JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 95/2001

SUIT NO. C.L. D-023/1998

MOTION

COR: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE WALKER J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	**PHYLLIS MAE MITCHELL**	**APPELLANT/ RESPONDENT**
AND	**ABRAHAM JOSEPH DABDOUB**	**1ST RESPONDENT APPLICANT**
AND	**DERRICK MAIS**	**2ND RESPONDENT**
AND	**DANVILLE WALKER**	**3RD RESPONDENT**
AND	**BANCROFT ANGLIN**	**4TH RESPONDENT**

R.N.A. Henriques, Q.C., Winston Spaulding, Q.C., Ransford Braham, Jalil Dabdoub & Ernest Smith instructed by **Dabdoub , Dabdoub & Co** for 1st Respondent/Applicant

Ian Ramsay, Q.C. & Walter Scott instructed by **Chancellor & Co** for 1st Appellant/Respondent

Michael Hylton, Q.C. Solicitor General and **Miss Nicole Pusey** for 2nd, 3rd & 4th Respondents

16th & 17th July & 25th October 2001

FORTE, P:

On the 16th and 17th July 2001, having heard arguments on this Motion filed by the 1st Respondent in the appeal, by a majority we made the following Orders:

1. An Order that the Judgment of Mr. Justice Reid made on the 29th day of June, 2001 has not been stayed as the Appellant has failed to obtain an Order for Stay of Execution pursuant to the Court of Appeal Rules.

2. An Order that on a proper construction of Section 20(f) and Section 22 of the Election Petitions Act there is no Statutory or Automatic Stay of Execution on the mere filing of an Appeal.

At that time, we promised to put our reasons in writing and what follows is my opinion.

The background to this Motion is the declaration in the National Elections held on the 18th December 1997, that the appellant had been returned as the winning candidate for the constituency of North East St. Catherine. The 1st respondent/applicant (the "Applicant") her opponent in that election, thereafter filed an election petition in the Election Petition Court, challenging the validity of the returns from the Electoral Office. Eventually, the matter came on for hearing before Reid J, who, on the 29th June 2001, adjudged that the 1st respondent/applicant (Mr. Dabdoub) was duly elected in the election. On that same day a Summons was taken out by the appellant/respondent (the "respondent") Mrs. Mitchell for a Stay of Execution returnable for the 4th July 2001. On that day the matter was adjourned to the 9th July 2001, but when the matter came on for hearing it was withdrawn by the appellant on the basis that the application was unnecessary because by virtue of the provisions of Section 20(f) of the Election Petitions Act, there was in existence a statutory Stay of Execution. As a result of that withdrawal, the applicant has by this motion, moved this Court for the following Orders:

1. An Order that the Judgment of Mr. Justice Reid made on the 29th June, 2001 has not been stayed as the Appellant has failed to obtain an Order for Stay of Execution pursuant to the Court of Appeal Rules.

2. Further or in the alternative, an Order that the purported Stay of Execution consequent on the filing of the Appeal be discharged.

3. Further, or in the alternative, that on a proper construction of Section 21(f)[sic] and Section 22 of the Election Petitions Act there is no Statutory or Automatic Stay of Execution on the mere filing of an appeal.

4. Any other relief, Orders or Directions as the Honourable Court deems fit in the circumstances of this case.

Before we embarked on the hearing of this Motion, the appellant Mitchell, through her Attorney Mr. Walter Scott, took a preliminary point challenging the jurisdiction of this Court to hear the Motion. He contended that:

1. There is no appeal from any Judgment or Order of the Supreme Court in the Summons for Stay of Execution.

2. This Honourable Court has no original Jurisdiction under either the Constitution or the Judicature (Appellate Jurisdiction) Act to make the Orders being sought in the Notice of Motion herein.

Of importance in determining the credibility of the arguments advanced by Mr. Scott is the fact that on the 3rd July 2001 the respondent in this Motion Phyllis Mae Mitchell filed notice and grounds of appeal against the decision of Reid J in which she detailed three grounds of appeal. It is on the basis of the filing of the appeal that the respondent/appellant maintains on the substantive arguments that a statutory Stay of Execution was created. On this preliminary point however, the applicant/respondent maintains that this Motion is a matter incidental to the appeal and therefore cannot be held to be a Motion which seeks to invoke an original jurisdiction of the Court. To put the matter in context it should be noted that the Court of Appeal does have the power to issue a Stay of Execution, and that normally the mere filing of an appeal does not

operate as a Stay of Execution. This is revealed in the provisions of section 21 of the Judicature (Court of Appeal) Rules which reads as follows:

> "Except so far as the Court below or the Court may otherwise direct –
>
> (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below;
> (b) no intermediate act or proceeding shall be invalidated by an appeal."

Given the particular history of these proceedings and the clear and unambiguous meaning of section 21 it would appear logical that a respondent to an appeal would be within his right to ask this Court whether in the light of these provisions, it could accurately be stated that there was an automatic stay on the filing of the appeal and that the power given this Court under section 21, need not be invoked. The 1st respondent/applicant however, in support of his case, relied on several sections of the 1962 Court of Appeal Rules (the "Rules") in order to convince us that this Court has the jurisdiction to hear the Motion.

A good starting point is Rule 18(1) which states:

> "In relation to an appeal the Court shall have all the powers and duties as to amendment and otherwise of the Supreme Court."

He relied strongly on the words "and otherwise" to call in aid Section 323 of the Civil Procedure Code which permits a Judge to direct questions of law to be raised for the opinion of the Court, before substantive matters of fact be tried. He also relied on section 528 of the Civil Procedure Code which allows a party making any application in Chambers to include on one and the same application all matters upon which he then desires the Order or Directions of the Court or Judge.

