an injunction by way of motion but it must be an Interlocutory Motion.

There is no known provision or authority for claiming an injunction by an Originating Notice of Motion. Paragraph 863 - "Only after a Writ of Summons has been issued". Motion must be annexed to a Writ of Summons.

Adenack v. Black 1962 5 W.I.R. 233.

Order 40 dealing with Motions.

Order 40 Rule 3 corresponds with Order 52 Rule 3 (U.K.).

This only gives machinery if you can properly move.

Order 41.

Odgers Pleading & Practice 16th Edition p. 351, 1957 re Meister.

Odgers 15th Edition 1963 p. 350.

Pierre v. Mbanefo 1964 7 W.I.R. 433, 435, letters H - I.

Solicitor General states that he has three other points to take on a preliminary objection but he has confidence in his first point, so perhaps without prejudice to the remaining three points, counsel for the applicant might reply to the first point taken.

Dr. Ramsahoye for the Applicant:-

The Solicitor General's Argument commenced on a wrong understanding of the last two lines in Article 19 (6).

They assume that the existing Rules of Court do not apply for the enforcement of fundamental rights and new Rules ought to be made. "Shall or may be made or brought" mean the same as the "may" in the succeeding line. They are saying there that the Judges may make rules for the enforcement of fundamental rights and that such rules when made will be subject to what Parliament does. If the existing rules were intended to apply, the Draftsman would have included the following words: "and until such rules are made the Rules of the Supreme Court for the time being in force shall apply to the matters aforesaid".

Parliament would also have known that the Rules of Court were not made to enforce fundamental rights which were unknown to the legal system when the Rules were made in 1955. Parliament would have known that there were at Common Law certain rights by virtue of which a litigant could approach the Courts for redress if Statute provides a right but does not provide a special remedy for enforcing it.

Where a Statute provides certain rights and states that an application may be made to the Court to enforce the right then if the Statute does not provide the procedure application may be made by originating motion. It would not be only a rule of practice but a Common Law right to approach the Court in these circumstances.

In the High Court of the Supreme Court of Judicature

No. 5

Notes of Trial Judge - 28th July, 1966 (Contd.).

His right partakes of two questions (a) He has a right to desire the exercise of the jurisdiction and (b) Up to 1914 when Meister was decided he would derive the right by originating motion.

The Common Law of Guyana is the Common Law of England and there is no doubt that where a litigant in England had a right under the Statute to apply to the Court for redress and no special procedure is laid down such litigant could proceed by Notice of Originating Motion.

This is permitted by the Common Law where an application may be made and no specific procedure is provided.

Order 5 Rule 3 of English Rules has no application in Guyana. Our local rules apply to the present proceedings which are permitted under the Common Law. Under our Order 2 proceedings are permitted at Common Law.

On a Writ no coercive order by way of an Injunction or otherwise could be made against the Crown because the Queen cannot be coerced in her own Courts. All we can get is a declaratory judgment against the Crown by way of the Dyson procedure. If any coercive relief is to be obtained against the Crown, it will have to be obtained under Article 19 (2). Last four lines of Article 19 (6) do not include the Rules of Supreme Court 1955 and they do assume that these rules are not applicable.

In the alternative if our rules apply then our rules under Order 2 protect the proceeding which would have been good at Common Law.

Section 3 of the Supreme Court Ordinance Chapter 7.

Section 3 (2) of the Supreme Court Ordinance, Chapter 7.

The Rules of Court would be subject to the provisions made by Parliament.

Article 13 (6) of 1961 Constitution.

It contemplates that the existing rules would not apply because if that were not the case they would have included the provision that the Rules of the Supreme Court for the time being in force should apply.

They could not have conceived that a procedure by way of Writ of Summons for a declaratory judgment could protect fundamental rights because in an action only a bare declaration could be made and no rights against the Crown could be made and no order to assess or pay compensation could be made against the Crown. Section 46 of Chapter 7 (Dyson's case is in the teeth of this).

The main point is whether Parliament not having made provision and whether Rules of Court not having been made concerning the fundamental rights clauses a litigant is bound to approach the Court by Writ. Rules of Supreme Court 1955 do not apply and Constitution does not contemplate this application and if they do apply then Order 2 permit a proceeding which would have been permitted at Common Law.

Common Law would have permitted an Originating Motion in circumstances of this case. The Rule of Court

In the High Court of the Supreme Court of Judicature

No. 5

Notes of Trial Judge - 28th July, 1966 (Contd.).

affecting Meister's case i.e. Order 5 Rule 5 has no application.

Re Squire's Settlement 1946 Volume 174 L.J. p. 150.

Cameron v. Chester 1943 L.R.B.G. p. 57; p. 63 of the judgment.

Solicitor General in reply:-

On the first point as to whether the existing Rules of Supreme Court have any application to the Court's original jurisdiction under Article 19. The importance of these constitutional rights should not be allowed to override existing rules.

Guyana Independence Order 5 (1).

The Rules of Supreme Court must be construed with necessary adaptations and modifications to bring them into conformity with the new Constitution. Order 5 Rule 4.

The Governor General has acted under 5 (4) of the Guyana Independence Order 1966 in making the Judicature Order of 1966. The whole object of this exercise under the Judicature Order of 1966 was to adapt the existing Rules of Supreme Court to the new jurisdiction conferred on the High Court by Article 19. The actual amendments are small but the point is that an annotation order has been made with specific reference to the Rules of Court and for the express purpose of adapting these rules and bringing them into conformity with the provisions of the Constitution.

None of the practice books put the Re Meister procedure on a Common Law footing. Wooding C.J. did not do that. Warrington J. in Re Meister did not say that. Each Court has a Common Law inherent authority to regulate its own procedure if there are no applicable rules but once the Court has utilised that Common Law power to make a particular rule, the rule is a rule of the Court and not a rule of the Common Law.

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No. 5

Notes of Trial Judge - 28th July, 1966 (Contd.).

D'Aguiar v. Attorney General 1962 4 W.I.R. p. 481.

Dr. Ramsahoye:-

Under Section 92 of Chapter 7 this Court has the power to raise a question of law in any matter in civil proceedings for the Court of Appeal.

NO. 6

J U D G M E N T

BEFORE: BOLLERS, C.J. (Ag.).

1966: July 28.

In the High Court of the Supreme Court of Judicature

No. 6

Judgment - 28th July, 1966.

F.H.W. Ramsahoye for the Applicant.

M. Shahabuddeen Q.C. with M.S. Rahaman for the Respondent.

In this originating Notice of Motion to which a preliminary objection has been taken on a point of procedure, the applicant in her capacity as executrix of the estate of William Arnold Jaundoo, deceased, Probate whereof was granted to her on the 17th November, 1965, by the

In the High Court of the Supreme Court of Judicature

No. 6

Judgment - 28th July, 1966. (Contd.).

High Court of the Supreme Court of Judicature and numbered 613, pursuant to the provisions of articles 8 and 19 of the Constitution of Guyana seeks the following orders of the Court:

(1) The Government of Guyana be restrained from commencing or continuing road building operations either by themselves or by persons employed by them for that purpose on the following described property, to wit:-

"a piece of land, part of the northern portion of Plantation Soesdyke, situate on the east bank of the river Demerara in the county of Demerara and colony of British Guiana...." unless and until adequate compensation in the sum of $250,000.00 (two hundred and fifty thousand dollars) or such other sum as the Court may consider just is paid to the applicant in respect of the compulsory acquisition by the Government of Guyana of part of the said property;

"(2) a survey to be undertaken on behalf of the applicant and the Government of Guyana jointly of crops growing on the said property and being part of the assets of the estate of the said WILLIAM ARNOLD JAUNDOO, deceased, with the right of the representatives of the applicant and the Government of Guyana to submit separate reports to the Court;

"(3) payment be made by the Government of Guyana to the applicant promptly of such compensation as may be assessed by the Court in respect of the compulsory acquisition of the said land;

(4) such further or other orders and/or directions as the Court may make or give to enable the applicant to be promptly paid adequate compensation in respect of that part of the aforesaid property being compulsorily acquired by the Government of Guyana and before any evidence of crops or other assets on the said property is destroyed by road building operations;

and

(5) the Government of Guyana do pay to the applicant her costs of this motion. "

The applicant then gives notice of her intention to serve a copy of the motion and the affidavit in support thereof on the Attorney General of Guyana.

In her affidavit in support of the motion the applicant has stated that prior to the death of the deceased the Government of Guyana decided to acquire compulsorily for road building purposes a part of the property aforesaid described in the notice of motion, the full and free possession of which is enjoyed by her on behalf of the estate of the deceased. Notice of the intention to build a road from Atkinson to Mackenzie was published in the Official Gazette of

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No. 6

Judgment - 28th July, 1966 (Contd.).

5th, 12th and 19th of June, 1966 and since the death of the deceased she had made efforts to ascertain the extent of the land forming part of the estate of the deceased which the Government wished to acquire and the amount of compensation, if any, which the Government proposed to pay to her as representing the estate of the deceased but no satisfactory reply had been received from the Ministry of Works and Hydraulics or from any Department under that Ministry. She was advised by counsel and believed that the acquisition of land forming part of the estate of the deceased could only be effected upon the prompt payment of adequate compensation, and the destruction of growing crops on the land without agreement with the Government as to their quantity would prejudice her rights in subsequent litigation. Similarly the acquisition of a sand-pit on the portion of land which was a substantial producer of income from the property could be compensated for only by the payment of a substantial sum. It is her further allegation that the act of the Government of Guyana by compulsory acquisition and taking of possession of part of the property referred to without prompt payment of adequate compensation was a violation of the provisions of Article 8 of the Constitution of Guyana providing protection from deprivation of property. Wherefore she prays that in the exercise of the powers vested in this Honourable Court pursuant to Article 9 of the Constitution and any other law the relief prayed for would be

granted by this Court.

The gravamen of her complaint is therefore that she is seeking to enforce a legal right to compensation for the deprivation of property rights over certain land and until such compensation is paid there must be an injunction to restrain the Government of Guyana or persons employed by them from commencing or continuing road building operations on that portion of the land which is the property of the estate of the deceased person.

In the affidavit in answer sworn to by the Chief Engineer of the Roads Division of the Ministry of Works and Hydraulics of the Government of Guyana and made on behalf of the Attorney General and the Government of Guyana this official states that he is advised by counsel that the decision to construct a public road over the property of the estate of the deceased does not constitute a compulsory acquisition of any part of it and that as a matter of law no compensation is or can be due to the estate of the deceased, nevertheless steps were being taken on an ex gratia basis to compensate the estate for any crops lost through the construction of the road. Finally, he was advised by counsel that the procedure adopted by the plaintiff in moving this Honourable Court is unknown to the law of Guyana and a nullity and this Court is without jurisdiction to entertain the motion or to grant any of the relief sought and at any rate the applicant is not entitled to any of the relief sought.

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No. 6

Judgment - 28th July, 1966 (Contd.).

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No. 6

Judgment - 28th July, 1966 (Contd.).

Article 19 (1), (2) and (6) reads as follows:

19. (1) Subject to the provisions of paragraph (6) of this article, if any person alleges that any of the provisions of articles 4 to 17 (inclusive) of this Constitution has been, is being or likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction -

(a) to hear and determine any application made by any person in pursuance of the preceding paragraph;

(b) to determine any question arising in the case of any person which is referred to it in pursuance of the next following peragraph,

and make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of articles 4 to 17 (inclusive) of this Constitution:

Provided that the High Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person

concerned under any other law.

(6) Parliament may make provision with respect to the practice and procedure -

(a) of the High Court in relation to the jurisdiction and powers conferred upon it by or under this article;

(b) of the High Court and the Court of Appeal in relation to appeals to the Court of Appeal from decisions of the High Court in the exercise of such jurisdiction;

(c) of subordinate courts in relation to references to the High Court under paragraph (3) of this article; including provision with respect to the time within which any application, reference or appeal shall or may be made or brought; and, subject to any provision so made, provision may be made with respect to the matters aforesaid by rules of court.

The Solicitor General for the respondents without prejudice to any further points that may be raised by him submitted that this application by way of notice of originating motion was in the circumstances not the correct procedure by which the applicant could approach the court for redress for breach of fundamental rights under Article 19 (1), (2), and (6). He urged that it was clear that the application had been made under Article 19 (6) in respect of breach of a fundamental right or rights as provided for in Article 8 of the Constitution

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Judgment - 28th July, 1966 (Contd.).

of Guyana and that as a result thereof the Rules of the Supreme Court 1955 of Guyana were applicable, in which case those rules did not provide for an application by way of originating motion but laid down that the procedure should be by way of an action to be commenced by a writ of summons. Counsel laid great stress on the interpretation of the last four lines of Article 19 (6) in maintaining his submission that the 1955 Rules of the Supreme Court were applicable to the present position. He submitted further in the alternative that even if the Rules of the Supreme Court 1955 (Guyana) were not applicable then according to the English rules the procedure adopted by the applicant by way of originating motion was without authority and altogether inapt as prescribed by Order 5, Rule 5 of the Rules of the Supreme Court (United Kingdom).

Counsel for the applicant in reply, urged that the argument of the Solicitor General was based on an incorrect understanding of the last two lines of Article 19 (6) and that when those words were construed they could only mean that the existing Rules of the Supreme Court were not applicable otherwise the draughtsman would have included a provision that the Rules of the Supreme Court for the time being in force should apply. Counsel's point was that the legislative body would know that there were no existing Rules of Court which dealt with the enforcement of fundamental rights, and if it were the intention of that body that

the existing Rules of the Supreme Court were to apply until Parliament had made provision in relation to the enforcement of fundamental rights, a provision would have been made that until such rules were made by Parliament the existing Rules of the Supreme Court for the time being in force should apply to the matters aforesaid. In the alternative the argument is advanced, as I understand it, that Parliament would also have known that the Rules of Court were not made to enforce fundamental rights which were unknown to the legal system when the rules were made in 1955, and would also have known that there were at common law certain ways by which a litigant could approach the Court for redress if statute provided a right but did not provide a special remedy for enforcing that right. In which case it would not only be a rule of practice but a common law right to approach the Court in these circumstances by way of originating motion. Under this head counsel maintains in this Court that as the common law of Guyana is the common law of England under section 3 (B) of the Civil Law of British Guiana Ordinance, Chapter 2, and as there is no doubt that when in England a litigant had a right under statute to apply to the Court for redress and no specific procedure was laid down, such litigant could proceed by way of notice of originating motion, therefore this procedure would be recognised by Parliament and there would then be no anxiety to lay down rules for the practice and procedure to be adopted in relation to the enforcement of fundamental rights.

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Judgment - 28th July, 1966 (Contd.).

Finally counsel advocated that even if the Rules of the Supreme Court 1955 were applicable to the present position, under Order 2 of Rules of Supreme Court 1955 the position is saved as the procedure by way of originating notice of motion is permitted by the common law of Guyana.

It is clear to me that this application is made in respect of a breach or violation of a fundamental right as enacted under Article 8 and is caught by the provisions of Article 19 (1) and in that situation the words "without prejudice to any other action with respect to the same matter which is lawfully available, the person may apply to the High Court" must mean without prejudice to the person affected bringing his action in the ordinary way by writ of summons.

Article 19 (2) (a) then confers upon the High Court an original jurisdiction to hear and determine any application made by any person in pursuance of an enforcement of fundamental rights under Articles 4 - 17 (inclusive) and the Court may then make such orders issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of articles 4 - 17 (inclusive) of the Constitution provided of course that the Court will not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law. Under Article 19 (6) (a) it is equally clear that Parliament may make provision with respect to the practice and

procedure of the High Court in relation to the jurisdiction and powers conferred upon it by or under this Article. Parliament, has, however, not made such provision and in my view the relevant words appearing in the last three lines of (6) must be interpreted to mean that provision may be made with respect to the matters aforesaid by rules of court, which rules, however, will be subject to the provision with respect to the practice and procedure thereof made by Parliament. It is true that the Article seems to contemplate that new Rules of Court will be made in respect of the aforesaid matters, that is to say the enforcement of fundamental rights, which of course, will always be subject to the practice and procedure laid down by Parliament, but until Parliament has spoken and enacted the practice and procedure, the existing Rules of the Supreme Court must apply. It may be that fundamental rights and their enforcement were unknown when the 1955 rules came into force, nevertheless even though in respect of the enforcement of fundamental rights the rules may be considered archaic, nevertheless they do provide a procedure to be adopted and this Court cannot disregard rules by which they are bound. Furthermore under the Guyana Independence Order 1966 section 5 (1) the Rules of the Supreme Court must be construed with the necessary adaptations and modificatications to bring those rules into conformity with the new Constitution.

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And under section 5 (4) the Governor-General has already acted under the Independence Order 1966 in making the Judicature Order of 1966. The whole object of this exercise being in the words of the Solicitor General to adapt the existing Rules of the Supreme Court to the new jurisdiction conferred on the High Court by Article 19 in order to bring those rules into conformity with the provisions of the Guyana Independence Act 1966. Thus recognising the existence of the Rules of the Supreme Court and their competence in relation to matters of this nature in which orders are sought by the applicant.

Before dealing with the appropriate procedure to be adopted under the local rules, for the sake of clarity I think I ought to consider what the position would be in England.

In the notes to the English Order 52, rule 3 in the Annual Practice 1965 Volume 1, page 1268 under the rubric "Practice - Originating Notice of Motion" it states that where a statute provides for an application to the Court without specifying the manner in which it is to be made, and the rules do not expressly provide for any special procedure, such application may usually be made by originating motion, and the authority for that proposition is given as in re Meister Lucius and Brunning, (1914) W.N. 390.

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Judgment - 28th July, 1966 (Contd.).

