Reasons for JUDGMENT

IN THE SUPREME COURT OF JUDICATURE

Ch. 351 of 1972.

IN THE REPRESENTATION OF THE PEOPLE LAW,

CAP. 342 OF THE LAWS OF JAMAICA.

AND

THE ELECTION PETITIONS LAW

CAP. 107 OF THE REVISED LAWS OF JAMAICA.

Election to the House of Representatives for the constituency of Eastern St. Thomas in the parish of St. Thomas holden on the 29th day of February, 1972.

IN THE MATTER OF AN ELECTION PETITION

BY SEYMOUR ASTON STEWART Petitioner

AGAINST LYNDEN G. NEWLAND First Respondent

AND R.A. EDMAN Second Respondent

Heard 9th, 10th, 11th May & 2nd June 1972

Messrs. Carl Rattray Q.C. Horace Edwards Q.C. and Winston A. Spaulding attorneys-at-law for Petitioner.

Messrs. V.B. Grant Q.C. R.S. Pershadsingh Q.C; Norman Hill Q.C., and Richard Ashenheim, attorneys-at-law for first respondent.

Summons adjourned to court for reasons for judgment.

The Petitioner, Seymour Aston Stewart, was the unsuccessful candidate in the General Elections for a member of the House of Representatives held on 29th February, 1972, for the constituency of Eastern St. Thomas. On the 20th March, 1972 he filed a petition in which he claimed to have had the right to be returned and alleged that Lynden G. Newland, the first respondent herein, (hereafter called the respondent), who had been duly elected, had been guilty of illegal practice on a number of stated grounds,

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of undue influence, illegal hiring, intimidation and sundry irregularities, in connection with the elections.

On the 21st March, 1972 at 8.00 a.m. the petitioner went to Port Morant in St. Thomas with a sealed copy of the petition, a copy of the Appointment of Agent and Notice of address for service with the intention of serving the same on the respondent. The petitioner visited two houses, one which he knew the respondent occupied during the campaign and the other which he believed the respondent owned. The respondent was not found and no one could give any information as to when he would be at those premises. On the 22nd March, the petitioner re-visited the same premises and again received the information that no one had seen the respondent nor knew when he would be likely to be at those premises. Before that, the petitioner had gone to the House of Representatives on the 21st March, but the respondent had not attended that sitting of the House.

The petitioner sought the assistance of the Bailiff of the Resident Magistrate Court for St. Thomas and forwarded to him by post two sets of the Election Petition, two sets of nature of security given and two sets of Notice of Presentation of Petition one set of which was for service on the respondent. Between the 25th March and 30th March, the Bailiff either alone or in the company of the petitioner made extensive enquiries in the parish of St. Thomas for the respondent but he could not be found. On the 7th April the Bailiff returned the documents to the petitioner's attorney, explaining that the respondent could not be located.

It was after the Bailiff had returned the documents with

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he comment that the respondent "lives in Kingston" that the petitioner bestirred himself to find alternative addresses for the respondent -see paragraph 18 of petitioner's affidavit of 20th April, 1972. Petitioner got word that the respondent had two Corporate Area addresses. The Assistant Bailiff for St. Andrew to whom the documents for service were later given, tried in vain to locate the respondent at these addresses or anywhere else in the parish of St. Andrew.

The Daily Gleaner carried a publication on page 2 of its issue of the 21st March, 1972, of the fact of the filing of the Election Petition and gave a fairly full account of the contents of the petition as filed. No other document was referred to in the Gleaner article. The petitioner has sworn in his affidavit that on the evening and night of 20th March, 1972, news of the filing of the Election Petition was published over both Radio Stations and that J.B.C. Television published on its News Programme, the fact of the filing of the Election Petition and this was accompanied by a photograph of the respondent.

The petitioner averred that in the instant circumstances the respondent was evading service.