As the issue as to whether the filing of an appeal in an Election Petition, gives rise to an Automatic Stay of Execution, is a question of law, which the Supreme Court by virtue of section 323 of the Civil Procedure Code would have jurisdiction to hear before a

trial, in the same way by virtue of section 18(1) of the Court of Appeal Rules, this Court has similar power to hear this Motion. Similarly, the 1st respondent/applicant maintains, that as in the Supreme Court a party may include in an application in Chambers all matters upon which he desires the Order or Directions of the Court or Judge, so too can such an application by virtue of Rule 18(1) be made before this Court. While these arguments are attractive, and would meet with my favour, I prefer to call in aid the provisions of section 10 of the Judicature (Appellate Jurisdiction) Act in determining the validity of the preliminary point taken by the 1st respondent/applicant. Section 10 reads:

> "**10.** Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958."

The power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations 1958 in so far as is relevant to this issue is to be found in Section 8(2):

> "For the purposes of this section, there shall be vested in the Court of Appeal all jurisdiction and powers formerly vested in the Supreme Court, or Full Court, when exercising appellate jurisdiction, and for all the purposes of and incidental to the hearing and determination of any appeal and the amendment, execution and enforcement of any judgment or order made thereon the Court of Appeal shall have all the power, authority and jurisdiction of the Supreme Court or Full Court."

This section in my view makes it very clear that the Court of Appeal has the jurisdiction to hear matters which are incidental to the hearing of an appeal. In my judgment, the question whether the mere filing of an appeal amounts to an automatic stay, particularly given the history and circumstances of this case, is a question of law incidental to the

hearing of the appeal. Section 10 of the Judicature (Appellate Jurisdiction) Act speaks to such matters and I would therefore conclude that by virtue of that section this Court has the jurisdiction to hear the Motion.

I now turn to the substantive questions raised in the Motion, which are as hereunder:

> i. Whether the judgment of Reid J made on the 29th June, 2001 has been stayed, the appellant having failed to obtain an Order for Stay of Execution pursuant to the Court of Appeal Rules; and
>
> ii. Whether on a proper construction of section 20(f) and Section 22 of the Election Petitions Act there is a Statutory or automatic Stay of Execution on the mere filing of an appeal.

If the answer to question (ii) is in the affirmative then of course the answer to question (i) would of necessity be also answered in the affirmative. The real question to be determined therefore is that in (ii) above.

In order to answer the question it will be necessary to look at the legislative history of the questioned provisions. However, I must first set out the provisions of section 20(f) which has given rise to these proceedings. It reads:

> "(f) At the conclusion of the trial, the Judge shall determine whether the member of the House of Representatives or the Parish Council or the Council of the Kingston and St. Andrew Corporation, as the case may be, whose return or election is complained of, or any and what other person, was duly returned or elected, or whether the election was void, and shall certify such determination to the Speaker of the House of Representatives, or, if the Speaker be the respondent, to the Deputy Speaker, in the case of an election to the House of Representatives, or to the chairman of the Parish Council, or if such chairman be the respondent, to the vice-chairman, in the case of an election to a Parish Council or to the Mayor of the Kingston and St. Andrew Corporation or, if the Mayor be the respondent, to the Deputy Mayor, in the case of an election to the Kingston and St. Andrew Corporation; and subject to an appeal under section 22

> the return shall be confirmed or altered, or the writ for a new election shall be issued, as the case may require, in accordance with such determination."

Section 22 of the Election Petitions Act states as follows:

> "**22.** (1) An appeal shall lie from the determination by a Judge of the Supreme Court on a petition under section 20 to 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."

Before these amendments were made to the Act there was no right of appeal to the Court of Appeal. These petitions were governed by Section 20(6) of the Election Petitions Law which reads as follows:

> "At the conclusion of the trial the Judge shall determine whether the member of the House of Representatives or the Parochial Board, as the case may be, whose return or election is complained of or any and what other person, was duly returned or elected, or whether the election was void, and shall certify such determination to the Governor, in the case of an election to the House of Representatives, or to the chairman of the Parochial Board, or if such chairman be the respondent, to the vice-chairman , in the case of an election to a Parochial Board; and upon such certificate being given such determination shall be final and the return shall be confirmed or altered, or a writ for a new election shall be issued, as the case may require, in accordance with such determination." (Emphasis added)

The underlined words made it absolutely clear that there was no appeal, the decision of the Judge being final. This was the law as it stood prior to the country becoming Independent in 1962. At that time, on the 6th August, 1962, the Jamaica (Constitution) Order in Council came into force. Section 44 of the Constitution provided as follows:

> "**44.** (1) Any question whether –

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

At the coming into effect of the Constitution therefore a contradiction between its provisions and that in section 20(6) of the Election Petitions Law arose. Whereas, section 20(6) made the decision of the Judge of the Supreme Court final, the Constitution gave a right of appeal to the unsuccessful party. The Act therefore had to be amended to bring it into conformity with the provisions of the Constitution. It was consequently amended to provide for a right of appeal, the original amendment being made in section 21A of the Law which provisions are now contained in section 20(f) and 22 of the Election Petitions Act.

It is against that historical background that the questioned sections ought to be interpreted. The words "subject to appeal under section 22" in my judgment does no more than to provide that the decision of the Judge is liable to an appeal. It specifically refers to the section which provides for the appeal and is consequently subject to the provision of that section.

The provisions of section 22 firstly in subsection (1) create a right of appeal from the determination by a Judge of the Supreme Court in a petition under section 20. Then of great significance to the issue in this appeal are the provisions of subsection (2) which provide that "so much of the provisions of the Act, and with such modification, as may be prescribed by rules of court shall have effect in relation to an appeal under this section."

