

REASONS FOR JUDGMENT

SUIT NO. M. 50 of 1970

SUIT NO. M. 53 of 1970

SUIT NO. M. 54 of 1970

SUIT NO. M. 55 of 1970

IN THE SUPREME COURT OF JUSICATURE OF JAMAICA

THE FULL COURT

BETWEEN

FABIAN BANTON

DEVON GRANT

CECIL LEWIS

JOSEPH WRIGHT

PLAINTIFFS

AND

ALCOA MINERALS OF
JAMAICA INCORPORATED

THE BUSTAMANTE INDUSTRIAL
TRADE UNION

DEFENDANTS

LESLIE GRANT

David Coore, Q.C. and M. Tenn for the Plaintiff Banton

Dudley Thompson, Q.C. and A. Spaulding for the Plaintiff Grant

Dr. L. Barnett for the Plaintiffs Lewis and Wright

Harvey DaCosta, Q.C. and R. N. A. Henriques for the first defendant

R. Pershadsingh, Q. C. and H. Gayle for the second defendant

Frank Phipps, Q. C. and H. Small for the third defendant

Dr. E. H. Watkins, Q.C., B. H. Scott and W. Waters-McCalla watching
proceedings on behalf of the Attorney General.

In order to appreciate the crucial issues that fall to be

resolved in the four actions which, pursuant to an order of Parnell, J. on

the 10th December, 1970, were heard together, it is desirable to set out in

some detail a history of the events giving rise to those issues the

importance of which cannot in any real sense be exaggerated.

The first defendant, Alcoa Minerals of Jamaica Inc. (hereinafter referred to as "Alcoa"), is engaged in the mining of bauxite in Jamaica under

a special mining lease. Alcoa undertakes the responsibility on behalf of its contractors and itself to negotiate and enter into agreements with Trade Unions in connection with the representation of certain categories of workers and the determination of the terms and conditions of their employment.

In or about March 1969 Alcoa commenced construction of a Bauxite and Alumina Plant at Halse Hall in the parish of Clarendon. This project involved the construction of a 45,000 ton capacity alumina refinery plant, access roads and ancillary facilities. Shortly after the commencement of this project the Bustamante Industrial Trade Union (hereinafter referred to as the "B.I.T.U.") approached Alcoa with a view to obtaining representational rights in respect of those construction workers of Alcoa and its contractors engaged at the Halse Hall and Rocky Point Shiploading sites. These workers then numbered 107. On being advised of this move by the B.I.T.U., the National Workers Union (hereinafter referred to as the "N.W.U.") addressed a letter to Alcoa in which it expressed the view that it was manifestly absurd for a poll to be held to determine representational rights in the case of such a relatively small body of workers, and more especially so when it was clear that by July 1970 the estimated work force would be considerably in excess of 1000. Notwithstanding this objection taken by the N.W.U. Alcoa acceded to the request of the B.I.T.U. On the 16th April 1969 a poll was conducted by the Ministry of Labour (hereinafter referred to as the "Ministry") in respect of 125 workers. The B.I.T.U. was the only union involved in this poll, and the workers concerned were required merely to answer the question: "Do you wish to be represented by the B.I.T.U.?" In the result the B.I.T.U. won a majority of those 125 workers and was accordingly recognized by Alcoa as the sole bargaining agent of the then total work force.

Between the 25th March 1969 and the 7th August 1970 some forty-six meetings were held between Alcoa and the B.I.T.U. These meetings have been described as "contract negotiation meetings", but for some reason which remains clouded in secrecy no agreement was concluded between these parties. It is perhaps somewhat remarkable that in the particular case of a construction project, a project of necessarily limited duration, forty-six meetings spread over some seventeen months should be shown to be so inadequate.

On the 19th August 1970 all workers engaged in construction at the sites above named ceased work. The B.I.T.U. claimed that this strike was in respect of claims by the workers for fringe benefits, premium pay for certain working conditions, and higher wage rates. The N.W.U., on the other hand, alleged that the strike had occurred because the majority of the workers (whose number had by then shown a substantial increase over the April 1969 figure - they now numbered 2,445) wished to be represented by the N.W.U. as their bargaining agent.

Pursuant to an agreement between Alcoa and the B.I.T.U. there was a resumption of work on the 8th September 1970. Following a meeting or meetings ^{between} the Ministry and the N.W.U., the Ministry, on the 4th September 1970, advised Alcoa that the N.W.U. had established a prima facie case for the holding of a representational poll. On the 11th September 1970 the B.I.T.U., the N.W.U. and Alcoa met at the Ministry to settle arrangements for the taking of this poll. This meeting ended in complete disorder and without any agreement as to a poll. At a subsequent meeting on the 21st September 1970 the parties finally agreed that a poll would be held on the 30th September 1970, and Alcoa and the N.W.U. signed a poll agreement. On the 24th September 1970, under the auspices of the Ministry, representatives of Alcoa, the N.W.U. and the Ministry visited the construction sites in order to settle the final

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details of the poll. This exercise proved futile in the face of an outbreak of violence at the Halse Hall site, in consequence of which Alcoa considered it necessary to close down the construction sites. In the result the poll scheduled for the 30th September 1970 was cancelled.

After a series of meetings at the Ministry between Alcoa and/or the B.I.T.U. and/or the N.W.U. it was agreed that the poll should be held on the 4th November 1970. For this purpose a new poll agreement was settled between the N.W.U. and Alcoa on the 28th October 1970. Before setting out certain portions of this new poll agreement it is perhaps desirable to observe that in order to ensure the attendance of as many as possible of those workers who were eligible to vote, Alcoa caused an advertisement to be published in the Daily Gleaner of the 1st November 1970. This advertisement sought to advise those construction workers who were at work on the 24th September 1970 (the day on which Alcoa closed down its construction sites) that if they wished to establish their right to future work they would be required to report at named points on the 4th November 1970. It has been argued on behalf of the plaintiffs that by so doing Alcoa made registration a pre-condition to the right to vote and that there resulted therefrom a variation of the poll agreement.

Paragraph 2 of the poll agreement provided:-

"For the purpose of ensuring that every worker engaged by the employer and eligible to vote has an opportunity of voting the employer has furnished to the Permanent Secretary to the Ministry of Labour and National Insurance thirty-five certified copies of a list of all the workers as shown on the employers' paybill for the week ending August 23, 1970.. . . This list shall be treated as the Voters' List for the said poll, and all the workers whose names appear thereon shall be entitled to vote."

Paragraph 6 provided:-

"A Ballot Paper will be provided on which shall be printed the following:

"DO YOU WISH THE N.W.U. TO REPRESENT YOU?"

