IN THE SUPREME COURT OF JUDICATURE

OF JAMAICA

IN COMMON LAW

SUIT NO. CL. T 041 of 1978

BETWEEN DONALD THOMPSON Plaintiff

THE ATTORNEY GENERAL
THE CHIEF ELECTORIAL OFFICER
MRS. CARMEN BARTLETT
MR. ROY KNIGHT
MR. DUDLEY THOMPSON Defendants

Bertham McCaulay QC, Winston Spalding, T.Ballentine instructed by Mrs. M.M. McCaulay for the plaintiff
Lloyd Ellis for 1st,2nd,3rd and 4th defendants
H.E. Munroe QC, Horace Edwards, QC, Dr. Lloyd Barnett, Heslop Harris and Miss Gloria Thompson instructed by Gilroy English for the 5th defendant.

Hearing October 2,3,4,5,8,9,1979

May 30,1980

J U D G M E N T

WRIGHT J.

The point at issue in this case my be briefly stated thus: Is there any power in the executive to revoke a nomination which, in the terms of the Representation of the People Act (hereinafter referred to as "The Act") "has been duly and conclusively" made?

It is readily seen that the question is not only a constitutional one but is, as well, a question of tremendous political import and it would be naive not to recognise this aspect. Indeed, the intensity of the arguments advanced bear eloquent testimony to the assessed importance of the case.

In order to place the matter in its true perspective it is necessary to trace the history of the events which led up to the question being submitted for the court's

determination.

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 PeoplesNational 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".

It is to be observed that the duties of the Returning Officer regarding the receipt and processing of nomination papers on Nomination Day are prescribed by section 23 of the Act. Much argument entered around subsections (1) and (6) of this section and this obliges me to set out the provisions of these subsections.

Section 23(1) "At noon on nomination day the Returning Officer and the Election Clerk shall both attend at the place specified in the election notice under section 22 as the place for the nomination of candidates and shall there remain until two O' clock in the afternoon of the same day for the purpose of receiving the nominations of such candidates as the electors desire to nominate After 2.O'clock on nomination day ho further nominations shall be received".

Section 23 (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 tohim a receipt therefor which shall be conclusive evidence that the candidate has been duly and regularly nominated"

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.

What had intervened or supervened to frustrate the issue which, flowing from the issue of the Proclamation and the Election Writ by the Governor General is regulated by the Act step by step? This will emerge. But the really important question is whether the law of the land recognises any act or circumstances as having the competence to legally bring about this frustration. 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 wouldbe 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"

So there it is- a virtual coup de grace delivered with finesse by the Chief Executive himself which, delivered from such majestic heights should suffice to disabuse the plaintiff of any hope or wish to take part in the afore-scheduled election. But the plaintiff howls in protest that nowhere in the laws of this nation neither in precept nor practice can authority be found for this revocation by the Executive.

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 exercise, 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.

However, in the meantime the plaintiff had, on the 24th day of July,1978 i.e. before the election of the fifth defendant, filed a Writ in which he seeks seven declarations.

It may be convenient to set out the claim at this point:-

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:
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 are invalid in that, such appointment purports to invalidate his said nomination which can only be done by a Returning Officer acting under section 23(5) of the Representation of the People Act 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, 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:

Arguments were advanced on the state of the pleadings. In order therefore, to keep everything in perspective it is thought advisable to list the pleadings here.

The 1st and 2nd defendants entered appearances on 31st July,1978, the 3rd defendant entered appearance on the 3rd August,1978 and the joint defence of the 1st, 2nd and 3rd defendants was filed on 25/8/78. A Reply was filed on 28/8/78. On the 25th day of September,1978 the fifth defendant entered an appearance and his undated defence was filed on the 17th day of October,1978. It was not until the 7th day of December 1978 that the 4th defendant entered an appearance and at the hearing of the Summons for Directions on the 11th December,1978 application was made to amend the defence filed by the 1st,2nd and 3rd defendants by adding "the 4th defendant" thereto. Also at the said hearing the plaintiff applied for and was granted leave to amend the Reply filed to read "Reply to the defence of 1st, 2nd,3rd,4th and 5th defendants". On the 15th day of Janauary,1979 an order for Speedy Trial was made and the 5th day of February,1979 was fixed for the commencement of the trial but on that day the matter was taken out of the list. Subsequently, on the 4th of June,1979 three affidavits were filed one each from the 2nd and 3rd defendants and one from one Mr. Cleve Leon a Superintendent of Police. Upon the application of the Mr. Ellis and there being no objection, these affidavits were admitted in evidence subject to any breaches of the hearsay rule. These affidavits purported to supply evidence of the happenings of the 10th of July,1978 out of which it was contended that justification arose for the revocation of the nominations on the 14th day of July,1978. So far as the contents of these affidavits are concerned the plaintiff's attorney contends that they do not supply the evidence which they are said to supply and further, that even if such evidence were disclosed it would be irrelevant for present purposes. It will be necessary,therefore to consider these affidavits in detail but before passing on to that exercise it may be appropriate at this point to deal with a submission made by Mr Ellis, not as a preliminary

