Judgment Book

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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEALS NOS. 46 & 47/80

BEFORE: THE HON. MR. JUSTICE ZACCA, PRESIDENT
THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CAREY, J.A.

BETWEEN

THE ATTORNEY GENERAL FOR JAMAICA
THE CHIEF ELECTORAL OFFICER
MRS. CARMEN BARTILOW
MR. ROY KNIGHT
MR. DUDLEY THOMPSON — DEFENDANTS/APPELLANTS

A N D

MR. DONALD THOMPSON — PLAINTIFF/RESPONDENT

Mr. Carl Rattray, Q.C. and Mr. Langrin for 1st, 2nd, 3rd and 4th appellants instructed by Director of State Proceedings.

Mr. Huntley Munroe, Q.C., Mr. Horace Edwards, Q.C., and Dr. Lloyd Barnett instructed by Mr. H. Harris for 5th appellant.

Mr. Berthan Macaulay, Q.C., Mr. Winston Spaulding, and Mrs. Margaret Macaulay instructed by Mr. Ossie Harding for respondent.

September 22, 23, 24, 25, 29;
October 24, 1980; July 23, 1981.

KERR, J.A.:

This was an appeal by the five defendants from a judgment of Wright, J. granting certain declarations sought by the plaintiff.

These declarations as set out in the pleadings are:

"1. That he is a legally nominated candidate for the By-Election to fill the vacancy which occurred in 1978, in the Parliamentary Western St. Andrew Constituency and therefore

2. That he was under Section 39 of the Constitution qualified to be elected as a member of the House of Representatives.

3. That he is and was at all material times entitled to contest in a poll in that Constituency to fill the vacancy which occurred in 1978.

"4. That his nomination on the 10th July, 1978, is conclusive and has not been directly or indirectly invalidated.

5. That the appointment of another nomination day after his nomination referred to in the foregoing paragraph 4 of these Declarations is invalid in that, such appointment purports to invalidate his said nomination which can only be done by a Returning Officer or by the Courts on an Election Petition.

6. That in the absence of a Proclamation by the Governor-General under Section 20 of Representation of the People Act, deferring the Poll, the fourth Defendant in purporting to grant and hold another poll acted unlawfully and unconstitutionally.

7. That the consent by the fifth Defendant to, and his subsequent, nomination, rendered his nomination on the 10th July, 1978, invalid."

Declaration No. 2 was not pursued, Declaration No. 7 was abandoned and Declarations 1, 3, 4, 5 and 6 were granted as prayed.

After hearing full and careful arguments, the Court on October 24 1980, handed down the following decision:

"(1) Nomination proceedings are part of the Electoral process. Any question concerning the Electoral process which would affect the validity of any person elected shall be determined by the Supreme Court in an Election Petition and in accordance with the Election Petition Act.

(2) Declarations 1, 3, 4, 5 implicitly and expressly involved questions affecting the validity of the 5th appellant's election to the House of Representatives. These questions could and should be properly raised in an Election Petition.

There can be no interim challenge nor arrest of the Electoral process by evoking the Common Law Jurisdiction of the Court. Consequently the validity of the election of the 5th appellant to the House of Representatives cannot be challenged in the instant proceedings.

(3) On the basis of the arguments presented we consider it necessary to give an interpretation of the meaning and effect of section 20 of the Representation of the People Act as to whether or not independent of the power conferred by the provisions of that section, the Governor-General has any power to postpone an Election duly fixed by a Proclamation issued under section 19 of the Representation of the People Act by revoking that proclamation by a subsequent proclamation issued for that purpose.

"(4) This question can be answered without involving a determination of any question as to the validity of the 5th appellant's election to the House of Representatives.

(5) The general powers of Revocation under s.29(a) of the Interpretation Act is inapplicable to a proclamation issued under s. 19 of the Representation of the People Act clearly indicate a contrary intention.

The Governor-General's power to adjourn an election is limited and defined by s. 20 of the Representation of the People Act and excludes a power to revoke.

(6) In any event, the evidence contained in the affidavits filed on behalf of the appellants fell far short of establishing that the violence which occurred at the Nomination Centre at Balmagie Primary School in St. Andrew on the 10th July, 1978 was of such a nature and extent as to render the nomination proceedings abortive. Nor do we find in the pleadings any admission to that effect.

(7) That the 4th appellant was properly joined in the proceedings.

(8) Accordingly the appeals are allowed in part:

(a) Judgment in the Court below granting Declarations 1, 3, 4 & 5 is set aside.

(b) In accordance with our opinions at (3) and (5) above in lieu of Declaration 6 we grant a declaration in the following form:

That in the absence of a Proclamation under section 20 of the Representation of the People Act deferring the Poll, the Governor-General has no power to revoke a proclamation made under section 19 of the Representation of the People Act."

I now set out herein my reasons for concurring in that decision. The facts and contentions were admirably summarised by the learned trial judge and in appreciation I quote the following excerpts:

"David Hilton Coore QC had been the member of Parliament for the constituency of St. Andrew Western until he resigned his seat with effect from the 20th day of June, 1978. On the 4th day of July, 1978 the Governor-General, in keeping with section 19(1) of the Act, issued a Proclamation appointing the 25th day of July, 1978 as the day for the holding of the By-Election to fill the vacancy thus created and issued the Writ of Election. Also on the 4th day of July, 1978 the Minister of Parliamentary Affairs in exercise of the power conferred upon him by section 21(1) of the Act issued a notice appointing the 10th day of July, 1978 as Nomination

"Day for the Constituency of St. Andrew Western. Following upon this Mrs. Carmen Bartilow the Returning Officer for the Constituency issued a Notice of Election on the 5th day of July, 1978 naming the Balmagie Primary School as the place where nomination papers would be accepted between the hours of noon and 2 p.m. on nomination day. This she did in compliance with section 22(1) of the Act which provides that:

> 'Within two days after the receipt of the Writ of election or within two days after he has been notified by the Chief Electoral Officer of the issue of such Writ, whichever shall be sooner the returning Officer shall issue an election notice in the form set out in the second schedule under his hand and shall mail one copy at least to the various postmasters of the post Offices within his constituency.'

It is to be noted that the Returning Officer's duty following upon the issue of the Writ of election by the Governor-General is mandatory. The 10th day of July, 1978 duly arrived and with it much feverish activity and heightened expectations. This is reflected in some measure by the fact that of the seven candidates who handed in papers for nomination six bore the surname Thompson, a fact which the attorney for 1st, 2nd, 3rd and 4th defendants alleged was calculated to cause confusion.

The plaintiff, Donald Thompson and the fifth Dudley Thompson, the former as an Independent candidate and the latter as the candidate of the Peoples National Party, attended during the prescribed hours and handed in their nomination papers which, according to an affidavit filed by the Returning Officer Mrs. Carmen Bartilow, 'were processed found to be in order and accepted.' "

"At 2 p.m. on Nomination Day when the proceedings are required by the Act to be closed, the only candidates whose nomination papers had been accepted were the plaintiff and the fifth defendant and as such were the only two persons who could proceed to contest the election scheduled to be held on the 25th day of July, 1978. But no such election was ever held. Consequently, although the plaintiff did not withdraw his candidacy, which he would have been entitled to do, but only in manner prescribed by section 25(1) of the Act, he was prevented from exercising the right accorded him by the acceptance of his nomination papers to proceed to election."

"The defence contends that during the nomination period 12-noon to 2 p.m. - there were acts of two different natures which alone or together sufficed to nullity the proceedings:

1. The improper act of the Returning Officer in wrongly rejecting the nomination papers of one Miss Angela Richardson of the Jamaica United Front which were at the time thought by the Returning Officer not to be in order but which conclusion was subsequently found to be erroneous.

"2. Acts of violence which are said to have prevented would be candidates from handing in their papers.

The position of the plaintiff regarding these allegations is this, assuming the alleged acts to have taken place, without admitting that they did take place, they would be irrelevant to the plaintiff's contention that he has a constitutional right to proceed to election and that the only authority with the power to deny him that right is not the Executive, not the parliament but the Supreme Court of Judicature of Jamaica and that any purported exercise of such power by any other body represents a usurpation of Judicial Power which must be resisted. Of course, the mere allegation of irregularities and violence could not per se put the brakes on the electoral machine which had been primed to run into election day 25th July, 1978. What actually did was a Proclamation by the Governor-General appearing in the Jamaica Gazette Supplement Proclamations Rules and Regulations dated July 14, 1978.

It reads:

> 'Whereas by Proclamation signed by me on the 4th day of July 1978 the twenty fifth day of July one Thousand Nine Hundred and Seventy-Eight was appointed as the day upon which the poll should be held in the constituency of St. Andrew Western to fill the vacancy in the membership of the House of Representatives occasioned by the resignation of David Hilton Coore.
>
> AND WHEREAS it has been decided that the poll shall not be held on the twenty-fifth day of July One Thousand Nine Hundred and Seventy-Eight:
>
> NOW, THEREFORE, I FLORIZEL AGUSTUS GLASSPOLE ORDER of the Nation Commander of the Order of Distinction Governor-General of Jamaica
>
> DO HEREBY REVOKE the proclamation signed by me on the 4th day of July, 1978.' "

"In order to fill the vacancy created by the revocation the Governor-General proceeded on the said 14 day of July, 1978 to issue another Proclamation appointing the 3rd day of August, 1978 as the new date of the election. Following upon this Proclamation the Minister of Parliamentary Affairs on July 14, 1978 issued his notice appointing the 18th day of July, 1978 as nomination day for the Constituency St. Andrew Western. Mrs. Bartilow had been replaced as Returning Officer for the Constituency by Mr. Roy Knight who on the said 14th day of July, 1978 issued notice of election appointing St. Patrick School as the place where nomination papers would be received during the prescribed hours on nomination day. The fifth defendant took part in that nomination exercised, the plaintiff did not nor did he in any way signify an intention to abandon his right to proceed to the election in respect of which his nomination had been accepted. In the election held on the 3rd day of August, 1978 the fifth defendant was declared as the successful candidate."

I now turn to the arguments presented on appeal.

Mr. Rattray submitted that the Court had no jurisdiction either at Common Law or by statute in relation to any question concerning the validity of any membership of Parliament and that the declarations sought expressly and implicitly, directly and indirectly challenged the validity of the election to the House of Representatives of the fifth appellant. Further, that the only method of challenge was by an election petition pursuant to and in accordance with Section 44 of the Constitution and the Election Petitions Act. He contended that as nomination proceedings are part of the electoral process, the validity of those proceedings cannot be questioned at any interim stage. He cited in support the case of N.P. Ponnuswami vs. Returning Officer, Namakkal Constituency and Others (1952) Supreme Court Reports (India), p. 218.