YES

NO "

Paragraph 11 provided:-

"When the ballots are counted, the Presiding Officer shall furnish to the Permanent Secretary a certificate showing -

- (i) The total number of persons eligible to vote
- (ii) The total number of persons who voted
- (iii) The number voting "YES"
- (iv) The number voting "NO"
- (v) The number which did not vote
- (vi) The number of spoilt votes. "

Paragraph 12 provided:-

"On the receipt of the Presiding Officer's certificate, the Permanent Secretary shall notify the parties concerned of the result of the poll, and if the number voting "YES" constitutes the majority of the workers listed on the Voters' List, the Union shall be accepted by the employer as being the exclusive representative of all the employees employed by such employer covered by this Agreement for the purpose of collective bargaining in respect of rates of pay, wages, hours and other conditions of employment concerning all the workers employed by the employer....."

The E.I.T.U. elected not to participate in this poll. Both unions undertook to instruct their members to register, in accordance with the advertisement mentioned earlier, on the 4th November 1970. The poll was in fact held on that date.

By virtue of paragraph 2 the eligibility of a worker to vote rested on the appearance of his name on the Voters' List. The requirement in paragraph 11 of the Presiding Officer's certificate as to "the total number of persons entitled to vote" must therefore be taken to relate to the totality of workers appearing on that list. It appears that both Alcoa and the N.W.U. fully appreciated on the 28th October 1970 that this Voters' List "included many workers who were (on that date) no longer employed" by Alcoa.

It is not known how many workers had ceased to be employed. It follows, therefore, that in relation to the certificate signed by the Permanent Secretary on the 5th November 1970 that "the total number of persons eligible to vote" on the 4th November, 1970 was 2,445, this figure does not represent the true picture. An equally important factor contributing to the distortion of this picture, insofar as the "eligibility to vote" was concerned, was the insistence by the B.I.T.U. that its members, though being free to register, should not vote. In the result, although the N.W.U. won the support of a vast majority of those workers who voted, it failed, in terms of the Poll Agreement, to win a majority of those whose names appeared on the Voters' List. If, as it seems clear, the purpose of the poll was to resolve a jurisdictional and/or representational problem, it is manifest, in the events as they occurred, that this purpose was quite decisively frustrated. In these circumstances there cannot be the least doubt that the result of this poll, from the point of view of both Alcoa and the N.W.U., was totally unsatisfactory and unreal. I am not, however, concerned to enquire into the fairness or the validity of the result of this poll. In passing I mention that of a total of 1,048 workers who voted, 984 voted in favour of representation by the N.W.U. Thirty-seven voted "NO", with 27 votes being spoilt.

Immediately following the announcement of the result of the poll on the 5th November 1970 both unions claimed the right to exclusive representation of the workers. The B.I.T.U. founded their claim on the fact that the N.W.U. had failed to win a majority of those workers whose names appeared on the Voters' List, while the N.W.U. rested their claim on the fact that it had won a substantial majority of those workers who had actually voted. Faced with these competing claims Alcoa, on the 6th November 1970, "requested a ruling from the Ministry as to which union had the bargaining rights for the employees in view of all the circumstances." The following day the Minister of Labour purported to give a ruling in the following terms:

....."(3) The.....

- " (3) The results of the poll show that the National Workers Union has failed to obtain from among the total number of workers whose names appeared on the company's payroll for the week ending 23rd August, 1970 - which payroll was designated in the agreement by the parties concerned as the official Voters' List - the number of votes necessary to entitle that union to be accepted by your company as being the exclusive representative of the employees covered by the agreement.

In such circumstances, the status quo remains."

I pause here to observe that the Minister had no authority either as a matter of law, or by virtue of any provision in the Poll Agreement, to hand down any ruling on any issue arising under that agreement. It is fair to say, however, that the Minister probably thought that he did have a right to do so. Nevertheless, Alcoa regarded the Minister's decree as binding and on the 9th November 1970, requested the B.I.T.U. to resume negotiations and settle a formula for the resumption of work. The B.I.T.U. and Alcoa then proposed to conclude an agreement as to the former's exclusive bargaining rights. That proposed agreement contained the following terms, inter alia :-

"RECOGNITION

1. The Contractors will recognize the B.I.T.U. as the exclusive bargaining representative of the employees unless or until some other union shall secure bargaining rights for the employees as a result of a poll conducted in accordance with the procedures outlined by and under the direction of the Ministry of Labour and National Insurance. If such procedures result in a change of unions the employees and their new union will continue to be bound under this agreement.
2. Under no circumstances will any union be at liberty to single out the Contractors' employees and claim to represent them individually or jointly."

It is on this background that the plaintiff, Fabian Banton, issued a writ (M.50 of 1970) on the 16th November 1970 against Alcoa. In this writ he claimed "the enforcement of the protective provisions of Section 23 of the Constitution of Jamaica" and:

- "(1) A declaration that the plaintiff has been or is being hindered in the enjoyment of his freedom of peaceful assembly and association.
- (2) A declaration that the defendant in negotiating with the B.I.T.U. to the exclusion of the N.W.U. or any other union or person is acting in contravention of Section 23 of the said Constitution.
- (3) An Order that the defendant, its servants and/or agents be restrained from recognizing the said B.I.T.U. as the exclusive bargaining agent and/or representative of the plaintiff and/or construction workers employed by the defendant and/or its contractors.
- (4) An Order that the defendant its servants and/or agents be restrained from concluding an agreement exclusively with the B.I.T.U. and/or granting the B.I.T.U. exclusive bargaining rights on behalf of the plaintiff and/or construction workers employed to the defendant company and/or its contractors.
- (5) A Declaration that the poll held on the 4th day of November 1970 did not fairly and/or satisfactorily determine which union should represent the construction workers employed by the defendant and/or its contractors.
- (6) An Order directing the defendant to enter into negotiations for the holding of a new poll based on a list settled on final resumption of work and truly representing the construction workers employed to the defendant company and/or its contractors."

over wages and conditions of employment

The argument of the respondent is that 'freedom of association' in sec. 1(j) of the Constitution means no more than it says, that persons are free to associate. It does not mean that the purposes for which they associate, and the objects which, in association they pursue, are sacrosanct under the Constitution...."

Lord Donovan then proceeded to explain why he agreed that the Act had undoubtedly abridged the freedom to bargain collectively, and continued at p. 1211:

"The question is whether the abridgment of the rights of free collective bargaining...are abridgments of the right of freedom of association.

Both courts below answered the question in the negative; and did so by refusing to equate freedom to associate with freedom to pursue without restriction the objects of the association.

Sir Hugh Wooding, C. J., put the matter thus:

'In my judgment then, freedom of association means no more than freedom to enter into consensual arrangements to promote the common interest objects of the association group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable.' "

At p. 1212 Lord Donovan continued:

"Their Lordships.....agree with the courts below in the rejection of the appellants' main argument."