matter but substantively and, concluding that he was correct,he moved for judgment and costs for the 2nd defendant.

The position of the 2nd defendant.

Mr. Ellis' submission was that this defendant is not a proper party of these proceedings and he based this submission partly on (a) the pleadings and

(b) the Common Law.

Pleadings

The particulars supplied in the statement of claim at particular No. 1,are :-

> "The plaintiff is and was at all material times a citizen of Jamaica above the age of 21 and has been ordinarily resident of Jamaica for at least 15 months before the 10th July,1978 and is still resident in Jamaica.
> The first defendant is the Attorney General of Jamaica and is sued in his capacity under the Crown Proceedings Act as a representative of the Crown. The second defendant is employed by the Government of Jamaica as a Chief Electoral Officer. The third defendant and the fourth defendant were appointed Returning Officers who worked under the supervision and control of the second defendant"

The defence of the 1st,2nd,3rd and 4th defendants states at paragraph 6.

> "These defendants deny that the 3rd and 4th defendants worked under the control of the 2nd defendant"

In his Reply the plaintiff pleaded at paragraph 2 "As regards the third paragraph of paragraph 6 thereof the plaintiff admits that the 3rd and 4th defendants did not work under the control of the 2nd defendant"
It is this admission that misled and emboldened Mr. Ellis to submit that by the plaintiff's own admission the 2nd defendant was not a proper party. But this misconceives the plaintiff's posture. By pleading "control" the plaintiff had pleaded in excess of the provisions of the law. His admission merely discarded the surplusage and brought his position in line with the law.

Section 62 of the Act empowers the Governor-General to appoint a Chief Electoral Officer and such officers as may be necessary to assist the Chief Electoral Officer in the discharge

of his duties.

By section 63 (a) of the Act, the Chief Electoral officer shall

> "Exercise general direction and supervision over the administrative conduct of elections and enforce on the part of all election officers fairness, impartiality and compliance with the provisions of this Act"

The definition section of the Act,section 2(1) defines election officer" as "Including every Returning Officer" It is patent,therefore,that a Returning Officer is subject to the general direction and supervision of the Chief Electoral Officer and this position cannot be altered by pleading.. Mr Ellis' submission in this regard is otiose and without any merit.

(b) As regards the Common Law.

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 will now turn to the affidavits

Affidavit of Carmen Bartilow

Summarised, this affidavit states:

1. Seven nomination papers were handed in.
2. Two were found to be in order and were accepted,the plaintiff's and the 5th defendant's.
3. of the other five

(a) four bore the surname Thompson;

(b) one was improperly rejected - that of one Angella Richardson.

Affidavit of Trevor Dixon

1. This states: that Mrs. Bartilow reported the rejection of Angella Richardson's nomination papers and gave reasons to have been wrongful.

2. " that as Chief Electoral Officer it has come come to my knowledge that there was widespread violence and a massive crowd at the nomination centre of St. Andrew Western Constituency on the 10th July, 1978, which prevented prospective candidates from attending at the nomination centre to offer themselves for nomination";

3. " that from information received and articles appearing in the Newspaper touching on the events of nomination day on the 10th July, 1978, which I verily believe it seems abundantly clear that there were irregularities in the proceedings of nomination papers on the 10th July, 1978, which caused injustice to prospective candidates thereby preventing them from being nominated".

Affidavit of Cleve Leon

It is best to quote the relevant portions of the affidavit of this deponent, a Superintendent of Police:

Para 2: " That on the 10th July, 1978 at about 9:15 a.m. I led a party of twenty(20) policemen at No. 9 - 11 Pen Avenue, Kingston, where I set up temporary headquarters for the object of providing police security at Balmagie Primary School, a nomination centre for the St. Andrew Western Constituency. An hour later we were joined by twenty-one (21) other policemen making a complement of forty-one (41) policemen";

Para 3: "That Mobile Patrol and police personnel were placed at strategic points including the main gate to Balmagie School."