Dr. Barnett here following on submitted that historically the English Parliament regulated its own affairs generally and particularly as to questions affecting membership and the Courts had only such jurisdiction in that regard as was specifically conferred by Parliament through appropriate legislation.

As illustrative that a similar position obtained in Jamaica he adverted the Court's attention to (i) the "Instructions by the Crown in 1661 - by Royal Proclamation dated December 14, 1661 - 1/15 - folio 181-184. (ii) Description of Constitutional Forms described by the Governor (1664-71) - Sir Thomas Modyford to the King's commission - Journal of the House of Assembly Vol. 1, app., pp. 22-23.

He submitted that Section 44 of the Constitution was consistent with and in recognition of that position. Further, even if alternative procedures to an election petition were available in the particular circumstances of the case, the declaration sought should not be granted as to do so would be inconvenient, likely to create uncertainty and confusion and was incapable of bringing the matter to a finality.

In reply, Mr. Macaulay submitted in effect that while the reasoning of the Attorney General appeared sound it was based on a false

premise namely - that the declarations questioned the validity of the fifth appellant's membership of the House of Representatives. The declarations, he maintained did no such thing; they were merely concerned with the respondent's position and sought from the Court an authoritative statement that:

(i) The respondent was duly nominated and his nomination was protected by the conclusive presumption in Section 23(6) of the Representation of the People Act.

(ii) The validity of that nomination can only be questioned by an election petition in the Courts.

(iii) Any act by the executive to the prejudice of the respondent's position would be contrary to law.

Accordingly, the declarations sought were within the jurisdiction of the Supreme Court to give a Declaratory Judgment. He cited Fabre v. Lay & Others, (1972) 127 C.L.R. p. 665 as illustrative. Further the question of jurisdiction should be considered as at the filing of the proceedings. At that time there was not nor ever likely to be an election flowing from the first nomination proceedings and for which any election petition could lie.

In reply the learned Attorney General questioned whether or not the respondent had any constitutional or identifiable right which had been prejudiced. He submitted that Section 23 was a procedural section and subsection (6) thereof did not create a right. He relied for this on the judgment and reasoning in Thompson v. Forrest (1967) 11 W.I.R. 296.

It seems convenient and proper to deal with the preliminary question in the Attorney General's reply before dealing with jurisdictional competence since if the Attorney General is right that would virtually be an end of the matter. In Thompson v. Forrest (supra):

> "On February 21, 1967, a general election was held for the election of members to serve in the House of Representatives. The petitioner, T., and the respondent, F., were the candidates for the constituency of Western Saint Mary, and the respondent W., was the returning officer. The respondent, F., was the successful candidate, winning by a majority of 125 votes. The petitioner presented a petition claiming that there had been no real election in the constituency

"and that the result returned was not a true expression of the will of the majority of votes qualified and enumerated in the constituency because the Chief Electoral Officer had omitted from the official lists of electors for the constituency the names of a number of persons in excess of 125 who were qualified to be registered as electors in accordance with the provisions of s. 37 of the Jamaica (Constitution) Order in Council 1962. Their names were omitted because they were not thumb printed and/or photographed in accordance with the provisions of the Representation of the People Law, Cap. 342 [J.] as amended by the Representation of the People (Amendment) Act 1963. It was contended that the provisions of the latter Law which required thumb printing and/or photographing as conditions for the registration of electors were repugnant to and inconsistent with and ultra vires the provisions of s. 37 of the Constitution of Jamaica and that the returning officer having conducted the poll on the basis of such official lists had thereby deprived a large number of persons in excess of 125 of the opportunity of voting at the election.

HELD: Section 37 of the Constitution was not intended to be a complete statement of the law governing the registration of electors. There are no provisions in that section or elsewhere in the Constitution prescribing the means whereby a person who is qualified becomes registered. This was left to be dealt with in the electoral law referred to in s. 38, i.e. the Representation of the People Law, as amended by the Representation of the People (Amendment) Act 1963, and there was no ground for holding that the provisions of that law relating to thumb prints and photographs were inconsistent with the Constitution."

The correctness of the decision has not been and is not now being challenged. In delivering the judgment Smith, J. (as he then was) as an additional plinth to his reasoning as well as a test to the correctness of his conclusion resorted to the technical formula of "covering the field", thus at page 300:

> "This test of inconsistency is conveniently referred to as the test of "covering the field" and both sides in this case appear to agree that this is the test that should be applied here."

and at page 301:

> "Now, what is the "field" or subject matter in this case for the purposes of the test of "covering the field" to which I have referred? On behalf of the respondent Forrest, it was submitted that it is the field of electoral law. In my view, this is too wide a field. In the Noarlunga case [(1957) A.C. 17 at page 28 the Privy Council stated as follows, in reference to the passage from Dixon, J.'s judgment in Ex parte McLean [(1930) 43 C.L.R. page 472], which I have cited above:

> " ' In applying this principle it is important to bear in mind that the relevant field or subject is that covered by the law and said to be invalid under the section.' "

After considering relevant Sections of the Representation of the People Act and of the Constitution of Jamaica in particular Section 37 he concluded at page 304:

> "In view of the decision at which I have arrived regarding the scope of s. 37, I hold that on a strict application of the "covering the field" test the provision impugned are not inconsistent with the provisions of s. 37."

However, the case illustrates the important difference between eligibility and entitlement. The Constitution sets out the qualifications, the possession of which would render a person eligible to be a voter. The Representation of the People Act, which should be interpreted as complementary and not in conflict with the provisions of the Constitution, provides that certain procedures must be carried out to elevate that eligibility to an entitlement to vote in an election. When these requirements are met there is conferred on the person so complying a right recognizable at law and justiciable in a competent Court. In the instant case on behalf of the respondent, it is being contended in effect that having complied with the relevant procedures required of him by the Representation of the People Act, his eligibility to be a candidate has been transformed to the right of a duly nominated candidate to have his candidacy go forward for contest in the election. I was surprised that the Attorney General should essay to raise this question in reply since in the Ponnuswami's case on which he so heavily relied the Court in the course of the judgment referred to "the right ..... to stand as a candidate for election."

It is enough to say that this argument of the Attorney General does not find favour with me.

Turning to the question of jurisdictional competence to grant the declarations it seems necessary to anxiously consider:

(1) The nature and scope of the jurisdiction to grant declaratory judgments.

(2) What effect, if any., Section 44 of the Constitution has on this jurisdiction.

(3) Whether the subject matter of the declarations fell within the contemplation of Section 44 of the Constitution.

The jurisdiction to grant a declaration is expressly recognized by Section 239 of the Judicature (Civil Procedure Code):

> "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any conseqeuntial relief is or could be claimed, or not."

In dealing with the nature of the declaratory judgment Professor deSmith in his Judicial Review of Administration Law (2nd Edition) with attractive clarity observed at page 493:

> 'The power of a court to render a purely declaratory judgment is particularly valuable in cases where a legal dispute exists but where no wrongful act entitling either party to seek coercive relief has been committed. By making an order declaratory of the rights of the parties the court is able to settle the issue at a stage before the status quo has been disturbed. Inconvenience and the prolongation of uncertainty are avoided."

and further at page 494:

> "A declaratory judgment differs from other judicial orders in that it declares the law without pronouncing any sanction directed against the defendant...."

and:

> "..... In any event, the issue determined by a declaratory judgment becomes res judicata, and the judgment forms a binding precedent; so that, although non-compliance with a declaratory order does not evoke any direct legal sanction, acts done in defiance of its terms may well be held to be devoid of legal effect if their validity is challenged in subsequent proceedings."

This Court has not been unmindful of the usefulness of declaratory judgments in determining questions of law of general public importance.

In National Workers Union vs. Half Moon Bay Hotel, Supreme Court Civil Appeal No. 47/77, the Court had to consider the desirability in granting a declaration. Carberry, J.A. who delivered the judgment reviewed the authorities which indicated a "broadening down from

precedent to precedent" of the scope of the declaratory judgment and cited as illustrative the following observation expressed by Lord Sterndale, M.R. in Hanson v. Radcliffe U.D.C. (1922) 2 Ch. 490 at page 507:

> "In my opinion, under Order xxv., r. 5. the power of the Court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should of course be exercised judicially, but it seems to me that the discretion is very wide."

However, whatever may be its scope there is the general principle as Professor deSmith put it at page 518 is that "..... when Parliament has created new rights or duties and has appointed a specific tribunal for their enforcement, recourse must be had to that tribunal alone."

As the House of Lords held in Pasmore v. Oswaldtwistle Urban District Council (1898) A.C. 387 per Earl of Halsbury, L.C.:

> "The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law."

Now Section 44 of the Constitution provides:

> "(1) Any question whether -
>
> (a) any person has been validly elected or appointed as a member of either House, or
>
> (b) any member of either House has vacated his seat therein or is required, under the provisions of subsection (3) or subsection (4) of section 41 of this Constitution, to cease to exercise any of his functions as a member,
>
> shall be determined by the Supreme Court or, on appeal by the Court of Appeal whose decision shall be final, in accordance with the provisions of any law for the time being in force in Jamaica and, subject to any such law, in accordance with any directions given in that behalf by the Chief Justice.
>
> (2) Proceedings for the determination of any question referred to in subsection (1) of this section may be instituted by any person (including the Attorney-General) and, where such proceedings are instituted by a person other than the Attorney-General, the Attorney-General if he is not a party thereto may intervene and (if he intervenes) may appear or be represented therein."

As far as researches reveal the laws referred to therein are:

(1) The Election Petitions Act with updating amendments, and

(2) The Parliament (Membership Questions) Act.

The first was enacted in 1885 and the latter in 1963. Our concern in this appeal will be confined to the Election Petitions Act.

In my view the provisions of Section 44 create an exclusive jurisdiction to be exercised in the manner provided by the two complementary Acts.

I am fortified in so holding by (i) the historical references to which I have been adverted, (ii) the dicta in a number of cases, (iii) the specific and detailed provisions of the Election Petitions Act. From such of Jamaica's Constitutional History as is available the earliest legislative bodies were fashioned on the English Parliament and the jurisdiction of the superior Courts were no higher than those of England.