I respectfully agree with the conclusion of the Privy Council.

In an elaborately framed argument reflecting the most painstaking industry and research into the historical background of the Bill of Rights in the Constitution of Jamaica, Mr. DeCosta attempted to show why the decision in Collymore's case (supra) should be followed. Indeed, he argued that 'freedom of association' in our Constitution meant precisely.

what the Privy Council said those words meant in the Constitution of Trinidad and Tobago.

I pass now to examine *Olivier v Buttigieg* (supra). Before doing so, however, it is desirable to recall the admonition of the Earl of Halsbury, L.C., in *Quinn v Leathen* (1901) A.C. 495 at p. 506:

"...there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

The material facts of *Olivier's* case were as follow :-

The respondent was the editor of a newspaper which, among others, was condemned by the ecclesiastical authorities in Malta. The appellant issued a circular which, in reference to political discussions by Government employees during working hours, prohibited in regard to these employees "the entry in the various hospitals and branches of the department of newspapers which are condemned by" the ecclesiastical authorities. The respondent claimed that this circular, insofar as it affected his newspaper, was a breach of sec. 13 and sec. 14 of the Malta (Constitution) Order in Council 1961, and claimed the appropriate remedy in accordance with the provisions of that Order.

Sec. 14(1) provided :-

"Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference....."

After stating the facts at some length Lord Morris said at p. 465,

"On these facts it may be convenient to consider in the first place whether the provisions of Sec. 14 of the Constitution were contravened in relation to the respondent. Was he hindered in the enjoyment of his freedom of expression?... Section 14(1) states that 'freedom of expression' covers freedom to hold opinions and to receive and impart ideas and information without interference. Was the respondent hindered in the enjoyment of his freedom to impart ideas and information without interference?....."

A measure of interference with the free handling of the newspaper and its free circulation was involved in the prohibition which the circular imposed."

Let it be observed that these passages make it unmistakably clear that their Lordships were not concerned to investigate the content or the implications of 'freedom of expression'. By the explicit words of sec. 1 the Constitution of Malta had declared that 'freedom of expression' encompassed the freedom to impart ideas and information without interference. This was, not, and indeed could not be, open to debate. The question, and the only relevant question, with which their Lordships were concerned was whether the respondent was hindered in the enjoyment of his freedom of expression or not. Lord Morris answered this question at p. 466 thus:

"In their Lordships' view the strict prohibition imposed by the circular now being considered amounted to a hindrance of the respondent in the enjoyment of his freedom to impart ideas and information without interference..... His Lordship freedom of expression includes a freedom to impart ideas and information "without interference".

Though

Though the respondent was not prevented from imparting ideas and information the inevitable consequence of what was done was that he was 'hindered' and that there was 'interference' with his freedom."

I am unable to detect the least relevance of the decision in Olivier's case to the issues raised before this Court.

I now examine the case of Uttar Pradeshiya etc. v State of Uttar Pradesh (supra), the reasoning in which Mr. Coore strenuously urged this court to follow. It seems unnecessary to observe that there is a very real and obvious danger in attempting to resolve any given problem in one jurisdiction by reference to the approach of a tribunal to a quite different problem in some other jurisdiction, and more particularly so, when this latter jurisdiction demonstrates, in not a few areas of though action and historical background, essentially fundamental differences from the former. Art. 19(1)(c) of the Constitution of India gives to all citizens the right to form associations and unions subject to certain restrictions specified in Art. 19(4). This latter sub-section provides that:-

"Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause."

The three principal issues before Dhaven J. were :-

- (1) Did the proviso to sub-rule (3) of Rule 40 of the U.P. Industrial Disputes Rules 1947, which enjoined that no federation of unions should be entitled to apply for approval unless a period two years had elapsed since its formation, constitute an unreasonable restriction on the right of a worker to form an association?
- (2) Did sub-rule (4) of Rule 40 which purported to vest in the Labour Commissioner an absolute power to approve a federation or reject its

application, constitute an unreasonable restriction on the right to form an association?

- (3) Did sub-sec. (3) of sec. 6 of the U. P. Industrial Disputes Act, 1947, which provided that no officer of a union should be entitled to represent any party unless a period of two years had elapsed since its registration, constitute an unreasonable restriction on the right to form an association?

Dhavan J. expressed his view in these terms: Freedom of association implied the freedom to form an association for any lawful purpose. The purpose of an association is an integral part of the right and if the purpose is restricted, the right is inevitably restricted. The right to form an association is not a right to be exercised in a vacuum or an empty or a paper right. Collective bargaining as such was a lawful purpose. If the State sought to restrict the purposes or objects or the normal functioning of an association this would necessarily involve a restriction on the freedom of association, and the reasonableness of such a restriction would fall to be determined within the context of Art 19(4). In the particular circumstances before him Dhavan J. held that the restrictions imposed by the relevant rules and section were unreasonable and led him to the clear conclusion that they were ultra vires and void.

A careful analysis of the judgment lends itself to the conclusion that Dhavan J. found the right answers to the questions with which he was concerned. It is the fact, as Dhavan J. found, that "the primary purpose of forming a trade union is to enable its members to take collective action for safeguarding their own interests." It may also be the fact that "in the peculiar conditions of India, collective bargaining on behalf of workmen is almost the only function of the overwhelming majority of the trade unions, the subsidiary purpose of functioning as friendly societies conferring material benefits on the members being almost unknown in (India)." In these circumstances it seems quite impossible to deny the unconstitutionality of any law that sought unreasonably to restrict or defeat the essential purpose

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of the formation of a trade union. I also unreservedly agree that the enjoyment of the right to form a trade union is not exhausted by the fact of bringing it into existence since the word "form" involves not merely the initial commencement of the association but also the continuance of that association.

But I am constrained to express my strongest dissent from any proposition involving the suggestion that the reasoning in that case can in any sense be applied in the case before me.

Professor Grunfeld in his Modern Trade Union Law at p. 37

says:-

"By forming and supporting financially and physically their own trade organisation, individual workers transcend themselves as individuals and raise themselves to the power of a new social and economic force. It is this collective force, different in kind, and separate from the sum of the individuals who contribute their human resources to it, that is normally understood when we speak of a trade union.

Relations between trade union officials and management or employers.....have significance only because behind the employees' representatives is the collective pressure that the trade union membership may exert in the industrial and political spheres."

This, in my view, is the motive spark underlying the very real power of trade unions. But in the absence of any enactment imposing on employers a clear duty to recognize and negotiate with the trade union of their employees' choice, the recognition by any employer of any particular trade union must ultimately depend on those social and economic sanctions to which I have already adverted. Therein lies the "right" of collective bargaining, a reflection not so much of the real purpose of the birth or the existence of a trade union, but rather of the result of that birth and that existence. Essentially all that Dhavan J. held was that the State could not unreasonably restrict that "right" and that purpose. Perhaps it is more accurate to describe the "right" of collective bargaining as the power of a union to compel the submission of an employer to the force of collective action.