By an exparte summons the petitioner has applied to the court for;

(a) Extension of time for service of the Petition and other statutory documents;

(b) That personal service of the documents be dispensed with and substituted service be ordered;

(c) In the alternative that the publication in the Daily Gleaner of 21/3/72, and of the Radio Broadcasts

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and J.B.C. Television publication be DEEMED to be sufficient service and notice brought to the attention of the respondent and will satisfy the provisions of Section 6 Cap. 107.

When this summons came on for hearing on the 24th of April, the court adjourned the summons and granted leave for the attorneys for the respondent to be heard on the summons, with certain reservations not material for these proceedings. At the hearing before me the attorneys for the petitioner raised no point as to the presence of the respondent's attorneys.

Two broad questions arose for decision, viz:-

(1) Does this Court have jurisdiction to extend time for service after the period of time fixed by Section 6 of the Election Petitions Law has expired?

(2) What is the jurisdiction of this Court to deem that service has been effected in the absence of personal or substituted service?

Section 6 of the Election Petitions Law, Cap 107 provides that the following documents:-

(a) Notice of the presentation of the Petition.

(b) Nature of the Proposed Security

(c) A copy of the Petition ~~shall be served by~~ shall be served by the petitioner on the respondent within 10 days after the presentation of the Petition. Mr. Rattray for the petitioner was prepared to assume for the purposes of his argument that service within 10 days was a condition precedent to the hearing of the petition. Mr. Edwards who followed for the petitioner argued that this provision

was directory only and that the case of Allen v Wright (Nov. 1960) 2W.I.R. 102 was wrongly decided.

Allen v Wright took very much the same course as this matter. Mr. Allen the defeated candidate, brought an Election Petition against and tried to locate Mr. Wright, the successful candidate, to serve the documents on him. Mr. Wright kept out of the way. When 10 days had passed after the presentation of the petition, on the application of the petitioner, Waddington J. extended time for service. Mr. Wright brought a motion to set aside the order for extension of time, after full argument, again before Waddington J. the order for extension of time was set aside and the service of summons made thereunder declared void and of no effect. Mr. Allen appealed and the matter was heard before the Federal Supreme Court. That court held that Waddington J. was right, that the provision regarding time is a matter of substantive law and cannot be dispensed with by the ~~law.~~ court. All three Judges expressly referred to the decision of Williams v Tenby Corporation (1879) 5 C.P.D. B5 with express approval. Grove, J. had held in Williams v Tenby Corporation, which too was an election petition case, that provisions similar to Section 6 of Cap. 107 were peremptory, were conditions precedent and ought to be compiled with before the petition could be presented. In Allen v Wright, Lewis, J. (later Lewis J.A. of the Court of Appeal of Jamaica) after referring to the intimate relationship of Section 4, 6, 7 of Cap. 107 concluded:-

> "When one looks at the law in that way one sees that all these provisions are intended to ensure that everything necessary for bringing the matter to trial, bringing the matter at issue in the terms of the last words of Sec. 7 is

required to be done within a rigid time-table, and I agree entirely with what the learned Chief Justice has said that the case of Williams v Tenby Corporation which has stood for so many years, is as applicable to this Law as to the English Statute notwithstanding the different arrangement of the sections."

The reasoning of Waddington, J. in Allen v Wright(judgment dated 13/11/59 in Suit C.L. 851/59 unreported) was expressly approved by Marnam, J. on appeal. When one looks at the very careful judgment of Waddington ,J. what one finds is that all the relevant authorities were reviewed and,the learned judge held that Section 23 (3) of Election Petitions Laws, Cap.107 and Section 676 of C.P.C. did not confer any jurisdiction on the court to extend time for service under Section 6 of Cap. 107. Mr. Rattray argued that more recent cases since Allen v Wright, although not directly on Election Petition statutes, have shown that the court will extend time even in matters where previously it was thought that the right of parties had been determined, thus rendering it impossible to extend time. He relied on Administrator General v Sewell and J.O.S. Ltd (1969) 14 W.I.R. 24, a decision of the Court of Appeal of Jamaica and submitted that that case is an authority for the proposition that when statutes lay down delimiting periods within which service of process of the court has to be effected, the modern authorities are that such provisions, if not complied with merely create irregularities and the court has power under the provisions of the Civil Procedure Code to extend the time within which service may be effected and that such extension can be done on an application made after the time has expired.