In my view subsection (2) makes appeals under the section, subject to the rules of the Court i.e. the Court of Appeal Rules.

It should be recalled that section 21 of the Judicature (Court of Appeal) Rules, 1962 specifically provides that an appeal shall not operate as a Stay of Execution of the decision in the Court below unless the Court otherwise orders. In that context, the words "subject to appeal under section 22" in section 20 (f) if it is construed to be granting a Statutory/Automatic Stay as contended for by the appellant would be in direct contravention to the provisions of section 22 which make appeals subject to the Court of Appeal rules in which by virtue of section 21 of the Judicature (Court of Appeal) Rules the filing of an appeal does not operate as a stay of execution. As section 20(f) specifically speaks to its provisions being subject to an appeal under section 22 it must therefore be construed to be subject to the requirements of section 22. That the Court of Appeal rules apply to Election Petitions was removed from doubt by the Election Petitions (Court of Appeal) Rules, 1967 which in Rule 2 states:

> "In relation to appeals under section 21A (section 22) the Court of Appeal Rules 1962 Title 1 Preliminary and Title 11 Civil Appeals from the Supreme Court shall apply so far as practicable."

In my judgment therefore, the Court of Appeal Rules being applicable to Election Petitions, then section 21 of those Rules by virtue of Section 22 of the Act would prevail, and consequently no Stay of Execution can exist unless granted by the Court.

Nevertheless, the appellant relied on certain dicta of Smith J, (as he then was), in the case of ***Brown v. Trelawny Parish Council*** [1967] 10 JLR 213 to support her contention that by virtue of section 20 (f) a Stay of Execution automatically came into effect at the filing of the appeal. In that case the learned judge sitting in the Supreme Court held that "the words 'subject to an appeal under section 21A' are clearly intended to stay the confirmation or alteration of a return on the issue of a writ for a new election

while an appeal is pending. This statutory stay operates from the time of filing of an appeal and not before."

For the reasons stated heretofore, this conclusion, in my judgment is incorrect. Though arguments appear to have been made to the learned judge on this issue, this particular dicta of his was not necessary to his conclusion in the case. Indeed, it appears that he did not have the benefit of the arguments put before us on this issue, and consequently there is no expressed view by him in respect of, for example on the effect of section 22 of the Act as it related to section 20(f). It is reasonable to assume therefore, that had his mind been addressed to these particular contentions, his decision may well have been different. In coming to his conclusion this is what he said at page 219:

> "What do the words 'subject to an appeal under s. 21A' mean? Are they devoid of meaning as counsel for the Council contends? A cardinal rule of construction is that the words of a statute ought to be construed ut res magis valeat quam pereat. Section 21A makes the decision of the Court of Appeal final and conclusive in an appeal on an election petition. If the House of Representatives or a parish council were free, while an appeal is pending, to act on a certificate issued under s. 20 (6) this could nullify completely a decision of the Court of Appeal in favour of an appellant and thus, in effect, deprive him of the right given him by the statute. Take a case, for example, where the judge who tries a petition determines that the election was void. The respondent appeals. Acting on the certificate of the judge, a writ for a new election is issued and the election is held. A candidate other than the respondent is elected. The Court of Appeal decides eventually that the decision of the judge was wrong and finds that the respondent was duly elected. What would be the respondent's position? Could he claim the seat? Learned counsel for the council said that he could not. Perhaps he could, but it certainly would involve protracted and expensive litigation to declare the rights of the parties. In my view, it is to avoid situations like this that the words being considered were written into s. 20 (6).
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> In my opinion, just as a return becomes conditional upon the filing of an election petition, so the determination of the judge on the petition becomes conditional upon the filing of

> an appeal, and remains so until upheld by decision of the Court of Appeal. As long as the determination of the judge is conditional the original return remains conditional. While the return remains conditional no action may be taken upon a certificate issued under s. 20 (6). In my judgment, the words 'subject to an appeal under s. 21A' are clearly intended to stay the confirmation or alteration of a return or the issue of a writ for a new election while an appeal is pending. In my opinion, this statutory stay operates from the filing of the appeal and not before."

In my view the above reasoning, being without the benefit of consideration of section 22, fell into error. The consequences which the learned judge imagines in his example, is a probability in almost all, if not all civil judgments. Without a Stay of Execution, judgments can be executed before an appeal is heard. If the appeal is successful, then the judgments would already have been executed, and the party upon whom it has been executed would have suffered. It is for this reason why the Court is given the discretion to order a Stay of Execution after due consideration of the particular circumstance of the case before it. In the example outlined by Smith J (as he then was) it is most likely that where a judge determines that an election was void, and that as a consequence a writ for a new election would be issued, a Court hearing the application for a Stay, except in some exceptional circumstance, would order such a stay.

I would conclude, therefore, that the conclusion on this issue in the ***Brown*** case, is incorrect, and that section 20(f) does not create an automatic or statutory stay of execution.

It was for these reasons, that I joined in the majority in concluding that the filing of the appeal in this Election Petition did not create an automatic Stay of Execution and concurred in making the Orders stated earlier in the judgment.

LANGRIN, J.A.:

By the General Election in the constituency of North East, St. Catherine held on 18th December, 1997, the appellant Phyllis Mitchell was candidate for the People's National Party. Abraham Dabdoub, attorney-at-law was the candidate for the Jamaica Labour Party, while Mr. Bancroft Anglin was the candidate for the National Democratic Movement.

As a result of a Magisterial recount of the votes, the appellant Phyllis Mitchell was declared the winner by a majority of 30 votes.

In February, 1998 an election petition was filed by Abraham Dabdoub in which he prayed that he would have been declared the Member of Parliament.

On June 29, 2001 Reid J. handed down a judgment in which he declared the petitioner the duly elected representative for the constituency of North East St. Catherine.