Para 4: "That at about 12 midday 10th July, 1978 a huge crowd consisting of about 2,500 persons assembled on the roadway in front of the gate to the nomination centre."

Para 5: "That I made several requests with my loud hailer to the crowd in front of the main gate to the nomination centre to move backwards and clear the main entrance to the nomination centre so that vehicles and persons could enter and leave freely but there was no compliance. I repeated my request over the public address system but received no favourable response."

Para 6: 'That at about 1:50 p.m. on the 12th July, 1978 the entrance to the nomination centre was cleared by the police personnel and simultaneously Miss Angella Richardson a prospective Candidate and her supporters drove up and entered the nomination centre under security by the police."

Para 7: "That on Miss Richardson's arrival at the Nomination Centre violence erupted and a man appearing to be a rastafarian rushed menacingly at the candidate's agent but was prevented from attacking him by the aid of the police."

Para 8: "That I was informed and verily believe that the nomination paper of Miss Angella Richardson of the Jamaica United Front was declared by the Returning Officer to be imcomplete at the time it was presented for nomination."

Para 9: "That I was informed and verily believed that several prospective candidates were deterred from entering the nomination centre because of the huge crowd which had blocked the entrance of the nomination centre coupled with the violence which was experienced at or near the nomination centre that day."

These affidavits were filed by the Director of State Proceedings and it is fair to assume that some-one 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 un-said, 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.

Mr. Ellis sought much assistance from these affidavits and made the following submissions thereon.

Re - Carmen Bartilow's Affidavit

1. She depo.es to the wrong done by her. The rejection of Miss Richardson's nomination papers which were in order was ultra vires.

2. The multiplicity of Thompsons at the Nomination Centre is suggestive of the fact that some mischief was a foot, namely, the confusion of the voters.

Re - Trevor Dixon's Affidavit

Evidence of violence and irregularity disclosed i. e. the prevention of would-be candidates from being nominated.

This submission ignores the fact that Carmen Bartilow who was the official on the spot does not refer to any violence let alone violence affecting the nomination process nor does she mention any would-be candidate as being excluded.

Re - Cleve Leons' Affidavit

1. Since the entrance to the nomination Centre was blocked between 12 noon and 1:50 p.m. persons would be prevented from entering among whom "could be, would-be nominees".

This he submitted is a valid inference and the irregularities were triggered off by this exclusion of persons.

2. It was a fact of some notoriety that this particular Nomination Day attracted more than seven persons for nomination. Indeed, he submitted that the Court could take judicial notice of the fact that more than seven persons did attend hoping to be nominated.

It is hardly likely that this latter submission could be meant to be taken seriously and it is treated accordingly.

When it was observed that the relevant portion of this affidavit, like Trevor Dixon's breaches the hearsay rule Mr. Ellis submitted that Superintendent Leon, being a Policeman, enjoys privilege from disclosing the source of his information. The privilege which the Police enjoy from disclosing the source of their information relates to crime detection which is not the issue here. But even on a common-sense view of the question how can it be said that a witness is privileged from disclosing the very thing he has been put forward to say, and by the very person putting him forward?

I hold that the patently hearsay portions of the affidavits are objectionable and that the evidence sought to be supplied in that manner is not otherwise supplied. They, therefore fail in their purpose.

Since it was essential for the Defence to reveal the basis for the revocation it was submitted that on the Pleadings as they stand the Plaintiff is estopped from contending that so such basis is pleaded.

This impasse arose in this way. Paragraph 3 of the Defence of the 1st to 4th Defendant pleads:

> "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 - 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 Reply states:

> "The Plaintiff joins issue with the 1st, 2nd and 3rd Defendants as regard 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 the 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 (the underlining is mine).

Subsequent to this Reply the 4th and 5th Defendants entered appearance and the 5th Defendant on 17/10/78 filed his Defence paragraph 3 of which reads:

> "The fifth defendant denies paragraphs 3,4,and 5 of the Statement of Claim and says that the nominations on July 10,1978 were unconstitutional, invalid and of no effect as-
> (a) the statutory procedure at nomination was not complied with in that 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.

As previously stated the 4th defendant filed no defence but at the hearing of the Summons for Directions on the 12th December,1978 the Heading to the Defence of the 1st,2nd and 3rd defendants was amended to include the 4th defendant who had entered his appearance just five days earlier. Also the heading of the reply was amended to include the 4th and 5th defendants. However,there was no other change to what had been pleaded in the reply which had been filed on the 28th August,1978 dealing specifically with the defences then on file. What then is the effect of the amendment to the heading of the reply to include the 4th and 5th defendants?