In that case the Board of Trade applied by petition to the High Court in England for the appointment of a controller of a company in circumstances predicated by section 3 of the Trading with the Enemy Act 1914, but the section did not state the mode of application to be adopted and Warrington J. held that as a matter of procedure the application might be made in any way in which the Court could be approached, and there was no doubt about it that the Court could be and frequently was approached by originating motion. As the Solicitor-General has however pointed out the rule in Re Meister is no longer law in England since the introduction in 1962 of Order 5 Rule 5 under R.S.C. (Revision 1962) which makes it clear that proceedings ~~in question~~ may be begun by motion if, but only if, by these Rules or by or under any Act the proceedings in question are required or authorised to be so begun. It follows then that in England the Rules of the Supreme Court or an Act of Parliament must require and authorise the procedure by way of Motion. In the instant case no statute authorises the bringing of an application in respect of a breach of fundamental rights by way of originating Notice of Motion, and such a proceeding must be clearly wrong.

I am fortified in this conclusion by reference to the Sixteenth Edition of Odgers' Principles of Pleading and Practice published in 1957 which reproduces the Re Meister rule at page 351 under the caption 'Originating Notices of Motion' but in the Eighteenth Edition published in 1963 under the same

In the High Court of the Supreme Court of Judicature

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caption the learned author states that proceedings may be commenced by Originating Notice of Motion if, but only if, this procedure is permitted by the rules or a statute and Order 5 Rule 5 is quoted as the authority for that procedure. It is true that in Trinidad in Pierre v. Mbanefo, (1964) 7 WIR p. 434 where an applicant approached the High Court by way of originating summons in which he alleged that one or more of a number of specified provisions of the Constitution of Trinidad and Tobago had been or are being or are likely to be contravened in relation to him and claimed redress under section 6 (1) of the Constitution, the Court of Appeal in Trinidad applied the rule in Re Meister and agreed with the Judge in chambers that the applicant was not entitled to proceed by way of originating summons for the redress claimed and dismissed the appeal. It does not however appear in the report that the attention of the Learned Judges was ever drawn to the new English Order 5 and we here are not aware of the Rules of the Supreme Court (T). The result of this case may therefore be misleading and I disregard it.

I turn now to consider what the position is under the local Rules of the Supreme Court and I am first attracted to Order 1 Rule 2 which states unequivocally that these rules shall apply in the Civil Jurisdiction of the Supreme Court and to all proceedings in all causes or matters pending or taken on or after the date that the rules

came into force, that is the 1st July, 1955.

Order 1 Rule 3 lays it down that wherever touching any matter of practice or procedure these rules are silent, the rules of the Supreme Court for the time being in force made in England under and by the Supreme Court of Judicature (Consolidation) Act 1965 shall apply. The local rules are however not silent on a matter of this kind as Order 2 states that save and except where proceedings by way of petition or otherwise are presented or permitted by any Ordinance, by the common law of this colony, by the Rules themselves or by any Rules of Court any person who seeks to enforce any legal right against any other person or against any property shall do so by a proceeding to be called an action. Order 3 Rule 1 states categorically that every action shall be commenced by a writ of summons. Counsel for the applicant has pressed upon me that the procedure adopted by way of notice of originating motion comes within Order 2 as this procedure is permitted by the common law of this country (formerly colony) which is the common law of England under section 3 (B) of Chapter 2 and cited in Re Meister as authority for this submission. I cannot however accept this contention as nowhere in the judgment of Warrington J. which was recently approved by Wooding C.J. in Pierre v. Mbanefo, (1964) 7 WIR at page 433 does His Lordship state that his conclusion, that where an Act

In the High Court of the Sup-reme Court of Judicature

No. 6

Judgment - 28th July, 1966. (Contd.).

provided for an application and did not say in what form that application was to be made, that as a matter of procedure it might be made by originating motion, was a rule of common law, or that it was a common law right for an applicant in that situation to approach the Court by way of originating notice of motion. All that His Lordship said was that the Court had been approached by way of petition and that where there were many cases which might arise in which the procedure by petition, which was somewhat cumbersome and which involved delay, would be an inappropriate mode of proceeding and accordingly he had consulted all the Judges of the High Court save one and the Master of the Rolls and they all agreed with him that in the circumstances the application should be by way of motion.

As the Solicitor General has quite rightly pointed out every Court has a common law inherent authority to regulate its own procedure if there are no applicable rules or if statute has not laid down a mode of proceeding in relation to an application to be made to the Court, but once the Court has utilised this common law power to make a particular rule or to lay down a mode of proceeding that rule becomes a rule of the Court and not a rule of the common law, or a common law right, as suggested by counsel for the applicant.

In Halsbury's Laws of England, Third Edition, Volume 21 at pages 410-414 we are informed that an injunction will generally be granted only after a writ of summons has been issued and where the substantial object of the plaintiff is to obtain an injunction he should endorse his writ with a claim therefor (see paras. 863 and 860). It is only in cases where the Court sometimes grants an interim order on the nature of an injunction that the application may be made on summons to a Judge in chambers or on motion - and unless ex parte, is made on notice, and the notice of application must be intituled "in the action" (see paras. 866 and 867).

Without presuming to enquire into the submission of counsel for the applicant that on a writ no coercive order by way of an injunction or otherwise can be made against the Crown because the Queen cannot be coerced in her own Courts and all that the individual can obtain is a declaratory judgment against the Crown, I am of the view that the procedure adopted by way of notice of originating motion must be justified by the Rules of the Supreme Court and the applicant must show affirmatively that such proceedings are within his competence. This the applicant has failed to do and I therefore cannot entertain the application. I have reached the conclusion that the application by way of notice of originating motion is wholly misconceived and is neither prescribed nor permitted by any

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Judgment - 28th July, 1966 (Contd.).

any statute or rule of Court or by the Rules of the Supreme Court or at common law and altogether unauthorised, and that the applicant is not entitled to apply to this Court by that means for the redress claimed and accordingly the motion must be dismissed with costs to the respondents fit for counsel.

Dated this 12th day of August, 1966.

H.B.S. Bollers
CHIEF JUSTICE (Ag.).

Solicitors:-

H.B. Fraser, Solicitor for the Applicant.

Crown Solicitor for the Respondents.

In the High Court of the Supreme Court of Judicature

No. 7

Order on Judgment - 12th Aug. 1966.

NO. 7

ORDER ON JUDGMENT BEFORE THE HONOURABLE MR. JUSTICE BOLLERS, CHIEF JUSTICE, ACTING - DATED FRIDAY THE 12TH DAY OF AUGUST, 1966 - ENTERED THE 23RD DAY OF AUGUST, 1966.

UPON the application of Olive Casey Jaundoo by way of motion filed herein on the 21st day of July, 1966, AND UPON READING the said application and the affidavits of the applicant filed on the 21st and 27th days of July, 1966 thereof and of Philip Anderson Desmond Allsopp filed

on the 26th day of July, 1966 on behalf of the respondent in answer thereto AND UPON HEARING Mr. M. Shahabuddeen Q.C. Solicitor General on behalf of the respondent on an objection in limine and Mr. F.H.W. Ramsahoye counsel for the applicant in reply thereto IT IS ORDERED that this application be dismissed with costs to the respondent to be taxed certified fit for counsel.

BY THE COURT
Kenneth W. Barnwell
DEPUTY REGISTRAR.

In the High Court of the Supreme Court of Judicature

No. 7

Order on Judgment - 12th Aug. 1966. (Contd.).

NO. 8

NOTICE OF APPEAL

In the Court of Appeal of the Supreme Court of Judicature

No. 8

Notice of Appeal - 19th August, 1966.

IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE

CIVIL APPEAL NO. 39 OF 1966

B E T W E E N:-

OLIVE CASEY JAUNDOO, in her capacity as executrix of the Estate of WILLIAM ARNOLD JAUNDOO, deceased, Probate whereof was granted by the High Court on the 17th day of November, 1965 and numbered 613,

(Applicant) APPELLANT

- and -

THE ATTORNEY GENERAL OF GUYANA,

(Respondent) RESPONDENT.

In the Court of Appeal of the Supreme Court of Judicature

No. 8

Notice of Appeal - 19th August, 1966.

NOTICE OF APPEAL

TAKE NOTICE that the (Applicant) Appellant being dissatisfied with the decision more particularly stated in paragraph 2 hereof contained in the judgment of the Honourable the acting Chief Justice delivered in the High Court on the 12th day of August, 1966, doth hereby appeal to the Court of appeal pursuant to the provisions of article 92 of the Constitution of Guyana upon the grounds set out in paragraph 3 and will at the hearing seek the relief set out in paragraph 4.

AND the Appellant further states that the names and addresses including his own of the persons directly affected by the appeal are those set out in paragraph 5.

2. The entire decision of the High Court dismissing with costs to the Attorney General of Guyana fit for Counsel an application brought by the Appellant pursuant to the provisions of Article 19 of the Constitution of Guyana.

3. GROUNDS OF APPEAL

(1) The High Court erred in holding that an application could not be made by originating notice of motion for relief under article 19 of the Constitution of Guyana.

(2) The High Court misinterpreted article 19 of the Constitution and particularly paragraph 6 thereof when the High Court held that the Rules of Court 1955 were applicable to an application under article 19 it being implied in the terms of the said paragraph that Rules of Court other than those in existence were to be made to enable the jurisdiction conferred by article 19 to be exercised. The High Court further erred in holding that the effect of the Judicature Order 1966 was to adapt the Rules of Court 1955 to enable them to be used for the purpose of enforcing rights under article 19 of the Constitution.

(3) The High Court ought to have held that in the absence of specific provision setting out the procedure upon an application under article 19 of the Constitution of Guyana the application could be made by way of the procedure whereby the common law courts in England were usually approached and that such application was properly made by originating notice of motion. The High Court ought to have held that in relation

In the Court of Appeal of the Supreme Court of Judicature.

No. 8

Notice of Appeal - 19th August, 1966 (Contd.).

to fundamental rights and freedoms an application to the Court could be made in any manner in which an application could be made to the Court in the exercise of its ordinary jurisdiction and that it would have been equally correct for the applicant to have approached the Court by motion or originating summons or if ex parte on an affidavit alone.

(4) The High Court erred in permitting technical objections to prevail in relation to an application for relief against the violation of a fundamental right and particularly that guaranteed by article 8 of the Constitution and the High Court further erred when it was held that an application under article 19 of the Constitution was circumscribed by the rigidity of the technical rules of procedure and pleading.

(5) The High Court ought to have held that if the Rules of Court 1955 did apply the procedure by way of originating motion did not offend the said Rules which saved proceedings which were permitted at common law and that the application before the High Court was so permitted in terms of

Order 2 of the Rules of the Supreme Court 1955.

(6) The High Court ought to have held that the provisions of article 19 of the Constitution did not intend that an application to the High Court could be made by a writ of summons since applications to the Court are never made in other cases by writ of summons and there is nothing in article 19 of the Constitution which provides reason for implying such an intention.

(7) The High Court ought to have held that since upon an application under article 19 the Court could make such orders issue such writs and give such directions as it may consider appropriate for enforcing or securing the enforcement of article 8 of the Constitution a writ of summons could not be the appropriate procedure because the article contemplates inter alia the issue of prerogative writs as well as other writs which may be specially devised and which may be of wider scope and such writs are not appropriately issued under or on a writ of summons.

In the Court of Appeal of the Supreme Court of Judicature

No. 8

Notice of Appeal - 19th August, 1966 (Contd.).

In the Court of Appeal of the Supreme Court of Judicature

No. 8

Notice of Appeal - 19th August, 1966 (Contd.).

(8) The High Court erred in holding that an injunction or other coercive order restraining the Government of Guyana could only be made if a writ of summons were previously issued such restrictions upon the grant of relief being beyond the contemplation of article 19 of the Constitution which contemplates the grant without restriction of any order of whatever nature and by whatever name called which the Court may consider appropriate for enforcing or securing the enforcement of articles 4 to 15 of the Constitution.

(9) The High Court misconceived the nature of the complaint by the applicant in that the applicant not only claimed a right to compensation but was relying on article 8 under which the Government of Guyana could not acquire her land without payment of prompt and adequate compensation or in the alternative without an intention to pay such compensation and the Court erred in failing to consider the stand taken by the Government of Guyana at the hearing as expressed in the affidavit sworn by the Chief Engineer, Roads, in which it was contended

in terms of paragraph 12 thereof that the Government of Guyana were under no liability to pay compensation for the land but were willing to pay compensation on an ex gratia basis for crops growing thereon. Such a stand justified the High Court in making an order restraining the acquisition of the taking of possession of any part of the land because the Court has no power to compel payment out of the Treasury and without Parliamentary appropriation.

(10) The High Court erred in disregarding the case of Pierre v. Mbanefo (1964) W.I.R. 434 wherein the Court of Appeal of Trinidad and Tobago was clearly of opinion that application of the nature of the ~~applicant's~~ appellant's was to be brought by way of originating notice of motion.

(11) The High Court further erred in holding that where the common law power to make rules regulating its own procedure was exercised by a Court the rule so made ceases to be a rule of common law and becomes a rule of Court for there are only two types of rules of court in existence namely those made by the Court upon a motion in Court or subsidiary legislation made in pursuance of power granted by Parliament in a written law.

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Notice of Appeal - 19th August, 1966(Contd.).

(12) The High Court erred in holding that because in England the rule in re Meister Lucius and Brunning (1914) W.N. 390 was varied by the terms of Order 5 Rule 5 made in 1962 in England under the Administration of Justice Act 1925 such statutory amendment applied to Guyana to deprive the decision of its effect according to its tenor and the High Court further erred in refusing to follow the decision in Re Meister for the reason that nowhere in the judgment of Warrington J. was it said that it was a rule of the common law or a common law right for an applicant to make an application by motion in the case under consideration.

(13) The High Court erred in dismissing the application on the grounds set out in the judgment of the Honourable the Chief Justice.

4. The Appellant seeks inter alia an order of the Court of Appeal setting aside the order dismissing the application by the Appellant and a further order directing that the land ought not to be taken unless compensation is assessed and paid to the Appellant by the Government of Guyana in respect of the land sought to be acquired by the Government of Guyana and forming the subject matter of the Appellant's application together with all such orders and directions and the grant of such writs as will guarantee

for the Appellant the rights conferred by article 8 of the Constitution. Alternatively, the Appellant will seek an order that the application be remitted to the High Court to be determined on its merits or such other order as the Court of Appeal may consider just. The Appellant will also seek a further order that her costs of this appeal and of the Court below be paid by the Respondent.

5. PERSONS DIRECTLY AFFECTED BY THE APPEAL:-

Names	Addresses
Olive Casey Jaundoo	9 Commerce & Longden Streets, Georgetown, Demerara.
Attorney General of Guyana	Attorney General's Chambers, Main Street, Georgetown, Demerara.

Georgetown, Demerara,
Dated this 19th day of August, 1966.

Fenton Ramsahoye
OF COUNSEL.

H.B. Fraser
Solicitor for Appellant.

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No. 9

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NO. 9

JUDGMENT OF THE COURT OF APPEAL

BEFORE: The Honourable Sir Kenneth Stoby - Chancellor

The Honourable Mr. E.V. Luckhoo - Justice of Appeal

The Honourable Mr. P.A. Cummings - Justice of Appeal.

1968: January 22, 23

Mr. J.O.F. Haynes, Q.C. associated with Dr. F.H.W. Ramsahoye for the Appellant.

The Solicitor General associated with Mr. S. Rahaman for the Respondent.

Sir Kenneth Stoby, Chancellor.

The Chancellor:

This appeal raises a point of some constitutional importance regarding the right of a citizen to approach the Court for the protection of his fundamental rights.

The appellant is the executrix of the estate of William Arnold Jaundoo, deceased. Her testator owned a piece of land at Plantation Soesdyke on the east bank of the Demerara River.

During the month of June, 1965, the Government of Guyana published in the Official Gazette notice of intention to build a road from Atkinson to McKenzie.

This road was to be constructed over a portion of the appellant's land at Soesdyke. In June 1966 the appellant's legal adviser wrote the appropriate civil servant enquiring how much compensation would be payable for the loss of that portion of her land utilised as a road. The officer replied that the Compensation Committee's assessment of compensation was not available until September, 1966. On the 19th July, 1966, the appellant's legal adviser wrote to say that the road was about to be constructed and asked for a definite decision regarding compensation. As a result of information received an originating motion was filed the next day. The motion sought the following relief:

"(1) The Government of Guyana be restrained from commencing or continuing road building operations either by themselves or by persons employed by them for that purpose on the following described property, to wit:-

a piece of land, part of the northern portion of Plantation Soesdyke, situate on the east bank of the river Demerara in the county of Demerara and colony of British Guiana, said northern portion of the said Plantation Soesdyke, having a facade of two hundred Rhynland roods by a mean depth of seven hundred and fifty Rhynland roods as laid down and defined on a diagram of said plantation made by John Peter Prass, Sworn Land Surveyor, dated the 19th day of July, 1884, and deposited

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'in the Registrar's Office of British Guiana, on the 10th day of of February, 1885, said piece of land having a facade of 44 (forty-four) roods running southward from the centre draining trench of said northern half of said plantation by the entire depth of said plantation, and on the buildings and erections that may be erected thereon during the existence of this mortgage, the property of the mortgagor, save and except an area of land part of the said piece of land measuring 5 (five) rods in facade by 30 (thirty) rods in depth commencing from the south-western boundary (Demerara) and extending north 5 (five) rods in facade by a depth of approximately 30 (thirty) rods east to the western edge of the public road to be transported to Bennie Jhaman, and also save and except an area of land measuring 3 (three) rods in facade commencing from the south-western edge of the drainage trench adjoining the Demerara River, and extending 3 (three) rods south by the full depth of 750 (seven hundred and fifty) rods, to be transported to Anrup and Sookeah jointly the said area of land measuring 3 (three) rods, being however, subject to a right of drainage through the said drainage trench in favour of the other owners of the said piece of land having a facade of 44 (forty-four) roods except the said area of land measuring 5 (five) rods to be transported to Bennie Jhaman the said right of drainage to be exercised by the digging of drains not exceeding 6 (six) feet in width, and at intervals of not less than 100 (one hundred) rods, running south

'to north and north to south and from the said drainage trench leading to the Demerara River.....'

unless and until adequate compensation in the sum of $250,000.00 (two hundred and fifty thousand dollars) or such other sum as the Court may consider just is paid to the applicant in respect of the compulsory acquisition by the Government of Guyana of part of the said property;

(2) a survey to be undertaken on behalf of the applicant and the Government of Guyana jointly of crops growing on the said property and being part of the assets of the estate of the said WILLIAM ARNOLD JAUNDOO, deceased, with the right of the representatives of the applicant and the Government of Guyana to submit separate reports to the Court;

(3) payment be made by the Government of Guyana to the applicant promptly of such compensation as may be assessed by the Court in respect of the compulsory acquisition of the said land;

(4) such further or other orders and/or directions as the Court may make or give to enable the applicant to be promptly paid adequate compensation

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'in respect of that part of the aforesaid property being compulsorily acquired by the Government of Guyana and before any evidence of crops or other assets on the said property is destroyed by road building operations; and

(5) the Government of Guyana do pay to the applicant her costs of this motion."