I now return to the principal question posed earlier in this judgment and my answer is that there is not a scintilla of evidence in this case that the plaintiffs, or any of them, have been hindered in the

enjoyment of their freedom of association. There is not the vaguest suggestion that they, or any of them, were in any way hindered in the exercise of their right to join or to belong to the union of their choice. No one sought to deny them, or any of them, that right, nor indeed, to interfere with its exercise. They were, at all material times, free to join any union they chose to join.

For these reasons I concluded -

- (i) that there should be judgment in favour of the three defendants against the plaintiff Benton on the Writ;
- (ii) that the motions should be dismissed; and
- (iii) that the injunction should be discharged.

I have found it unnecessary, in the light of my conclusion, to pursue the many other issues that could be said to arise, and more particularly those questions concerning the alleged variation of the poll agreement, and the right of a person to seek redress in this court when the contravention alleged did not involve any act on the part of the State. Perhaps this latter question will one day fall to be decided by this Court.

.....
(C. H. Graham-Perkins)

Messrs. Hew & Bell, Solicitors for the plaintiffs
Messrs. Dunn, Cox & Orrett, Solicitors for the first defendant
Mr. Stanley Fyffe, Solicitor for the second defendant
Messrs. A. E. Brandon & Co., Solicitors for the third defendant.

PARNELL, J.

I agree with the conclusion of my Lord. When the arguments in this case were concluded, none of us entertained any doubt what the judgment ought to be. However, as there were several points which were raised - matters of great public interest - we took time to consider how best to express our decision upon them.

The arguments on both sides were put forward with skill. Some of the contentions propounded were more ingenious than sound. In others the academic fragrance was ^{devoid} devoid of reality.

But, speaking for myself, I received great assistance and enlightenment from Counsel during the proceedings. I shall be relieved in reciting the facts in detail since my Lord has dealt so fully with them.

I hope I will not cause offence if I say that I do not intend to examine all the contentions put forward on behalf of the four plaintiffs.

I am not prepared----as at present advised - to say that some or all of the main arguments of Counsel for the plaintiffs, Banton for example, are irrelevant and untenable. But the view I take of one or two fundamental points dealing with the alleged breach of the fundamental right of the individual to form or belong to a trade union, makes it unnecessary for me to give the arguments of Counsel the usual respect and treatment which a case of this nature should demand.

I must, however, at the outset refer to the strong caution which both Mr. Coore and Mr. Thompson administered to us concerning our use of common sense in deciding the constitutional issues involved. If I understand correctly what they were saying, it is this. that the Court should not abandon the application of a legal principle for the sake of common sense and in any event, a constitutional

Court is never at liberty to substitute common sense for constitutional rights. This early prayer of Counsel for the plaintiffs during their arguments touched me for a moment. The pleasant story of Lucian comes to mind: Jupiter and a country man were conversing with great freedom and familiarity on the subject of earth and heaven. The country man listened with rapt attention to the contentions of the former and expressed a doubt in the validity of the argument. Jupiter threatened the countryman with thunder and the latter replied :

"Ah, ah! now Jupiter, I know that you are wrong; you are always wrong when you appeal to your thunder."

What is under consideration in this case, is the true construction to be given to certain sections of the Constitution. And in construing a constitutional provision---- like the construction of an Act of Parliament - one's common sense should not be put to sleep. Lord Goddard, C.J. in *Barnes v Jarvis*, (1953) 1 AER. 1061 at P. 1063 B, says this:

"One has to apply a certain amount of common sense in construing statutes and to bear in mind the object of the Act."

The real questions which arise for consideration in these proceedings may be stated as follows:

- (1) Is there a legal right for a worker who is a member of a trade union, to demand that his employer should recognise, as his bargaining agent, the union of his choice?
- (2) If an employer takes the stand that, according to accepted procedure which was duly followed, a particular trade union having failed to secure the necessary percentage of the work force at his ~~plant~~ ^{plant} will not treat with that union, may a worker, who belongs to that union or wishes to join the said union, complain that his fundamental right to form or belong to a trade union has been contravened?
- (3) If a trade union bona fide acts on behalf of its members, may a member of that union or of another union challenge in the Constitutional Court, the action of his employer who accepts what

(2) Freedom of association does not import freedom to bargain collectively and that recognition of a union by an employer is a prelude to collective bargaining. See (1969), 2 AER, 1207 at pp. 1210-1211.

Mr. Coore had adverted to Collymore's case in his arguments but he also propounded the view that the decision is not germane to the issues before us principally on the ground that the structure of the Bill of Rights in the Constitution of Trinidad and Tobago is different from that in the Constitution of Jamaica.

Mr. Coore conceded, and Dr. Barnett did not contest the concession, that Part 3 of the Constitution which embodies the fundamental rights and freedom guaranteed to the individual, does not create any rights or confer any freedoms which were not known and enjoyed prior to the 6th August, 1962, and that no citizen since independence, may invoke its provisions to demand for himself any greater right, freedom or privilege which was not open to him prior to independence.

I am satisfied that the concessions were correctly made. There was no escape. The very preamble contained in Sec. 13 of the Constitution concludes the point. The examination of this section by Lord Devlin in D.P.P. v Nasralla, (1967) 3 WLR. 13 at pp. 16-18 and his conclusion ^{thereon} ~~therein~~, lend support to the proposition that where it is alleged that a fundamental right guaranteed by the Constitution has been contravened, a simple and practical method of testing the validity of the claim is to ask a direct question, namely; Could the argument which is being advanced in support of the proved facts have been sustainable in a competent Court in Jamaica prior to independence for obtaining some relief in an appropriate action or other judicial proceeding? This is based on the assumption that the right in question was justiciable before independence. If the answer is a resounding "No," then the claim is bound to fail. If the answer is "Yes," then there is some basis to consider the case on its merits.

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has been done, by complaint that his personal fundamental right has nevertheless been contravened thereby?