It is trite learning that what is pleaded in a defence is in issue if there is no reply. Dr. Barnett contends that where there has been a joinder of issue on certain matters pleaded in a defence it is not good construction nor commonsense to say that what has not been specifically replied to is also in issue. Has there been in fact a joinder of issue on certain

matters pleaded in the defence of the fifth defendant?

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 aerobat 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.

But having regard to Dr. Barnett's submission it is apparent that he proceeded on the basis that there had been a reply specific to certain allegations and non-specific to others, which in the circumstances, would be deemed to be admitted. Consequently, he complained, they were misled into believing that the plaintiff was raising no issue as to what were the facts and circumstances of the evidence and/or intimidation alleged by the fifth defendant.

What the plaintiff is saying is, even assuming the allegations in your defence are correct I will not in anyway concern myself with them because they cannot affect my claim. All the defendants construe the plaintiff as admitting the facts on which they rely and that,accordingly, the need for proof had been dispensed with.

There seems, however, to have been second thoughts on the part of the first four defendants. Hence the affidavits.

Parties are at liberty to limit the scope of a trial by agreeing certain matters between themselves which thereafter are no longer in issue. But it is my opinion that while they may agree matters into which the court will not then enquire, it is not competent for them, by any such agreement, to exclude the court from enquiring into matters not merely related to their personal rights and claims but are of such a public nature that they transcend the rights of the parties and involve matters of public rights and interest. The plaintiff has not offended in this regard. I understand him to be saying,well,you haven't disclosed those matters which you claim give validity to what I complain of as being a flagrant usurpation of the function of the court but if you think they can avail you, the way is clear for you to let the court hear them so go ahead and prove them. In any event I maintain they can't affect me.
But Dr. Barnett did not get that message and so he took as admitted matters in which the plaintiff displayed no interest. The facts should be placed before the court.

The plaintiff's position,therefore,is that whether the defendants prove or fail to prove the allegation of fact on which they rely his case cannot be affected.

It is pertinent to observe that the instrument effecting the revocation does not pray in aid any facts at all. What we have is the bald,/and un-reasoned-statement "AND WHEREAS bland 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. Then follows "I..... DO HEREBY REVOKE THE PROCLAMATION etc"

I will now address my mind to assessing the arguments advanced in favour of as well as, against the validity of this proclamation. I do not propose to refer in the judgment to all the cases cited before me but only

to such as seem really relevant. Without doing violence to the submissions, I hope to set them out as concisely as I may and so deal with them.

In a free democracy a would-be parliamentarian puts himself in contention by becoming nominated as a candidate for any prospective election. It is essential therefore, that the nomination process be well prescribed and regulated by law; otherwise the constitutional right to advance oneself as a candidate could be easily frustrated. The process that brings a nomination into being is initiated by the Executive and while, in the contemplation of the plaintiff, the logical destination of a nomination duly complying with the law, excluding the death of the candidate or his withdrawal in accordance with the provisions of The Act (see section 25(1) of the Act) is the ballot box, the defendants, on the principle that he who makes can unmake, maintain that the Executive is imbued with power to cut short the expectation of a duly nominated candidate by revoking the very process by which he was nominated and start proceedings de novo. This leads to a consideration of the provisions for nomination and how these may be affected.

The initiation of the process by the executive would be productive of nothing unless there were in place administrative officers to give effect to the orders and directions of the Executive. By section 64(1) of The Act the Governor-General is empowered to appoint a Returning Officer for each constituency and by section 3(2) of The Act it is to such Returning Officers that the Writ of elections by which elections are instituted are directed and their due performance is secured under pain of penalty provided by section 3(3) of The Act.

The electoral process begins by the Governor-General making a Proclamation appointing the day upon which the poll shall be held at any election which day shall be specified

in the Writ of Election (See section 19 (1) of the Act.) Here is the birth of what was referred to in arguments as the Siamese twins - the, Proclamation and the Writ of Election. The provisions of section 22 (1), already noted, follow upon this action by the Governor-General. A persual of the Act reveals that so far as the Returning Officer is concerned his duties relating to -

(a) Preparation for Nomination Day

(b) Nomination Day

(c) The results flowing from Nomination Day

(d) Preparation for election day

(e) Election Day and thereafter

are prescribed in various sections of the Act. (Sections 13(2), 18, 21(2), 22(2), 23, 24, 25, 26, 27, 28, 29, 30, 32, 45, 46, 49, 51, 60, 105(2), 108(5), 109(5), and, with the exception of section 21 (2) which gives him a discretion in choosing the actual public building for the nomination of candidates and section 29(2) relating to the choice of polling stations, the sections prescribe the duties in mandatory terms.