Of the cases I refer first to Bradlaugh v. Grossett (1884) 12 Q.B.D. p. 271. In that case Stephen, J. summarised the facts and the remedy sought at page 277:

> "The resolution of the House of Commons of the 9th of July, 1883, read with the Correspondence between the Speaker and Mr. Bradlaugh shews that for reasons which are not before us the House of Commons resolved that Mr. Bradlaugh, who had been duly elected member for Northampton, should not be permitted to take the oath prescribed by law for members duly elected, and that he should be excluded, if necessary, by actual force from the House, unless he would engage not to do so. We are asked to declare this order void, and to restrain the Serjeant-at-arms from enforcing it."

and then at page 278 said:

> "I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal proceedings, and that the use of such actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable."

He referred to two authorities in support:

(a) "Blackstone says:

'The whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.' '"

(b) Stockdale v. Handard (9 Ad. & E. 1) and quoted therefrom inter alia Coleridge, J.:

"That the House should have exclusive jurisdiction to regulate the course of its own proceedings, and animadvert upon any conduct there in violation of its rules or derogation from its dignity, stands upon the clearest grounds of necessity."

In Williams v. Manley (1973) 12 J.L.R. page 1151 at page 1155 Smith, J.A. said:

"Law 3 of 1885 was modelled on the Parliamentary Elections Act 1868 (31 & 32 Vict. c. 125) of the United Kingdom. Formerly, the right of deciding upon the validity of all elections to the House of Commons in England was exercised exclusively by the House itself. This right was subsequently transferred to the judges of the superior courts and the Act of 1868 is one of the earliest in which comprehensive provisions to this end were made. It then became the duty of the judges to decide whether an election in respect of which a petition is brought was properly conducted according to the laws governing the conduct of elections."

The detailed provisions of the Election Petitions Act include fairly comprehensive procedures and are clearly in keeping with the opinion of Smith, J.A. in Williams vs. Manley (supra).

Thus: election petition is defined in Section 2:

"..... 'petition' or 'election petition' shall mean a petition complaining of an undue return or undue election of a member of the House of Representatives or a councillor of a Parish Council, presented to the Supreme Court under the provisions of this Act."

By Section 3. The persons who may present a petition include:

"(a) in relation to the House of Representatives by the Clerk of the House of Representatives by authority of a resolution of that House;

(b) in relation to the House of Representatives or a Parish Council, by the Attorney-General or by any other person."

There are specific provisions as to the filing, presentation procedural requirements and conduct of an election petition e.g. Section 20 (a) to (g).

The powers of the Court are set out in Section 24:

> "(1) On the trial of an election petition the Judge shall, subject to the provisions of this Act and to any directions given by the Chief Justice, have all the powers, jurisdiction and authority of a Judge of the Supreme Court; and the Court held by him shall constitute a Court of the Supreme Court.
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> (2) Witnesses shall be subpoenaed and sworn in the same manner (as nearly as circumstances will admit) as in a trial of a civil action in the Supreme Court and shall be subject to the same penalties for perjury.
>
> (3) An election petition shall be deemed to be a proceeding in the Supreme Court and, subject to the provisions of this Act and to any directions given by Chief Justice, the provisions of the Judicature (Civil Procedure Code) Law and the rules of court shall, so far as practicable, apply to election petitions.
>
> (4) Unless otherwise ordered by the Chief Justice and subject to the provisions of this Act, all interlocutory matters in connection with an election petition may be dealt with and decided by any Judge of the Supreme Court."

and the provisions for appellate jurisdiction thus:

Section 20 (i):

> "..... Where, upon the application of any party to a petition under this Act, it appears to the Court or to a Judge in Chambers that the case raised by the petition can be conveniently stated as a special case, the Court of Judge may direct the same to be stated accordingly; and any such special case shall, as far as may be, be heard before the Court of Appeal, and the decision of the Court of Appeal shall be final; and the Court of Appeal shall certify to the Speaker or Deputy Speaker of the House of Representatives or to the chairman or vice-chairman of the Parish Council, as the case may be, its determination in reference to such special case."

Section 21:

> "If it appear to the Judge on the trial of the said petition that any question or questions of law, as to the admissibility of evidence or otherwise, require further consideration by the Court of Appeal then it shall be lawful for the said Judge to postpone the granting of the said certificate until the determination of such question or questions by the Court, and for this

"purpose to reserve any such question or questions in like manner as such questions are generally reserved by a Judge at nisi prius."

Section 22:

"(1) An appeal shall lie from the determination by a Judge of the Supreme Court on a petition under section 20 of the Court of Appeal whose decision shall be final and conclusive to all intents and purposes.

(2) So much of the provisions of this Act, and with such modifications, as may be prescribed by rules of court shall have effect in relation to an appeal under this section, and to the appellant and respondent in such appeal as they apply to a petition and to the petitioner and respondent in respect of such petition."

In Patterson v. Solomon (1960) 2 All E.R. 20, the Privy Council had to consider a preliminary objection on behalf of the respondent that no appeal lay to Her Majesty in Council from the decision of the Supreme Court of Trinidad in a matter affecting membership of the Legislative Council and consequently affecting membership of the Executive Council and of the office of Minister. It was urged that the objection was entertainable notwithstanding that special leave to appeal had been granted. The Board in dealing with the objection considered the effect of the relevant legislation namely, Section 40 of the Trinidad and Tobago (Constitution) Order - Council 1940 as affected by an amendment of 1956 which reads:

"(1) All questions which may arise as to the right of any person - (i) not being an elected member of the Legislative Council to be or remain a member of the Legislative Council as Speaker, or (ii) to be or remain an elected member of the Legislative Council, shall be referred to the Supreme Court of the colony in accordance with the provisions of any law in force in the Colony.

(2) All questions which may arise as to the right of any other person to be or remain a member of the Legislative Council shall be referred to the Governor and shall be determined by the Governor acting in his discretion."

Viscount Somonds who delivered the judgment of the Board said at page 24:

"..... This objection can conveniently be examined on the footing that the appellant's claim had been maintained in its entirety. On this footing, it appears to their Lordships that it must be sustained.

> "Adapting the words of Lord Cairns, L.C., in Théberge v. Laudry [(1876) 2 A.C. 108], they are of opinion that, on a fair construction of the Order in Council, it does not provide for the decision by the Supreme Court of mere ordinary civil rights, but creates an entirely new jurisdiction in a particular court of the Colony for the purpose of taking out of the Legislative Council with its own consent and vesting in that court the very peculiar jurisdiction which had existed in the council itself of determining the status of those who claim to be members of the council. If so, it follows that the determination of that court is final, and that from it no appeal lies. Nor does this rest on the validity of the assumption that, apart from s. 40 of the Order in Council, the question could be determined by the council itself. In De Silva v. A.G. for Ceylon, it was made clear that the same principle applies whether or not the jurisdiction vested in the particular court had previously been exercised by the legislative body."

In my view Section 44 of the Constitution is in recognition of and necessitated by the principle stated in Bradlaugh v. Grossett. Reiterating for emphasis this special exclusive jurisdiction created by the Constitution is exercisable in the manner and to the extent described and defined by the relevant legislation.

Do the declarations as sought fall within the contemplation of Section 44 of the Constitution? Mr. Macaulay's argument that they are not concerned or do not in any way question the validity of the fifth appellant's membership in the House of Representatives formed an area of weakness in an edifice of otherwise well structured submissions.

It is clearly not maintainable in the face of Declaration 5 which expressly challenges the validity of the nomination proceedings from which flowed the election resulting in the fifth appellant being declared a member of the House of Representatives.

Nomination proceedings are part of the electoral process. In so holding I am influenced by the following passage from Ponnuswami's case - pp. 227-228:

> "That the word "election" bears this wide meaning whenever we talk of elections in a democratic country, is borne out by the fact that in most of the books on the subject and in several cases dealing with the matter, one of the questions mooted is, when the election begins. The subject

"is dealt with quite concisely in Halsbury's Laws of England in the following passage under the heading "Commencement of the Election":

> 'Although the first formal step in every election is the issue of the writ the election is considered for some purposes to begin at an earlier date. It is a question of fact in each case when an election begins in such a way as to make the parties concerned responsible for breaches of election law, the test being whether the contest is "reasonably imminent". Neither the issue of the writ nor the publication of the notice of election can be looked to as fixing the date when an election begins from this point of view. Nor, again, does the nomination day afford any criterion. The election will usually begin at least earlier than the issue of the writ. The question when the election begins must be carefully distinguished from that as to when "the conduct and management of" an election may be said to begin. Again, the question as to when a particular person commences to be a candidate is a question to be considered in each case.'

The discussion in this passage makes it clear that the word "election" can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process."

Nomination proceedings in Jamaica has its head-waters in the grant of poll by proclamation under Section 19 of the Representation of the People Act which provides:

> "(1) Subject to the provisions of subsection (2) and of section 20 the Governor-General shall by proclamation appoint the day upon which the poll shall be held at any election, and such day shall be specified in the writ of election. At a general election the writs for all the constituencies shall be dated on the same day, and shall name the same day for the poll.
>
> (2) In any case to which the provisions of section 20 or of section 26 apply, the day to which any election is adjourned shall be deemed to be the day appointed by the Governor-General and specified in the writ."

Subsection (2) and Section 20 are not of immediate concern and will be dealt with later. Section 26 which deals with the procedure on the death of a nominated candidate is irrelevant to this appeal.

Nomination day is fixed by the Minister pursuant to the grant of poll - Section 21 (1):

> "Subject to the provisions of section 26, nomination day shall be such day, other than a Sunday or public holiday, as may be appointed by the Minister, by notice in the Gazette, not being more than twenty-three, nor less than sixteen days, next before election day."

Upon the set day at the nomination centre duly publicised as such by the returning officer every candidate who complies with the statutory procedural requirements has his nomination protected by the purposeful provisions of Section 23 (6) of the Representation of the People Act which reads:

> "(6) The returning officer shall not accept any deposit until after all the other steps necessary to complete the nomination of the candidate have been taken, and upon his accepting any deposit he shall give to the person by whom it is paid to him a receipt therefor which shall be conclusive evidence that the candidate has been duly and regularly nominated."

In the **Fabre** case, the plaintiff F.