On the face of it, I would have thought that all three questions should be answered in the negative. But as Mr. Coore for the plaintiff Banton;

Mr. Thompson for the plaintiff Grant and Dr. Barnett for the plaintiffs Lewis and Wright have all argued strenuously to the contrary, I shall examine as carefully as I can, what I understand their arguments to embrace. Let me first advert to certain important facts which are not in dispute:

- (a) That at least, up to the 23rd September 1970, each of the four plaintiffs was a member of the B.I.T.U.
- (b) That on the 24th September 1970, the first department (Alcoa Mineral) closed the construction site at Halse Hall, Clarendon, owing to violence at the ~~plant~~ presumably sparked by trade union rivalry;
- (c) That pursuant to an agreement between the first defendant and the N.W.U., a poll was held on the 4th November, 1970 in which the N.W.U. obtained 984 votes out of ^a possible 2445;
- (d) That prior to the holding of the poll, the B.I.T.U. was recognised by the first ~~defendant~~ ^{defendant} as the exclusive bargaining agent for all the 2445 persons who were eligible to vote for a change of union representation;
- (e) That if the N.W.U. (which had challenged the B.I.T.U.) had obtained at least 1223 votes, then it would have been recognised as the exclusive bargaining agent in the place of the B.I.T.U.;
- (f) That the B.I.T.U. did not take part in the poll and had taken the decision not to participate on the 11th September, 1970 on which date all four plaintiffs were members of the B.I.T.U.;
- (g) That when the result of the poll (conducted by the Ministry of Labour and National Insurance) was announced, both unions, the B.I.T.U. and the N.W.U. claimed victory and as a result, the first defendant sought and obtained, the advice of the Minister responsible for Trade Union and management relations;
- (h) That as a result of the poll and the advice obtained, the first defendant (Alcoa Minerals) resumed negotiations with the B.I.T.U.

with a view to concluding a collective bargaining agreement;

(i) That the recognition of the B.I.T.U. by the first defendant as the exclusive bargaining agent for the purpose of concluding an agreement touching rate of pay and other terms and conditions of employment of the workers, is the main and only ground on which the complaint of the plaintiffs is based;

(j) That the contention of all four plaintiffs is to this effect: in the events that happened, the employer (Alcoa Mineral) in negotiating with the B.I.T.U. to the exclusion of the N.W.U. is guilty of a breach of Sec. 23 of the Constitution; that is: each of the plaintiffs is being hindered in the enjoyment of his right to form or join a Trade Union.

The burden of the arguments for the plaintiffs was borne by Mr. Coore. In his opening, he addressed the Court for a little over two days. At the end of his submissions which were marked with skill, eloquence and resolution, I am not sure that he had touched the real substance in the case. The structure which he built was grounded around the case of *Oliver v Buttigieg*, (1966) 2 AER. 459 (PC)

I shall analyse the facts in that case in due course.

It was when Dr. Barnett addressed the Court that a valiant attempt was made to grapple with the essence in the complaint of the plaintiffs. His advocacy at times assumed a bold tone. In order to surmount an obviously difficult hurdle, he invited us to dismiss as irrelevant and wrong, a crucial part of the opinion of the Judicial Committee of the Privy Council when *Collymore v Attorney General of Trinidad and Tobago*, (1969) 2 AER. 1207; (1970) 2 WLR 233, was before that august body on appeal. What Dr. Barnett urged us to reject, is the opinion of the Judicial Committee of the Privy Council delivered by Lord Donovan in which the learned Lord of Appeal agreed with the judgment of *Wooding, C.J.* and in particular agreed with these points namely:

(1) Freedom of association means no more than freedom to enter into consensual arrangements to promote the common interest objects of the association group;

Section 23 (1) of the Constitution provides as follows:

"Except with his own consent, no person shall be hindered in the enjoyment of his freedom of peaceful assembly and association, that is to say, his right peacefully to assemble freely and associate with other persons and in particular to form or belong to trade unions or other association for the protection of his interests."

Long before the Constitution came into force, the trade union movement had been fully established in Jamaica. Following hard on the creation of the International Labour Organization pursuant to articles 387-427 of the Treaty of Versailles (1919), the Jamaica Legislature enacted Law 37 of 1919 and thus put on a statutory basis the right of a worker to form or belong to a trade union. This Law (37/1919) is now Cap. 389, the Trade Union Law. But this right had to be used for a lawful purpose, that is to say, for the protection of the common interest of the workers combined. And a corresponding right was also conferred on employers or masters for the protection of their interests. Under the umbrella of certain statutory immunities, workers could now by a single combination face their employer through the voice of a trade union. On the other side of the coin, the employers or management--- by whatever name they are called ---- could entertain this newly created statutory combination by a combination of their own.

All over the years since then, the interested onlooker has witnessed the flexing of muscles between trade union and management; sometimes there were interruptions of industry by strikes or lock-outs. But in almost every case without exception, the parties would settle their disputes around the conference table with the aid of an arbitrator if possible and not by means of attempting to enforce in a court of law any term of a labour agreement alleged to have been breached or any promise or undertaking which is said to have been dishonoured.

And since the worker or workers would constitute only a part of the community, his right to form or belong to a trade union; his

activities in the Union, and the privileges which he or they may enjoy thereby must be subject to a larger right, namely, that of the community considered as a whole. The just rights and freedoms of other members of the public must also be considered. It is in this context that one is able to appreciate certain provisions under the Universal Declaration of Human Rights which seem to have influenced greatly the thinking of the framers of our constitution.

Article 23 (1) of the Declaration of Human Rights states as follows:

"Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."

Art. 23 (4) says:

"Everyone has the right to form and to join trade unions for the protection of his interests."

And Art. 29 (1) provides that:

"Everyone has duties to the community in which alone the free and full development of his personality is possible."

On this background, I shall now examine the case for the plaintiffs.

Mr. Coore's contention may be summarised as follows:

(1) That any act which hinders a person in the exercise of his right to join the trade union of his choice so as to protect his interest, prima facie constitutes a breach of Sec. 23 of the Constitution unless it can be brought within some exemption or other provision under the Constitution.

(2) Where the act in question so reduces the ability of the trade union to protect the worker's interest so that membership in that union would be of little more than theoretical value, then this amounts to a hindering of the enjoyment of the right of free association within the meaning of the Constitution;

(3) That the individual's right to join a trade union necessarily involves the right to obtain the assistance of that union for the protection of his interest and if an employer refuses to receive representation from the union of a worker's choice, the main value

an "interference" with the enjoyment of the worker in his right to the protection of his interest by his trade union;

(4) If the B.I.T.U. was not a party to the agreement between the N.W.U. and the first defendant, then the former cannot claim any benefit under it. In the same way, the B.I.T.U. would not be bound by the result of the poll;

(5) There was no authority for the Minister to give or offer any advice or opinion which the first defendant sought after the result of the poll was ascertained.