It follows therefore, so goes the submission on behalf of the plaintiff, that it would be unlawful for the Returning Officer to fail to comply with the requirements of the Act. And equally without legitimacy is any act of the Executive promoting such non-compliance by the Returning Officer. Of course all the defendants rely on the constitutionality claimed for the Executive's act of revocation.

The actual provisions for the conduct of nominations have already been set out (See Sec. 23 supra) and so far as the plaintiff and the Fifth Defendant are concerned there is no question but that they complied with the requirements and that the Returning Officer, Mrs. Bartilow, obeyed the law

relating to their nominations. But on behalf of the defendants it was contended that there is more to nominations than the mere compliance with the legal requirements by the candidates and the Returning Officer. The nomination process, it was said, is intended to provide a free and fair opportunity to all who wish to be nominated to do so and if any would-be candidate is prevented from exercising his right by violence or intimidation then it matters not that some have complied with the requirements. Their nomination manouvres would not attract any validity because of the failure of others to exercise their rights. Further, the submission runs and it carries with it the contention that disqualifying violence and intimidation have been proved, what happened on the 10th July, 1978 produced only a legal nullity which should not be allowed to give birth to an election which an Election Court would assuredly upset because of the disabling events; for to do so would be to fly in the face of common-sense, and to indulge in absurdity. The oppropriate remedy, therefore, is what the Governor-General did. Wipe the slate clean and fix a new date because he alone has the power to fix the date, an act which does not partake of the judicial nature. This is the pith of the submissions on behalf of the Defence.

In so compressing several submissions into a composite one I hope I have nonetheless retained their various identities and have done no injustice to counsel.

The comment I make at this stage is this. A candidate though he and the Returning Officer have complied with the law would never know if he has indeed been nominated until the end of the day depending on the receipt or non-receipt of any complaint that would-be candidates had been or might have been prevented from exercising their right! Is it consonant with good sense or constitutional law that so important a matter could be left hanging on so

frail a thread? I think not.

But the question may also be asked. Can the slate be really wiped clean as easily as proposed? Also, is the cleansing process in any way facilitated by the admittedly wrongful rejection by the Returning Officer of Miss Richardson's nomination papers? I cannot see how this factor can avail if the compliance by the plaintiff and the fifth defendant yielded any legal result which cannot be ignored. Whether or not there was any cause for complaint, the plaintiff urged, such complaint must be taken before the competent court i. e. an election court after election. But to this the defence rejoins that, while it is not denied that such a court could pass upon the matter it would be a waste of time because the court's judgment would only be declaratory of the fact that the election was void,not by virtue of the court's decision but, because of the events. It would seem to me that the corollary to this is the claim that if an election court can declare proceedings void so,too,can the Executive .

It was Dr. Barnett who introduced the term "Legal nullity" to describe the results of Nomination Day. Inherent in his submission, even if not readily apparent, is the need to first of all determine that the proceedings are in fact a "Legal nullity" '.

I do not propose to burden the judgment with a consideration of the cases cited in support of the proposition that the fixing of nomination date does not partake of the nature of a judicial function. It is readily conceded that the proposition is correct. What is not conceded, however, is that what was done in this case was merely fixing a date. Unless one is reckless of the constitutional rights of the citizen it is first of all essential to determine what is being dealt with on the

slate which is being wiped clean. In this regard it is imperative that a process be invoked to determine the legality of anything done in purported compliance with the law. Otherwise it will not be known whether, as is contended, only a legal nullity resulted from the day's proceedings. What must this process be? Can it fail to be of a judicial nature? I cannot find any other but judicial proceedings with the necessary competence to decide an issue of such fundamental importance.

If all we were contending with was a nomination date on which, for some reason no candidate turned up to be nominated, then, in those circumstances no legal rights could be adversely affected by the fixing of a new nomination date and the Executive in so doing would not be e exceeding the provisions for appointing a nomination day. The submission is pregnant with the germ of its own destruction.

Mr. McCaulay urged the court to recognise the dan er in the Executive encroaching upon the Judiciary and eroding its power. He cited in support the approach adopted by the Supreme Court of the United States per Bradley J. in Boyd v. United States (116 US 616) 6 S Ct. 524 at p. 535.