The appellant filed a notice and grounds of appeal on the 3rd July, 2001 against the judgment of Reid J. On the same day a summons was taken out for a stay of execution returnable on the 4th July, 2001. On this day the matter came before Harrison J, and was adjourned to the 9th day of July, 2001. When the application came on for hearing on the latter date the appellant withdrew the application on the basis that there was already in existence a statutory or automatic stay of execution.

On the 11th July, 2001 the first respondent/applicant filed a Motion for this court's determination as to whether or not there has been an automatic stay without compliance with the Court of Appeal Rules.

In order to fully appreciate the subsequent proceedings it is important to state in full the relevant parts of the Notice of Motion which are as follows:

> "**TAKE NOTICE** that the Court of Appeal will be moved at the Court of Appeal, Public Building West, King Street, Kingston on Monday the 16th day of July, 2001 at 9:30 a.m. or as soon thereafter as Counsel may be heard on the application of the First Respondent, Abraham Joseph Dabdoub, for the following:
>
> 1. An order that the Judgment of Mr. Justice Reid made on the 29th day of June, 2001 has not been stayed as the Appellant has failed to obtain an Order of Stay of Execution pursuant to the Court of Appeal Rules.
>
> 2. Further or in the alternative an Order that the purported Stay of Execution consequent on the filing of the Appeal be discharged.
>
> 3. Further or in the alternative that on a proper construction of Section 21 (f) (sic) and Section 22 of the Election Petitions Act there is no Statutory or automatic Stay of Execution on the mere filing of an appeal.
>
> 4. Any or other further relief, Order and Directions as this Honourable Court deems fit in the circumstances of this case.
>
> **AND FURTHER TAKE NOTICE** that the grounds on which the First Respondent/Applicant relies, inter alia, are:
>
> (a) The Appellant having made an application for a Stay of Execution as provided for by the Court of Appeal Rules and the Election Petitions (Court of Appeal) Rules, 1967 thereafter withdrew the application and thereby obtained no Order for Stay of Execution from the Supreme Court or Court of Appeal, the Judgment of Mr.

Justice Reid is not the subject of any Order staying same;

(b) The mere filing of an Appeal does not operate to stay the Judgment of Mr. Justice Reid;

(c) The filing of an Appeal does not operate as a Statutory Stay of the Judgment of Mr. Justice Reid;

(d) The Appellant having made an Application for a Stay of Execution and thereafter withdrawing same on the basis of a purported Statutory Stay is an abuse of the process of the court designed to circumvent and usurp the rules and/or jurisdiction of the Court of Appeal.

DATED THE 11TH DAY OF JULY 2001

Dabdoub, Dabdoub & Co."

Mr. Walter Scott on behalf of the appellant raised a preliminary objection to the applicant's Motion being heard on the basis that this court lacks jurisdiction to hear the Notice of Motion. The grounds are stated as follows:

"1. There is no appeal from any judgment or Order of the Supreme Court on the Summons for a Stay of Execution.

2. This Honourable Court has no original jurisdiction under either the Constitution or the Judicature (Appellate Jurisdiction) Act to make the Orders being sought in the Notice of Motion herein".

He submitted that the order being sought is a declaratory one, declaring the rights of the parties and any such relief can only arise if there was an Originating Motion.

Reliance was placed on **Barnes v Bennett** [1991] 28 **JLR** 531. The relevant part of the headnote reads:

> "That whether an application for a stay of execution is made to the Court of Appeal or to a single judge of the Court of Appeal such an application must be made first to the Court below, as the Court of Appeal has no original jurisdiction; in the instant case the application was wrongly made to the judge of appeal;"

By way of response Mr. R.N.A. Henriques Q.C. submitted that the issue as to whether in fact there is an automatic stay or a statutory stay in the filing of an appeal, in relation to an Election Petition under Section 22 of the Election Petitions Act, is an issue or question of law which the Supreme Court would have had jurisdiction to hear prior to any trial. By virtue of Rule 18 of the Court of Appeal Rules, 1962 similar powers have been vested in the Court of Appeal in relation to any question of law which could be conveniently heard prior to the hearing of the appeal.

Rule 2 of the Election Petitions (Court of Appeal) Rules, 1967 Title I and II of the Court of Appeal Rules, have been expressly made applicable to appeals relating to election petitions filed pursuant to the Election Petitions Act.

Rule 18(1) of the Court of Appeal Rules provides that:

> "In relation to an appeal the Court shall have all the powers and duties as to amendment and otherwise of the Supreme Court" (Emphasis supplied)

In this regard Section 323 of the Civil Procedure Code provides:

> "If it appear to the Court or a Judge, that there is, in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to an arbitrator, the Court or Judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or Judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed".

Further Section 528 of the Civil Procedure Code provides:

> "In every cause or matter where any party thereto makes any application at Chambers either by way of summons or otherwise, he shall be at liberty to include in one and the same applications all matters upon which he then desires the order or directions of the Court or Judge, and upon the hearing of such application it shall be lawful for the Court or Judge to make any order and give any directions, relative to or consequential on the matter of such application as may be just; any such application may, if the Judge thinks fit, be adjourned from Chambers into Court, or from Court into Chambers."

Further, he submitted that under Section 10 of the Judicature (Appellate Jurisdiction) Act, the Court of Appeal in relation to matters incidental to the hearing and determination of an appeal, has all the power, authority and

jurisdiction of the former Supreme Court that existed prior to the enactment, of the Federal Supreme Court Regulations (1958). Section 10 of the Act provides:

> "Subject to the provisions of this Act and the rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958". (Emphasis supplied).