The substance of this argument on behalf of the plaintiff Banton was adopted by Mr. Thompson and Dr. Barnett with grateful alacrity when each put forward the case for the plaintiffs Grant, Lewis and Wright. Mr. DaCosta for the first defendant referred to the arguments of Mr. Coore as subtle and as that of a man "who was willing to arrive but unwilling to take the journey." This sounds as a variant of the reference of Alexander Pope concerning Joseph Addison. In Pope's "Epistle to Dr. Arbuthnot," Addison the famous essayist is obliquely referred to as one "willing to wound and yet afraid to strike." (See line 203 of the Epistle). Mr. Pershadsingh for the second defendant also fired a few shots at the arguments of Mr. Coore. With a certain amount of vigour he said that industrial and economic chaos and anarchy would result if Mr. Coore's contentions were to be accepted. So as not to be left out of the picture, Mr. Phipps also put in his punch. With his usual persuasiveness and lucidity, he said this (and he was referring to Mr. Coore's interpretation of Sec. 23 of the Constitution) "if the submission of Mr. Coore is correct it would make a mockery of trade union practice and it would deny the trade unions the hard earned industrial advantages gained in their struggle over the years. The calendar would be turned back 100 years."

With these salvos being directed at the main structure of Mr. Coore's argument and the propositions buttressing his base, when the reply of all the plaintiffs was undertaken, the burden was again borne by Mr. Coore himself. This time he put in writing

the summary of the the plaintiffs' case. It is a seven page document. In my view, the kernel of what is contended for is at page 3 of the "summary." The authority relied on is the case of Oliver v Buttigieg to which I have already referred and which I shall examine in a little while. He says this at P.3 (f):

"To come more specifically now to Sec. 23, the right which is guaranteed and which has always been recognised is a right of free association which includes inter alia, a right to form and belong to trade unions - the protection afforded to this right is given in Sec. 23 which provides that a person shall not be hindered in the enjoyment of the right. The effect of this is that:-

- (a) Any direct action which results ⁱⁿ ~~is~~ a complete denial of the right is prohibited - and in addition:-
- (b) Any collateral action which has the effect of substantially interfering with the enjoyment of the right so as to significantly reduce its value, is likewise prohibited."

I am unable to accept this contention. To push an argument, which sounds logical too far, may land one in the area of absurdity, contradiction and impossibility. With respect, the fallacy in Mr. Coore's argument as shown in paragraph 3 (f) of his summary is not difficult to detect. Firstly, Sec. 23 of ^{the} Constitution guarantees the right to form or belong to a trade union but the words "for the protection of his interests" do not enlarge the right guaranteed. The main object of a worker joining a trade union is to have his interest protected. So that even if the words "for the protection of his interests" were left out of the section by the Framers of the Constitution, the main object of forming or joining a trade union would be the same.

Secondly, the protection given to the right guaranteed by sec. 23 is not to be found under that section. The protection is given by sec. 25¹ which my Lord Graham-Perkins, J has referred. Indeed the fallacy that section 23 is protective of itself is reflected

"the recognition of the B.I.T.U. as exclusive bargaining agent and the conclusion of the agreement as aforesaid hinder me in the enjoyment of my fundamental freedom of peaceful association and/or contravenes or is likely to contravene sec. 23 of the Constitution of Jamaica which protects my said freedom."

Section 25 (1) of the Constitution states:

"Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

Section 2 of Section 25 then refers to the jurisdiction conferred on the Court to make orders, issue writs or to give such directions as may be appropriate "for the purpose of enforcing or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled."

Article 8 of the Universal Declaration of Human Rights states:

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

The "effective remedy" is granted by Section 25 of the Constitution which protects each and every guaranteed fundamental right.

Thirdly, the words "that is to say" in Sec. 23 (1) of the Constitution, introduce a clause which is explanatory of the principal clause. And the principal clause is:

"no person shall be hindered in the enjoyment of his freedom of peaceful assembly and association."

When a man joins a trade union, he is exercising his right of freedom of association. The sportsman who joins

a cricket club; the person who becomes a member of a lodge and the sixth form boy who forms a debating society - are all exercising their right of freedom of peaceful association. So that the words "that is to say" only introduce the words that follow that is:- "the right to form or belong to a trade union."

But even if no direct reference was made to the right to form or belong to a trade union in this section, a member of a trade union could still claim protection in a proper case under sec. 25 for this reason that, as is the position in Trinidad and Tobago, ^{by joining a trade union} he would be exercising his right of freedom of peaceful association which is what Sec. 23 (1) guarantees in the principal clause of that section.

And lastly, the words

"no person shall be hindered" in Sec. 23 (1) can be regarded as nothing more than the choice of an expression in order to convey some notion. It is the draftsman's choice of words which the framers of the constitution adopted. But these words do not expand the right guaranteed since a "hindering" of the enjoyment of the right, is a contravention of the provision and in any event a contravention is remediable under Sec. 25.

During the reply of Mr. Coore, he conceded - and indeed he was bound to concede - that the following consequences must flow from his argument:

- (1) That a worker could claim on behalf of his union the right of recognition and presumably the right of collective bargaining.
- (2) That if an employer in Jamaica wants to operate a closed shop at his plant, he would be contravening the fundamental right of freedom of peaceful association guaranteed to the individual under the constitution if he demands, and a worker refuses to comply, that all his workers should join the trade union recognised by him.
- (3) That if an employer refuses to allow a trade union to represent a member at the hearing of a disciplinary charge instituted against a worker, this would be a breach of the

of the freedom of peaceful association guaranteed by the constitution.

And finally, Mr. Coore conceded two other points. He said that he is not contending that the right of freedom of peaceful association guaranteed by the constitution is a different right or freedom from that which was previously enjoyed in Jamaica prior to independence. And further he conceded that, if his argument is sound,

"hindering" in Sec. 23(1) would cover interference with a worker's right to join a trade union and "interference" of the worker after he has joined the union. Presumably any kind of interference would be enough.

The examination which I have made of the structure of Mr. Coore's main argument and of the alarming consequences which would flow if it is accepted and which he himself conceded, should be sufficient in my view, to say that the interpretation which is sought to be placed on section 23 (1) of the constitution is not sound.

If, in construing a provision in a written constitution, a logical construction leads one to a result which it is impossible to believe was intended by the founding fathers, that is a reason for thinking that that is not the true meaning. If the foundation of the argument fails, as I think it does, then the claims of the plaintiffs must also fail. The case of *Oliver v Buttigieg* which is the main plank in Mr. Coore's superstructure, can be disposed of without difficulty.

Section 14 (1) of the Constitution of Malta provides :

"Except with his own consent no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence."