> "..... presented in due time and in due form to an officer at the Commonwealth Electoral Office for the Electoral Division of Lowe a nomination paper nominating him as a candidate in the election for the House of Representatives to be held on 2nd December, 1972, as a representative of the Australian Commonwealth Party. On presenting the nomination paper the plaintiff proposed to satisfy the requirements of s. 73(c) (ii) of the Commonwealth Electoral Act 1918-1966 (the Act) by offering the officer a personal cheque to the amount of $100. The officer refused to accept the cheque as a deposit on the ground that it was not a "banker's cheque." The plaintiff contested this view of the officer, leaving with him the nomination paper which had endorsed thereon the plaintiff's consent to act if elected and his declaration that he was qualified under the Constitution and the laws of the Commonwealth to be elected a Member of the House of Representatives. The hour of nomination for the election of the House of Representatives to be held on 2nd December 1972 was twelve o'clock noon on 10th November 1972, and apparently the interval between the time of the plaintiff's attendance at the Electoral Office and that hour was insufficient to permit the plaintiff, had he desired to do so, to obtain $100 in cash.
>
> On 15th November 1972, the plaintiff, by writ of summons accompanied by a statement of claim, commenced an action against the defendants whose personal names were added by amendment made on 22nd November 1972, pursuant to leave granted in that behalf. Upon a summons for directions the following questions were directed by the Chief Justice to be argued before a Full Court in the present sittings of the Court, pursuant to s. 18 of the Judiciary Act 1903-1969, viz.:

" '(1) Whether upon the facts stated in the statement of claim lodged by the plaintiff in this cause the plaintiff's nomination for election as a member of the House of Representatives was valid.

(2) Whether [there is] jurisdiction to hear an action founded on the plaintiff's statement of claim.

(3) Whether s. 73 (c) (ii) is a valid law of the Commonwealth.' "

Section 73 of the Act required the deposit to be "in legal tender or in a banker's cheque".

> "The first and third questions were argued before all members of the Court on 24th November 1972, and at the conclusion of the argument the Court answered the first question in the negative and the third question in the affirmative. The Court said that it would not answer the second question."

The Court held that the description "banker's cheque" will not be satisfied by "a personal cheque".

In Fabre's case the Court declared a particular nomination invalid while the nomination proceedings as a whole were not challenged. remained valid and a valid election could flow therefrom.

The converse, however, has different consequences. Even if a particular nomination is good if the nomination proceedings on a whole are invalid [they] will taint the subsequent elections which flows therefrom with invalidity and a competent Court would so hold - see Wilson v. Ingham (1895) 72 L.T. 79; Howes v. Turner (1876) 1 Common Pleas p. 670; In Watson v. Ayton (1946) 1 K.B. 297:

> " By para. 5 sub-para. 1 of Schedule II. to the Local Government Act, 1933, it is the duty of the mayor of a borough on the occasion of the election of a borough councillor to 'examine the nomination papers, and decide whether the candidates have been validly nominated in accordance with the provisions of this schedule.' The mayor decided that a candidate had not been validly nominated by reason of the fact that he was disqualified for being elected by the provisions of s. 59, sub-s. 2 of the Local Government Act, 1933:-
>
> HELD, that the duty of the mayor was limited to deciding the question of the validity of a nomination by an examination of the nomination paper itself and that he had no jurisdiction to decide that a nomination was

"invalid on the ground that the candidate was disqualified from election."

For these reasons, the election was declared void - page 302.

Nomination proceedings, however, being an integral part of the electoral process are challengeable not only in an election petition but are not subject to prerogative orders in interim proceedings i.e. while the election is in progress.

In Ponnuswami's case the Court had to consider legislation similar in tenor and intendment to the Representation of the People Act and the Constitution of Jamaica.

The headnote of that case reads:

> "Article 329 (b) of the Constitution of India provides that 'no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.' The Representation of the People Act, 1951, which made detailed provisions for election to the various Legislatures of the country also contains a provision (sec. 80) that no election shall be called in question except by an election petition presented in accordance with the provisions of the Act.
>
> The appellant, who was a candidate for election to the Legislative Assembly of the State of Madras and whose nomination paper was rejected by the Returning Officer, applied to the High Court of Madras under article 226 of the Constitution for a writ of certiorari to quash the order of the Returning Officer rejecting his nomination paper and to direct the Returning Officer to include his name in the list of valid nominations to be published.
>
> Held by the Full Court (Patanjali Sastri, C.J., Fazl Ali, Mahajan, Mukherjea, Das Chandrasekhara Alyar JJ.) that in view of the provisions of article 329 (b) of the Constitution and sec. 80 of the Representation of the People Act, 1951, the High Court had no jurisdiction to interfere with the order of the Returning Officer."
>
> "..... Having regard to the important functions which the legislatures have **to** perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

"In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the "election"; and if any irregularities are committed while, it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the "election" and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress.

The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it. Strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it.

Where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of."

In the course of the judgment Fazl Ali, J. said:

"The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under article 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded), and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, which, as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any court. It seems to me that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question."

I am attracted both by the reasoning and the decision in Ponnuswami's case.

Declaration 5 definitely challenged the validity of the second nomination proceedings and consequently the fifth appellant's election to the House of Representatives. Apart from being impractical the co-existence of two sets of nomination for an election to the same vacancy would patently be in conflict with the intention of the legislation. Thus it clearly fell well within the contemplation of Section 44 of the Constitution and therefore excluded from the scope and ambit of a declaratory judgment. Mr. Macaulay's submission that at the time the writ was filed an election petition would not lie and therefore these proceedings judged at that time were proper ignored the realities. On July 24, 1978, when the proceedings were filed it was obvious:

> that the elections fixed for July 25 and based on the first nomination proceedings would not be held; (2) that another date for elections had been fixed by a Proclamation; (3) that in due course the question of the validity of the second nomination proceedings and the resultant elections flowing from this grant of poll would be challengeable by an election petition.

Accordingly, the validity of the earlier nomination proceedings and their effect, (if any) on the granting of another poll are incidental questions and could properly be raised in such an election petition.

The respondent quite properly in my view abandoned Declaration 7 as taking part in the subsequent nomination proceedings could not affect his position in relation to the first nomination proceedings or in any way be prejudicial to the right to challenge the validity of the second nomination proceedings.

Fabre's case (supra) is therefore distinguishable from the instant case on the following grounds:

> (i) In Fabre's case there was but one nomination proceedings and at the time the questions came before the Court the electoral process flowing from those proceedings were still in progress.

(ii) It was eminently convenient to determine the validity of the applicant's nomination so that the authorities concerned may know whether or not they should include or omit the plaintiff's name as a candidate from future electoral documents and processes.

(iii) The question of jurisdiction though raised by the Attorney General was not pursued and the Court declined to determine that question.

(iv) In any event, the proceedings did not question the validity of the "nomination proceedings."

In Petrie v. The Attorney General and Others - (1969) 14 W.I.R. 292, the Governor-General acting in accordance with the provisions of art. 67 of the Constitution of Guyana appointed a stated day -

> "..... for the election of the Members of the National Assembly. But before that date, the plaintiffs took out a summons in which they sought declarations that the Acts of Parliament and the regulations made thereunder, by virtue of which the elections were to be held, should be declared unconstitutional, illegal, null and void, and an injunction restraining the Chief Elections Officer from holding any election on the basis of registers of electors compiled pursuant to the legislation by Parliament by virtue of which the elections to the National Assembly are conducted, administered and held.
>
> Subsequently, the plaintiffs took out a summons in which they sought certain interlocutory order against the 2nd, 3rd, 4th and 5th defendants (all members of the Elections Commission) to perform certain acts under the Constitution, and to restrain the 6th defendant (the Chief Elections Officer) from conducting, holding, or administering any election to the National Assembly on the basis of the registers aforesaid.
>
> Upon a preliminary objection taken by the Attorney General,
>
> Held: (i) that by virtue of art. 71 of the Constitution, Parliament has conferred an exclusive jurisdiction on the High Court to determine certain questions appertaining to elections to the National Assembly, and the court had no jurisdiction to determine the matters raised as they pertain to the class of questions enunciated by art. 71; such matters must be raised by way of an election petition after the result of the election has been made known;
>
> (ii) (obiter) that the plaintiffs are not entitled to the equitable remedy of injunction as this would be a negation of art. 67 of the Constitution."

In delivering the judgment Bollers, C.J., at page 300 quoted with approval the following passage from Théberge v. Laudry (1876), 2 App. Cas. at page 102:

> "A jurisdiction of that kind is extremely special and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the Constitution of the Legislative Assembly to be distinctly and speedily known."

and forthrightly stated at page 304:

> "I reject the submission of counsel for the plaintiffs, unsupported as it was by authority or analogy, that the court in its general jurisdiction at common law would have jurisdiction in these matters. I think that the history of this special jurisdiction, which has been conferred on the High Court by art. 71, indicates clearly that the court never had such a jurisdiction at common law, nor can it be said that the summons raises the specific question as to the interpretation of the Constitution."

I am of the view that the only and proper course was for the respondent to await the outcome of the election and file an election petition.

This conclusion ought not to be taken as criticizing the institution of the proceedings as being due to imprudence or want of foresight. On the contrary, I see in so doing a skilful manoeuvre to attack the validity of the second nomination proceedings from the shelter of the statutory presumption seeking at the same time to limit the Court's enquiry on the basis that nomination proceedings can only be questioned in an election petition. For the Court to take such a blinkered view would result in the probability of declaring a particular nomination valid even where there are factors which if considered would move the Court to declare the proceedings invalid. In the special circumstances of this case the validity of the first nomination proceedings is relevant to the consideration of the validity in fixing another election date and the holding of another nomination proceedings. However regard must be had to the practicalities: the fact that an election has been aborted for whatever reason cannot deny the right of the citizens of Jamaica to the holding of elections with due expedition.

It is of no little concern that the election that was eventually held pursuant to the new grant of poll, the majority of electors cast their votes for the fifth appellant. These proceedings in general were, in my view, designed to avoid the constraints of Section 44 of the Constitution and to challenge by this oblique method the validity of the fifth appellant's seat in the House of Representatives.

In fairness to the learned trial judge, whose full and eloquent judgment is testimony to the care and consideratiom he gave this question, the argument before him was advanced along different lines. As urged before him on behalf of the defendants it was put not as a question of competence but as one of discretion. Even if urged as such in my view having regard to all the circumstances he ought to decline jurisdiction. It would be pointless to deal with Declarations 1, 3, 4 and 5 disjunctively. Indeed without Declaration 5 the game would not be worth the candle. The matter of great public concern was not whether or not a particular potential candidate had complied with the statutory requirements for a valid nomination but whether the nomination proceedings were valid and whether the subsequent nomination proceedings terminating in the "election" of the fifth appellant to the House of Representatives were valid. In other words was he validly elected to the House of Representatives?

The declarations as granted left unresolved these questions of exceptional public importance.

While it is not unknown for a Court to grant a declaration without coercive orders yet a declaratory judgment must not be an exercise in futility - some good must flow from it. As Bruce V.-C in Clough v. Radcliffe (1847) 1 DeG. & S. 164 at 178-9 observed:

> "Nakedly to declare a right, without doing or directing anything else relating to the right, does not, I conceive, belong to the functions of this Court."