A stay of execution pending appeal is legally permitted pursuant to Rule 21 of the 1962 Court of Appeal Rules. Rule 21 (1) provides:

> "21 (1) Except so far as the Court below or the Court may otherwise direct –
>
> (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below;
>
> (b) no intermediate act or proceeding shall be invalidated by an appeal".

The Court of Appeal prior to 1958, formed part of the Supreme Court of Judicature: See section 3 of the Judicature (Court of Appeal) Law. In addition to its appellate jurisdiction and for purposes of and incidental to the hearing and determination of an appeal it had the authority of the Supreme Court or

Full Court. I am confirmed in this view on an examination of Section 8 (2) of the Judicature Court of Appeal Law:

> "8 (1)...
>
> (2) For the purposes of this section, there shall be vested in the Court of Appeal all jurisdiction and powers formerly vested in the Supreme Court, or Full Court, when exercising appellate jurisdiction, and for all the purposes of and incidental to the hearing and determination of any appeal and the amendment, execution and enforcement of any judgment or order made thereon the Court of Appeal shall have all the power, authority and jurisdiction of the Supreme Court or Full Court."

It is clear in my view from the foregoing that the Court of Appeal, prior to independence and as presently constituted, has the jurisdiction over a stay of execution pending appeal and is therefore entitled to clarify and determine any issue incidental to an appeal.

I am of the view that the decision in **Barnes v Bennett** (supra) is limited to a situation where an application is made for a stay of execution either in this court or the court below. What is being sought in this Motion is a clarification of the law incidental to the appeal. If this was not permitted to be done it would certainly make a mockery of the process of the Court. I totally reject the submission that this Court lacks the jurisdiction to clarify a legal question incidental to an appeal which is pending.

In my judgment this Court is entitled to determine any issue or question incidental or ancillary to the appeal prior to the hearing and determination of the appeal. The preliminary point is misconceived and must be dismissed.

The substantial point is whether the appellant is entitled to a statutory stay on the mere filing of an appeal.

The question as to whether or not there is a statutory stay is to be determined on the proper construction of Section (20) (f) and Section 22 of the Election Petitions Act. It is therefore necessary to set out the following provisions.

> "20 (f) At the conclusion of the trial, the Judge shall determine whether the member of the House of Representatives or the Parish Council, as the case may be, whose return or election is complained of, or any and what other person, was duly returned or elected, or whether the election was void and shall certify such determination to the Speaker of the House of Representatives, or, if the Speaker be the respondent, to the Deputy Speaker, in the case of an election to the House or the Parish Council, or if such chairman be the respondent, to the vice-chairman, in the case of an election to a Parish Council; and subject to an appeal under section 22 the return shall be confirmed or altered, or the writ for a new election shall be issued, as the case may require, in accordance with such determination".

However, Section 22 of the Act relating to appeals provides:

> "22 (1) An appeal shall lie from the determination by a judge of the Supreme Court on a petition under s 20 to the Court of Appeal whose decision shall be final and conclusive to all intents and purposes.

> (2) So much of the provisions of this Law, 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 order to determine the question it is necessary to set out the legislative history of these provisions. Section 20 (6) of the Election Petitions Law contained in the Revised Laws of Jamaica 1953 provided that at the conclusion of the trial of an election petition a determination by the trial judge shall be final. However, this was radically altered in 1962 by the Independence Constitution. Section 44 (1) of the Constitution provides:

> "(1) Any question whether –
>
> (a) Any person has been validly elected or appointed as a member of either House;
>
> (b) Any member of either House has vacated his seat therein or is required, under the provisions of sub-section (3) or sub-section (4) of section 41 of this Constitution, to cease to exercise any of his functions as 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".

It must be observed that prior to the Constitution it was provided that decisions of the Judge of the Supreme Court shall be final. The Constitution at Section 44 provides for the right of appeal to the Court of Appeal whose determination shall be final. As a consequence the Election Petitions Law had to be amended to bring it in harmony with the right of appeal enshrined in the Constitution. Hence Law 6 of 1963 amended Section 20(6) by adding the words:

> "and subject to an appeal under section 21A the return shall be confirmed or altered, or the writ for a new election shall be issued, as the case may require, in accordance with such determination"

The amendment introduced Section 21A which gives the right of appeal and provides for the introduction of Rules of Court in relation to the amendment. Section 20(f) and 22 of the current Election Petitions Act (the "Act") are now the consequences of the amendment introduced by Section 21A.

On the 13th July, 1967 the Election Petitions Act (Court of Appeal) Rules, 1967 was promulgated. Rule 2 states:

> "In relation to appeals under Section 21A (Section 22) of the Election Petitions Law, Chapter 107, the Court of Appeal Rules 1962 Title I Preliminary and Civil Appeals from the Supreme Court shall apply as far as practicable".

Rule 21(1) of the Court of Appeal Rules 1962 provides:

> "(1) Except so far as the Court below or the Court may otherwise direct-
>
> (a) an appeal shall not operate as a stay of execution or of

> proceedings under the decision of the court below;
>
> (b) no intermediate act or proceeding shall be invalidated by an appeal."
>
> (Emphasis supplied)

In construing the amending provisions of Section 20(f) and 22 of the Act it is important to bear in mind that the mischief which the amendment in 1963 was intended to deal with was to bring the statute in harmony with the Constitutional provisions. Prior to this there was no right of appeal to the Court of Appeal.