The respondent was the editor of the "Voice of Malta," a weekly newspaper published by the Malta Labour Party. On the 26th May, 1961, the Archbishop of Malta issued a circular condemning the newspaper and announcing that anyone printing or reading it would be committing a mortal sin. About 11 months after, the Chief Government Medical Officer issued an order forbidding the entry into the hospital of

of newspapers which had been condemned by the Church authorities. The order affected 2,660 persons who would be desirous of reading the "Voice of Malta" during their luncheon break or leisure hours. But other newspapers could be freely taken by employees into hospitals and departmental buildings. The order of the Chief Medical Officer was challenged by the respondent as being in violation, inter alia, of section 14 of the Constitution. The judge of first instance and the Court of Appeal of Malta held that the order infringed the respondents' Constitutional right guaranteed under Sec. 14. This conclusion was affirmed by the Privy Council which rejected the contention that any hindrance of the respondent in the enjoyment of his freedom to impart ideas and information without interference was minimal. On the special facts proved or admitted and in view of the clear provision of the 14th section of the constitution, no other conclusion could have been possible. The reference in the case to the famous words of the American Judge (Rutledge, J) is apt.

"The restraint is not small when it is considered what was restrained It is from petty tyrannies that large ones take root and grow." See *Thomas v Collins*, 323 U.S. 516, 543 (1944). I am in full agreement with the view of my Lord Graham-Perkins, that Oliver's case has no relevance to the facts which are before us. I must confess that I am not easily persuaded by the technique of referring to an authority emanating from special facts and on a particular background in a foreign jurisdiction in order to throw light on a problem here in Jamaica when different facts on a different - background have to be resolved. I will not summarily dismiss any argument founded on the ^{foreign} ~~foreign~~ authority nor will I without careful examination, accept the propositions put forward. What may be accepted in Malta may have to be rejected in Jamaica and vice versa. It should not be forgotten that law can develop - and this includes the interpretation to be given to a Constitutional provision - only by constantly drawing new values and solutions from the life of the community. And no developing system of law can escape the influence generated by the community as to the end which the law itself should pursue.

If it were not for the importance of the case, I would be prepared to rest my judgment on the points which I have already outlined. If, therefore, I am said to be more discursive than I should, I will bear the criticism in order that I may show other grounds why, in my opinion, none of the plaintiffs could succeed in the claim which each put forward.

I shall advert to a simple ground which should be of special interest to the ordinary worker who joins a trade union. A man who joins a trade union does so subject to the union rules. He expects his union to do the best for him so long as he remains a member and he expects also that the union will have to make decisions of far reaching importance in the hurly-burly of trade union rivalry. The union is his agent to act for him in any dispute with his employer and in any negotiation touching wages or other conditions of employment. So long as the trade union is acting in accordance with the best practice acceptable, what it does bonafide in connection with the execution of a collective agreement binds the member on whose behalf any particular action was taken. The framers of the Constitution were well aware of the position. Indeed from as far back as in 1952, a learned Resident Magistrate as he then was (Mr. Frank Barrow) sitting as an Arbitrator in *N.W.U. v Sprostons Ltd.* (see Daily Gleaner, 15th August, 1952), gave the opinion that in making a collective agreement, the Union is acting as agent of the workers in settling wages and other terms of employment. I think the facts put before the learned Arbitrator are important and I shall, therefore, refer to them as briefly as possible. Certain fundamental principles concerning trade union rights and practices were determined and accepted by the respective parties, involved.

On the 11th May, 1951, Sprostons Ltd. entered into an agreement with the TUC for the taking of a poll at their plant site on certain terms and conditions. It was agreed that in the event of the TUC obtaining a majority of the work force, Sprostons would accord sole bargaining rights to that union followed by a collective labour agreement duly negotiated. It was further agreed that the

labour agreement would remain in force for two years from the date of execution. These events followed:

- 26th May 1951: A Poll was taken and the TUC won a majority.
- 30th July, 1951: A collective agreement for 2 years was signed by Sprostons and TUC.
- 24th April, 52: The N.W.U. sent a telegram to Sprostons claiming that the workers wished to reject the TUC in favour of N.W.U.
- 28th April, 52: Sprostons replied to N.W.U. and drew the union's attention to the labour agreement between itself and TUC.
- 13th May, 52: The Labour Adviser informed the parties that he intended to take a poll.
- 20th June, 52: A poll was taken and the N.W.U. won in accordance with the terms of the poll agreement.
- 9th July, 52: N.W.U. claimed that sole bargaining rights should be accorded to them in place of the TUC and demanded a basic minimum wage increase for all Sprostons' workers.

The claim of N.W.U. on behalf of the workers was rejected by Sprostons.

- 11th July, 52: An agreement was reached to submit the impasse to arbitration with Mr. Barrow as the sole arbitrator

The Arbitrator heard arguments from all the interested parties. One of the founding Fathers of the Constitution, the late and lamented lawyer and statesman, Mr. N.W. Manley, Q.C. argued the case on behalf of the N.W.U. The TUC's case was put by Mr. Frank Hill while that on behalf of Sprostons was urged by Mr. D.J. Judah.

In his ruling and award, the learned Arbitrator whose ability, learning and competence are unassailable, held as follows:

- (1) That a trade union not being a legal entity, enters into

contracts in the capacity of agent only and the workers are bound by contracts so made by their bargaining agent for the time being.

(2) That if an agreement made with the accredited bargaining agent subsists, when new workers accept employment they are bound by the subsisting agreement, otherwise the position would be unworkable.

(3) That the Poll of the 20th June, 1952 did not affect the rights of the parties under the Labour Agreement of the 30th July, 1951 which was binding on the workers and their new agents, the N.W.U. This case, in my judgement, can be cited as an authority for the simple proposition that a worker's complaint that what his union ^{has} properly done on his behalf is not binding on himself, is untenable. Anything to the contrary would be the ^{beginning} of the end of true trade unionism. The ruling of Mr. Barrow was given shortly after "Recommendation No. 91" of the International Labour Organisation was published. The General Conference meeting at Geneva in June 1951, adopted the Collective Agreements Recommendation, 1951.

Article 3 (1) of the Recommendation States:-

"Collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded. Employers and workers bound by a collective agreement should not be able to include in contracts of employment stipulations contrary to those contained in the Collective Agreement."

And the worker will be bound not only when the union signs the collective agreement with the employer but when the union does any act or thing preparatory to the execution of the said agreement. Owing to trade union rivalry, a poll may have to be taken in order to decide which of two or more unions seeking representational rights should be recognised by management. The strategy of non-participation in the poll (where that union is already recognised) may be decided upon. This is an act ^{preparatory} to the securing of representational rights.

Under Section 23 (1) of the Constitution, it is a good

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defence to prove that any alleged breach of the freedom of peaceful association which it guarantees was occasioned "with the consent of the person alleging the breach."