That was a case dealing with two statutes authorising seizure and search and requiring a defendant to produce evidence against himself, though such evidence was in the form of invoices. They were challenged as being in breach of the Fourth and Fifth Amendments to the American Constitution. At page 535 of the judgment, Mr. Justice Bradlay had this to say:

> " Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure yet, as before said, it contains their substance and essence and effects their

> substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constituional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon"

The relevance here is that if any ground is yielded to the Executive even for motives which Mr. Ellis said were applauded by the entire nation, thus enabling it to encroach upon territory which constitutionally is reserved for the Judiciary that may prove to be "the obnoxious thing in its mildest and least repulsive form".

Cited also on the question of encroachment on the Judiciary was the case of Liyanage v. The Queen (1967) 1 A. C. 259.

This case had to do with the question of encroachment by the Ceylon Legislature but the principle is the same. The Privy Council decision was delivered by Lord Pearce who at page 291 at letters "F" and "G" had this to say.

> " " If such acts as these were valid the judicial power could be wholly absorbed by the Legislature and taken out of the hands of the judges. It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution".

The impugned acts were held ultra vires and invalid.

Dr. Barnett took no issue with the principle as set out but submitted that the jurisdiction to try criminal offences,with which the case deals,clearly concerns the exercising of traditional power. Accordingly,the case can provide no authority for the proposition that the issue of a second Proclamation fixing a New nomination date is usurpation of judicial power.

But such a submission ignores the fact that the very pith and substance of the decision deals with the separation of powers under the Ceylon Constitution. The Jamaica Constitution is similarly framed on the separation of powers. In my opinion this submission is wrong. I hold that though the Privy Council was in fact dealing with a criminal case the resolution of the issue flowed from a consideration of the exercise of powers as awarded under the Constitution. Did the legislature keep to its appointed bound or did it trespass on to territory identified as strictly judicial? And this is similar to the very question before me.

So then, to return to the slate I ask the question what really was on the slate? Which is just another way of asking "Was there any legal consequence resulting from the nomination of the plaintiff and the Fifth defendant which the law will uphold and protect until its legitimate purpose has been effectuated or otherwise determined in accordance with law?

It is important to note that in the contemplation of section 23(6) of the Act (Supra) the final act in completing a nomination is acceptance of the candidate's deposit and the issue to him of a receipt therefor. What is the next step? So far as the candidate is concerned, if there be more than one nominated he has nothing to do but move forward to election day. In those circumstances, the Returning Officer is required by section 28(1) of the Act

as follows:

> " If more than one candidate is nominated for the constituency in the manner required by this act the Returning Officer shall grant a poll for taking the votes of the electors"

So that whether a court of competent jurisdiction would ultimately uphold the nominations or not at the end of the day Mrs. Bartilow had two nominations on her hand which, in keeping with the law, required her to grant a poll for the taking of the votes of the electors. This is what would have had to be disposed of if any other elections, apart from one relating to these nominations, were to be held.

It appears to me that a nomination arrived at in accordance with the provisions of the Act possesses a certain tenacity of purpose which is not easily over-run. True, it is, that the nominated candidate can withdraw. But even this procedure is regulated by The Act, no doubt, to guard against any fraudulent inducement to withdraw.

Also, by section 20(1) of the Act the Governor-General in Council is empowered upon the occurence of certain events, which are not relevant to the present consideration, by Proclamation to "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" (i.e. the day originally appointed for the holding of the election.

Section 20 (5) provides:

> " Where any proclamation is made under this section after nomination day the adjournment by such proclamation of the day upon which the poll is taken shall in no way affect the validity of any nomination validly made upon nomination day and <u>no other nomination shall be made</u>" -(underlining mine).

Accordingly, even where justification arises for post-poning the holding of the election no power is given to affect the validity of nominations which have been entered for the election.

Recognising that the Executive could change the election date, Mr. McCaulay took the precaution to secure from the First Defendant a denial of any recourse having been taken to the provisions of section 20.

Even though no action was taken under section 20 three matters of interest may be noted when that section is employed:

1. The Proclamation need not apply to the entire electorate but only to such constituencies as are specified in such proclamation (section 20 (2);

2. The writs of election for the constituencies shall be deemed to have been amended by the substitution of the new date for the elections in those constituencies (Section 20 (3)).