The Court must be satisfied that it will serve a useful purpose - Attorney-General v. Colchester Corp. (1955) 2 Q.C. 207 at 217.

The declarations as granted rather than solve a problem created one. The judgment granting these declarations raised uncertainty in the minds of the public as to whether or not the fifth appellant was properly and validly elected to the House of Representatives; it cast a shadow over his seat - a shadow he was powerless to remove by any legal action; it placed the Speaker of the House in a quandary - the judgment conferred on the Speaker no authority to act in relation to the fifth appellant, gave neither guidance nor advice as to the course to pursue. It could not revive the aborted 1st nomination proceedings. The learned trial judge could not fail to be unaware of the inadequacies of the judgment; he had no power to declare the election of the fifth appellant "null and void"; no authority in law was given to the Executive to take any action in relation to the membership in the House of Representatives of the fifth appellant. The most that the judge could do was to communicate to the Speaker the terms and/or tenor of his judgment a judgment delivered in open Court. In so doing it amounted to no more than the courtesy of an address. Accordingly, even if by considering each of the declarations - 1, 3, 4 & 5, - as independent and by so doing one could carve out of the pleadings some declaration which would by itself be inoffensive to the principle in Ponnuswami's case yet for the reasons adumbrated above and in particular their inconclusive nature, the applications in relation to these declarations should not have been entertained.

For these reasons, I hold that the learned trial judge erred in granting Declarations 1, 3, 4 and 5.

I now turn to consider the arguments raised in relation to Declaration 6. The Court was of the view that this declaration involved broad principles of construction and was concerned with the purported exercise of a power that was not expressly provided for in the Representation of the People Act and although it formed the factual cover for a new grant of poll, the power to grant a poll was independent and expressly provided for in the Representation of the People Act. Accordingly, this declaration did not involve in any

way any question concerning the fifth appellant membership of the House of Representatives.

It was submitted on behalf of the appellants that as there was no specific provisions in the Representation of the People Act for revoking a proclamation granted under Section 19 of that Act, the Governor under the general power conferred by Section 29(1) of the Interpretation Act could validly revoke the proclamation of the 4th July 1978 and properly did so as an occasion arose which warranted a revocation. Further that the occasion arose because of the following factors:

(a) the wrongful rejection by the Returning Officer of the nomination papers of a particular nominee.

(b) The violence at the nomination centre which rendered the proceedings abortive.

It seems necessary to deal with these factors beyond the purpose outlined by the Attorney General because of certain broad propositions with far reaching consequences as put forth by Dr. Barnett. As I understand his arguments, Dr. Barnett was saying that a competent Court would undoubtedly find that these factors would render any election flowing from the first nomination proceedings "null and void." Consequently he submitted, the proceedings were void ab initio and any one could so treat it. In that regard he drew an analogy with void marraiges. He referred to a number of cases including Howes v. Turner (1876) 1 Common pleas page 670; Wilson v. Ingham (1895) 72 L.T. (1866) and R. v. Watson & Ayton (1946) 1 K.B. 297 at page 796 in which Courts had held elections "void" on the grounds of wrongful acts by election officers. Further that the consistency of the language of the Court in so declaring tended to support his contention.

Notwithstanding that Mr. Macaulay had urged that these factors were irrelevant in considering whether or not to grant the declarations sought, the learned trial judge considered this evidence tendered for the purpose of establishing that the first nomination proceedings were aborted through violence at the centre and said:

> "These affidavits were filed by the Director of State Proceedings and it is fair to assume that someone with knowledge of the purpose to be served by the affidavits would have read them and satisfied himself that they met the test.
>
> The purpose, as I understand it, is to disclose facts which it is contended, justified the revocation of the nomination proceedings and so render void the plaintiff's nomination. But if this is so then these affidavits, without exception, are remarkable for what they have failed to say. Nowhere is it stated that even one prospective candidate lodged a complaint that he/she was denied entry to the nomination centre. If there were such persons why is there no affidavit from even one such? Then, too, if Superintendent Leon's account of the police conduct on such an important occasion is true it were better left unsaid, for such disclosure open as it is to be construed as a virtual aiding and abetting of the very evil sought to be prevented can only redound to the discredit of the police."

With this assessment of the evidential worth of the relevant affidavits I am in entire agreement. It is enough to say that they are too nebulous to fulfil the purpose for which they were tendered.

Dr. Barnett however, countered by contending that it was not open to the trial judge to so find as implicit in the pleadings this was no longer a live issue demanding of the fifth appellant the tendering of evidence in proof thereof because the respondent in his reply had neither traversed nor denied this allegation of the fifth defendant/appellant.

An examination of the pleadings revealed that in the statement of the defence filed by or in behalf of the first to fourth defendants/appellants at paragraph 3 there is the following:

> "Paragraph 4 of the Statement of Claim is expressly denied. And these Defendants will say that the facts and circumstances surrounding the Nomination on the 10th of July 1978 were such that the Nomination was completely invalidated and will argue that accordingly an occasion arose for new nominations to be held."

Paragraph 5 of the respondent's reply states:

> "The Plaintiff joins issue with the 1st, 2nd and 3rd Defendants as regards paragraphs 1, 2, 3, 4, and 7, except in so far as any parts of these paragraphs amount to admissions by the Defendants. The facts and circumstances referred to in paragraph 3 of that Defence, whatever they were, and the fact that "elections" as a matter of

"fact, have taken place, which is referred to in paragraph 7 but after the issue of the Writ herein, are not and will not be challenged at the trial, by the Plaintiff, as those facts are not relevant to the declarations of Law sought by him, in paragraphs 1 to 7 in his Statement of Claim."

Subsequently on the 17th of October, 1978, the fifth defendant filed his defence and paragraph 3 reads:

"The fifth Defendant denies paragraphs 3, 4 and 5 of the Statement of Claim and says that the nomination, on July 10, 1978 were unconstitutional, invalid and of no effect as -

(a) the statutory procedure at nomination was not complied with in that the nomination papers of persons validly nominated on that day were not accepted or acted upon by the Returning Officer and/or

(b) by reason of violence and/or intimidation the nomination papers of persons qualified to be members of the House of Representatives could not be handed to the Returning Officer or received by her."

The respondent filed an amended reply on the 12th December, 1978. This amended reply was headed:

"AMENDED REPLY

TO THE DEFENCE OF 1ST, 2ND, 3RD, 4TH AND 5TH DEFENDANTS

SUIT No. C.L. T041 of 1978

In the Supreme Court of Judicature of Jamaica

Common Law

BETWEEN	DONALD THOMPSON	- PLAINTIFF
A N D	THE ATTORNEY GENERAL THE CHIEF ELECTORAL OFFICER MRS. CARMEN BARTILOW MR. ROY KNIGHT MR. DUDLEY THOMPSON	- DEFENDANTS

Nowhere in the operative part of this reply was any reference made to any of the fifth defendant's specific allegations.

In the conduct of the case for the respondent both in the Court below and before us Mr. Macaulay was carefully consistent in urging that the question as to whether or not the violence at the nomination centre aborted the proceedings was irrelevant. I do not

consider such a stand as amounting to a concession that the violence was of such a nature as to render the first nomination proceedings aborted. It was therefore open to the trial judge if on the pleadings the issue was alive and he considered it necessary, to make a finding on this aspect of the matter. Because of the decision to which we came such a finding by us is not essential. However the learned trial judge in dealing with this question of the pleadings said:

> "The defence of the 1st, 2nd, 3rd and 4th defendants contains 7 paragraphs to each of which, in keeping with the rules relating to pleadings, the plaintiff replied specifically. The defence of the fifth defendant is set out in eleven paragraphs which are not in terms identical with the other defences. Short of being a very skilled legal acrobat one would be severely tested to cull the semblance of a reply to the defence of the fifth defendant out of the amended reply. But even if successful such acrobatic effort would not be countenanced by the rules which require that a traverse must be specific, must not be evasive and must answer the point of substance. Therefore to answer the two questions posed (supra) it seems to me that despite any harboured intention on the part of the plaintiff there is in fact no reply to the defence of the fifth defendant. Accordingly matters not admitted by the defence and not already admitted by the reply are in issue."

To me this seems the correct decision.

Turning to Dr. Barnett's broad proposition as to the proceedings being void ab initio I note that this question was raised before the learned trial judge who dealt with it thus:

> "But it was argued that had an election been allowed to proceed on the nominations of the 10th July, 1978 a competent court would necessarily upset the results on the ground that the nominations were void. But if that is sound reasoning then by the same logic one may have a shoemaker extract one's tooth on the premiss that any qualified dentist would extract it."

I myself shall earnestly endeavour to refrain from ironic analogies. Dr. Barnett's submission cuts across that of the Attorney General's that the nomination proceedings are part of the electoral process and are challengeable only by the special procedures and in the special jurisdiction created by the Constitution and other statutes thereunto enabling. Dr. Barnett frankly

conceded that his arguments presented a wider proposition than that put forth by the Attorney General.

In my view this proposition ignores the spirit and intendment of the Constitution and the Representation of the People Act that once the election process has been set in motion it should proceed with expedition and without undue or unauthorised interruption to the fulfilment of its purpose, the election of a member to the House. His forced and unhappy analogy to void marraiges overlooks the statutory presumption in Section 23 of the Representation of the People Act. Nor can the language of the Court in pronouncing an election "null and void" be taken as indicative that the proceedings could have been treated as void ab initio. On the contrary the fact that in the cases cited a judicial pronouncement was necessary is indicative that unless and until there is such a pronouncement the proceedings hold good. One needs no vivid imagination to visualize the consequences if while an election is in progress every Tom, Dick or Harry on his own judgment could treat the electoral proceedings or any part thereof as void. This would open the door for chaos, dark and rude to enter and rule the electoral process.

There would be uncertainty and dark surmises in the minds f many citizens. In my view any question challenging the validity f electoral proceedings is one for determination by a competent ourt and any attempt by the Executive by declaration or decree to ss adverse judgment upon such proceedings would clearly be a rpation of judicial power.

As the learned trial judge said:

> "It is conceivable that matters relevant to the validity of the person's election may arise out of his nomination. In such circumstances it would be nothing short of legislative schizophrenia to assign to the Executive the power to determine the validity or invalidity of a nomination while reserving for the Supreme Court the question of the validity of the election which is the progeny of the nomination. And particularly, having regard to the clear language of the section there is no room to accommodate any argument favouring con-current exercise of the

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"power by the Executive and the Judiciary. It is my view, therefore, that the Constitution of Jamaica does not favour the contention of the defendants."