The respondent in an affidavit in reply denied that the appellant was entitled to compensation but asserted that an ex gratia payment was being favourably considered. The respondent also said:-

"16. The construction of the road is a matter of national urgency and importance, and considerable public funds are involved. The lands of the deceased's estate lie at the northern end of the road. This is the natural point of commencement of operations and the basis on which all plans have been made for construction of the road. It would now be impracticable for construction to commence elsewhere. Construction was scheduled to commence on the 28th July, 1966, and delay would involve grave damage to the implementation of the entire programme relating to the road with resulting prejudice to the economic development of the country and serious financial losses to the Government and its contractors.

" 17. I am advised by Counsel and verily believe that -

(i) the procedure adopted by the plaintiff in moving this Honourable Court is unknown to the law of Guyana and a nullity;

(ii) this Honourable Court is without jurisdiction to entertain the applicant's purported motion or to grant any of the reliefs sought by her;

(iii) the applicant is not entitled to any of the reliefs she seeks."

When the Motion came on for hearing the Solicitor General submitted in limine that an originating motion was not the correct way to approach the court for the kind of redress sought even though the motion alleged a breach of a fundamental right. He submitted that an action should have been instituted.

The Chief Justice agreed with the submission and dismissed the application, hence this appeal.

Counsel for the appellant submitted that the language of Article 19 of the Constitution permits an originating motion. Article 19 is as follows:-

"19.(1) Subject to the provisions of paragraph (6) of this article, if

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"if any person alleges that any of the provisions of articles 4 to 17 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction .

(a) to hear and determine any application made by any person in pursuance of the preceding paragraph;

(b) to determine any question arising in the case of any person which is referred to it in pursuance of the next following paragraph,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of articles 4 to 17 (inclusive) of this Constitution:

" Provided that the High Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

(3) If in any proceedings in any court subordinate to the High Court any question arises as to the contravention of any of the provisions of articles 4 to 17 (inclu (inclusive) of this Constitution, the person presiding in that court shall refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.

(4) Where any question is referred to the High Court in pursuance of paragraph (3) of this article, the High Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal under this Constitution to the Court of Appeal or to Her Majesty in Council, in accordance with the decision of the Court of Appeal or, as the case may be, of Her Majesty in Council.

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" (5) Parliament may confer upon the High Court such powers in addition to those conferred by this article as may appear to Parliament to be necessary or desirable for the purpose of enabling the High Court more effectively to exercise the jurisdiction conferred upon it by this article.

(6) Parliament may make provision with respect to the practice and procedure -

(a) of the High Court in relation to the jurisdiction and powers conferred upon it by or under this article;

(b) of the High Court and the Court of Appeal in relation to appeals to the Court of Appeal from decisions of the High Court in the exercise of such jurisdiction;

(c) of subordinate courts in relation to references to the High Court under paragraph (3) of this article;

including provision with respect to the time within which any application, reference or appeal shall or may be made or brought and, subject to any provision so made, provision may be made with respect to the matters aforesaid by rules of court."

It was stressed that "apply" includes the procedure by way of a motion; that "adequate means of redress" would imply an injunction and payment of money since the appellant would not obtain an injunction against the Crown by way of action, nor could she obtain payment of compensation. There were other submissions with which I will deal.

Before discussing the arguments advanced by the appellant's counsel and those of the Solicitor General, I think the true purpose of the provisions relating to fundamental rights must be understood, and certain elementary principles restated.

Before the advent of a written constitution the legislature of colonial British Guiana was supreme; true, its supremacy was not absolute in the sense in which the United Kingdom Parliament is absolute. A colonial government's legislation was subject to the supervision of the Secretary of State who could withhold his assent if the proposed law infringed certain canons of justice or policy. But within the limits of these restrictions the legislature could introduce laws which were severe or even revolutionary. Colonial politicians accustomed through reading and association to the moderation of English politicians, and Guyanese lawyers trained in England and engrained in the common law of England which had spread its roots throughout the British Commonwealth, recognised the greatness of a system which protected the democratic rights of peoples. No attempt was ever made to alter or restrict the fundamental principles of British

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jurisprudence. Even when Roman Dutch law was the common law of Guyana judges trained in British institutions were engrafting and introducing bit by bit the canons of English Common law.

Thus it was that throughout the history of Guyana in a criminal trial every person charged with a criminal offence was presumed to be innocent until he was proved guilty. The Magistrate trying a criminal charge or the Judge presiding over a trial by jury who did not conform to this principle of the English common law was deemed to have violated so important a feature of a criminal trial that a conviction in the absence of such a direction was upset on appeal.

When internal self-government was introduced and when independence was achieved all those safeguards which had prevented colonial peoples from oppression were engrafted into the Constitution and called fundamental rights. By inserting them into the Constitution the result which flowed was that Parliament became subject to the Constitution. It was supreme and yet not supreme. Parliament can alter the Constitution in the manner prescribed by the Constitution, but until it is altered no legislation can be enacted which infringes a fundamental right. Returning to the illustration already given, should Parliament legislate to provide that in all criminal trials an accused is presumed to be guilty, the Courts can strike down this legislation as being ultra vires the

Constitution. Where, however, Parliament has enacted no such legislation, and a judge or magistrate conducts a criminal trial on the assumption that an accused is presumed guilty, it is not the State which has infringed a fundamental right but the functionary concerned who has ignored the common law of the land. In the first illustration where the State has legislated to override a fundamental right an application to the Court to have the legislation declared invalid as a breach of Article 10(2)(a) is appropriate; in the second illustration an appeal is the proper course.

In the majority of emergent territories the framers of their respective consitutions placed great emphasis on the provisions contained therein for the protection of fundamental freedoms. Despite the insertion of articles protecting fundamental rights very little ~~legislation~~ litigation has resulted therefrom, at least in the Caribbean. Although not responsible for the lack of litigation the decision of the Privy Council in the Jamaican case of Director of Public Prosecutions v. Nasrella (1967) 2 All E.R. 161 has done much to clarify the position. Subsection (8) of s. 26 of the Jamaican Constitution enacts -

> " Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

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The applicant, Nasrella, who had been indicted for murder, had been found not guilty of murder, but the jury were in disagreement as to the issue of manslaughter which had been left to them by the judge. He sought relief from the order of the judge that he stand trial on the issue of manslaughter at the next sitting of the circuit court and relied on subsection 8 of section 20 of the Jamaican Constitution which provides -

" No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other offence of which he could have been convicted at the trial for that offence ....."

In dealing with the protection afforded by the section, Lord Devlin at page 165 of the report said -

" All the judges below have treated it (section 20(8)) as declaring or intended to declare the common law on the subject. Their Lordships agree. It is unnecessary to resort to implication for this intendment, since the Constitution itself expressly ensures it. Whereas the general rule, as is to be expected in a Constitution and as is here embodied in S. 2, is that the provisions of the Constitution should prevail over other law, an exception is made in Ch.III.

"This chapter, as their Lordships have already noted, proceeds on the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed."

Article 18(1)(a)(b) and (c) of the Guyana Constitution is not dissimilar to s. 26 of the Jamaican Constitution so it follows that the true purpose of the fundamental rights provisions is to preclude Parliament from legislating in derogation of these rights. The object was to enable the Courts to declare legislation invalid. It was never intended that where no law had been enacted in defiance of fundamental rights, the normal process of the Courts should be superseded.

I concede that the question with which this Court is concerned is not whether there has been a breach of a fundamental right but whether the procedure adopted by the appellant in applying to the Court by way of originating motion for an injunction against the Crown is a procedure made possible by virtue of the Constitution.

A summary of the appellant's arguments is necessary.

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Counsel submitted that the appellant could not issue a writ because no coercive order by way of injunction or otherwise could be made against the Crown as the Queen cannot be coerced in her own Courts. He said all that could be obtained was a declaratory judgment, but as coercive relief was required and as this could be obtained under Article 19 of the Constitution an application was made under that Article. It was further submitted that Article 19 authorises the procedure by way of motion; that the Rules of the Supreme Court, 1955, do not apply to fundamental rights and if they do, then under Order 2 he is entitled to come by way of motion under the common law.

So that this judgment can proceed on agreed premises, I must refer to the appellant's affidavit in support of the Motion to show the nature of the relief asked by the applicant. Paragraphs 14, 15 and 17 of the appellant's affidavit state:

> " 14. I am advised by Counsel and verily believe that the act of the Government of Guyana by compulsory acquisition and taking of possession of part of the property herein referred to without prompt payment of adequate compensation and causing the said land to be used by contractors acting for or on behalf of the Government or by the direction of the Government are respectively violations of the provisions of article 8 of the Constitution of

"Guyana providing protection from deprivation of property. I am further advised by Counsel that no other law permits the grant of an injunction or other coercive order against the Crown and that I have no other means of redress than that whereby I may make application to this Honourable Court pursuant to the provisions of article 19 of the Constitution of Guyana.

15. The Government of Guyana intends to commence road building operations forthwith and unless restrained will enter the land and will destroy the growing crops thereon and will deprive me of possession thereof.

17. Wherefore I pray that in exercise of powers vested in this Honourable Court pursuant to article 19 of the Constitution of Guyana and in pursuance of any other law grant the relief prayed in terms of the Notice of Motion herein."

The language of these paragraphs is clear and unambiguous; the remedy being sought is to restrain the Crown from commencing the building of a road. I stress this aspect because in the Court below the application was dismissed on the ground that an originating motion was not the correct procedure in which to approach the Court under Article 19. In this Court the appeal proceeded on a somewhat broader basis. Argument was addressed to us by both sides on the assumption that assuming the trial judge to be wrong in coming to the conclusion that a Motion was an incorrect procedure, nevertheless the remedy asked for could not be granted by originating motion or at all. If correct, this argument disposes of the appeal.

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No one questions the correctness of the statement that an injunction is not granted against the Crown; nor is it open to discussion to assert that where an injunction is the remedy sought in cases not involving fundamental rights, the established procedure of our courts is for a writ to be issued. Where the matter is one of urgency an ex parte originating summons is filed supported by an affidavit claiming an interim order by way of injunction. It is not unknown for the interim order to be made before the filing of the writ providing counsel undertakes to have the writ filed forthwith. The procedure after these preliminary steps is too well known to justify recording it here. What the appellant says is that the legal system of Guyana has by Article 19 of the Constitution been divided into two; the relief under Article 19 (2) is unlimited whereas the relief under our system of law in existence before Independence was dependent on the common law of England and on statute law, regulated by relevant rules of the Supreme Court. We were urged to begin with Article 3 as a necessary concomitant to understanding Article 19 which brings into operation the second dimension of our legal system.

Article 3 is as follows:-

" 3. Whereas every person in Guyana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin,

" political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the following provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

The vital words, according to the submission, are "subject to such limitations of that protection as are contained in those provisions, ... does not prejudice the rights and freedoms of others or the public interest". I agree that Article 3 has a very important bearing on all the fundamental rights and freedoms enshrined in Articles 4 to 18.

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But by no canon of construction can it be said that Article 3 expressly or by implication operates to change or enlarge the common law of Guyana. All that Article 3 means is that despite the guarantee given under the Constitution for the inviolability of fundamental rights circumstances may arise where the rights of an individual may have to be curtailed in the public interest. Because of Article 3 it was possible to introduce the National Security Act providing in certain cases for preventive detention. Article 5, for example, is concerned with the protection of the right to personal liberty; it contains clauses limiting those rights in certain cases. So what Article 3 means is that the only limitations on personal freedom are the limitations expressed in Article 5 itself. It is not possible to impose restrictions on personal freedom other than the restrictions permitted in Article 5.

The other limb upon which it was sought to project the idea that the Constitution had introduced into Guyana a juristic approach hitherto unknown, was Article 19 which has already been recorded; but I will repeat some portions of it so that the argument will not lose cogency through the absence of sequence.

> "19.(1) Subject to the provisions of paragraph (6) of this article, if any person alleges that any of the provisions of articles 4 to 17 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him

"him (or in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction -

(a) to hear and determine any application made by any person in pursuance of the preceding paragraph;

(b) to determine any question arising in the case of any person which is referred to it in pursuance of the next following paragraph,

and make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of articles 4 to 17 (inclusive) of this Constitution;

Provided that the High Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."

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The words requiring interpretation are "without prejudice to any other action ..... may apply to the High Court for redress" in 19(1) and "Provided that the High Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law" in 19(2). I applaud the ingenuity of the submission but reject its validity. The fact that an injunction is not available does not mean that an applicant who applies for redress can obtain a remedy unknown to the law. The redress which the High Court can give to vindicate the fundamental rights of a person whose rights are being assailed must be legal redress. The High Court is not given power to legislate; the powers it is given to issue writs and give directions it considers appropriate are procedural powers to ensure that its legal decisions are carried out. A fundamental right is not a synonym for legal chaos; protection of the wronged is not accomplished by judicial hysteria.

During the argument frequent reference was made to the Indian Constitution in order to illustrate the way in which the Indian Supreme Court has brushed aside technicalities in order to safeguard a citizen's fundamental rights. Article 32 of the Constitution of India says:

"32.(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Sup reme Court by Clauses (1) and (2), Parliament may by law empower any other Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right ~~guar~~ guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

The fundamental rights are stated in previous articles.

Referring to Article 32 Dr. Ambedkar in the Constitutent Assembly said:-

"If I was asked to name the particular article in the Constitution as the most important without which this Constitution would be a nullity, I could not refer to any other article except this one. It is the

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"very soul of the Constitution and the very heart of it.. ..... It is not that the Supreme Court is left to be invested with the power to issue these writs by a law to be made by the Legislature at its sweet will. The Constitution has invested the Supreme Court with these rights and these writs unless and until the Constitution itself is amended....."

Basu in his Commentary on the Constitution of India says at p. 267 Vol. 2:-

"It is acknowledged on all hands that a declaration of individual rights would be an idle formality if there is no effective means to enforce them.",

And again at p. 267 Vol. 2:-

" This clause gives a very wide jurisdiction to the Supreme Court for the enforcement of the Fundamental Rights. It not only empowers the Supreme Court to issue the writs of Habeas corpus, mandamus, prohibition, quo warranto and certiorari as they are known in England, but also enables the Supreme Court to devise directions, orders or writs analogous to the above, or to improve upon the above writs so as to avoid their technical deficiencies, if any, or to adapt them to Indian circumstances."

The same writer says this at p. 289 Vol. 1:-

"(In England) the efficacy of Injunction as a remedy for obtaining judicial review of administrative action has been narrowed down in England by the principle that an injunction (unlike a declaratory action) is not available against the Crown either directly or by issuing it against its servants, such relief has also been specifically excepted also by the Crown Proceedings Act, 1947 (s. 21(1)). An injunction is not thus available against any Government department or agency. Its use is virtually restricted to local authorities, or statutory domestic tribunals, or public corporations.

In India, the remedy of perpetual injunction is governed by statute, the conditions being laid down in ss. 54-56 of the Specific Relief Act, 1877.

Its applicability against administrative action is restricted by the provision in s. 56 (d) which corresponds to the English rule already seen. It says that -

'An injunction cannot be granted to interfere with the public duties of any department of the Central Government or any State Government."

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In order to appreciate the comments made above reference must be made to Article 1 of the Constitution of India. Article 1 (3) states:

"(3) The territory of India shall comprise -

(a) the territories of the States;

(b) the Union territories specified in ..... the First Schedule;

(c) ....."

There is no distinction in status between the States inter se. But the Union territories are subject to legislation by Parliament. Article 226 of the Constitution of India is as follows:

" 226. (1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders, or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred on a High Court by clause (1) shall not be in derogation of the power conferred on the Supreme Court by Clause (2) of article 32."

This probably explains why an injunction was granted in Kochunni v. State of Madras (1959) S.C. 725, there being specific legislative power to do so.

The argument for the appellant that Article 19 (G) introduced what was termed another dimension to our legal system must be further examined in the light of the suggestion that because the article speaks of making such orders, issuing such writs as may be considered appropriate this language has in some way changed the nature of prerogative writs. A few illustrations will dispose of this heresy. Mandamus is usually addressed to an inferior court requiring it to do some particular thing which appertains to the Court's function. It can also apply in other circumstances. Against a public officer acting in contravention of his public duty and so on. But where Parliament signifies its intention to enact a law which infringes on a citizen's fundamental rights, mandamus will not issue to Parliament; after the law is passed mandamus may go to those public officers who have to enforce the law. Again, where a private individual seizes another's property and refuses to pay adequate compensation, mandamus will not lie against the private individual as the writ does not apply to such a person.

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What Article 19 means when it says the High Court may issue writs and give directions for the purpose of enforcing fundamental rights is that the prerogative writs may be adapted in a suitable case to ensure the carrying out of the Court's decision; the first requirement is to decide whether the writ is applicable then if it is, no technical rule will preclude its issue. An example of this is Wazir Chand v. State of Himachal Pradesh (1955) S.C.R. 408. The Police seized goods from the possession of a person without any authority of law in contravention of Article 31 (1) (I.). Mandamus is not used to decide a question of title but what the Court did was to issue mandamus directing the restoration of the property and leaving it to the parties to settle the question of title. The Court did not change the law; it did not arrogate to itself a function never had; it used mandamus to restore the status quo ante without infringing the basic principles on which the writ is issued. The police were public officers to whom the writ is applicable but the decision would have been different in respect of a private person not purporting to act under a law.