Great reliance was placed on the case of ***Brown v Trelawny Parish Council*** [1967] 10 JLR 213 in support of the proposition that section 20(f) of the Election Petitions Act gives a mandatory statutory stay on the mere filing of an appeal. The headnote of the case reads in part as follows:

> "The plaintiff Brown and H.J. were the candidates at an election held on June 28, 1966, in the parish of Trelawny to elect a Councillor to serve on the Parish Council for the No. 7 – Duncans electoral division. H.J. was the successful candidate. On July 21, 1966, the plaintiff presented a petition under the provisions of the Election Petitions Law, Cap 107 [J] claiming that H.J. was disqualified for nomination as a candidate at the election and was incapable of being elected or of sitting and voting as a Councillor for the Parish Council and praying that the nomination and election of H.J. was void and/or invalid and/or praying that the nomination and election of H.J. was void and/or invalid and that the plaintiff was duly elected ought to be returned. H.J. died on November 7, 1966, and C.M. was admitted as a respondent to the petition in his place. The plaintiff's petition was heard and determined by the Chief Justice of the

Supreme Court on December 9, 1966, who concluded that H.J. was duly returned or elected and therefore dismissed the petition. On application of counsel for the petitioner (plaintiff) a stay of execution was granted for a period of six weeks from December 9. As required by s.20(6) of the Election Petitions Law, Cap. 107 [J], the Chief Justice issued a certificate dated December 15, 1966, the chairman of the Trelawny Parish Council certifying his determination of the petition. On January 12, 1967, notice of appeal was filed in the Court of Appeal against the determination of the Chief Justice. On the same day the parish council passed a resolution that the seat for the No. 7 – Duncans electoral division be declared vacant in view of the decision of the Chief Justice and in view of the death of H.J., and that such vacancy be entered on minutes of the meeting of the Council. Acting on this resolution the Chairman of the Parish Council declared the seat vacant and ordered that the vacancy be entered on the minutes of the Council.

The plaintiff thereupon filed an action against the Parish Council for declaration that the act of the Parish Council in purporting to declare the seat vacant was improper and illegal and for an injunction to restrain the taking of any, or any further, step to declare the seat vacant or to hold any election or by-election to elect a councillor for the electoral division.

...

Held: (i) the stay of execution granted by the Chief Justice was intended to restrain any action which should or could be taken as a result of the judgment and therefore the Parish Council was bound by it in that respect;

(ii) title II of the Court of Appeal Rules 1962 does not apply to proceedings under the Election Petitions Law, Cap. 107 [J]. unless made to apply by virtue of a statutory power and there does not exist any such statutory power;

> (iii) where any order for stay of execution is granted without authority such order is binding until it expires or is set aside by a superior court;
>
> (iv) as the period of the stay of execution ordered had not yet expired when the Parish Council passed the resolution on January 12, 1967, the Council had no authority to declare H.J.'s seat vacant.
>
> (v) The words 'subject to appeal under section 21A' are clearly intended to stay the confirmation or alteration of a return on the issue of a writ or a new election while an appeal is pending. This statutory stay operates from the time of filing of an appeal and not before."
>
> (Emphasis supplied)

Mr. Ramsay, Q.C. argued that the Election Petitions Act is a Special law and its provisions override any rule or regulation that is inconsistent with it. Further he argued that the clear purpose manifested in the Act is to achieve celerity and finality in an area critical to parliamentary democracy. He asked the Court not to overrule Brown's case.

The question which therefore arises is, what is the meaning of the words in section 20(f) which states: "subject to an appeal under section 22..." As already demonstrated by the legislative history of the section, the words were intended to relate to a right of appeal to the Court of Appeal since the purpose of the enactment was to bring same in harmony with the constitutional provisions.

The words "subject to" have been judicially interpreted in the case of **C & J Clark Ltd v Inland Revenue Commissions** [1973] 1 WLR 905 Megary J stated:

> "In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. Where there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail."

The Court held that where a statutory provision was held to be "subject to" another statutory provision, that merely made the latter prevail over the former. If there was any conflict, it did not require the master provision to be construed in such a way as to make the whole of the master provision conflict with the "subject" provision.

On appeal the Court of Appeal unanimously endorsed the decision of Megary J. See [1975] 1 WLR 413, 417. Stamp L.J. stated:

> "Megary J. subjected the language of section 78 to a most careful and exhaustive analysis and, because I find that analysis convincing and detect no flaw in it, ... I agree with his conclusion that subsection 2 of the Section does not come into play unless there is to be an appointment of income".

In my judgment the words "subject to an appeal under section 22" in section 20(f) merely means that section 20(f) is governed by section 22 which is the master section and section 20(f) is subservient to section 22. If there is a conflict between section 20(f) and section 22 it follows that section 22 would prevail.

In my view Section 22 on any interpretation does not create a stay. Even assuming that it does, there would be a conflict between section 20(f) and section 22(2) and insofar as it incorporates and applies the Court of Appeal Rules, particularly Rule 21, then section 22 and the Rules of the Court

ought to prevail. The reason is even more compelling when consideration is given to section 29(d) of the Interpretation Act which states that "no regulation shall be inconsistent with the provisions of any Act".

Consequently, I find that the words "subject to appeal" in section 20(f) cannot be construed as providing a statutory stay as same would conflict with section 22 (2) and the rules incorporated by virtue of Rule 2 of the Election Petition (Court of Appeal) Rules 1967. I do not accept the argument that the words "as far as practicable" in the 1967 Rules limits the application of Rule 21.

The well established principle of construction that there is a presumption against Intending Injustice or Absurdity is referred to in Maxwell on Interpretation of Statutes 12 Edition page 208:

> "Whenever the language of the legislature admits of two constructions and, if construed in one way, would lead to obvious injustice, the courts act upon the view that such a result could not have been intended, unless the intention to bring it about has been manifested in plain words. If the court is to avoid a statutory result that flouts common sense and justice it must do so and not disregarding the statute or overriding it, but by interpreting it in accordance with the judicially presumed parliamentary concern for common sense and justice. But possibility of injustice which leads the court to adopt a particular construction must be a real one: if the injustices suggested in argument are purely hypothetical, and may never or only rarely occur in practice, the court will remain unmoved."