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The short answer to this argument is that Election Petition Statutes have always been strictly construed and the statutory provision which deems election petitions to be proceedings in the Supreme Court is made subject to the Election Petitions Law in expressed terms. There was no statutory provision which inhibited the Court in Administrator General v Sewell from applying section 675 of the Civil Procedure Code. In Allen v Wright, Waddington J. would have exercised his discretion to extend time if the law permitted this, but the question must remain does the law permit an extension of time on an application made out of time?

It is not worthwhile to set out the arguments on which Allen v Wright was attacked by Mr. Edwards. Suffice it to say that the High Court of St. Christopher , Nevis and Anguilla (Appellate Jurisdiction) Coram (St.Bernard, Bishop & Peterkin, J.J.) approved Allen v Wright in the case of Stevens v Walwyn (1967) 12 W.I.R. 51. That was an election petition case and the question was whether the court could enlarge the time of 21 days within which the election petition should be presented, so as to enable an amendment which would cure a defect in the Petition, there being no prayer in the original petition. The court held that a provision in the Constitution and Elections Ordinance which is similar in wording to Section 4 (2) of Cap. 107 (5) (1)

> "is substantive, not procedural and that it cannot be enlarged by the court in its discretion."

The Privy Council has recently restated the principle that the interests of the public requires the speedy determination of elections petitions, and consequently when a statute lays

down the time for service of the petition, those statutory provisions should be regarded as mandatory and a failure to observe the time for service thereby prescribed rendered the proceedings a nullity.

Nair v Teik (1967) 2 A.E.R. 34: The Jamaican Case of Allen v Wright was not referred to in Nair v Teik but it is significant that Lord Upjohn who delivered the Opinion of the Board when referring to the persuasive authority of Williams Tenby Corporation used language very similar to that adopted by Lewis J. in Allen v Wright, when he said,

> "The case of Williams v Tenby Corporation which has stood the test of nearly ninety years and seems to their Lordships plainly rightly decided, strongly supports the view that provisions of V.15 are mandatory."

Nair v Teik (1967) 2 A.E.R.- 34 at p. 40.

In a neat way Waddington, J. attempted to lay down guide-lines for a vigilant petitioner who has to locate and serve within a fairly short time a respondent who might have his own very good reasons for keeping well out of the petitioner's way whether by resorting to one device or another, when he said in Allen v Wright

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> "The simple answer to this (the contention that every candidate could hide behind the Law and made a mockery of it and by means of any device or subterfuge successfully stultify the Law) is that in any case of real difficulty in effecting service a Court would always aid a Petitioner by ordering substituted service on an application made in time." (underlining mine).

In my opinion and I so hold, the provisions of Section 6 of Cap. 107 which provides that the documents named therein,"shall

within ten days after the presentation of the petition, be served by the petitioner on the respondent," are mandatory and must be strictly complied with. The provisions of Section 9 Cap. 107 refers to the methods by which service ought to be effected and not to time within which service must be effected. Section 23 (3) of Cap. 107 which deems election petition to be proceedings in the Supreme Court is made subject to the provisions of the Election Petition Law and does not have the effect of empowering this court to apply Sec. 676 of Cap.177 to enlarge the time for service prescribed by Sec.6 of Cap. 107. I hold that I have no jurisdiction to extend the time for service as requested by the petitioner in the summons and I hold further that an application for substituted service must be made within the 10-day time limit fixed by Sec.6 of Cap. 107 and whatever order is made must be performed within the said 10 days. It follows then that as the petition was ~~prescribed~~ presented on the 20th March, 1972 and as the application for substituted service came before the court on a summons dated 20th April, 1972, such an application must fail, as one month had elspsed between the date of presentation of the petion and the date of issue of the summons.