Certiorari is the writ used to keep judicial and quasi judicial tribunals within the limits of their legal authority.

In Luck v. Sharples 1954 No. 590 where a magistrate exceeded his jurisdiction and committed the applicant to prison, the High Court issued a writ of habeas corpus and later quashed the decision by certiorari even after the time for appealing had expired, because the magistrate had exceeded his jurisdiction. Had a High Court judge exceeded his jurisdiction and the time for appealing had passed, another High Court judge could not quash his decision by certiorari. No matter what fundamental right was involved the Court would not have the power to issue the writ of certiorari or to adapt it or to give directions. Article 19 has not gone that far.

The judicial writ of Prohibition issues out of a superior Court to an inferior Court to prevent the inferior Court usurping powers it does not have. In Small v. Saul and Saul (1965) W.I.R. 352 the Caribbean Court of Appeal held that the High Court had no jurisdiction to maintain an action for damages arising out of s. 26(1) of the Rent Restrictions Ordinance, Cap. 186, such a claim being maintainable only in the Magistrate's Court. A judge who assumes jurisdiction in breach of the Ordinance cannot have a writ of Prohibition issued against him. The alleged new dimension of law created by Article 19 is circumscribed by the historical realities of the common law. The development of the common law takes place by giving a modern interpretation to principles of law

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enunciated under circumstances unknown and undreamt of at the present time. The law of negligence, the law of agency, master and servant, the relations of the Crown and its servants, are all fruitful fields for courageous and intelligent improvement of some of the unsatisfactory features of the past. The Court in exercising its fundamental rights jurisdiction can play a vital part in clamouring for a Crown Proceedings Act, can frame orders and issue practice directions relating to procedure, can interpret the fundamental rights in the light of its own country's problems but must draw the line at mutilating the prerogative writs bequeathed to us by the common law.

The observations I have made and the nature of the relief asked for by the appellant are sufficient to dispose of this appeal. However, considerable time was devoted to the respondent's submission that even if, which is denied, there was a violation of Article 8 (G.), the question is whether procedure by originating notice of motion was the correct way of applying for redress under Article 19 (1).

The Solicitor General submitted that the Rules of the Supreme Court 1955 apply to applications made under Article 19 of the Constitution; that Order 2 of these rules is: "Save and except where proceedings by way of petition or otherwise are prescribed or permitted by any Ordinance, by the

Common Law of this Colony, by these Rules or by any Rules of Court, any person who seeks to enforce any legal right against any other person on or against any property shall do so by a proceeding to be called an action", and the words "Common Law of this Colony" mean Roman Dutch common law. I will discuss this submission. Article 19 (6) is:-

" (6) Parliament may make provision with respect to the practice and procedure -

(a) of the High Court in relation to the jurisdiction and powers conferred upon it by or under this article;

(b) of the High Court and the Court of Appeal in relation to appeals to the Court of Appeal from decisions of the High Court in the exercise of such jurisdiction;

(c) of subordinate courts in relation to references to the High Court under paragraph (3) of this article;

including provision with respect to the time within which any application, reference or appeal shall or may be made or brought; and, subject to any provision so made, provision may be made with respect to the matters aforesaid by rules of court."

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Parliament has not made any provision. Since this is so, counsel for the appellant contends that the Article itself authorises the procedure by motion and we do not have to look for guidance to the Rules of Court. I disagree. The Article authorises an application to the Court. But the procedure for applying to the Court is regulated by Rules of Court; the manner in which this came about is germane to the point under discussion. The Judicature Act of 1873 (U.K.) defined an action as "a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court." As a result of this and the 1875 Act, rules of court regulating the procedure in the High Court were made. In 1893 there was enacted in the then Colony of British Guiana a Supreme Court Ordinance. S. 5 (1) of that Ordinance was: "The practice and procedure of the Court in its general civil jurisdiction shall be regulated by this Ordinance and by the Rules, and where no provision is made by this Ordinance, by the Rules, or by any other statute the existing practice and procedure shall remain in force.", which is similar to s. 44(1) of the Supreme Court Ordinance, Cap. 7 enacted in 1915. S. 44(1)(a) provides:-

" 44.(1) The practice and procedure of the Court -

(a) in its general civil jurisdiction shall be regulated by this Ordinance and by rules of court, and where no provision is made

" by this Ordinance, by rules of court, or by any other statute, the existing practice and procedure shall remain in force;"

After the 1893 Ordinance was passed Rules of the Supreme Court 1893 were made. O. 1 r. 3 of the 1893 rules was: "Any inhabitant of the Colony acting in his own right, or in the right of another, who seeks to enforce a right to legal relief against some other person or against a res, as a plantation or a ship, shall do so by means of an action. An action shall be begun by filing a claim with the Registrar." In Winter v. Black (1896) L.R.B.G. 22 the Court held that as a result of this rule the only way to approach the Court was by action and not by petition as was previously done in certain applications to the Court. But in Henriques v. Henriques (1897) 7 L.R.B.G. 101 the Court held that Winter v. Black was wrongly decided and despite O. 1 r. 3 of the 1893 rules relief could be obtained by petition. In the course of his decision Atkinson C.J. pointed out that from 1855 to 1893 (when the Supreme Court Ordinance was passed) the Court's procedure was regulated by a Manner of Proceeding Ordinance (No. 5 of 1855) and the practice and procedure recorded by Roman Dutch writers. The learned Chief Justice also referred to the fact that Ordinance 1 of 1897 had amended s. 51(1) of 7 of 1893 substituting therefor, the following:-

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" The practice and procedure of the Court in its general civil jurisdiction shall be regulated by this Ordinance and the Rules made thereunder, and in matters in respect of which no provision is made by the same, shall be regulated as far as may be by the practice and procedure followed in respect of the like matters in England under the Judicature Acts and the rules made thereunder in force for the time being, and where no such procedure is applicable, then by the practice and procedure which was followed at the date of the coming into operation of this Ordinance."

He then concluded that the Rules of Court 1893, and in particular O. 1 r. 3, were controlled and limited by all the provisions of the Ordinance (7 of 1893) and the procedure by way of petition was still valid.

The next step is that the Rules of Court were made in 1900. O. 2 r. 1 uses the same language of O. 1 r. 3 of the 1893 rules. In 1910, O. 2 of the 1900 rules was amended to read thus:-

" 1. Save and except where proceeding by way of petition or otherwise is prescribed or permitted by any Ordinance or Rules of Court or by the Common Law of this Colony, any person who seeks to enforce any legal right against any other person or against property shall do so by a proceeding to be called an action."

So the Solicitor General contends that having regard to the History of our rules and the decision in Henriques v. Henriques (supra), the reference to the common law in the 1910 rules was to Roman Dutch Common Law and nothing has taken place to give the same words a different meaning in the 1955 rules. The relevant 1955 rule is O. 2; exactly the same as in 1910 where, as I have shown, the common law of the Colony meant Roman Dutch Common Law.

But, indeed, a great deal has taken place. On the 1st January, 1917, the Civil Law of British Guiana Ordinance came into force. The common law of the Colony became the common law of England. The Judiciary was not unaffected by this change. While before 1917 the judges of British Guiana were not only trained in Roman Dutch Law, but steeped in its traditions, later judges sought to engraft on what remained of Roman Dutch law the principles of English common law and the procedure of English Courts as regulated by existing English rules of Court. In 1932 Mr. Justice Savory was appointed from Trinidad. He immediately saw the weakness of the 1900 Rules in relation to the law as it had to be interpreted, and the unsatisfactory nature of a petition for certain applications in chambers. He resolutely set himself to amend the 1900 rules. Order 41 was introduced providing for business in Chambers; the English rules were used as a model and provision made for Summonses and Motions.

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When the 1900 rules as amended in 1910, 1916, 1920, 1925, 1932, 1947, 1948 and 1954 were completely revoked by the 1955 rules, the rule making authority of 1955 retained the language of O. 2 of the 1910 rules in O. 2 of the 1955 rules. In 1910 the common law of the Colony was Roman Dutch, in 1955 the common law of the Colony was English. Even so, the Solicitor General urges, the true meaning of O. 2 of the 1955 Rules is not so easily ascertained. He adverts to s. 44 (1) of Cap. 7 and recalls that the section deals with the practice and procedure of the Court and stipulates for following existing practice and procedure where the rules are silent. Existing procedure in 1915 when Cap. 7 was enacted was Roman Dutch. I see no difficulty in rejecting the view point. S. 44(1) Cap. 7 is specifically concerned about those areas of our law untouched by rules of Court. Rule 2 of the 1955 rules permits proceedings to be taken other than by action if among other things the common law of England permits it, consequently there is no need to enquire about the 1915 existing procedure. S. 44 (1) Cap. 7 probably provides for those areas of our law unknown to the English common law, for example, opposition actions, parate execution, and so on where no rules are applicable, and as no English common law could apply, the procedure to be followed would be the procedure existing in 1915. O. 1 r. 3 applying the English rules where the 1955 Rules are silent, is also relevant. See my own decision in Coghlan v. Vieira (1958) L.R.B.G. 108 at pp.118-120.

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The analysis I have undertaken does not conclude the topic as to whether a motion is the proper way to approach the Court under Article 19. In re Meister, Lucius and Bruning Limited (1914) W.N. 390, Warrington, J. said that he had no doubt that where an Act of Parliament said that an application might be made to the court that application might be made by motion. In the common law courts before the passing of the Judicature Act the only mode by which the Court was approached otherwise than by the issue of a writ was by a motion. In the High Court of Chancery it was quite true that the summary mode of proceeding was usually by petition, but his lordship saw no reason, and he had spoken to all the judges of the Chancery Division except one whom he had not been able to see, and also to the Master of the Rolls, and they all agreed with him that in such a case as the present, where the act merely provided for an application and did not say in what form that application was to be made, as a matter of procedure it might be made in any way in which the court could be approached. There was no question about it that the Court could be, and frequently was, approached by originating motion.

O. 5 r. 5 of the 1962 Rules of the Supreme Court nullified that decision by providing that "Proceedings may be begun by petition or motion if, but only if, by these Rules or by or under any Act the proceedings in question are required or authorised to be so begun".

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If, as I think it does, O. 2 of the 1955 Rules (G.) means that motions are permissible in Guyana in those cases where motions were permitted at Common Law, then O. 5. r. 5 1962 (U.K.) does not affect the point. In Collymore and Abraham v. The Attorney General of Trinidad the applicants moved the Court by Motion to have the Industrial Stabilisation Act 1965 (T.) declared invalid. No objection to the procedure was taken.

I have come to the conclusion that under Article 19 an originating motion can be filed -

(a) where Parliament has enacted legislation which the applicant claims is ultra vires the Constitution;

(b) where the applicant desires one of the prerogative writs.

On the other hand an action is the proper way of obtaining an injunction if such a remedy is available. Where Parliament has violated no constitutional provision an individual, who claims that the Crown has deprived him of a fundamental right although the Crown is not acting under an invalid law, must proceed by way of a declaratory action. A declaration cannot be made on motion except where a specific law is attacked in order to have it struck down.

I should add that analogies drawn from the Constitution of India must be carefully examined not only because of Article 226 (I.) already referred to, but by virtue of the fact that rules of their Supreme Court have authorised the procedure

of bringing a petition to have all issues of fundamental rights settled.

In a conflict between the citizen and the Crown the Courts can do no more than decide the issues in the same way as an issue between citizen and citizen is decided, that is, according to the prevailing law.

I would dismiss the appeal. I would also have ordered each party to bear its own costs here and in the Court below, but in view of the judgment of Luckhoo, J.A., whose decision I have had the opportunity of reading, I agree that costs should be as proposed by him.

Dated this 6th day of June, 1968.

KENNETH S. STOBY
CHANCELLOR.

ADDENDUM:

The day after judgment was delivered in this appeal, counsel for the appellant submitted the case of Carlic v. The Queen and Minister of Manpower and Immigration (1968) 65 D.L.R. This was a case where an act of Parliament authorised the appropriate functionary to deport persons from Canada. Canadian citizens and persons domiciled in Canada for 5 years could not be deported. A deportation order was made against Carlic. He brought an action, not a motion, against the Queen and the Minister claiming an injunction restraining his deportation on the ground he was domiciled in Canada for 5 years.

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Sir Kenneth Stoby, Chancellor.

The Crown filed a Motion claiming that an injunction could not be granted against the Queen. The Court in refusing to strike out the action observed that if Carlic's contention was correct, then if an injunction was granted against the Queen and the Minister and the officer responsible for deportation, it was the Minister and the appropriate officer who would have to refrain from acting on the deportation order.

The appellant did not file an action for a declaration that compensation was payable under the Public Lands Acquisition Ordinance Cap. 179.

KENNETH S. STOBY
CHANCELLOR.

Judgment - 6th June, 1968, - Luckhoo, J.A.

LUCKHOO, J.A:

Under a Development Programme for Guyana the construction of a stretch of road for 47 miles to link Atkinson Field with the bauxite town of Mackenzie was approved by the Legislature. This operation involved the utilisation of lands of the deceased, William Arnold Jaundoo, as the commencement point for that road, and construction operations were due to commence on the 28th July, 1966.

The Government of Guyana, without admitting legal liability to pay compensation, was not averse to the principle of so doing and for this purpose a Committee

was appointed. The Permanent Secretary of the Ministry of Works and Hydraulics, on the 11th July, 1966, by letter informed the appellant's legal representative "that the Compensation Committee's assessment of compensation due to the estate of W.A. Jaundoo, deceased, will not be available before September 1966 (subject to ratification by the Cabinet before payment is effected)."

This the appellant did not find satisfactory. She was anxious, on advice received, to have the question of compensation dealt with before the property was used. She thought that compensation should be in the vicinity of $250,000, on the assumption that the road would pass through a sandpit and so deprive the estate of a valuable source of revenue; and wanted this question to be settled as well as that relating to the quantity of crops on the land at the time.

The Chief Engineer, Philip Anderson Allsopp, attached to the above Ministry did not know whether the proposed road would pass through that sandpit. He challenged the applicant's estimate of the value of the sandpit and quantity of crops on the land, and considered her demand irreconcilable with the fact that for estate duty purposes the entire estate was valued on 30th October, 1965, in the gross sum of $85,707.22, while the whole of the deceased's property through which the road was to pass was placed at $40,000.

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Judgment - 6th June, 1968. (Contd.).

Luckhoo, J.A. (Contd.).

Steps were being taken, he said, to the knowledge of the appellant, to compensate the estate on an ex gratia basis for any crops which on an examination may be found likely to be lost through the construction of the road.

But the appellant was firm in her desire to prevent any attempt to use the land as contemplated by the Ministry of Works and Hydraulics without the conclusion of satisfactory arragements with her as to the payment of compensation etc. When this prospect seemed unattainable, she sought the intervention of the Court to stop a likely contravention of her rights under the Constitution of Guyana, which came into force on the 26th May, 1966 (and which will be subsequently referred to as "the Constitution").

This was opposed on the grounds which will be stated later, and the irrelevant consideration was put forward that any delay would involve grave damage to the implementation of the entire road programme with resulting prejudice to the economic development of the Country and serious financial loss to the Government and its contractors.

When the matter came before the Court on 28th July, 1966 (the day on which operations were due to commence), Bollers, C.J., had before him an originating motion supported by affidavit, with notice to the Attorney General who opposed the motion, also supported by affidavit.

The attack on the motion consisted of the following objections, namely, that the procedure adopted in moving the Court was unknown to the law of Guyana and a nullity, that the

Court was without jurisdiction to entertain the motion or to grant any of the reliefs sought; and that there was no entitlement to any of those reliefs.

The reliefs sought in the motion were:

(1) That the Government of Guyana be restrained from commencing or continuing road-building operations either by themselves or by persons employed by them for that purpose on the property in question unless the payment of adequate compensation in the sum of $250,000 or such other sum as the Court may consider just, is paid to the appellant.

(2) That payment be made by the Government of Guyana to the appellant promptly of such compensation as may be assessed by the Court because of the acquisition of that land, and

(3) That an Order be made for a survey to be undertaken on behalf of the applicant and the Government of Guyana, jointly, of crops growing on the said property, with the right of the representatives of the applicant and the Government of Guyana to submit separate reports to the Court.

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Luckhoo, J.A. (Contd.).

The Solicitor General, for the Attorney General, without prejudice to any further points that may be raised by him, submitted that the application by way of notice of originating motion was in the circumstances not the correct procedure by which the applicant could approachethe Court for redress for breach of fundamental rights under Art. 19 of the Constitution of Guyana. He urged that it was clear that the application had been made under Art. 19 in respect of a breach of a fundamental right or rights, as is provided for in Art. 8 and that as a result thereof the Rules of the Supreme Court, 1955, of Guyana, were applicable, in which case those rules did not provide for an application, by way of originating motion, but laid down that the procedure should be by way of an action to be commenced by a writ of summons.

This submission found favour with the Court, and the application was dismissed.

In the course of replying to this successful presentation, Dr. Ramsahoye argued that if proceedings were commenced by writ of summons, no coercive order by way of an injunction or otherwise could be made against the Crown because the Queen cannot be coerced in her own Courts, and that all the applicant could get if an action was brought was a declaratory judgment against the Crown by way of the Dyson procedure. He further submitted that if any coercive relief was to be obtained against the Crown, it would have to be

obtained under Art. 19(2) of the Constitution. He stressed that it could never have been contemplated that a procedure by way of writ of summons for a declaratory judgment could protect fundamental rights, because in an action only a bare declaration could be made, and no order to assess or pay compensation could be made against the Crown. This argument even found its way in the appellant's affidavit supporting her motion when she swore:

> "I am advised by Counsel that no other law permits the grant of an injunction or other coercive order against the Crown and that I have no other means of redress than that whereby I may make application to this honourable Court pursuant to the provisions of Art. 19 of the Constitution of Guyana."