It should be observed that in Section 20(f) it is provided, in the first part thereof that at the conclusion of the trial, the Judge shall determine whether

the election of a member of the House of Representatives or Parish Council was duly returned or elected or was void, and shall certify such determination. In the second part of the subsection it concludes that subject to an appeal under Section 22, a return shall be confirmed or altered or a writ for a new election shall be issued as the case may require in accordance with such determination. An examination of the statutory provisions reveals that whereas in the first part of the sub-section, the determination relates to whether or not one has been elected, in the second part dealing with the appeal, reference is only made to whether or not the return should be confirmed or altered.

The decision in ***Brown v Trelawny Parish Council*** (supra) cannot be authority for the proposition that there is a mandatory statutory stay on the mere filing of an appeal in respect of the petition because section 20(f) is expressly made subject to a right of appeal which is granted by Section 22 pursuant to the Constitution. Further Rule 2 of the Election Petitions Act (Court of Appeal) Rules 1967 embraced the Court of Appeal Rules of 1962. A judge of the Supreme Court has delivered a judgment indicating that the petitioner is the duly elected candidate and is entitled to the seat. This is a vested right of the Petitioner which cannot be interfered with or derogated from except by precise and clear words of a statute. The appellant has merely filed an appeal and having made an application to the Supreme Court for a stay of execution pursuant to the Rules, has withdrawn the application on the basis that there is a statutory stay relying on the

authority of ***Brown v. Trelawny Parish Council*** (supra). In view of the foregoing, this case is decided per incuriam and should not be followed.

In my judgment, without an order of the Supreme Court or the Court of Appeal there is no stay of the execution of the judgment and I so hold.

The Motion therefore should be granted.

WALKER, J.A. (Dissenting)

By this motion Abraham Joseph Dabdoub (the applicant) applies for relief as follows:

> "(1) An Order that the judgment of Mr. Justice Reid made on the 29th day of June, 2001 has not been stayed as the Appellant has failed to obtain an Order for Stay of Execution pursuant to the Court of Appeal Rules.
>
> (2) Further or in the alternative, an Order that the purported Stay of Execution consequent on the filing of the Appeal be discharged;
>
> (3) Further or in the alternative that on a proper construction of Section 21 (f) and Section 22 of the Election Petitions Act there is no Statutory or automatic Stay of Execution on the mere filing of an Appeal.
>
> (4) Any or other further relief, Order and Directions as this Honourable Court deems fit in the circumstances of this case".

on the grounds that:

> (a) The appellant having made an Application for a Stay of Execution as provided for by the Court of Appeal Rules and the Election Petitions (Court of Appeal) Rules, 1967, thereafter withdrew the application and thereby obtained no Order for Stay of Execution from the Supreme Court or Court of Appeal, the Judgment of Mr. Justice Reid is not the subject of any order staying same;
>
> (b) The mere filing of an Appeal does not operate to stay the Judgment of Mr. Justice Reid;
>
> (c) The filing of an Appeal does not operate as a Statutory Stay of the Judgment of Mr. Justice Reid;
>
> (d) The appellant having made an Application for a Stay of Execution, and thereafter withdrawing same on the basis of a purported Statutory Stay is an abuse of the process of the Court designed to

circumvent and usurp the rules and/or jurisdiction of the Court of Appeal."

Following general elections for membership of the House of Representatives held on December 18, 1997, Phyllis Mae Mitchell (the appellant/respondent) who was the candidate representing the People's National Party was duly elected as the Member of Parliament for the Constituency of North East St. Catherine. According to the official count of votes she was declared the winner of this constituency over the applicant, who was the representative of the Jamaica Labour Party, by a majority of 30 votes. Not satisfied with the outcome of this election the applicant filed an election petition in the Supreme Court by which he challenged this result. The petition, which was hotly contested, was heard by Reid J who on June 29, 2001 gave a judgment in favour of the applicant. It was a decision which had the effect of unseating the appellant/respondent.

By letter dated July 3, 2001 Reid J certified his finding to the Speaker of the House of Representatives pursuant to the provisions of s.20(f) of the Election Petitions Act (the "Act").

On the same day i.e July 3, 2001 the applicant attended the House of Representatives when a request was made of the Speaker of the House for him to be sworn in. However, on that occasion his swearing in did not take place and the applicant went away. Also on July 3 the appellant/respondent appealed the judgment of Reid J filing Civil Appeal No. 95 of 2001 in this court and, pursuant to that appeal, applied to the Supreme Court for a stay of execution of that judgment. On July 4 this application for stay came on before Harrison J in the Supreme Court and was adjourned to July 9 for hearing.

The next development in this matter was that by letter dated July 5, 2001 the Solicitor General wrote to the Clerk to the Houses of Parliament. In that letter the Solicitor General gave an opinion that there was in force a statutory stay of execution of Justice Reid's judgment, and he also advised that no steps should be taken to swear in the applicant as a member of Parliament unless and until either:

> "(a) Civil Appeal No. 95 of 2001 is heard or otherwise disposed of; or
>
> (b) The Court hands down a decision which overrules the decision in **Brown v Trelawny Parish Council"**

On July 9 when the appellant/respondent's application for a stay came on for hearing it was withdrawn by Counsel in reliance on the Solicitor General's opinion as aforesaid.

At the outset of this hearing Mr. Scott for the appellant/respondent took a preliminary point. He submitted quite simply that in order to adjudicate upon the present Motion this court would, of necessity, be obliged to exercise an original jurisdiction which it did not have. But Mr. Henriques, Q.C. for the applicant took a different line. He contended that jurisdiction to entertain the Motion was conferred upon this court by section 10 of the Judicature (Appellate Jurisdiction) Act which provides as follows:

> "Subject to the provisions of this Act and to rules of court the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the

former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958".