In support of his alternate ground that the court ought to deem that service of the petition has been effected, Mr. Rattray submitted that if it is established that there is a condition precedent in relation to service of the documents to which Sec.6 refers, and that the petitioner has done all things possible to effect service within the time stated and so comply with the condition precedent but has had his efforts thwarted by impossibility

or impracticability and specifically by evasive action of the respondent in relation to service, then a court, satisfied, that there is an issue to try, will deem the provisions of the statute to have been complied with and will allow in the interests of justice that the issue be tried. He based this submission upon the decision in Wills and Sons v McSherry and others (1913) 1 K.B. 20.

That was a case in which there was a statutory right of appeal and as a condition precedent to the hearing of the appeal the appellant was required within three days of receiving the case stated, to serve notice in writing of the appeal and a copy of the case stated upon the respondent. The respondents were nine seamen, eight of whom were foreigners. They all left for sea and the only addresses which they left with their former solicitor were those in foreign countries to which additional wages could be sent in case the appeals were unsuccessful. The appellants first sent registered letters to the last known address of the respondents in England but the letters were returned marked "gone away". The relevant documents were served on the solicitor who had been acting for the respondent but he said he had no instructions regarding the appeal. The Greek, Russian and Turkish Consuls were consulted. They could not help. Seamen's institutes were canvassed, but they could not give the whereabouts of the respondent. On these facts With great reluctance and doubting to the very end, the Court of Appeal held that the statute would be sufficiently complied with if the party had done everything in his power to effect service and it was clearly impossible for him to do so.

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The facts of the McSherry case are easily distinguishable from the instant case. The respondent had given an address in St. Thomas as his official address for purposes of the General Elections. Between the 21st March, and 7th April, a period of 18 days, the petitioner confined his efforts to locate the respondent to St. Thomas. The petitioner did not within 10 days after 21st March, follow the advice of Waddington, J. and seek the aid of the court. He did not commence enquiries in Kingston for the whereabouts of the respondent until after the 7th April, a lapse of 18 days. He did not himself place any advertisement in the Daily Gleaner setting out the contents of the several documents which he shught to serve on the respondent. He did not send the documents by registered post to the respondent's last known place of abode. He did not make any enquiries from the Ministry of which the respondent was so lately a Minister.

The principle in Wills v McSherry was not intended to be of general application. The court itself drew attention to the fact that that case was argued only on one side. The respondents did not appear. Channel ,J. hinted in the very first sentence of his judgment that the decision should be followed with caution for he said. "I am willing to concur in the view that in this case the appeal may be heard, but the question is one of great principle, and I cannot help thinking that our decision may be quoted in support of propositions to which it was never intended to be applied."

The final sentence of his judgment is equally revealing. "If the question can be decided on the merits of the particular case, the present case is certainly one in which it is desirable

to hear the appeal, and on the facts of this case I am not prepared to say that the Court has not jurisdiction to hear the appeal, but I hope that this decision will not be used as an authority in cases where the facts are very different."

I very much doubt that a court in Jamaica has the power to declare that section 6 of Cap. 107 has been sufficiently complied with if a petitioner has done every thing in his power to effect service on a respondent but the respondent has successfully evaded service. If, however, the court has such a jurisdiction, the court would have to be satisfied not only that the petitioner had been thorough and deligent in his search for the respondent, and in his efforts to ascertain but also that the application to the court was made without delay. The petitioner who comes to the court after the lapse of one month to ask for discretionary relief in a matter which the petitioner must know requires utmost deligence and strict adherence to a fixed time table, would in my view be guilty of undue delay. I find that the petitioner's affidavit does not show any real determined effort on his part to locate and serve the respondent with the relevant notices. It was open to the petitioner to follow the advice of Waddington J. and make application to the court within the time of 10 days limited for service. This he did not do. It was open to the petitioner to make an application to the Chief Justice under Section 9 of Cap. 107 for directions as to serving of the relevant notices, (there being no general directions in force) within the ten days limited for service. This he did not do.