The learned Chief Justice, however, was only willing to pronounce upon the correctness of the procedure adopted and not upon the jurisdiction of the High Court to grant coercive relief against the Crown, and left that question severely alone when he said:

> "Without presuming to enquire into the submission of counsel for the appellant that on a writ no coercive order by way of an injunction or otherwise can be made against the Crown because the Queen cannot be coerced in her own Courts and that all the individual can obtain is a declaratory judgment against the Crown, I am of the view that the procedure adopted by way of notice of originating

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"motion must be justified by the Rules of the Supreme Court, and the applicant must show affirmatively that such proceedings are within his competence. This the applicant has failed to do, and I therefore cannot entertain the application."

In this appeal the Court was asked for an order directing that the land ought not to be taken unless compensation is assessed and paid to the appellant by the Government of Guyana in respect of the land sought to be acquired by them ..... together with all such orders and directions and the grant of such writs as will guarantee for the appellant the rights conferred by Art. 8 of the Constitution, for it was argued on behalf of the appellant (and equally contested by the Solicitor General in opposition) that there was jurisdiction for the learned Chief Justice to have made the restraining orders requested in the application and grant "coercive remedies against the Crown" under Article 19.

I therefore feel justified in considering not only the question whether the High Court erred in holding that an application could not be made by originating notice of motion for relief under Art. 19 but the further question whether an injunction or other coercive order could be made against the Crown under Art. 19 of the Constitution.

I will first deal with the procedural question before considering that of jurisdiction.

One normally resorts to the Rules of the Supreme Court, 1955, for guidance when any issue of procedure arises, in the High Court except, of course, there are other rules applicable, which is not so in this case. No argument raised convinces me to the contrary. In fact, I find it obligatory so to do, and so immediate resort must be had to that rule dealing with the commencement of proceedings, that is, Order 2. It is as follows:

> "Save and except where proceedings by way of petition or otherwise are prescribed or permitted by any Ordinance, by the common law of this Colony, by these rules, or by any rules of Court, any person who seeks to enforce any legal right against any other person or against any property shall do so by a proceeding to be called an action."

The learned Chief Justice, after analysing this rule, did not find justification under it for the procedure adopted, and so was left with the conclusion that the proceedings had to be by way of action, which under Order 3 r. 1 had to be "commenced by a writ of summons". He proceeded then to hold:

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(1) That the application by way of notice of originating motion was wholly misconceived, was neither prescribed nor permitted by any statute or rule of Court, or by the Rules of the Supreme Court, or at common law, and altogether unauthorised, and that the applicant was not entitled to apply by that means for the redress claimed.

(2) That an injunction will generally be granted only after a writ of summons has been issued, and where the substantial object of the plaintiff is to ~~entertain~~ obtain an injunction he should endorse his writ with a claim therefor. That it was only in cases where the Court would grant an interim order in the nature of an injunction that the application may be made on summons to a Judge in chambers or on motion - and, unless ex parte, would be made on notice and the notice must be intituled 'in that action'. (Referring to Halsbury's Laws of England, 3rd Ed., Vol. 21, at pages 410-414).

What must now be determined is: Are these conclusions sound and maintainable when reliefs under Art. 19, including the substantive remedy of injunction, are sought by originating motion for the alleged breach of a fundamental right in the deprivation of property?

This right is protected amongst a number of constitutional rights guaranteed in the Constitution in the protection of fundamental rights and freedoms of the individual within Articles 4 to 17. At Art. 8 it is proclaimed as follows:

"(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except by or under the authority of a written law and where provision applying to that acquisition or taking of possession is made by a written law -

(a) requiring the prompt payment of adequate compensation; and

(b) giving to any person claiming such compensation a right of access, either directly or by way of appeal, for the determination of his interest in or right over the property and the amount of compensation, to the High Court."

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When there is a failure to comply with this article, and others of the like, be it on the part of Government or otherwise, that contravention creates a legal right to apply for a legal remedy to protect, safeguard, and enforce, what must be sacred to the subject and ought to be within the competence of the Constitution to guarantee.

Within the confines of Art. 19 lies the responsibility for this most exacting task. It confers on the High Court original jurisdiction " to hear and to determine any application made by any person" who alleges a contravention or likely contravention thereof, and gives power to the Court to make "such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement" of this right.

Parliament, although bequeathed that power by the Constitution, has yet to make provision with respect to the practice and procedure pertaining to the enforcement of the protective provisions of Art. 19; neither have rules of Court been made with that end in view. If I may take the liberty and opportunity of commenting, it would seem that the task of fulfilling in some measure this obligation should not be left unattended for too long.

Now for an examination of Order 2 (G) on the procedural aspect. If that Order is to be authority for the procedure adopted by way of originating motion, then such a procedure must be "prescribed or permitted"

by the common law of this Country. When this Order came into force, the common law of this country (subject to specific reservations) was the common law of England and was so since 1917 when section 3 (b) of the Civil Law Ordinance, Cap. 2, provided that:

> "The common law of the Colony shall be the common law of England as at the date aforesaid including therewith the doctrines of equity as then administered or at any time hereafter administered by Courts of Justice in England, and the Supreme Court shall administer the doctrines of equity in the same manner as the High Court of Justice in England administers them at the date aforesaid or at any time hereafter."

No doubt it was this importation of such a substantial portion of the English commonlaw as part of our laws which inspired the recognition and acceptance of proceedings prescribed by the commonlaw, for certain remedies, or permitted to be used, as a way of procedure. Two distinct concepts here emerge, viz. the sanction of procedure which is fixed or laid down by the commonlaw because of the subject-matter of the proceedings and the other, when the subject-matter is immaterial; but the authority for use arises from the nature of the proceedings and the circumstances in which it is taken.

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William Tidd in his admirable book on the Practice of Courts of King's Bench and Common Pleas, Vol. 1 (1828) refers to that elegant writer on the Law and Constitution of England, Wynne, who in his Eunon. Dial., Vol. 2, Art. 26, recorded in the distant past, said even of those days,

> "The application to a Court is called a motion, and the Order made by a Court on any motion when drawn into form by any officer is called a rule."

Motions were not necessarily connected with any suit. There were motions such as to set aside an annuity, to deliver up securities to be cancelled, to strike an attorney off the roll for misconduct, etc. The object of a motion was to seek for a rule or order which was either granted or refused, and, if granted, was either made a rule absolute in the first instance or only to show cause or, as it is commonly called, a rule nisi, that is, unless cause be shown to the contrary which is afterwards on a subsequent motion, it is either made absolute or discharged.

The commonlaw prescribed that motions should be used when seeking rules for the grant of prerogative writs, as it also permitted motions to be used in making applications under statutes where there is no set procedure.

A case which prominently illustrates how the common-law sanctioned the employment of motions in certain circumstances, is that of Re Meister, Lucius and Bruning, Ltd., (1914) 31 T.L.R. 28. There, section 3 of the Trading with the Enemy Act, 1914, provided "that the Board of Trade may apply to the High Court for the appointment of a controller of the firm or company and the High Court shall have power to appoint such a controller etc."

The first question which arose was how and in what manner the application ought to be made. The application was at first made by petition, but, on the question being raised, Warrington, J., said:

> "The present application is made by petition as it had been suggested to the Board of Trade that in as much as the application is made to the Chancery Division and in as much as according to the old practice of the High Court all Chancery summary applications not in suit were usually, if not universally, made by petition ex abundante cautela, it would be safer to proceed by petition. But it is obvious that there are many cases which may arise in which the procedure by petition, which is somewhat cumbersome and which involves some considerable

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"delay would be an inappropriate and inconvenient mode of proceeding and accordingly I have been asked to say what, in my opinion, is the procedure which may be adopted under the provisions of this Act if the Board of Trade should in any particular case be advised not to proceed by petition. I have no doubt myself that where an Act of Parliament says that an application may be made to the Court, that application may be made by motion. In the commonlaw Courts, before the passing of the Judicature Act, the only mode by which the Court was approached otherwise than by the issue of a writ was by a motion. In the High Court of Chancery it is quite true that the summary mode of proceeding was usually by petition, but I see no reason - and I have spoken to all my brothers in this division except one, I think, whom I have not been able to see, and also to the Master of the Rolls - and they all agree with me that in such a case as the present where the Act merely provides for an application and does not say in what form that application is to be made, as a matter of procedure it may be made in any way in which the Court can be approached. Now there is no question about it that

"the Court can be and frequently is approached by originating motion."

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I am satisfied that what has been said by Warrington, J., constitutes well-established practice at commonlaw where the use of motions was sanctioned because it was a desirable form of procedure, which provided a convenient and expeditious way of approaching the Court where such applications were required to be made.

The Meister case was approved in Pierre v. Mbanefo et al, (1965) W.I.R. Vol. 7, Part II, p. 433. The appellant in that case caused an originating summons to be issued in respect of some alleged contravention of rights which he claimed to have under the Constitution of Trinidad and Tobago. A Judge in Chambers dismissed it on the ground that he was not entitled to proceed by way of originating summons for the redress claimed. This decision was upheld by the Trinidad Court of Appeal. The value of the decision here lies not so much in the condemnation of the procedure adopted, but in the affirmation that the application should have been made by way of originating motion.

Section 6 (1) and (2) of the Trinidad and Tobago Constitution corresponds very closely and in some respects is identical to our Art. 19 (1)(a) and (b) dealing with the enforcement of protective provisions. The

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right to apply to the High Court in its original jurisdiction for redress is granted in equal terms, with nothing to indicate the way of approach to the Court. Wooding, C.J., at page 436 said:

> "In this case the appellant made it abundantly clear both in his originating summons and in his submission before us that he is claiming redress under section 6 (1) of the Constitution ..... So far as material, it reads as follows:
>
> > ".....That if any person alleges that any of the provisions of the foregoing section ..... of this Constitution has been, is being, or is likely to be contravened in relation to him then .... that person may apply to the High Court for redress."

It will, however, be observed that the subsection does not prescribe the means by which a claimant for redress should apply, it simply says that he may apply to the High Court. How then was it contemplated that the application should be made? A like question arose in Re Meister, Lucius, & Bruning, Ltd., in which the Board of Trade applied by petition to the High Court in England for the appointment of a

"controller of a company in circumstances predicated by section 3 of the Trading with the Enemy Act, 1914. That section was no more speaking than ours on the mode of applying which it had in mind."

After referring to the passage already quoted from Warrington, J.'s judgment, on his general observations on the practice to be adopted, the learned Chief Justice proceeded:

"It will be observed that Warrington, J., did not refer in any manner expressly to the procedure by way of originating summons, and that he intimated that the application might be made in any way in which the Court may be approached. Accordingly although Re Meister is authority for what is now the usual procedure by way of originating motion..... it does not necessarily rule out as incompetent or impermissible the procedure by way or originating summons, but, as we said earlier, the express sanction of a statute or a rule of Court is essential if proceedings are commenced in the High Court by summons."

Bollers, C.J., in not following that case thought that the attention of the learned Judges there was never drawn to the new English Order 5. He said further:

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"We here are not aware of the Rules of the Supreme Court, Trinidad. The result of this case may therefore be misleading, and I disregard it."

The Judges of the Trinidad Court of Appeal did have the new English Order 5 before them, as the report itself shows, but, in any event, whether they did or did not, those rules had nothing to do with the established principle which was being affirmed, as the practice of commonlaw in utilising motions for movement to the Courts. Rules of Court are not static; they are always being subjected to the buffets of change. Although Order 5 r. 5 in 1962 may have changed the scope of the use of motions in England previously obtaining, it certainly cannot nor did affect or change the rule of practice at commonlaw. Well-established rules at commonlaw are of an enduring character; and, their permanency is not easily dislodged. The English commonlaw practice of originating motion was found to be pertinent for use in Trinidad in the context of their Constitution as, indeed, it appears to me, to be most appropriate, in this Country, for ours. Rules of Court may supersede the commonlaw, but they cannot and do not pretend to alter the substance of what the commonlaw settles, at practice or otherwise.

When Bollers, C.J., held that originating motion did not fall within any of the excepted categories of Order 2, he concluded that the mode of procedure under that Order was by action to be

commenced by writ of summons. With the greatest respect, I cannot comprehend how the true purpose of making applications under Art. 19 could be served by commencing such proceedings by writ of summons.

That article was in effect establishing a new jurisdiction in a different sphere of legal movement; its set purpose will never be appreciated until the limitation appearing in the proviso to Art. 19 (2) sets in relief and under-scores its dominant features.

It provides:

> "That the High Court shall not exercise its powers under this paragraph, if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."

It would then appear that manifest requisites within the framework of this special original jurisdiction, would be, easy and ready access to the Courts; swift, adequate and imperative remedies to applicants deserving of such grants; due observance of the necessity to avoid delays where urgency is written over the face of the application; and an unremitting zeal to preserve the letter and spirit of what was intended to be protected.

An action appears to me to be the very antithesis of the procedure here contemplated.

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It would be ill-tuned to serve the real needs of Art. 19, if it is not incongruous, cumbersone and inconvenient.

If and when a Court is satisfied that adequate means of redress are available under any other law, it will decline to use its powers when summarily approached, and leave the applicant to seek his remedy in the ordinary way. Until then, it would be a strange and repellent doctrine to say that approaches to the Court under that Article should be by action in the normal way.

I have already referred to section 6 of the Constitution of Trinidad & Tobago (similar to Art. 19). In an application under that section Learie Collymore and John Abraham applied for redress under provisions of that Constitution which guarantee certain freedoms. The Attorney General was named as respondent. The applicants sought a declaration from the High Court of Trinidad that the Industrial Stabilisation Act, 1965, was ultra vires the Constitution and therefore null and void and of no effect. They did so under the facility of section 6.

Sir Hugh Wooding, C.J., in the course of his judgment in the Court of Appeal said that the applicants were entitled to proceed under that section for the declaration which was sought, and held that the Supreme Court as the guardian of the Constitution was not only competent, but under a right and duty to make binding declarations, if and whenever warranted, that an Act of Parliament was ultra vires and therefore void, because it infringed rights

and freedoms recognised and declared under the Constitution.

What was very significant in that case was that the application was made by moving the Court for that declaration.

I am in no doubt that if a declaration was desired in the instant case the Court could similarly have been been moved under the facility of Art. 19 of the Constitution, subject to the enforcement of the limitation under Art. 19 (2) if warranted under the circumstances.

It has been said that Judges have a power necessarily inherent in all Courts to make rules for the regulation of their practice, and that the adoption of analogous practices or even the resort to moulding forms of procedures may be justified. But it is not necessary to consider these aspects in view of the opinion I have expressed that a form and method of procedure not only existed at commonlaw; but was preserved and remained in force; and was called into service by Order 2 of our rules; and was so used in this case.

To say that a claim for an injunction will generally be granted only after a writ of summons has been issued, as the learned Chief Justice did after reference to Halsbury's, Vol. 21, pp. 410-414, is to state what is indisputable under ordinary law; but which is

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infeasible under Art. 19 of the Constitution (subject to the proviso).

The essential stamp of that original jurisdiction predicates an application for an action; a motion for a writ; and ready redress for fundamental rights, unavailable at "other law", according to actually known remedies, or those added by Parliament.

Injunctions, as remedies, serve this jurisdiction equally well in the manner contemplated by Art. 19 of the Constitution as it does at ordinary law through the process of action commenced by writ. That article would certainly lose its momentum and vitality if it were to be geared to the slower machinery of "other law" unless time is not of the essence of the procedure.

If one were to test this matter in another way, the same result would ensue. It cannot be questioned that the prerogative writs are available as remedies under Art. 19. They are indeed extraordinary and extensive in their scope and efficacy. But no one will think of making an application for one of these writs by action because in their nature and concept historically they arose in a different way. The commonlaw regarded the Sovereign as the source or fountain of justice and the remedial processes of these prerogative writs were from the earliest times issued from the Court of Queen's Bench only upon cause shown, as distinct from the original or judicial writs which commenced suits

between party and party and which issued as of course. If any of these prerogative writs be required, whether in defence of the freedom of the subject or to compel some person to do some act in justification of the applicant's rights, the Court would have to be moved in the accepted way known to law. It would be unthinkable to harness such requests to an action.

I am fully satisfied that the learned Chief Justice was in error in dismissing the application because it was commenced by originating motion. The procedure was correctly conceived; was permitted by our rule of Court as a way of practice at commonlaw, and was wholly authorised.

If that was the only question for decision, then the motion must be remitted for hearing on its merits, but the High Court's jurisdiction to grant coercive remedies, unanswered as it is, must now receive scrutiny.

In considering this aspect, I will not forget that the Court is the custodian and guardian of the Constitution, seeking as it must at all times to prevent encroachment on or violation of the liege's rights, to the depths of its power, be it against Government, or Legislature.

It was the argument of the Solicitor General that, as against the Government, the appellant could only proceed by action for a declaratory judgment which would be acknowledged and respected. He further

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contended that as the Roads Ordinance under which the land was to be used had not provided for compensation (and was saved by Art. 18), only an ex gratia payment could be expected.

Before considering the question of the jurisdiction to grant the remedies asked for, I hope I may be pardoned for attempting to look briefly at what is open to a subject who alleges that he is aggrieved, as in the circumstances of this case, and wishes to stand on his rights.

Under section 46 (2) of the Supreme Court Ordinance, Chapter 7,

> "All claims against the Government of the Colony which are of the same nature as claims which may be preferred against the Crown in England by petition, manifestation, or plea of right, may, with the consent of the Governor, be brought in the Court, in a suit instituted by the claimant as plaintiff against the Attorney General as defendant, or any other officer authorised by law, or from time to time designated for that purpose by the Governor."

Under section 47 (1) the fiat of the Governor is required before the claim "shall be prosecuted in the Court".