According to Mr. Henriques the requisite jurisdiction is conferred upon the court by virtue of the fact that the Motion raises an issue that is incidental to the appeal. Insofar as Mr. Scott's submission was that this Court is not invested with original jurisdiction it is, no doubt, correct. It does not admit of argument that this court is a creature of statute to which no original jurisdiction is given either by the laws or Constitution of Jamaica: see ***Barnes v Bennette et al and Bennette et al v Barnes*** [1991] 28 J.L.R. 531. We may adjudicate upon, and may only adjudicate upon, matters falling within our jurisdiction. The present Motion prays for an order in the nature of a declaratory order based upon a true construction of sections 20(f) and 22 of the Act (although erroneously the motion speaks of s.21(f) of the Act). As such, adjudication here would, **prima facie,** require the exercise of an original jurisdiction. A declaratory order such as the one presently sought is properly obtained by action begun by writ or originating summons in the Supreme Court: see ***Punton v Ministry of Pensions and National Insurance*** [1963] 1WLR 186.

So the real question must be: Is it for any purpose of and incidental to the hearing and determination of the present appeal that any issue disclosed in this Motion should now be resolved by this Court? The point of controversy is whether, on a true construction, section 20(f) and 22 provide for a statutory stay of execution of a judgment of the court given after the hearing of an election petition once an appeal against that judgment has been lodged. On the authority of ***Brown v Trelawny Parish Council*** [1967] 10 JLR 213 the Solicitor General expressed an opinion that this was so and advised the Speaker of the

House of Representatives accordingly. Firstly, it is important to appreciate that the advice of the Solicitor General, of itself, raised no justiciable issue as would validate the present Motion. But, arguably, a justiciable issue might arise if, relying upon that advice, the Speaker of the House of Representatives were to refuse and/or neglect to swear in the applicant. In that event it would be within the competence of the applicant to commence an action in the Supreme Court by way of writ or originating summons for a declaration that the Solicitor General's advice, based as it was on the decision in ***Brown,*** was wrong. Alternatively, the applicant could seek relief by invoking section 25 of the Constitution of Jamaica if he thought that any constitutional right guaranteed to him had been, was being, or was likely to be, infringed. In the further alternative it would be open to the applicant to commence proceedings in the Supreme Court for an order of Mandamus to compel the Speaker of the House of Representatives to perform the public duty of swearing him in as a duly elected member of the House. It will be seen that in none of these circumstances would the applicant have had a direct approach to this court, the proper forum being in all instances the Supreme Court. Secondly, to my mind a determination as to the correctness of the Solicitor General's advice is not necessary for the purpose of and incidental to the hearing and determination of the appellant/respondent's appeal which, be it remembered, is the only appeal in this matter. Whether or not there was in force at the time a statutory stay of execution of the judgment of Reid J was something that was collateral to the filing of the present appeal and not incidental to the hearing and determination of the appeal. The judgment of Reid J is not based on the decision in **Brown,** nor

does the final outcome of the present appeal hinge in any way on that decision. Certainly, the interpretation of sections 20(f) and 22 of the Act is not an integral part of the hearing and determination of the appeal, and the fact that this Motion is brought under the umbrella of the appeal does not make it so. That umbrella, however held, cannot provide effective cover against the criticism which underlies the preliminary point taken by Mr. Scott. In my judgment the point is well made and effectively disposes of this Motion in favour of the appellant/respondent.

However, in the event I have wrongly decided this jurisdictional point I make these further comments. Laid bare, what this Motion is all about has to do with whether the advice tendered by the Solicitor General to the Clerk to the Houses of Parliament is correct or not. That determination must, necessarily, entail an examination of the **ratio decidendi** in ***Brown*** (supra) which was the foundation of that advice. ***Brown*** was decided at first instance by Smith J (as he then was). That learned and much respected judge was later to become a valued member of this court and, still later, Chief Justice of Jamaica. The decision in ***Brown*** was a reasoned one. It was never appealed and is no longer appealable. It has stood for 33 years. Can we now in the context of the hearing of this Motion critically examine this decision and, should we come to the conclusion that it was wrongly decided, over-rule it? I made such an enquiry of Mr. Ramsay, Q.C. during the course of his submissions and he indicated a willingness to address the point. However, at the end of the day, and I hasten to say through no fault of Mr. Ramsay, my enquiry remained unanswered. For his part Mr. Henriques thought that Smith J's interpretation of like provisions of the

Election Petitions Law, Cap. 107 (which preceded the Act) was flawed, and he said so in terms that were at once unnecessarily extravagant and unflattering. As far as ***Brown*** is concerned this court has not yet been afforded an opportunity to give a decision as to the true interpretation of sections. 20(f) and 22 of the Act. In my opinion if ***Brown*** was, in fact, wrongly decided it may only be over-ruled in appropriate circumstances, as where in a later case the interpretation of sections 20(f) and 22 is raised as an issue before a court of co-ordinate jurisdiction with the court in ***Brown*** and the issue is there determined one way or the other. In such circumstances it would, undoubtedly, be open to an aggrieved party to appeal such a decision to this court for a ruling as to the correct interpretation of these statutory provisions. The reality is, and must be, that unless and until it is overruled ***Brown*** remains good law.

For these reasons I would not at this time and in the context of hearing the present Motion be prepared to embark upon an exercise to determine the correctness of the decision in ***Brown*** or, it follows, to say that that case was wrongly decided.

In the result, respectfully dissenting from the opinion of my brethren, I would dismiss this Motion with costs to the appellant/respondent to be agreed or taxed.