The Constitution having conferred jurisdiction on the Supreme Court, it is not open to the Executive to erode that jurisdiction by oblique methods - see Patterson v. Solomon (supra). Further it is immaterial that in the distant past questions as to membership of Parliament were dealt with by Parliament itself. The jurisdiction having been conferred on the Supreme Court can now only be affected by legislation intra vires the Constitution. See deSilva v. A.G. for Ceylon (1949) 50 N.L.R. 481. This is so self-evident that I find it unnecessary to quote dicta from Liyange v. The Queen (1967) A.C. 259 or Hinds v. The Queen (1976) 1 All E.R. 353 or other cases reiterating the doctrine of the separation of powers as it applies to Constitutions such as ours.

As between the parties to these proceedings it is a good rule that works both ways; just as the respondent could not on his own judgment treat the nomination proceedings resulting in the election of the fifth appellant to the House of Representatives as invalid so in like manner the first and fifth appellants or any other person could not take it upon themselves to hold that the first nomination proceedings were invalid. Whether or not in fact they were rendered invalid by any one of the factors described above must perfore remain a question unanswered since proper proceedings for their determination were not instituted.

Verily, I can find no merit in Dr. Barnett's broad proposition.

With respect to the contention that the Governor-General had powers of revocation under the Interpretation Act to revoke a proclamation made under Section 19 of the Representation of the People Act the Attorney General frankly stated that the circumstances described in Section 20 of the Representation of the People Act and in which the Governor-General is empowered by the provisions of the Section to defer an election did not exist in the instant case nor did the

Governor-General purport to act under or in accordance with those provisions.

Section 20 reads:

> "(1) where at any time between the making of any proclamation under subsection (1) of Section 19 and the day appointed by such proclamation for the holding of the poll at any election the Governor-General in Council is satisfied that it is expedient so to do by reason of -
>
> (a) Her Majesty's Government having become engaged in any war; or
>
> (b) the proclamation of any state of emergency under the Emergency Powers Act; or
>
> (c) the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence or outbreak of infectious disease or other calamity to the foregoing or not; or
>
> (d) the likelihod that the official lists for all constituencies or for any particular constituency will not be printed before the day appointed under section 19 for the holding of the poll or that any essential electoral supplies or materials will not be available in adequate quantities upon such day,
>
> he may by proclamation adjourn the holding of the poll to some other day specified in such proclamation not being more than thirty days after the day specified in the proclamation under section 19."

It is clear that none of the circumstances or events described in Section 20 (supra) existed and quite properly there was no attempt by the appellants to pray in aid the provisions of that Section.

Section 29(1) of the Interpretation Act reads:

> "Where an Act confers power on any authority to make or issue regulations, the following provisions shall, unless the contrary intention appears, have effect with reference to the making, issue and operation of such regulations -
>
> (a) a regulation may be at any time amended, varied, suspended, or rescinded or revoked by the same authority and in the same manner by and in which it was made;

"(b) .....

(c) where any Act confers power on any authority to make regulations for any general purpose, and also for any special purposes incidental thereto, the enumeration of the special purposes shall not be deemed to derogate from the generality of the powers conferred with reference to the general purpose;

(d) no regulation shall be inconsistent with the provisions of any Act.

(e) .....

(f) any reference in any regulation to "the Act" shall be read and construed as meaning the Act conferring the power to make or issue such regulations."

Section 34(1) of the Interpretation Act reads:

> "Where any Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires."

Section 3 of the Interpretation Act gives the following interpretations:

> " 'Regulations' include rules, by-laws, proclamations, orders, schemes, notifications, directions, notices and forms."
>
> " 'Proclamation' means a proclamation of the Governor-General under the Broad Seal."

The circumstances described in Section 20 of the Representation of the People Act include events of grave national calamity or upheavals. On the happening of such events the Governor-General's power is confined to deferring the election for a limited period. Implicit in it is the intendment to preclude any general power of postponement. These provisions are specific and in a special statute dealing with elections and the electoral process.

The provisions of the Interpretation Act are clearly of general application.

In Barker v. Edger (1898) A.C. 748 at page 754:

> ".... When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each

> "enactment must be construed in that respect according to its own subject-matter and its own terms."

In my view these provisions of Section 20 of the Representation of the People Act were intended to define and confine the power of the Governor-General to postpone or interfere with the progress of an election to the circumstances described or categorised and in the manner authorised therein. They are clearly incompatible with any general power to halt or stop temporarily or permanently the progress of an election. The effect of the proclamation revoking the first grant of poll was to stop the election which was in progress.

A wide discretion to revoke a grant of poll as contended for by the appellants would confer on the Executive the sort of power which as Shakespeare put it is one "which at his will he may do mischief with."

Accordingly, the general powers of revocation in the Interpretation Act are inapplicable to a poll granted under Section 19 of the Representation of the People Act since in the provisions of the later Act a contrary intention appears. There is clearly a contrariety between the provisions of the general enactment in the Interpretation Act and the special provisions of the Representation of the People Act and the rule of construction expressed in the maxim "generalia ex specialibus non derogant" is applicable; a fortiori when the general statute contains the words "unless a contrary intention appears" the question is beyond debate.

Accordingly, for these reasons I agree with the decision of the Court in the granting of Declaration 6 in the form set out above.

Our decision on this point may now be considered of limited application since in the interim the Representation of the People Act has been amended inter alia to confer on the Governor-General power to adjourn by proclamation the holding of elections where the electoral process is interrupted or obstructed by riot, violence or other civil disturbances.

The question whether or not those amendments will affect the democratic rights of the people to have free and fair elections timeously and with due expedition did not arise for consideration although we were aware of the proposed legislation. It would not only be obiter but impolitic to make any observations pertaining to these amendments.

It was also urged that the fourth appellant was improperly joined as a party to the proceedings. The fourth appellant was the Chief Electoral Officer and duly appointed as such under Section 62 of the Representation of the People Act and his powers, responsibilities and duties are comprehensively conferred and defined by Section 63 of the Representation of the People Act:

> "The Chief Electoral Officer shall -
>
> (a) exercise general direction and supervision over the administrative conduct of elections and enfore on the part of all election officers fairness, impartiality and compliance with the provisions of this Act;
>
> (b) issue to election officers such instructions as from time to time he may deem necessary to ensure effective execution of the provisions of the Act; and
>
> (c) execute and perform all other powers and duties which in this Act are imposed upon him."

In my view in the light of the statutory powers and duties of the Chief Electoral Officer, the propriety of joining him in the absence of evidence of any wrongful act or omission on his part, cannot rest upon the narrow basis of vicarious liability. Consideration must be given to the nature of the proceedings and the remedy sought and his duties and responsibility under the Act. I have already dealt with the nature and purpose of declaratory judgments and in particular that there may be a declaration without pronouncing any sanction.

In Williams v. Manley (1973) 12 J.L.R. page 1151, it was held that:

> "..... any act or omission of a returning officer, or anyone for whose acts he is legally responsible, in the conduct of an election which a petition claims resulted in an undue election or an undue return, is a complaint against his conduct within the meaning of s. 18 of the Election Petitions Law, Cap. 107."

In dealing with this question the learned trial judge adopted a similar approach and said:

> "It was submitted that there is no master - and servant relationship which could render the 2nd defendant vicariously liable for the conduct of the 3rd and 4th defendants. This need not be accorded any consideration. The relationship is already clearly established.
>
> The plaintiff calls into question the failure of the 3rd defendant to comply with certain statutory duties which are claimed to be mandatory as well as the authority of the 4th defendant to act as he did. It is obvious, therefore, that the conduct of the Chief Electoral Officer in his supervisory capacity is also under impeachment. I hold that he has been properly joined as a party and reject the call for judgment in his favour on the ground that he is not a proper party to the proceedings."

I am in agreement with this finding. Having regard to the nature of the proceedings, the pleadings and the conduct of the cases both for the plaintiff and the first and fifth defendants it was eminently proper to name the fourth appellant in the proceedings.

On the question of costs, as the respondent was successful in relation to a question of law of exceptional public importance I agree with the apportionment of the costs of the appeal as set out in the oral decision:

> "Two thirds costs to the respondent to be paid by the 1st appellant - such costs to be agreed or taxed. No further order as to costs."

For their industry in research and the careful presentation of their arguments I am grateful to Counsel on all sides. My appreciation for the efforts of each one remains unaffected by the fact that on certain points I am constrained to differ.

ZACCA - PRESIDENT:

I have had the advantage of reading the judgment of Kerr, J.A. in which he has fully set out the reasons for our decision given on October 24, 1980. I agree with it and cannot usefully add anything.

CAREY J.A.

The 25th July, 1978, was the date duly fixed by the Governor General for the holding of a poll in respect of the St. Andrew, West constituency. Two candidates, surnamed Thompson, were certified by the Returning Officer as duly nominated: they were respectively the fifth appellant, Dudley and the respondent, Donald. But that poll was not held. On 14th July, 1978, the Governor General revoked his earlier proclamation announcing the holding of a poll by another proclamation which, although cancelling the former, did not particularize the grounds for this decision. It was not therefore the most distinguished example of parliamentary drafting. It baldly stated "it has been decided that the poll shall not be held." Although the voters of the constituency involved would have been particularly interested in learning what were the facts and foundation for this assumption and exercise of executive power, no information was vouchsafed until the hearing of a suit at the instance of Donald Thompson against Dudley Thompson, the Attorney General and certain electoral officials which came on for hearing in October 1979, before Wright J. from whose judgment this appeal now comes to this court.

In the pleadings filed on behalf of the Attorney General in that action, it was averred that the facts and circumstances surrounding nomination day of 10th July, were such that the nomination was completely invalidated. The evidential support which was provided by affidavits from the Returning Officer, the Chief Electoral Officer and a Superintendent of Police, amounted to this (i) there had been a wrongful rejection of nomination papers submitted by a prospective candidate (ii) violence had erupted, and a man had rushed menacingly at this candidate's agent but police action prevented any harm; (iii) a large crowd milled about the nomination centre preventing easy access to or egress from the nomination centre: (iv) Seven prospective candidates had tendered nomination papers to the Returning Officer but of these two (2) only were accepted. In the face of this exiguous

evidence I confess difficulty in appreciating the argument on the part of the appellants that the effect of this violence was to show the likelihood that other prospective candidates were deterred from coming forward and proferring their nomination papers for the most violent act identified, was the possible assault on a candidate's agent. No one was produced to say he had been deterred or that the violence displayed was such as to alarm any person of reasonable firmness. This then was the sum total of evidence which, it was argued allowed the Executive to void the nominations, and issue a fresh proclamation to enable a start de novo of the entire electoral proceedings in that constituency. But I will consider this aspect of the matter later in this judgment.