It must be borne in mind that a petition of right, unlike a petition addressed to the grace and favour of the Sovereign, is founded on the violation of some right in respect of which, but for the immunity of all process with which the law surrounds the person of the Sovereign, a suit at law or equity could be maintained. It follows that a petition of right which complains of a tortious act done by the Crown or by a public servant by the authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress. But the subject may not be without remedy when illegal acts are committed by a Minister or officer of the Crown who may be responsible in law for their tortious acts done to a fellow subject. (See Feather v. The Queen, (1865) 6 B. & S. at page 296).

The subject, then, under the ordinary law faces two problems: (1) He must obtain a fiat in those matters under section 46 (2) of Chapter 7; (2) He cannot sue in tort. The first is of no real practical significance. The fiat is to ensure that the Crown is not harrassed by a frivolous claim, and will be granted as a matter of invariable grace by the Crown whenever there is a shadow of claim. The latter, in prohibiting any advance to the Courts where tortious acts are under complaint, may create a serious hardship on the subject. This unsatisfactory situation was remedied in England by the Crown Proceedings Act, 1947,

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which in effect assimilated proceedings against the Crown to ordinary litigation between citizens. In the trend of today's enlightenment it may not be amiss for me to say that perhaps the time is more than ripe for a similar legislation to be introduced in this Country so that the subject may not feel the disadvantages of his legal position (particularly in the field of tort) against the Crown which have really been allowed to survive for much too long.

The principle of the immunity of the Crown from proceedings in tort has been described as a "startling principle unique among civilised people". (See Allen's Law and Order, p. 256). In England after a Committee set up by the Lord Chancellor had reported in 1927 that the Crown should be made "liable for any wrongful act done, or any neglect or default committed, by an officer of the Crown in the same manner and to the same extent as that in and to which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed, by his agent", it was the pointed denunciation which came from the Courts which led nearly twenty years afterwards to the Crown Proceedings Act in 1947. Many years ago an abortive attempt was made in this Country to introduce this measure. Perhaps Parliament may now be more receptive.

However, where constitutional rights are infringed by tortious acts remedies would exist under Art. 19 as the Constitution

recognises contraventions, however occurring, subject only to limitations accepted by the Constitution itself.

When one looks at Art. 8 (1), it is forbidden to compulsorily take property except all of the following conditions are fulfilled:

(1) The taking is authorised under a written law.

(2) That law provides for the prompt payment of adequate compensation.

(3) And also provides for a right of access to the High Court for determination of the owner's interest in the land and the amount of compensation which should be paid.

The Roads Ordinance makes no provision for (2) and (3) and so the right to take or use the land has not been fully met by the requirements of that Article; but that Ordinance, argues the Solicitor General, is saved by Art. 18 (1) of the Constitution and nothing contained in or done under the authority of that law shall be held to be inconsistent with or in contravention of any provision of Articles 4 to 15, inclusive.

I would only wish to comment that it does not follow that because the Roads Ordinance makes no provision for compensation, that this means that no compensation is payable (this apart from any constitutional issue).

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That classic and much quoted passage in the speech of Lord Warrington and Clyffe in Colonial Sugar Refining Co., Ltd. v. Melbourne Harbour Trust Commissioners, (1927) A.C. 343, 359, draws attention to

> "the well-known principle that a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms."

A clear intention that there is no liability to pay compensation does not appear in that Ordinance. In the negative state of that Ordinance an inference ought not to be drawn to frustrate fundamental rights which are guaranteed by the Constitution.

If the appellant's constitutional rights then have been contravened, what are her remedies?

Injunction apart, the prerogative writs loom readily afore where ordinary legal remedies are inapplicable or inadequate. Mandamus, as the writ of the most extensive remedial nature, requiring a person to do something which appertains to his office, in the nature of a public duty, would naturally command most attention. It will issue to the end that justice may be done, in cases where there is a specific legal right, and no specific legal remedy for endorcing that right.

It aims at producing a convenient, benficial and effectual mode of redress. It may even issue to Government officials in their capacity as public officers exercising executive duties which affect the rights of private persons. This order, then, must be counted of great value in the service of Constitutional remedies. Together with the restraining order of an injunction - if they legally fit into the facts and circumstances - there could be no better means of protecting and enforcing the constitutional rights of the subject, but the key-note will be: Who is to be restrained? Who is to be commanded to do what is required to provide the remedy? These are anxious and vital questions to be answered when making the application.

If a Court could be persuaded that a public officer is sufficiently required to discharge a duty in law to the applicant under circumstances in which this writ will issue, there can be little doubt as to its efficacy and desirability.

Two recent cases will illustrate the lengths to which mandamus could be taken, and its potential as a remedy. In Padfield & Others v. Minister of Fisheries & Food and Others, (Times, 15th February, 1968):.

> "To get the Minister to take action under the Agricultural Marketing Act, 1958, the appellants approached him and met Ministry Officials on April 30,1964.

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"The outcome was unsatisfactory to them, and on January 4, 1965, their solicitors made a formal complaint to the Minister and asked that it be referred to the committee of investigation, the nature of the complaint being that the Board's acts and omissions were (a) contrary to the proper and reasonable interests of the South Eastern and other producers near large liquid markets, and (b) were not in the public interest.

To that the Minister's private secretary replied by letters in March and May, 1965, stating inter alia, that in the Minister's view the complaint was unsuitable for investigation because it raised wide issues going beyond the immediate concern of the appellants; that the issue was of a kind which should be resolved through arrangements available to producers and the Board within the scheme; that under the Act the Minister had unfettered discretion to decide whether or not to refer a particular complaint to the committee of investigation, and that in reaching his decision he had in mind the normal democratic machinery of the scheme in which all registered producers participated and which governed the Board's operations."

"The appellants thereupon applied for an order of mandamus commanding the Minister to refer the complaint to the committee for investigation.

"At issue were the nature and extent of the Minister's duty under section 19 (3) (b) in deciding whether to refer to the committee a complaint as to the operation of any scheme made by persons adversely affected by it.

"It was implicit in the argument for the Minister that there were only two possible interpretations to the statutory provision: either he must refer every complaint or he had an unfettered discretion to refuse to refer to any case. His Lordship did not think that was right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, which had to be determined by construing the Act as a whole; and construction was always a matter of law for the Court."

xx xx xx xx

"Then it was said that the Minister owed no duty to producers in any particular region, and reference was made to the 'status of the milk marketing scheme as an instrument for the self-government of the industry' and to the Minister 'assuming an inappropriate degree of responsibility'. But the Act

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"imposed on the Minister a responsibility whenever there was a relevant and substantial complaint that the Board were acting against the public interest.

"His Lordship could find nothing in the Act to limit that responsibility or justify the statement that the Minister owed no duty to producers in a particular region. If the Board acted contrary to what both the Committee and the Minister held to be the public interest, the Minister had a duty to act, and a complaint that the Board had so acted imposed a duty on him to have it investigated.

"As to the reason that if the committee upheld the complaint the Minister would be expected to make a statutory order to give effect to the committee's recommendations, if that meant that the Minister could refuse to refer a complaint because if he did so he might find himself in an embarrassing situation, that would plainly be a bad reason.

"It was argued that the Minister was not bound to give any reasons for refusing to refer a complaint to the committee, in which case his decision could not be questioned, and that it would be unfortunate if giving reasons put him in a worse position. His Lordship did not agree that a decision could not be questioned if no reasons were given. If it was the Minister's duty not to act so as to frustrate the policy and objects of the Act, and it appeared that that had been the effect of the refusal, the Court

"must be entitled to act."

The House of Lords by a majority held that an order of mandamus should issue to the Minister of Agriculture requiring him to consider a complaint by the minority of milk producers against the working of the Milk Marketing Board Scheme and to refer the complaint to the committee of investigation, in exercise of the discretion conferred on him by section 19 of the Agricultural Marketing Act, 1958.

In R. v. Metropolitan Police Commissioner Ex Parte Blackburn, (1968) 1 A.E.R. 763, a mandamus was sought against the Commissioner of Police to reverse a policy decision given in confidential instruction. It was held that the present instance was one in which the Court would have interfered in appropriate proceedings, but for the fact that the applicant had obtained, by reason of the undertaking given to the Court, the substance of the relief that he sought, that is, that the confidential instruction would be revoked.

It was the duty of the Commissioner to enforce the law. The Court would interfere in respect of a policy decision amounting to a failure of duty to enforce the law of the land.

Davies, L.J. at page 777 said:

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"In particular, it would follow that the Commissioner would be under no duty (if he followed his confidential instruction) to prosecute no one for breaches of the Gaming Acts, no matter how flagrantly or persistently they were defied. Can that be right? Is our much vaunted legal system in truth so anaemic that, in the last resort, it would be powerless against those who, having been appointed to enforce it, merely cocked a snook at it?"

But, it is not alleged in this motion that the Attorney General was under any statutory duty to discharge any particular obligation. He was brought into the picture for no other reason than that as Attorney General he was the most suitable officer to represent the Government. Now coercive orders are desired against a person wholly innocent of the facts presented, which, if made, could lead to attachment, if disobeyed.

Does the Court then have jurisdiction to do so?

Mr. Haynes repeated the argument of Dr. Ramsahoye before the learned Chief Justice - that the coercive remedies sought must be available against the State, otherwise fundamental rights would be valueless. He submitted that Art. 19 gave special relief and provided a special remedy. That special remedy be required

here was to prevent the Crown from oppressing the subject by using his land without payment of prompt or agreed compensation.

The commonlaw, in the development of the prerogative writ of mandamus, never went as far as to say that it could be invoked against the Crown. As no Court can compel the Sovereign to perform any duty, no order of mandamus would be to the Crown. Lord Denman said in R. v. Powell, (1841) 1 Q.B. 352 at page 361:

> "That there can be no mandamus to the Sovereign, there can be no doubt, both because there would be in incongruity in the Queen commanding herself to do an act and also because disobedience to the writ of mandamus is to be enforced by attachment."

(See also R. v. Treasury Lords Commissioners (1872) L.R. 7 Q.B. at page 394 - per Cockburn, C.J.).

For like reasons also, an injunction cannot be granted against the Crown.

In Raleigh v. Goschen, (1897) 1 Ch. 973:

> "The plaintiffs commenced an action against the Lords of the Admiralty with the object of establishing as against them that they were not entitled to enter upon, or acquire by way of compulsory

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"purchase, certain land, the property of the plaintiffs, for the purpose of erecting thereon a training college for naval cadets, and claiming damages for alleged trespass and an injunction to restrain further trespass:

Held, that although the plaintiffs could sue any of the defendants individually for trespass committed or tnreatened by them, they could not sue them as an official body, and that as the action was a claim against the defendants in their official capacity, it was misconceived and would not lie; leave to amend by suing the defendants in their individual capacity, and by adding as defendants the persons who had actually trespassed on the land, was also refused, and the action was dismissed with costs."

It should be observed that in the pleadings in that case the defenants were treated as an official body - that is to say, as a body representing the Crown or Government, or as responsible for the acts of all officials or persons acting or purporting to act on behalf of the Crown, or of the Government, or of the Admiralty.

In England even under the Crown Proceedings Act, 1947, which did so much to extend the dommonlaw rights of the subject

against the Crown, an injunction is not permitted to be issued against the Crown.

Neither commonlaw nor statute law sanctions the grant of the remedies of mandamus or injunction against the Crown. Does that power then lie under Art. 19?

Orders, writs and directions there referred to could only be, and mean, what is recognised, accepted and practised and enforced by the law as we know it. In these separate categories of orders, writs and directions, the sanction of the law must prevail. There is no arbitrary right to distribute remedies according to any judicial whim or fancy without regard for the vital question, as to whether those remedies are known to law.

It is perhaps consoling, however, to reflect that the reservoir of judicial power under Art. 19 is not at its maximum level. What is there available may well be insufficient to truly dispense justice and fully meet the needs and requirements of the Constitution if its high ideals are to be preserved. This, nevertheless, does not create a licence for the assumption of power neither given to, nor possessed, by the Courts.

The Constitution itself acknowledges that there may be a deficiency in the supply of existing judicial power

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which ought to be augmented or supplemented to meet the exigencies of situations.

Under Art. 19 (5) it is provided that -

> "Parliament may confer upon the High Court such powers in addition to those conferred by this article as may appear to Parliament to be necessary or desirable for the purpose of enabling the High Court more effectively to exercise the jurisdiction conferred upon it by this article."

Any such additional powers may in time give to the Courts power to devise, fashion or invent writs in the nature of prerogative writs or to issue processes against the Government etc., or to enlarge the scope of existing remedies. The greater the judicial power the more effective will be the safeguard of constitutional rights, but until Parliament in its wisdom chooses so to do, rights may be there but remedies may be wanting.

Although a Court may declare or assess damages against the Government under the law as it now stands, the element of coercive force is lacking. The State in effect is the judge in its own cause and cannot exercise constraint against itself.

The Attorney General cannot be restrained or compelled to act in terms of the remedies sought.

The ingenuity of approach in other ways may achieve similar results, but that will be for Counsel to explore.

When applications are made, great care ought to be taken to ensure that what is asked for is within the competence of the Court to grant.

The Constitution does not authorise the use of writs, orders or directions unknown to law, or, if known, to be used in a manner unauthorised by law.

I must therefore hold that there is no jurisdiction in the High Court to grant the remedy of injunction or other coercive remedy against the Government through the Attorney General, which was clearly what was asked for, and which Counsel at first instance and on appeal said he wanted.

In the result: I would dismiss the appeal for want of jurisdiction on the motion for the High Court to grant the remedy of injunction or other coercive remedy against the Government of Guyana. I hold, nonetheless, that the application was properly brought by way of originating motion and that the learned Chief Justice was in error in ruling that this procedure was wrong.

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The appellant will be entitled to half of her costs in the Court below certified fit for Counsel, and each party will bear its own costs in this Court.

EDWARD V. LUCKHOO,
Justice of Appeal.

Dated this 6th day of June, 1968.

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Cummings, J.A.

CUMMINGS, J.A.

This is an appeal from a judgment of the Chief Justice of the High Court dismissing an application by way of originating motion to that Court for the following orders, that:

(1) The Government of Guyana be restrained from commencing or continuing road building operations either by themselves or by persons employed by them for that purpose on a piece of land, part of the northern portion of Plantation Soesdyke, Demerara,River, the property of the applicant (appellant) unless and until adequate compensation in the sum of $250,000.00 (two hundred and fifty thousand dollars) or such other sum as the Court may consider just is paid to the applicant in respect of the compulsory acquisition by the

Government of Guyana of part of the said property.

(2) A survey be undertaken on behalf of the applicant and the Government of Guyana jointly of crops growing on the said property and being part of the assets of the estate of the said WILLIAM ARNOLD JAUNDOO, deceased, with the right of the representatives of the applicant and the Government of Guyana to submit separate reports to the Court.

(3) Payment be made by the Government of Guyana to the applicant promptly of such compensation as may be assessed by the Court in respect of the compulsory acquisition of the said land.

(4) Such further or other orders and/or directions as the Court may make or give to enable the applicant to be promptly paid adequate compensation in respect of that part of the aforesaid property being compulsorily acquired by the Government of Guyana and before any evidence of crops or other assets on the said property is destroyed by road building operations.

(5) The Government of Guyana do pay to the applicant her costs of this motion.

The motion is intituled as follows:-

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"IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

(CIVIL JURISDICTION)

In the matter of an application by Olive Casey Jaundoo, in her capacity as Executrix of the Estate of William Arnold Jaundoo, deceased, Probate whereof was granted by the High Court on the 17th day of November, 1965, and numbered 613,

-and-

In the matter of Articles 8 and 19 of the Constitution of Guyana,

-and-

In the matter of the Rules of Court, 1955. "

In her affidavit filed in support of the motion the appellant (applicant) set out facts which she claimed amount to violations of her fundamental rights by the Government of Guyana and/or its servants and/or agents. She further swore that she had been advised and verily believed that she had no means of redress other than to invoke the powers of the High Court in pursuance of Article 19 of The Constitution of Guyana.

Affidavits in answer and in reply to the answer were filed and served upon the appellant (applicant) and respondent (respondent), respectively, between the 21st and 27th July, 1966, and the matter came on for hearing on the 28th July, 1966.

At the hearing the respondent objected in limine that the proceedings were misconceived and should have been by writ of summons in accordance with Order 3 rule 1 of the Rules of the Supreme Court, 1955, which were adapted to the High Court by virtue of the provisions of The Guyana Independence (Adaptation and Modification of Laws) (Judicature) Order, 1966.

The learned Chief Justice in the course of his judgment upholding the objection said:

"Without presuming to enquire into the submission of Counsel for the applicant that on a writ no coercive order by way of an injunction or otherwise can be made against the Crown because the Queen cannot be coerced in her own Courts and all that the individual can obtain is a declaratory judgment against the Crown, I am of the view that the procedure adopted by way of notice of originating motion must be justified by the Rules of the Supreme Court and the applicant must show affirmatively that such proceedings are within his competence. This the applicant has failed to do and I therefore cannot entertain the application. I have reached the conclusion that the application by

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"way of notice of originating motion is wholly misconceived and is neither prescribed nor permitted by any statute or rule of Court or by the Rules of the Supreme Court or at common law and altogether unauthorised, and that the applicant is not entitled to apply to this Court by that means for the redress claimed and accordingly the motion must be dismissed with costs to the respondents fit for counsel."

The appellant appeals on numerous grounds but these can all be conveniently summarised into two questions for answer by this Court:

(i) Does Article 19 of the Constitution of Guyana - hereinafter in this judgment referred to as "The Constitution" - confer a new jurisdiction in the High Court with respect to the enforcement of fundamental rights?

(ii) If so, what procedure did the Legislature contemplate for the invocation of the exercise of this new jurisdiction by the High Court?

It should be observed at the outset that all that this Court is now called upon to consider are those two questions. Nothing else was argued before the learned trial Judge and no other point now arises for the consideration of this Court.

Counsel for the appellant submitted that -

(a) Article 19 confers a new jurisdiction on the High Court for the enforcement of fundamental rights and expressly provides for this purpose a special procedure for the invocation of the Court's exercise of this jurisdiction. The complaining citizen must "apply" to the Court. Not only does that language permit of procedure by motion, but it effected that it was imperative to do so in the circumstances, as the proper mode of application to the Court where no statute or rule lays down the procedure is by way of motion.