3. Where such proclamation is made before the day appointed as nomination day then nomination day shall be deemed to have been adjourned to the twenty-third day next before the day to which the holding of the poll is adjourned except where such twenty-third day is a Sunday or public holiday in which case the new nomination day shall be the first day not being a Sunday or a public holiday after such twenty-third day (Sec. 20 (4)).

The matter of significance here is the care taken to preserve and not revoke both the writs of election and nomination day. And it is to be noted that this is the closest resemblance to a power of revocation provided for by the Representation of the People Act. It can, therefore be stated categorically that under this Act the Executive has no power to revoke either nomination day nor a nomination which has been duly and conclusively made.

Section 4(1) of the Jamaica (Constitution) Order in Council 1962 provides:

> " All laws which are in force in Jamaica immediately before the Appointed day shall (subject to amendment or repeal by the Authority having power to amend or repeal any such law) continue in force in and after that day etc"

Among the laws preserved is the Representation of People Act. Accordingly, the Constitution rather than derogating from, confirmed the judicial incapacity of the Executive. Powers were retained in the hands of the traditional authorities (see Hinds and Others vs. The Queen (1975) 13 J.L.R. 262). Indeed, the constitution has stated beyond the peradventure of a doubt where lies the power to question the validity of an election. Section 44 (1) provides:

> " 1) Any question whether -
>
> (a) any person has been validly elected or appointed as a member of either House, or
>
> (b) .....
>
> 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 is conceivable that matters relevant to the validity of a person's election may arise out of his nomation. 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 nomation 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 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 forte of the defence is that nonimation day once fixed can be altered in the same way in which it was fixed. The authority relied on for this proposition is section 29 of the Interpretation Act which provides:

> " Where an Act confers power on any authority to make 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".

Also in support of the proposition was cited Sec. 34 of the Interpretation Act which states:

> (1) 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".

These two sections are apparently understood to be saying that since the Governor-General has conferred on him authority to make and issue regulations (a proclamation is a regulation) he may revoke such regulations by subsequent regulations and he may do so "from time to time as occasion requires"unless a contrary intention appears. Section 2 of the Interpretation Act makes it clear that,unless the context otherwise requires the Act applies to all legislation enacted whether before or after the passing of the Interpretation Act, 1st April, 1968.

The Representation of the People Act is the principal legislation dealing with elections and I may be pardoned for thinking that it's scheme,though not comprehensive,(see Thompson vs. Forrest and another (1967) J.L.R. 303) is designed to ensure a free flow from the proclamation announcing election day into the ballot box and thence to Parliament. Such a scheme provided for only one interference, namely, what may be termed section 20

emergencies and, even so, provisions are made for dealing with those emergencies which are not allowed to abort an election. As has already been discussed that Act makes no other accommodation for executive interference with the electoral scheme. And yet, this is where I would expect to find expressed a reservation in favour of an Executive countermand.

The power contended for is exercisable "from time to time as occasion requires". Such time limit obviously includes up to and including the counting of the ballots (shades of Chief Jonathan of Lesotho!) Thereafter, once a candidate has been announced as elected the Supreme Court takes over. One must ask the question whether such a power could be made to rest merely on the flimsy basis of "from time to time as occasion requires"? Might not the Executive "from time to time as occasion requires" revoke a whole general election or by analogy to section 20 (2), revoke the nominations or elections in certain specified constituencies? These questions take on a greater urgency bearing in mind Mr. Ellis' submission based on section 34 (Supra) that it is not true to say that you cannot revoke something that has been acted upon.

Then, again, the broader context in which all the relevant laws must be viewed is the context of a democracy buttressed by legislation designed to procure and preserve individual rights and privileges. The Representation of the People Act is designed to afford the individual Jamaican a voice in the affairs of his country both as an elector and as a representative in Parliament. Would it be anything short of horrendous to discover that unknown to this electoral scheme, is a power which would make a dictator or a would - be dictator dance with glee? For by

simple resort to this legislative boon he could effectively disfranchise whole communities through harrassment simply by employing the power to revoke "from time to time as occasion requires" and so drive any opposition from the field. This would be virtually institutionalsing a dictatorship among the provisions for operating a multi-party democracy!

I am not pursuaded by anything put before me that our legislators were or could be guilty of the level of mental aberration necessary for such an accomplishment. Nor can it be objected that the integrity of the Executive is sufficient safe-guard against any possible abuse of this awesome power. If asked to respond, history, would merely remind us that in the days when kings ruled by "divine right" there was much about their ruling that was not kingly and nothing divine! Indeed, knaves have succeeded princes in office.