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In my opinion the petitioner has failed to show that he did everything in his power to effect service and that it was clearly impossible or impracticable for him to do so. Consequently the principle in Wills v McSherry availeth ~~but~~ him nothing.

Before I part with this case I desire to say a few words concerning the statutory provisions governing the service of notices in Election Petition cases.

Section 9 of the Election Petitions Law, Cap 107 provides:-

> "9. Service of any notices required to be served shall subject to any particular directions given by the Chief Justice, be effected in accordance with the rules in force in the Supreme Court or in the Court of Appeal, as the case may be, with reference to service."

The Judicature Civil Procedure Code, Cap.177 provides for personal service, substituted service and service upon an attorney. It has been found in other jurisdictions that special rules are necessary to effect service in Election Petitions due in part to the very short periods limited for service and in part to the fact that the Court has no power to extend the time limited for service.

For over a century, from as far back as 1868 Parliamentary Election Petitions Rules have existed in England. Rules 13, 14, & 15 are instructive.

> "13. The time for giving notice of the presentation of a petition and of the nature of the proposed security, shall be five days, exclusive of the day of presentation."

> "14. Where the respondent has named an agent or given an address, the service of an election petition may be by delivery of it to the agent, or by posting it in a registered letter to the address given at such time that, in the ordinary

course of post, it would be delivered within the prescribed time.

In other cases the service must be personal on the respondent, unless a judge, on an application made to him not later than five days after the petition is presented on affidavit showing what has been done, shall be satisfied that all reasonable effort has been made to effect personal service and cause the matter to come to the knowledge of the respondent, including when precticable, service upon an agent for election expenses, in which case the judge may order that what has been done shall be considered sufficient service, subject to such conditions as he may think reasonable."

"15/ In case of evasion of service the sticking up a notice in the office of the master of the petition having been presented, stating the petitioner, the prayer, and the nature of the proposed security, shall be deemed equivalent to personal service if so ordered by a judge.."

Ceylon, in its Election Offences Ordinance of 1954, has provided special rules for service. Rules 10 & 15 provide as follows:-

"10. Any person returned may at any time, after he is returned, send or leave at the office of the registrar a writing signed by him on his behalf appointing an advocate and solicitor to act as his solicitor in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address within the Federation at which notices addressed to him may be left, and if such writing be left or address given, all notices and proceedings may be given or served by leaving the same at the office of the registrar.....

"15. Notice of the presentation of a petition, accomplished by a copy thereof, shall, within ten days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the solicitor appointed by the respondent under r. 10 of these rules or by posting the same in a registered letter to the address given under r. 10 of these of these rules at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no solicitor has been appointed, or no such address given, by a notice published in the Gazette stating that such petition has been presented, and that a copy of the

same may be obtained by the respondent on application at the office of the registrar."

The attorneys who appeared before me were unable to refer me to any special directions by the Chief Justice made under Sec.9 of Cap.107. It seems that immediate and urgent steps should be taken to frame a set of permanent practical rules for the service of notices in Election Petition cases in Jamaica. which will remove the temptation or render nugatory the efforts of a respondent who would prefer not to be served with the Petition.

It was for the reasons contained herein that I dismissed the summons on the 11th May 1972 and promised to put my reasons in writing.

T.D. ROWE.
~~(Judge)~~

J

On 7/6/72

application for Costs by Respondent refused.

Application for leave to appeal ~~against~~ refusal of ~~refusal~~ to order Costs Refused.

J.