(b) The entire context of Article 19 imports that procedure should not be by way of writ of summons, at any rate where the party violating or threatening the violation is the Government.

(c) The Rules of Court, 1955, were not applicable, but even if they were Order II not only permitted application by way of motion but rendered adoption of this procedure imperative.

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The Solicitor General, on behalf of the respondent, contends:

(a) From time to time the Legislature creates new rights and new legislation but enforcement of these always fails to be exercised by the Court within its normal jurisdiction and within its normal practice and procedure.

Order 2 of The Rules of the Supreme Court, 1955, provides:

"COMMENCEMENT OF PROCEEDINGS.

Save and except where proceedings by way of petition or otherwise are prescribed or permitted by any Ordinance, by the Common Law of this Colony, by these Rules or by any Rules of Court, any person who seeks to enforce any legal right against any property shall do so by a proceeding to be called an action."

Order 3 rule 1 provides:

"Every action shall be commenced by a writ of summons, to be issued out of the Registry, which shall be indorsed with a statement of the nature of the claim made or of the relief or remedy required in the action."

Consequently, these proceedings should have been commenced by writ of summons.

(b) The reference in Order 2 to "The Common Law of the Colony" is not an implied reference to the Common Law of England but rather to the original Common Law of British Guiana, that is the Roman-Dutch Law which was in force in this country when this provision was first introduced in identical terms by Order II of the Rules of Court, 1910, which amended the Rules of Court 1900; and consequently the rule-making body ipso facto intended a reference to that law. So that, in the alternative, if proceedings were not to be commenced by writ of summons recourse should be had to some form of Roman-Dutch procedure.

(c) If the Rules of the Supreme Court, 1955, are inapplicable, then the matter is not at large; the Court must refer to the basic law governing the Supreme Court and its practice and procedure as set out in section 44 (1)(a) of the Supreme Court Ordinance, Cap. 7, which provides that "where no provision is made by this Ordinance, by Rules of Court or by any other statute, the existing practice and procedure shall remain in force." This section was in the original Ordinance of 12th March, 1915, and was consequently expressly saved

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by section 3 of The Civil Law Ordinance, Cap. 2, which provided as follows:

"From and after the date aforesaid save as provided by any Act of the Imperial Parliament now or hereafter applying to the Colony, or by any order of Her Majesty in Council, or by this Ordinance, or by any other Ordinance of the Legislative Council now or at any time hereafter in force, or by any order of the Governor in Council made in pursuance of any statute, or of any other lawful authority.

(A) The law of the Colony ..... shall cease to be Roman-Dutch law, and as regards all matters arising and all rights acquired or accruing after the date aforesaid, the Roman-Dutch law shall cease to apply to the Colony."

Hence the procedure to be adopted with respect to this application should be Roman-Dutch.

The answers to the question - mentioned and referred to earlier herein - raised for the consideration of the Court in this appeal must depend upon the construction to be put upon the provisions of The Constitution dealing with the Fundamental Rights.

The general rules adopted for construing a written Constitution embodied in a statute are the same as for construing any other statute or other written document - per Griffith, C.J., in

Tasmania v. Commonwealth, (1904) 1 C.L.R. 329 at pp. 338, 339.

In Salkeld v. Johnson, (1848) 2 Ex. 256, a case sent by the Lord Chancellor to the Judges of the Court of Exchequer for their opinion, Chief Barron Pollock, delivering the opinion of the Court (Barrons Parke, Anderson and Platt concurring) said at page 272:

> "This question depends upon the construction of this Act, which unfortunately has been so penned as to give rise to a remarkable difference of opinion among the judges..... We propose to construe the Act, according to the legal rules for the interpretation of statutes, principally by the words of the statute itself, which we are to read in their ordinary sense, and only to modify or alter so far as it may be necessary to avoid some manifest absurdity or incongruity, but no further. It is proper also to consider (1) the state of the law which it proposes or purports to alter; (2) the mischief which existed, and which it was intended to remedy; and (3) the nature of the remedy provided, and then to look at the statutes in pari materia as a means of explaining this statute. These are

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"the proper modes of ascertaining the intention of the legislature."

With respect and humility, I adopt these pronouncements as accurate statements of the law and now proceed accordingly.

Chapter II of The Constitution deals with the "Protection of Fundamental Rights and Freedom of the Individual". They are declared in Art. 3 and protected by Articles 4 - 15. Article 16 provides for time of war and emergency. Art. 17 provides for reference to a tribunal in cases of detention referred to in Art. 16 (2). Art. 18 saves existing laws and disciplinary laws, and Article 19 provides as follows:

"19. (1) Subject to the provisions of paragraph (6) of this article, if any person alleges that any of the provisions of articles 4 to 17 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

" (2) The High Court shall have original jurisdiction -

(a) to hear and determine any application made by any person in pursuance of the preceding paragraph;

(b) to determine any question arising in the case of any person which is referred to it in pursuance of the next following paragraph,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of articles 4 to 17 (inclusive) of this Constitution:

Provided that the High Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."

The language used describes the rights as fundamental. What, then, is the nature of this right called "fundamental right"? First of all, a legal right is one which is enforceable in the Courts of law.

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It is protected and enforced by the ordinary law of the land. A fundamental right, however, is one which is expressly protected and guaranteed by the written organic law of a State; that is, the Constitution. It is termed "fundamental" because, unlike an ordinary right which may be changed by the Legislature in its ordinary powers of legislation, it cannot, because it is guaranteed by the Constitution, be altered by any process other than that required for amending the Constitution itself. Nor can it be suspended or abridged except in the manner laid down in the Constitution itself.

The existence of such a guarantee precludes any organ of the State - executive, legislative or judicial - from acting in contravention of such rights, and any purported State act which is repugnant to them must be void. The Constitution being the supreme organic law of the land, the powers of all the organs of Government are limited by its provisions.

There could be no justification for such a classification of these rights if they can be overridden by the Legislature and so become ineffective. In order to vest them with reality and meaning, there must then be some authority under the Constitution empowered to pronounce a law or other State act invalid where it contravenes or violates any of them directly or indirectly; and to make effective without delay, orders for the prevention of their violation or

immediate restoration where they have actually been violated. In my view, that authority, under the Constitution of the U.S.A., India, and Guyana, is the Court. Without an authority so empowered, the declarations and protective provisions under reference would be "like unto a tale told by an idiot, full of sound and fury signifying nothing" - brutum fulmen. It is really the enforceability of the constitutional guarantee that gives life and meaning to the right. Professor Dicey's comment that the prerogative writs "are for practical purposes worth a hundred constitutional Articles guaranteeing individual liberty" is indeed germane to the topic. Consequently, the extraordinary nature of the right must be paramount in the process of the construction of Article 19. which deals with the nature of the remedy intended.

While it is true that prior to the coming into force of the Constitution of Guyana, the Courts in Guyana, like those in England, had full power to protect the individual against executive tyranny through the prerogative writs of mandamus, certiorari, prohibition and quo warranto - as Lord Atkin succintly put it in delivering the opinion of The Judicial Committee of The Privy Council in Eshugbayi v. Government of Nigeria, (1931) L.J.R. p. 152 at page 157:

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"..... No member of the Executive can interfere with the liberty or property of a British Subject except on the condition that he can support the legality of his action before a Court of Justice." -

they were powerless against legislative aggression upon individual rights. In short, there were no fundamental rights binding on Parliament.

In Lee v. Bude Co., (1870) L.R. 6 C.P. p. 577 at page 582, Willes, J., stated the law as follows:

"Acts of Parliament are laws of the land and we do not sit as a Court of Appeal from Parliament ..... If any act of Parliament has been obtained improperly, it is for the Legislature to correct it by repealing it, but so long as it exists as law the Courts are bound to obey it."

And in Leversidge v. Anderson, (1942) A.C. p. 246, Lord Wright said in his speech in the House of Lords:

"All the Courts today, and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law ..... It is in Burke's words "a regulated freedom". .....

"In the constitution of this country there are no guaranteed or absolute civil rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has evolved."

It was therefore the sagacity of Parliament itself, at the back of which lies what is often called the political genius of the English people - that which enables them to hold the "just balance between power and liberty" which protected individual liberty against the inroads of the omnipotent Parliament.

In Guyana (then British Guiana) the Legislature had since 1928 power to make laws for the "peace, order and good government of the Colony", but His Majesty expressly reserved to himself and his heirs and successors "their undoubted right and authority to confirm, disallow or with the advice of his or their Privy Council to revoke or amend any such laws, and to make, enact and establish, from time to time with the advice of his or their Privy Council, all such laws as may to him or them appear necessary for the peace, order and good government of the Colony". This had the effect of safeguarding against legislative inroads upon the freedom of the individual contrary to the concepts known to and accepted by the British Parliament. In other words,

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it was an indirect projection of that ability to hold the "just balance between power and liberty" into the Colonial Legislature.

Although the British Guiana (Constitution) Order in Council, 1953, purported to confer a form of self-government on the territory, the same royal reservations and powers of disallowance were therein preserved. These were further preserved by virtue of the provisions of the British Guiana (Constitution) (Temporary Provisions) Orders in Council, 1953 and 1956.

In legislating for a fully self-governing territory, however, Parliament enacted through the machinery of Her Majesty's Order-in-Council, styled The Guyana Independence Order, 1966. The Constitution of Guyana, which by Article 72 conferred upon the Parliament of Guyana power, subject to the provisions of the Constitution, to make laws for the peace, order and good government of Guyana; and abrogated Her Majesty's powers of reservation, revocation, and disallowance of the enactments of the Guyana Parliament, substituting therefor the assent of the Governor General on behalf of Her Majesty. This assent, however, was to be in accord with the advice of the Cabinet or a minister acting under the general authority of the Cabinet. Thus, with the coming into force of the Constitution of Guyana, the British "political sagacity" to which Lord Wright referred, would no longer project upon the enactments of the Parliament of Guyana.

Such, then, was the state of the law with regard to individual rights in Guyana upon the attainment of Independence.

History has revealed only too well the danger of unlimited power over individual rights and liberties.

In the American case of Citizens' Savings & Loan Association v. Topeka, (1874) 20 Wall 655, Mr. Justice Miller said at page 662:

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognised no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power is after all but a despotism. It is true it is a despotism of the majority if you choose to call it so, but it is none the less despotism."

And Mr. Justice Jackson said in Board of Education v. Barrette, (1943) 319 U.S. 624:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the viccissitudes of political controversy, to place them beyond

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"the reach of majorities ..... and to establish them as legal principles to be applied by the Courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to the vote; they depend on the outcome of no elections."

In Fletcher v. Peck, (1810) 6 Cr. 87, the Court observed that -

"It is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment, and that the people of the United States in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed."

The British Parliament, even if not actually aware of these American judicial pronouncements, must be deemed to have been, and in any event must also be presumed to have appreciated the state of the existing law in Guyana and the consequent necessity for the avoidance of the possibility of a despotism. In other words, the mischief and defect for which the existing law would not have provided after the

withdrawal of the reserved powers was a realistic safeguard for the avoidance of legislative inroads on the freedom of the individual.

"What," then, "was the remedy the Parliament had resolved and appointed to cure this disease of the commonwealth?" In this case it was to prevent, not to cure.

On December 10, 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights and proclaimed it as

> "a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

Then followed the articles which are faithfully adumbrated mutatis mutandis in Chapter II of the Constitution of Guyana. It is not without significance that Article 8 of the Declaration provided that -

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"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law."

Great Britain was a signatory to this declaration.

In Buns Philip & Co. v. Nelson & Robertson, (1958) 1 Lloyd's Rep. 342, it was held by the High Court of Australia that where a particular enactment was ambiguous, it was permissible to refer to an international Convention.

Small wonder, then, that the remedy the British Parliament resolved to avoid the possibility of the disease was the enshrinement of a Bill of Rights in the Constitution of Guyana, buttressed, as it is, by an enforcement provision which is itself relegated to the position of a fundamental right; for Article 19, like the other Articles in Cap. II of the Constitution, is entrenched and cannot be altered except in accordance with the provisions of Article 73 (3) (b) which provides as follows:

"73. xx xx xx

(3) A Bill to alter any of the following provisions of this Constitution, that is to say -

xx xx xx

(b) Chapter II ..... shall not be submitted to the Governor-General for his assent unless the Bill, not less than two nor more than six months after its passage through the National

"Assembly, has, in such manner as Parliament may prescribe, been submitted to the vote of the electors qualified to vote in an election and has been approved by a majority of the electors who vote on the Bill:

Provided that if the Bill does not alter any of the provisions mentioned in subparagraph (a) of this paragraph and is supported at the final voting in the Assembly by the votes of not less than two-thirds of all the elected members of the Assembly it shall not be necessary to submit the Bill to the vote of the electors."

Nor should it be forgotten that the Constitution in its final form had received the consensus of the Government of Guyana before promulgation.

With that background in mind a detailed analysis of Article 19 is now indicated. The Article gives to the citizen a right to apply to the High Court for redress if there is in relation to him a contravention, actual or threatened, of a fundamental right. This is without prejudice to any other action lawfully available in respect of the same matter. In other words, although the ordinary remedy hitherto known by law is available to him, he may now resort to this extraordinary one. What would be extraordinary about this remedy if the Legislature intended that the aggrieved party

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should file an ordinary action by way of a writ of summons? As discussed earlier in this judgment, rights now declared as fundamental rights are not new to the Guyanese, but as in England they were only protected against Executive action and the avoidance of inroads against legislative invasion was left to the good sense of the Legislature subject to the royal powers of reservation, revocation and disallowance. Now these latter are to be left to the good sense of the Guyanese people but subject to this new safeguard - remedies in the nature of the prerogative writs for the curb of executive violation were now to appear with regard to legislative violation by virtue of the Court's new jurisdiction to make "such orders", give "such directions" as it "may consider appropriate for the purpose of the enforcement of any of the provisions" relating to fundamental rights.

Clearly such a power could not be effectively exercised by the lengthy procedure which inevitably resulted from recourse to an ordinary civil action.

The British Parliament in promulgating the Constitution of Guyana must have contemplated the immediate alerting of the Court to a threatened or actual violation of a fundamental right and the Court's immediate reaction, "Now, whoever or whatever you are, show cause why!" In other words, the immediate issue of something in the nature of an order nisi returnable within the time contemplated by the Court to be reasonable, having regard to the nature of the threatened or

actual violation. The entire context of Article 19 makes it clear that Parliament was consciously conferring a new jurisdiction on the High Court but realised that express rules did not exist for the exercise of this power - indeed, Article 19 (6) enacts that -

"Parliament may make provision with respect to the practice and procedure -

(a) of the High Court in relation to the jurisdiction and powers conferred upon it by or under this Article;

(b) of the High Court and the Court of Appeal in relation to appeals to the Court of Appeal from decisions of the High Court in the exercise of such jurisdiction;

(c) of subordinate courts in relation to references to the High Court under paragraph (3) of this article;

including provision with respect to the time within which any application, reference or appeal shall or may be made or brought; and, subject to any provision so made, provision may be made with respect to the matters aforesaid by rules of Court."

Moreover Article 92 (1)(b) enacts:

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"92. (1) An appeal to the Court of Appeal shall lie as of right from decisions of the High Court in the following cases, that is to say -

xx xx xx

(b) final decisions given in exercise of the jurisdiction conferred on the High Court by article 19 of this Constitution (which relates to the enforcement of fundamental rights and freedoms); and

xx xx xx

When, therefore, consideration is given to the whole scheme of the legislation set out in the Constitution with respect to fundamental rights, it is clear that both the right and the remedy transcend the sphere of ordinary existing substantive and adjective law.

Bearing in mind that it must be speedy and effective, what, then, is the procedure to be adopted for the invocation of the Court's aid in the face of threatened or actual violation of a fundamental right?

In Jowitt's Dictionary, "application" is defined as "a motion to a Court or Judge".

Tidd in his work on "The Practice of the Courts of King's Bench and Common Pleas in Personal Actions and Ejectment" at page 478 states:

"The usual modes of applying to the Court are by motion or petition. A motion is an application to the Court, by Counsel in the King's Bench, or a sergeant in the Common Pleas, for a rule or order; which is either granted or refused, and if granted, is either a rule absolute in the first instance, or only to show cause, or as it is commonly called, a rule nisi, that is, unless cause be shown to the contrary, which is afterwards on a subsequent motion made absolute or discharged. To use the words of an elegant writer on the constitution of England, 'The application to a Court by Counsel is called a motion, and the order made by a court on any motion, when drawn into form by the officer is called a rule.' But besides the rules which are moved for in Court there are others made out by the officers as a matter of course, or drawn up on a motion paper signed by a Counsel or sergeant."

In Re Meister, Lucius & Bruning Ltd., (1914) 31 L.T. p. 28, Warrington, J., said:

"I have no doubt myself that where an Act of Parliament says that an application may be made to the Court that application may be made by motion. In the Common Law Courts before the passing of the Judicature Act the only mode by which the Court was approached

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"otherwise than by the issue of a writ was by a motion. In the High Court of Chancery it is quite true that the summary mode of proceeding was usually by petition, but I see no reason and I have spoken to all my brothers of this division except one, I think, whom I have not been able to see, and also the Master of the Rolls, and they all agree with me that in such a case as the present when the Act merely provides for an application and does not say in what form that application is to be made in any way in which the Court can be approached. Now there is no question about it that the Court can be, and frequently is, approached by originating motion."