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!

The argument continued that there was no other suitable remedy or equally effective action which could have been taken in the circumstances to deal with the situation. I am not moved by such pleas of mitigation for I find that to construe such a power into being would be to create a remedy more to be feared than the mischief from which relief is sought. I do not find myself constrained so to do.

Mr. McCaulay termed the venture as a side-wind by the Executive designed to defeat the express provisions of the law which must not be allowed. I prefer however, the

more elegant pronouncement of Parnell J. in the Election Petition case! Buck v. King and Campbell where at page 109 of his judgment the Learned Judge had this to say:

> " An executive order may not be given which requires a public officer to circumvent the law of the land in the execution of his official duties. And where such order has been given and an attempt is made to implement it any person who can prove that his statutory or constitutional right has been breached or threatened thereby has the right to move the court for redress. Neither the Constitution of Jamaica nor any other law, as far as I am aware, permits the suspension of an Act of Parliament or any of its provisions by the mere word of mouth of the Executive or by the administrative directive of an Official".

It is true that the Learned Judge was dealing with suspension by mere word of mouth or administrative directive and that here the issue is circumvention, nay, abrogation of the duties of the Returning Officer by Proclamation. But the principle is apposite and I adopt it bearing in mind particularly, that it was submitted that the plaintiff is not entitled to the remedy sought.

I find, therefore, that the claim for the existence of the power to revoke is not sustained by the Interpretation Act. And I hasten to add that my findings would be no different had there been admissible evidence of disabling violence or intimidation on the 10th of July, 1978, for the simple reason that 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 plaintiff did not press his claim to Declaration No. 2 and abandoned Declaration No. 7. I hold herefore that he is entitled to Declarations Nos. 1, 3, 4, 5 and 6

with costs to be taxed or agreed.

The Declarations granted are:

No. 1. That he was a legally nominated candidate for the by-election to fill the vacancy which occurred in the Parliamentary Western St. Andrew Constituency;

No. 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;

No. 4. That his nomination on the 10th July, 1978 is conclusive and has not been directly or indirectly invalidated;

No. 5. That the appointment of another nomination day after his nomination above referred to is invalid in law; such an appointment purports to invalidate his said nomination which can only be done by a Returning Officer, acting under section 23(5) of the Representation of the People Act or by the Courts on an Election Petition;

No. 6. That in the absence of a Proclamation by the Governor-General under section 20 of the Representation of the People Act deferring the poll, the Fourth defendant in purporting to grant and hold another poll acted unlawfully and unconstitutionally.

Before I turn to the question of costs I must make a comment. Experience has shown that it is very difficult to secure an early hearing before an Election Court and even after a hearing has commenced it can be protracted over a period of months and it may prove very costly. Section 20 of the Representation of the People Act makes provisions for the adjournment of nimination day and election day upon the occurring of certain events. These provisions omit consideration of the fact that nominations may be disrupted during the prescribed hours and may have to be abandoned before there has been due compliance with all that the Act requires to be done.

In those circumstances, veiwing the situation pragramatically Parliament may well consider inserting in Section 20 provisions to deal with such disrupted and abandoned nominations. This would obviate the delay and

expense encountered in bringing legal proceedings and thus ensure that no section of the electorate is, upon such a contingency, deprived of representation in Parliament for an inordinate period.

COSTS

I have given very serious consideration to the apportioning of costs among the Defendants.

It is clear that Carmen Bartilow is guilty of misconduct on nomination day and of failing to grant the poll for taking the votes of the electors as required by section 28(1) of the Act and that the Chief Electoral Officer failed to ensure that she complied.

Roy knight as Returning Officer, under the supervision of the Chief Electoral Officer, to the great prejudice of the plaintiff conducted the By-Election from which the Fifth defendant profited. But is it conceivable that either Bartilow or the Chief Electoral Officer would have stuck to the requirements of the Act in defiance of the impugned Proclamation? I think not.

It is evident, therefore, that what precluded the Plaintiff from exercising his constitutional rights to contest the poll was the action of the Executive. Also, it was the action of the Executive that opened the door to the wrong committed by the Chief Electoral Officer and Roy Knight in relation to the second nomination day and the resultant election.

In the circumstances it seems just that the costs be paid by the First defendant and I so order.

Since my determination affects the seat of the Member for St. Andrew Western who was returned by virtue of the poll held on August 3, 1978 in keeping with precedent I shall notify the Speaker of the House of Representatives in due course the result of these proceedings.