In this court leave was sought and, in the event, granted to allow the appellants to argue a ground not canvassed in the court below. It related to the jurisdiction of Wright J. to determine the issues raised in the action before him. The question of the Court's jurisdiction to deal with the issues raised in this action in the manner presented to the court below, concerns the efficacy of the declaratory judgment in the circumstances of this case. That the Supreme Court has wide discretionary powers to grant relief by way of declarations, is plain. Denning L.J. (as he then was) in Barnard v. National Dock Labour Board (1953 2 Q.B. 18 at p. 41 remarked:-

> "I know of no limit to the power of the Court to grant a declaration except such limit as it may in its discretion impose upon it."

But it is recognized that there are limits which the court itself or particular statutes might place on the exercise of this seemingly inexhaustible plentitude of power. Thus the court will not entertain matters which are not within its powers, inherent or otherwise, and traditionally the courts have never considered matters relating to parliamentary privileges because disputes of that nature were the special province of parliament itself, Bradlaugh v. Gossett (1884) 12

Q.B.D. 271, nor have the courts granted declarations where the plaintiff asserts a right or interest not recognized by the law, Nixon v. Attorney General (1930) 1 Ch. 566; where the subject matter of the action lies outside the jurisdiction of municipal courts, Buck v. Attorney General (1965) Ch. 745: where the matter is placed within the exclusive jurisdiction of another tribunal Re: Birkenhead Corporation (1952) ch. 359, (statutory provision for special tribunal to determine industrial disputes); where there is no existing justiciable controversy between parties Maerkle v. British Commercial Fur Co. (1954) 1 W.L.R. 1242. For these and other categories see the works of S.A. deSmith; Judicial Review of Administrative Action (2nd Edition) and Zamir - The Declaratory Judgment (1962).

It becomes necessary therefore to examine the declarations which the respondent sought in his action in the court below to determine whether or not, they fell within any of these categories. Although some seven declarations were prayed for in his pleadings, one was not pressed and another was abandoned at the hearing. The declarations were as follows:

1. That he is a legally nominated candidate for the By-Election to fill the vacancy which occurred in 1978, in the Parliamentary Western St. Andrew Constituency and therefore:

2. That he was under Section 39 of the Constitution qualified to be elected as a member of the House of Representatives.

   This declaration was not pressed.

3. That he is and was at all material times entitled to contest in a poll in that Constituency to fill the vacancy which occurred in 1978.

4. That his nomination on the 10th July, 1978 is conclusive and he had not been directly or indirectly invalidated.

5. That the appointment of another nomination day after his nomination referred to in the foregoing paragraph 4 of these Declarations is in valid in that such appointment purports to invalidate his said nomination which can only be done by a Returning Officer or by the courts on an Election Petition.

6. That in the absence of a Proclamation by the Governor General under Section 20 of the Representation of the People Act, defering the poll, the fourth defendant in purporting to grant and hold another poll acted unlawfully and unconstitutionally;

7. which I omit, was abandoned.

It was argued on behalf of the appellants that all the declarations sought to challenge the election of the 5th appellant and accordingly the court had no jurisdiction to grant relief by way of a declaration but only by an Election Petition. Mr. Macaulay endeavoured to demonstrate that the declarations did not have that effect. The first three declarations listed, indicate in my view that the respondent was asserting his nomination as still being valid and effective notwithstanding the election of the 5th appellant at the poll which was in fact held on 3rd August, 1978. Declarations 3 and 4 are merely supportive of that stance. The corollary was that the 5th appellant was not validly elected. This plainly was a challenge of his parliamentary privilege, that is, his right to sit in the House of Representatives. Declaration 5 plainly questions the right of the executive to revoke a nomination where candidates have been duly returned as nominated. This is a constitutional matter of fundamental importance and involves an interpretation of Section 20 of the Representation of the People Act. In that exercise, although the effect of the construction might well involve a challenge as to validity of the election of the 5th appellant, the construction itself does not require a determination of or a pronouncement in that issue. Put another way, the extent of the Governor General's power under that Act does not call in question any parliamentary privilege.

Section 44 of the Constitution provides as follows:

(1) Any question whether

(a) any person has been validly elected or appointed as a member of either House; or

(b) any member of either House has vacated his seat therein or is required, under the provisions of sub-section (3) or subsection 4 of Section 41 of this Constitution, to cease to exercise any

of his functions as a member.

shall be determined by the Supreme Court or, on appeal by the Court of Appeal whose decision shall be final, in accordance with the provisions of a by law for the time being in force in Jamaica and, subject to any such law, in accordance with any directions given in that behalf by the Chief Justice.

(2) Proceedings for the determination of any question referred to in subsection (1) of this Section may be instituted by any person including the Attorney General, the Attorney General if he is not a party thereto may intervene and (if he intervenes) may appear or be represented therein.

Once therefore, there is any question relating to the validity of the appointment of a member of either House, the procedure is not by a Declaration, but by a special procedure in a special division of the Supreme Court.

I can now advert to the Indian case of Ponnuswami v. Returning Officer Namakkal Constituency & Others (1952) S. Cr. 218 which is apposite. In that case the applicant whose nomination papers had been rejected by the Returning Officer, applied to the High Court for a writ of certiorari to quash the order of the Returning Officer and for an order that his name be restored to the list of valid nomination. It was held there that if irregularities did occur which would have the effect of vitiating the 'election' that question should be determined before the tribunal prescribed by way of an Election Petition and not made the subject of a dispute before any court while the election is in progress.

It is to be noted that the court in that case was careful to say - "while the election was in progress". I am inclined to think that this emboldened Mr. Macaulay to contend that the declarations he sought did not challenge the election of the 5th appellant for the good reason that when the writ was filed on 24th July, 1978 no election was in progress nor was he seeking to arrest the electoral process. Factually, Mr. Macaulay was, I fear, in error: the Governor General

had by the proclamation dated 14th July, 1978 directed that polling day was to be 3rd August, 1978. The result is that, contrary to Mr. Macaulay's submission on this point, an election was in progress; the machinery for the holding of an election had been set in motion. The decision in Ponnuswami, with which, with respect, I entirely agree, demonstrates the grave inconvenience which would result from permitting disgruntled or aggri ed candidates to pursue remedies which would halt the election process. The forceful argument of Mr. Macaulay, however, that a declaration did not have the effect of halting the election process. The respondent had acquired rights under the Representation of the People Act; he had the status of a duly nominated candidate, and was accordingly entitled to have that right affirmed by an appropriate declaration.

As to this approach, the Ponnuswami case is illustrative of another point worth mentioning, namely, the effect of constitutional provisions prescribing the method by which a challenge may be made regarding the electoral process. The Indian Constitution by Article 329 (b) provides that "no election to either House of the parliament or to the House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be proved for by or under any law made by the appropriate Legislature." The Indian Court unanimously held that:

> "Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted. In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the "election"; and if any irregularities are committed while it is in progress and they belong to the category or class which

> under the law by which elections are governed, would have the effect of vitiating the elections and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any court while the petition is in progress."

I think these observations are applicable to the instant case. Section 44 of our Constitution reproduced earlier in this judgment albeit in altogether different terminology from the anologous provision in the Indian Constitution has in my view the same meaning, Although this Court is not bound by the decision of the Indian case, it is so eminently right, that I think we ought to regard it as of persuasive authority, and to follow it. The law in this country which governs such disputes, is the Election Petition Act. The Election Court is therefore the proper forum to vindicate rights arising under the Representation of the People Act from election disputes. By election disputes I am to be taken as including any irregularities affecting a candidate from the date the poll is fixed by the Governor General to the date the results of that poll are announced.

It is apodictic that the courts will not interfere with the internal proceedings of either House. In Bradlaugh v. Gossett (1884) 12 Q.B.D. 271, the plaintiff though duly elected as a member for a certain constituency was by resolution of the House of Commons prevented from taking the oath prescribed by the Parliamentary Oath Act 1866 for members duly elected. He claimed a declaration that the resolution was ultra vires and void. The action was dismissed, Stephen J. declaring that the House of Commons is not subject to the control of Her Majesty's Court in its administration of that part of the statute law which has relation to its own internal proceedings." In that case the plaintiff had been duly elected to Parliament and was not therefore in the position of the respondent. But I do not think it affects the significant point that the courts did not entertain disputes regarding the validity or otherwise of the election of anyone

to parliament. The Jamaican Constitution provides for the resolution of challenges to the validity of elections by a special procedure and by a special court. Save that the Jamaican Constitution enables the Supreme Court to strike down any Act or Regulation as unconstitutional, so far as interference with the internal proceedings of Parliament are concerned, the law is the same in this country as in the United Kingdom.

The learned Attorney General did make this point and he pointed out correctly as I think, that the procedure provided in the Election Petition Act, made the decision of this Court final. But if the common law remedy of declaration was available, the provision for finality could be evaded, and an appeal would lie to the Judicial Committee of the Privy Council. He argued however that the respondent had, at all events, no 'legal right' with respect to which he could claim a declaration. But this argument is unsound in my judgment. The right to vote is created by the Constitution and is shared by most Jamaicans or Commonwealth Citizens over 18 years. The right to stand as a candidate is shared by all those who are voters and is a Constitutional right which can undoubtedly be protected in the Supreme Court. When a person is duly nominated, he is now recognized by the law as entitled to have his name placed on the ballot paper for the appropriate constituency. He has the legal right of a nominated candidate. This right is created by the Representation of the People Act. But how is this right to be protected? That Act provides no sanction. What are the remedies open to him if his right is infringed? Mr. Macaulay says by a declaration. The Attorney General concedes he has a status but says he has no identifiable legal rights.

The Respondent had his nomination revoked. So he was prevented from facing the Polls and a chance of being a member of Parliament. He had a right recognized by the Representation of the People Act. He had the rights of a duly nominated candidate. However, the revocation was by executive action. The argument of Mr. Macaulay

would perhaps be the more weighty if his action were brought solely against the Crown, but he did join the 5th appellant as a party, at the time when he said there was no election. The 5th appellant, on the argument of Mr. Macaulay, would not be affected by any order the Court made. What was the purpose then of making him a party to the action?