Assuming that the Rules of Court, 1955, did apply, it is now quite clear from the discussion earlier in this judgment that the Legislature did not contemplate that an action was to be brought by way of a writ of summons for the vindication of a fundamental right - actual or threatened; consequently it would be Order 2 that would apply. Perhaps one example is sufficient to illustrate the state of the law between the period of the 1900 Rules of Court and the enactment of the 1955 Rules, and will no doubt assist in ascertainment of the intention of the rule-making body in this regard. In Lewis v. Williams,

19th April, 1909, General Jurisdiction, Berkley, J., in dealing with points of procedure with regard to a specially endorsed writ, relied on the judgments of Lord Coleridge, C.J., in Bikers v. Spaigat, 22 Q.B. p. 7; Cockburn, C.J., in Walker v. Hicks, 47 L.J. Q.B. p. 27; The Annual Practice, 1909, and Bullen & Lake, 5th Ed., p. 82 - clearly indicating that it was to the English Rules for the administration of the English Common Law that our Courts turned for guidance. Moreover, the Civil Law Ordinance of 1916 introduced the Common Law of England as the Common Law of this country. Accordingly the Legislative history of Order 2, the state of the law at the time of its enactment, the presumption against inconvenience and absurdity renders untenable the Solicitor General's submission that the expression "Common Law of the Country" in Order 2 referred to the Roman-Dutch Common Law. In my view it clearly referred in that context to the Common Law of England.

The term "existing practice and procedure" in section 44 (1)(a) of Cap. 7 received judicial interpretation in the case of Coglan v. Vieira, (1958)B.G.L.R. p. 108. That was an application for an order nisi for the prerogative writ of mandamus. By virtue of the introduction of the English Common Law into the Courts of British Guiana, the Court had jurisdiction to make such an order. No local

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rule existed as to the practice and procedure and the English Statute Law had abrogated the Common Law prerogative writ and substituted an Order in the nature of mandamus, for the obtaining of which new rules of practice and procedure had been set up. It was not therefore competent to invoke an English rule in accordance with Order 1 rule 3 of the 1955 Rules.

Stoby, J. (as he then was) had this to say at page 120:

> "I have said before that I do not agree with the proposition that Order 1 rule 3 is ultra vires. The fact that section 44 (1) of the Supreme Court Ordinance, Cap. 7, says that where no provision is made by Cap. 7 of Rules of Court or by any other statute the existing practice and procedure shall remain in force, is no ground for saying that a rule of Court cannot make the English Rules applicable. When the English Rules become applicable provision is made and section 44 no longer applies. But when the English Rules are not applicable and when there is no local rule, then the existing practice and procedure become important. In Cameron v. Chester (supra) Duke, Acting J., said this:
>
> 'As Sir Anthony de Freitas, C.J., delivering the judgment of the Full Court,

'said in Fernandes v. da Silva, (1927) L.R.B.G. 87,92:'

"The jurisdiction of a Court may be exercised although no appropriate rules of procedure have been made."

"In A.G. (Ontario) v. Dauly, (1924), A.C. 1011, it was held by the Privy Council that there is power in a Colonial Supreme Court (as in the High Court in England) to issue an order of mandamus to an inferior court, and that although no rules had been made regulating the method in which that power was to be exercised, that did not prevent the Court from making full use of its powers. Where no rules of procedure have been prescribed, the judge will adopt whatever procedure is convenient and will give such directions as justice and commonsense alike call for."

Consequently, the procedure by motion to the Court for the appropriate order, direction and/or writ is not only dictated by the language used, logic, commonsense and convenience but it is also supported by authority.

In delivering the opinion of the Judicial Committee of the Privy Council in Webb v. Outrim, (1906) A.C. p. 81, a case dealing

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with the Australian Constitution, the Earl of Halsbury said at page 88:

> "No one could speak lightly of the authority of such a judge as Marshall, C.J., and, dealing with the same subject matter as that which that most learned and logical lawyer applied his observations, his judgment might well be accepted as conclusive. But as Griffith, C.J., himself points out, 'we are not bound by the decisions of the Supreme Court of the United States' though, as the same learned judge says, further on in the same case, D'Emden v. Pedder, those decisions may be regarded as 'a most welcome aid and assistance.'"

And at page 89:

> "It is quite true, as observed by Griffith, C.J., in the abovementioned case of D'Emden v. Pedder, that: 'When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them."

I now refer to Articles 13, 32 and 226 of The Constitution of India and to the judicial interpretation put upon them by the Supreme Court of India:

"13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause, shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires -

(a) 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) 'laws in force' includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution

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and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."

In Gopalan v. State of Madras, (1950) S.C.R. 88, Kania, C.J., at page 100 observed:

"The inclusion of Article 13 (1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits, invalid. The existence of Article 13 (1) and (2) in the Constitution therefore is not material for the decision of the question what fundamental right is given and to what extent it is permitted to be abridged by the Constitution itself."

In Guyana although articles similar to 13 (1) and (2) do not appear in The Constitution, it has been held that the position with respect to Article 13 (2) is the same - vide Lilleyman et al v. Attorney General, (1964) L.R.B.G. page 15.

Articles 32 and 226 of The Constitution of India provide the right to constitutional remedies for the actual or threatened violation of fundamental rights in the following terms:

"PART III

32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of Habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

And

"PART IV - THE STATE.

226. (1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to

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"which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(1A) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territores within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(2) The power conferred on a High Court by clause (1) or clause (1A) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32."

In Gopalan's case (supra), Shastri, J., said:

".......... the insertion of a declaration of Fundamental Rights in the forefront of the Constitution coupled with an express

"prohibition against legislative interference with these rights (Article 13) and the provision of a constitutional sanction for the enforcement of such prohibition by means of a judicial review (Article 32) is ..... a clear and emphatic indication that these rights are to be paramount to ordinary State-made laws."

The words "in the nature of" are pregnant with meaning. The Courts are not limited to the prerogative writs themselves.

In this article Mukherjea, J., in Chiranjit Lal v. Union of India, S.C.J. 869 at page 900, observed:

"Art. 32 gives us very wide discretion in the matter of framing our writs to suit the exigencies of particular cases, and the application of the petitioner cannot be thrown out simply on the ground that the proper writ has not been prayed for."

And Shastri, J. (as he then was) in Romesh Thappar v. State of Madras, (1950) S.C.R. 594 at page 596 et seq. said:

"That Article does not merely confer power on this Court, as Art. 226, does on the High Courts, to issue certain writs for the enforcement of the rights conferred by Part III or for any other purpose, as part of its general jurisdiction. In

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"that case it would have been more appropriately placed among Articles 131 to 139 which define that jurisdiction. Article 32 provides a 'guaranteed' remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III. This Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights."

In State of Madras v. V.G. Row, (1952) S.C.R. 597, His Lordship (Shastri, C.J.) in the same strain, observed at page 605:

"Before proceeding to consider this question, we think it right to point out what is sometimes overlooked, that our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution. If, then, the Courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the 'fundamental rights' as to which this Court has been assigned the role of a sentinel on the qui vive."

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In Dwarka v. I.T.O., A. (1966) S.C. 81 at p. 84:

"Article 226 is couched in comprehensive phraseology and it ex facie confers a wide power on the High Court to reach injustice wherever it is found. A wide language in describing the nature of the power, the purposes for which and the person or authority against whom it can be exercised was designedly used by the Constitution. The High Court can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of expression 'nature', which expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. The High Courts are enabled to mould the reliefs to meet the peculiar and complicated requirements of this country. To equate the scope of the power of the High Court under Art. 226 with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a Unitary form of Government to a vast country like India functioning under a federal structure. Such a

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"construction would defeat the purpose of the article itself. But this does not mean that the High Courts can function arbitrarily under this article. There are some limitations implicit in the article and others may be evolved to direct the article through defined channels."

In T.C. Basappa v. T. Nagappa & Anor., (1954) S.C.R. at page 250, Mukherjea, J., said at p. 255:

"As is well known, the issue of the prerogative writs, within which certiorari is included, had their origin in England in the King's prerogative power of superintendence over the due observance of law by his officials and Tribunals. The writ of certiorari is so named because in its original form it required that the King should be 'certified of' the proceedings to be investigated and the object was to secure by the authority of a superior Court, that the jurisdiction of the inferior Tribunal should be properly exercised. These principles were transplanted to other parts of the King's dominions. In India, during the British days, the three chartered High Courts of Calcutta, Bombay, and Madras were alone competent to issue writs

"and that too within specified limits and the power was not exercisable by the other High Courts at a all. 'In that situation' as this Court observed in Election Commission, India v. Saka Venkata Subba Rao, (1953) S.C.R. 1144 at 1150, 'the makers of the Constitution having decided to provide for certain basic safeguards for the people in the new set up, which they called fundamental rights, evidently thought it necessary to provide also a quick and inexpensive remedy for the enforcement of such rights and, finding that the prerogative writs, which the Courts in England had developed and used whenever urgent necessity demanded immediate and decisive interposition, were peculiarly suited for the purpose, they conferred, in the States' sphere, new and wide powers on the High Courts of issuing directions, orders, or writs primarily for the enforcement of fundamental rights, the power to issue such directions 'for any other purpose' being also included with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of King's Bench in England.'

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"The language used in articles 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs or directions including writs in the nature of habeas corpus, mandamus, quo warranto, prohibition and certiorari as may be considered necessary for enforcement of the fundamental rights and in the case of the High Courts, for other purposes as well. In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of certiorari in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."

I am not unmindful that there are some differences in the wording of the Constitution of India but the effect produced is the same as that of The Constitution. Consequently,

I invoke, with great respect and humility, the aid of these judicial interpretations by the Indian Supreme Court of these provisions of the Indian Constitution which are in pari materia with the fundamental rights provisions of The Constitution. The effect of this, coupled with the results of the application herein of the other rules of construction to the interpretation of Article 19, lead to the inevitable conclusion that:

(a) Article 19 conferred a new and extraordinary jurisdiction on the High Court of Guyana.

(b) The proper method of application to the Court for the exercise of this jurisdiction is by motion praying the issue of "such order", "such writs", "such directions" as the Court "may consider appropriate for the purpose of enforcing or securing the enforcement of" this extraordinary right; and it is incumbent upon the Court so to do regardless of whether or not the applicant indicated in his prayer what form of writ, direction, or order he desired.

Although full argument was not heard upon this aspect of the matter, there is, in my view, sufficient highly persuasive authority to establish beyond any doubt the view that the Courts have jurisdiction to order that the appropriate authority under the Roads Ordinance be joined as a defendant and restrained from

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continuation of the said works until compensation shall have been assessed in accordance with the provisions of the Public Lands Acquisition Ordinance, Cap. 179 - Vide Carlic v. The Queen and Minister of Manpower and Immigration, (1968) 65 D.L.R. p. 633, and Westminster Bank Ltd. v. Beverley Borough Council & Anor., reported in The Times Newspaper of 1st March, 1968, at page 13.

The Court, however, although having jurisdiction, must, in exercising it, consider whether it is just and convenient to grant the injunction, and whether in the circumstances that is the appropriate remedy. There can be no doubt that the speedy implementation of Government's road-building policy, as adumbrated in its road programme, is of paramount importance to the Country's economic development, and that the Court, in exercising this jurisdiction, must take cognizance of this. But the works having been completed, the question of an injunction is now only of academic importance.

Government's policy necessitated, and the Roads Ordinance justified, the acquisition of the appellant's property. Government, therefore, had every right to take the property. But then the citizen has every right to seek the enforcement of his constitutional right to compensation therefor. The machinery for this purpose is provided by The Public Lands Acquisition Ordinance, Cap. 179. Were this

matter to be dealt with on its merits, the Court has jurisdiction to make an appropriate order - I emphasize that I consider it unnecessary to decide this point now - which maywell be a direction for the joinder of the proper authority under the Roads Ordinance as a defendant in these proceedings and the issue of an order calling upon him to show cause why a writ of mandamus or an order in the nature of mandamus should not issue upon him to have the citizen's compensation assessed in accordance with the provisions of the Public Lands Acquisition Ordinance, Cap. 179, and paid to the appellant. This Court could also have made such an order were the merits of the matter before it.

No doubt Art. 19 of The Constitution casts upon the Court a heavy responsibility and a difficult task, but this does not justify judicial abdication. "Fear must not lend wings to our feet."

I would allow this appeal, set aside the judgment of the learned trial Judge, order that the appellant should have her costs both here and in the Court below, and remit the matter to the learned trial Judge for hearing on its merits.

PERCIVAL A. CUMMINGS
Justice of Appeal.

Dated this 6th day of June, 1968.

In the Court of Appeal of the Supreme Court of Judicature

No. 10

Order on Judgment - 6th June, 1968.

NO. 10

ORDER ON JUDGMENT

BEFORE THE HONOURABLE, SIR KENNETH STOBY, CHANCELLOR

THE HONOURABLE MR. E.V. LUCKHOO, JUSTICE OF APPEAL

THE HONOURABLE MR. P.A. CUMMINGS, JUSTICE OF APPEAL.

DATED THE 6TH DAY OF JUNE, 1968.

ENTERED THE 15TH DAY OF NOVEMBER, 1968.

UPON READING the Notice of Appeal on behalf of the (Applicant) Appellant dated the 19th day of August, 1966 and the record filed herein on the 30th day of January, 1967

AND UPON HEARING Mr. J.O.F. Haynes, Queen's Counsel, of counsel for the (Applicant) Appellant and Mr. M. Shahabuddeen, Queen's Counsel, Solicitor General on behalf of the (Respondent) Respondent

AND MATURE DELIBERATION THEREUPON HAD

IT IS ORDERED that this appeal be dismissed on the ground that there is no jurisdiction for the grant against the Attorney General of an order of injunction or other coercive order as prayed for in the originating notice of motion raised by both parties at the hearing of the appeal

In the Court of Appeal of the Supreme Court of Judicature

No. 10

Order on Judgment - 6th June, 1968 (Contd.).

AND IT IS FURTHER ORDERED that the decision of the Honourable the Chief Justice dated the 12th day of August, 1966 dismissing the notice of motion be wholly set aside as it is competent to move the Court under article 19 (1) of the Constitution of Guyana by way of Originating Notice of Motion

AND IT IS FURTHER ORDERED that each party do bear its own cost in this Court and that the Respondent (Respondent) do pay to the Applicant (Appellant) one half of her costs in the Court below certified fit for counsel.

BY THE COURT

H. MARAJ

SWORN CLERK & NOTARY PUBLIC

FOR REGISTRAR.

NO. 11

ORDER GRANTING CONDITIONAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

In the Court of Appeal of the Supreme Court of Judicature

No. 11

Order granting Conditional Leave to Appeal to Her Majesty in Council - 17th August, 1968.

BEFORE THE HONOURABLE MR. V.E. CRANE, JUSTICE OF APPEAL (IN CHAMBERS)

DATED THE 17TH DAY OF AUGUST, 1968

ENTERED THE 20TH DAY OF AUGUST, 1968.

UPON the petition of the

In the Court of Appeal of the Supreme Court of Judicature

No. 11

Order granting Conditional Leave to Appeal to Her Majesty in Council - 17th August, 1968, (Contd.).

abovenamed (applicant) appellant dated the 26th day of June, 1968 for leave to appeal to Her Majesty in Council against the judgment of the Court of Appeal of the Supreme Court of Judicature delivered herein on the 6th day of June, 1968

AND UPON READING the said petition and the affidavit of the (applicant) appellant dated the 26th day of June, 1968 in support thereof

AND UPON HEARING Mr. H.B. Fraser, Solicitor for the (applicant) appellant and Mr. S. Rahaman, Senior Crown Counsel, of Counsel for the (respondent) respondent

THIS COURT DOTH ORDER that subject to the performance by the said (applicant) appellant of the conditions hereinafter mentioned and subject also to the final order of this Honourable Court upon due compliance with such conditions leave to appeal to Her Majesty in Council against the said judgment of the Court of Appeal of the Supreme Court of Judicature be and the same is hereby granted to the (applicant) appellant

AND THIS COURT DOTH FURTHER ORDER that the (applicant) appellant do within ninety (90) days from the date of this order enter into good and sufficient security to the satisfaction of the Registrar of this Court in the sum of $2,400: (two thousand four hundred dollars) with one or more sureties or deposit into Court the said sum of $2,400 (two thousand four hundred dollars)

No. 11

Order granting Conditional Leave to Appeal to Her Majesty in Council - 17th August, 1968 (Contd.)

for the due prosecution of the said appeal and for the payment of all such costs as may become payable to the (respondent) respondent in the event of the (applicant) appellant not obtaining an order granting her final leave to appeal or of the appeal being dismissed for non-prosecution or for the part of such costs as may be awarded by the Judicial Committee of the Privy Council to the respondent (respondent) on such appeal

AND THIS COURT DOTH FURTHER ORDER that all costs of and occasioned by the said appeal shall abide the event of the said appeal to Her Majesty in Council if the said appeal shall be allowed or dismissed or shall abide the result the said appeal in case the said appeal shall stand dismissed for want of prosecution.

AND THIS COURT DOTH FURTHER ORDER that the (applicant) appellant do within four (4) months from the date of this order in due course take out all appointments that may be necessary for settling the record in such appeal to enable the Registrar of this Court to certify that the said record has been settled and that the provisions of this order on the part of the (applicant) appellant have been complied with

In the Court of Appeal of the Supreme Court of Judicature

No. 11

Order granting Conditional Leave to Appeal to Her Majesty in Council - 17th August, 1968 (Contd.).

AND THIS COURT DOTH FURTHER ORDER that the (applicant) appellant be at liberty to apply at any time within five (5) months from the date of this order for final leave to appeal as aforesaid on the production of a certificate under the hand of the Registrar of this Court of due compliance on his part with the conditions of this order.

BY THE COURT

H. Maraj

SWORN CLERK AND NOTARY PUBLIC

FOR REGISTRAR.

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IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL OF THE
SUPREME COURT OF JUDICATURE

B E T W E E N :-

OLIVE CASEY JAUNDOO,
in her capacity as
Executrix of the
Estate of WILLIAM
ARNOLD JAUNDOO,
deceased, Probate
whereof was granted
by the High Court
on the 17th day of
November, 1965, and
numbered 613,

(Applicant) Appellant,

- and -

THE ATTORNEY GENERAL
OF GUYANA,

(Respondent) Respondent.

RECORD OF PROCEEDINGS