Since it is the law that the Courts have no jurisdiction at common law to consider parliamentary privileges, it would follow ineluctably that the court would not be competent to make any declarations therein. Although the Representation of the People Act creates the status of candidate and confers on him rights, the protection of those rights is to be found in the statute concerned with the resolution of disputes within the electoral process viz. the Election Petitions Act. The Constitution commands in Section 44 that questions affecting the validity of membership in the House are to be determined by the Supreme Court by a special process. Any declaration as to the due nomination of the respondent involves, at the very least indirectly, a challenge of the election of the 5th appellant at the rescheduled poll. The evidence which the court would have had to consider in an election petition is precisely the same that was presented before Wright J. at the hearing for the declarations. In that situation, it seems to me idle to say that this action did not challenge an election.

A declaration, it can be said, cannot be sought when either the matter is placed within the exclusive jurisdiction of a special tribunal e.g. The Election Court or involves Parliamentary privileges. A declaration that the respondent is validly nominated involves a challenge to the election of the 5th appellant. It matters not whether the challenge be direct or indirect, the effect is the same. The Courts have never hitherto exercised jurisdiction with respect to the question of parliamentary privileges except in so far as the power to entertain such matters are now made justiciable. The determination of whether a

candidate is or is not validly elected is cognizable only in the Election Court by virtue of the Constitution. In this particular case, both classifications are applicable and therefore prevent the granting of those declarations which challenge the right of Mr. Dudley Thompson to take his seat in parliament.

I have therefore come to the conclusion that the declarations 1,3,4,5, could not be granted because the court was without jurisdiction to entertain the action, and so grant the declarations.

With respect to the other matter of substance in this appeal, the question starkly stated is this: did the Executive have power to revoke the due nominations of the Respondent and the 5th appellant Mr. Dudley Thompson and thereafter set a new date for the election? First, it was argued that since the nomination proceedings would have been declared null and void by a court, had an election petition been brought, the Executive could regard the proceedings as null and void, and act accordingly. Further, so the argument ran, the nature of the violence was such as to prevent the existence of an atmosphere conducive to the proper holding of an election and the Executive as responsible for the safety and security of the state was constrained to act in this regard. This assumption of power, was derived from Section 29 of the Interpretation Act because the Representation of the People Act nowhere provided for such a contingency as arose: Section 29 of the Interpretation Act enacts as follows:

> "Where an Act confers power or any authority to make or issue regulations, the following provisions shall, unless the contrary intention appears, have effect with reference to the making, issue and operation of such regulations.
>
> (a) a regulation may be at any time amended, varied, suspended, rescinded or revoked by the same authority and in the same manner by and in which it was made;
>
> With this provision, must be read Section 34 (1) of the same Act:

> "Where any Act confers a power or imposes a duty, then unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires." "

Seeing that the Governor General has power to issue a proclamation it was said he also had the power to revoke a proclamation. There can be no gainsaying the fact that the wrongful refusal of nomination papers would be a powerful ground in an election petition for declaring an election void. R. v. Glover (1866) 15 L.T. 289 Homes v. Turner (1876) C.P.D. 670 Haverfordwest case v. Kensington (1874) L.R. 9 C.P. 720. But I am quite unable however to accept the proposition that because this irregularity is a ground for invalidating an election, that it follows the election is void at law. In my judgment, the election becomes void at law when a court of competent jurisdiction has so declared. Neither the Executive, the candidate or voters, would be at liberty to regard the candidate who had won at a poll as not being validly elected on the footing that one or any number of prospective candidates had had their nomination papers improperly rejected by a Returning Officer. Until the aggrieved candidate filed a petition within the limitation period and successfully proved the irregularity before an Election Court the candidate elected would be entitled to take his seat in the House of Representatives as the duly appointed member. The state is in no different position to any other citizen in this regard seeing that the Election Petition Act enables the Attorney General to file a petition as well. Plainly, if the Executive had evidence of irregularities, its duty would be to file an election petition. Any other view would, I think, lead to uncertainty, chaos and perhaps violence, a non-consummation devoutly to be wished.

I have already shown that the evidence of violence fell far short of demonstrating that any prospective candidate was prevented from submitting his papers to the Returning Officer. The determination of the question whether an election petition is void,

is one for the court. The Executive has no judicial function. The usurpation of that function by the Executive would mark the demise of the democratic principles of the separation of powers enshrined in the Constitution. A fear of the abrogation of the Rule of Law led Mr. Macaulay symbolically to invoke the ultimate decree of the Senate of Rome:

> "Caveant consules ne quid res publica detrimenti caparet." (Let the consuls see to it that no harm comes to the state.) We were invited to be stern against any erosion of the judicial function.

The effect of what has so far been said, shows that the factual basis for the assumption of power to revoke did not exist. Whether the power assumed by the Executive exists in point of law must now be considered.

Section 20 (1) of the Representation of the People Act is in the following form:

> (1) Where at any time between the making of any proclamation under subsection (1) of section 19 and the day appointed by such proclamation for the holding of a poll at any election the Governor General in Council is satisfied that it is expedient so to do by reason of:
>
> (a) Her Majesty's Government having become engaged or being likely to become engaged in any war; or
>
> (b) the proclamation of any state of emergency under the Emergency Powers Act; or
>
> (c) the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence or outbreak of infectious disease or other calamity whether similar to the foregoing or not; or
>
> (d) the likelihood that the official lists for all constituencies or for any particular constituency will not be printed before the day appointed under section 19 for the holding of the poll or that any essential electoral supplies or materials will not be available in adequate quantities upon such day, he may by proclamation adjourn the holding of the poll to some other day specified in such proclamation not being more than thirty days after the day specified in the proclamation under section 19.

The subsection provides for four categories of emergencies. One

would have thought that there could be no more grave and catastrophic event in a country's history than a declaration of war. And in that eventuality, the Act allows for as adjournment of the date of poll by the Governor General issuing an appropriate proclamation. Section 20 (5) in terms, saves the events of nomination day. The proceedings are thus, it must be emphasized, not revoked. What is significant about the emergencies mentioned is that, few if any of those events can be stage managed. The learned judge in the Court below said, rightly as I think - " the danger of the situation is that incidents seized upon as justification may be no more than a cloak, albeit, fortuitous, for the arrogation of unconferred power." The intention of the legislature, I would declare to be clear beyond a peradventure: nominations should hold good despite the postponement. The greatest power which the Act conferred on the Executive in times of crisis was that of postponement. I incline to think that this was for a good reason. If it were to be accepted that an outbreak of violence allowed the executive which in practical terms means the Government of the day, to declare nominations void, violence would become institutionalized. The society would be at the mercy of the gun man, the thug, the terrorist. It would mean that the State had surrendered its duty of safeguarding its citizens from violence. Anarchy would be the inevitable result if that view were to prevail. It would be possible to postpone elections indefinitely and forever revoke nomination proceedings on the basis that violence had erupted, especially since the courts would no longer be required to determine the matter; the State had assumed the judicial mantle. All of this is in my opinion, proof positive of the contrary intention referred to in Section 29 of the Interpretation Act.

This 'contrary intention' precludes any support from the Interpretation Act. The observations of Wright J. are so eminently right and felicitous, that I would remind us all of them:

> "There is no legislation conferring upon the Executive the powers of revocation on such a contingency. The danger of the situation is that incidents seized upon as justification may be no more than a cloak, albeit fortuitous, for the arrogation of unconferred power."

The matter is one of profound importance. The observation of Sir Joscelyn Simon P. in Szechter v. Szechter (1970) 3 All E.R. 905 at p. 908 can bear repetition.

> "Not only does law, as Burke said, stand in awful enmity to arbitrary power, the rule of law, as Dicey pointed out, stands in contradiction to (among other things) wide discretionary authority."

Jamaica remains a democratic country: it is not a People's Republic: the rule of law is no mere noble aspiration: it is reality. For this reason the argument of the learned Attorney General seemed to me, quite unreal. For he was arguing that the power to revoke existed, yet was aware of a Bill which had already passed both Houses and was awaiting the Governor General's assent, which in terms conferred upon the Executive for the first time the authority which he was boldly asserting he already had. If there was any faith or confidence in the merit of the arguments being advanced supporting this view, the need for an Act amending the Representation of the People Act would be otiose.

The powers of the Governor General have been carefully circumscribed by the Representation of the People Act. His powers to revoke a proclamation by virtue of the Interpretation Act are real. If there had been an error made in the proclamation, I do not think anyone could for a moment doubt, that an amending proclamation would be permissible. Where, as was alleged in this case, violence occurred so that the nomination proceedings were in fact disrupted, Section 20, would be apt. Section 20 (c) provides as follows:

> "The occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence or outbreak of infectious disease or other calamity whether similar to the foregoing or not."

I venture to think that reliance on these provisions could not lead to the usurpation of judicial power by the Executive; there would be harmony with the Rule of Law, a fundamental plinth in the democratic structure.

The power to revoke a regulation under the Interpretation Act, does not nullify lawful acts done prior to revocation. So that legal rights acquired prior to the revocation, are not extinguished. Section 25 (2) of the Interpretation Act provides as follows:

> "Where any Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not -
>
> (c) affect any right, privilege, obligation, or liability, acquired, accrued, or incurred, under any enactment so repealed; or
>
> (e) affect any investigation, legal proceedings, or remedy, in respect of any such right, privilege, obligation, liability, penalty, fine, forfeiture, or punishment, as aforesaid."

The argument on behalf of the appellants proceeded on the basis that it was the events of nomination day which rendered the entire electoral process a nullity and there was not in the circumstances any need to invoke judicial action. I am however quite unable to accept this argument as it is fallacious. In the absence of the repealing proclamation, the nomination of both Thompsons which had been duly certified would have gone forward. The Executive acting, as it was urged, in terms of Section 29 of the Interpretation Act, had, as a matter of historical record revoked the earlier poll. But if this argument is valid, the repealing proclamation whatever else its effect, would not have disturbed legal rights acquired under the Representation of the People Act and taken to its logical conclusion the result would be that the respondent and the 5th appellant remained candidates, despite the repealing proclamation.

The respondent was duly nominated as a candidate. Another candidate the 5th appellant was also nominated. Under the Act, a poll was essential. But no poll was held. Polling day was revoked and a new polling day set. It was said the respondent had acquired no rights cognizable at law. Since he had acquired no rights, the revocation had not in any way affected his rights. This argument I found unconvincing. A candidate who has had his nomination papers accepted, has acquired a status in the eye of the law. It is true he cannot seek a declaration as to do so would involve an interference by the courts with parliamentary privileges, but he could file an election petition.

In my judgment the Executive were without power to usurp the judicial function and declare that the proceedings were null and void nor did it have the power to determine whether violence was sufficient or not to disrupt the proceedings.

For these reasons I concurred in allowing the appeal to the extent already indicated by my brethren.