It has been admitted that all four plaintiffs were members of the B.I.T.U. prior to the 11th September, 1970 and at least up to the 23rd September, 1970. It seems that both the B.I.T.U. and the N.W.U. were sparring for an opening or further opening on the question as to representational rights for all the workers at the plant of the first defendant. The decision was taken by the B.I.T.U. on the 11th September that it would not participate in the poll but instead would watch the result of what had been agreed between the N.W.U. and the first defendant. In my judgment, all the plaintiffs would, therefore, be precluded from challenging in a Court of Law what decision was made on their behalf by the union which then represented them. This would be a "consent" on the part of the plaintiffs within the meaning of section 23 (1) of the Constitution. If membership in a trade union means anything and if management is not to be prejudiced by bona fide acts of trade union leaders acting on behalf of its workers, there cannot be any other sensible and reasonable result but to hold the workers or the unions to what has been agreed. With respect, there is plenty of force and good sense in the reasoning of Goddard, J (as he then was) when he said this:

"As I said in the course of the argument, the great benefit of a trade union is that you can have collective bargaining between employers and employees, and, if the union come to an arrangement or come to a decision regarding any man or body of men, and then that man or body of men refuses to be bound, it destroys the confidence that should exist between the employers and the union, and is to the detriment of collective bargaining." *Evans v National Union of Printing*, (1938) 4 AER. 51 at P.54.

I am unable to agree with the argument of Mr. Coore that since the B.I.T.U. was not a party to the poll agreement between the N.W.U. and the first defendant, therefore, the B.I.T.U. cannot claim or derive any benefit under it. There is a rule that only a party to a

to a contract can sue for a breach of it. But there is no rule that two persons cannot make an agreement under which a third party may derive some benefit.

The question on this point, is not whether the B.I.T.U. can claim anything under the poll agreement but whether or not the B.I.T.U. having elected not to be a party to the said agreement, all four plaintiffs or any of them can be heard to say that he did not give his consent to the B.I.T.U. to act as it did. Under the terms of the poll agreement if the N.W.U. did not obtain the necessary work force to oust the B.I.T.U., then the latter would continue to represent all the workers and the first defendant would continue to treat with the B.I.T.U. towards the settlement of a labour agreement.

One of the main submissions of Dr. Barnett on behalf of the plaintiffs Lewis and Wright should be mentioned. I think it is fair to say that the validity of this portion of his argument is an indication of the strength of the remainder.

In winding up his submissions during which he was at times driven to the ultimate virtue of persistency, he argued as follows.

"The ^{plaintiffs} ~~plaintiffs~~ (Lewis and Wright) cannot be said to have consented to the exclusion of the union of their choice from representing them in their relationship with their employer because:

- (1) they were not parties to any agreement which conferred a right on the employer or any other person to deprive them of such representation;
- (2) the evidence indicates quite clearly that they have expressed a desire to be represented by the N.W.U. and that they have repudiated such relationship as they had with the B.I.T.U."

Dr. Barnett listed about five other points to support his contention. In my view it is not necessary to refer to any of the others because what I have quoted is enough to show that this crucial part for what he is contending is based on a shaky foundation. He has assumed that a worker in his own right can demand to be a party to an agreement.

followed in Jamaica to ascertain exclusive bargaining rights, Mr. DaCosta agreed with Dr. Barnett on this point but Mr. Pershadsingh argued with force to the contrary. The evidence as to what the practice or "custom" is was given by Mr. James Weller and Mr. Jack Govern of the Ministry of Labour and National Insurance.

Mr. Weller, a senior officer of the Ministry, spoke on a background of over 15 years personal experience of the "practice and procedure relating to labour relations and the taking of polls for exclusive representational rights etc."

The B.I.T.U. has been a registered trade union since the 23rd January, 1939 and the N.W.U. has been registered as a trade union since the 17th October, 1952. The evidence of Mr. Weller is that to his knowledge, since 1955, both unions have accepted the practice which he outlined and they have acted on it. And that he had been informed and he verily believed.

"That such practice, usage and custom existed for many years before 1955."

Where a practice has gained strength over a period because of its obvious or seeming utility, it should be recognised, especially where it produces clear and reasonable advantage to the public. If the prevailing sentiment of the community tends to accept the practice because of the absence of anything more efficacious to replace it, then a good case has been made out for the Court to recognise, and if possible to enforce, the practice in question. We the judges are not expected to operate in the dark or in a vacuum but indeed are part of the community in which we function.

In a proper case a judge is entitled to take judicial notice of a practice and to act on it. I am not prepared to accept the invitation, implicit in the argument of Dr. Barnett, that this practice or custom referred to by Mr. Weller should be tested according to the ancient rules which were used to measure a manorial custom in England. Blackstone made mention of them in his series of lectures delivered at Oxford University as the first Venerian professor of law over 200 years ago. But when Blackstone delivered his first

lecture in 1758, there was no recognised trade union movement in England. There is much force in the passage in Grunfield's Modern Trade Union law (1966 edit) p.320 which was brought to our attention owing to the industry of Mr. Pershadsingh. It states:

"Custom in labour relations does not connote ancient usage. The expression simply means either the established practice of a trade or industry or section thereof or more usually the rules and practice of a place of work etc."

Article 1 (1) of Recommendation No.91 (Collective Agreements Recommendation 1951), to which I have already referred states as follows:-

"Machinery appropriate to the conditions existing in each country should be established, by means of agreement or laws or regulations as may be appropriate under national conditions, to negotiate, conclude, revise and renew collective agreements, or to be available to assist the parties in the negotiating, conclusion, revision and renewal of collective agreements."

The machinery which exists at the Ministry to which Mr. Weller is attached, appears to be broad enough to cover all steps referable to concluding a collective agreement. For many years this machinery had been in operation, having been established in the public interest and for the good order and discipline in the trade union movement. I would hold, therefore, that the accepted practice and procedure which trade unions in Jamaica have adopted, accepted and relied on for determining exclusive representational rights, is law within the meaning of Sec. 23 (2) of the constitution. There is no need to wait for another fifteen years or more for some other Court to make the pronouncement. If a law makes provision for the purpose of protecting the rights or freedoms of other persons and that person or persons should do nothing more than to exert the right which is protected, then such an action is not a contravention of the fundamental right of any individual. A registered trade union, and a registered liability company cannot enforce a fundamental right as plaintiffs in a Constitutional Court in Jamaica. But both must

be regarded as "persons" for the purpose of defending any right or interest vested in them and which is being attacked by a plaintiff. The B.I.T.U. on behalf of its members and the first defendant on behalf of its own interest, were in the process of negotiation preparatory to the conclusion of a collective agreement when the plaintiffs launched proceedings. The result of the poll agreement and the terms of the agreement itself permitted the action that was being pursued by the B.I.T.U. and the ~~defendant~~ ^{first defendant}. In my opinion, none of the plaintiffs could therefore, succeed in his allegation that his fundamental right guaranteed by Sec. 23 (1) had been contravened since the guaranteed right is subject to certain exceptions one of which has been established. A glaring anomaly which is fraught with mischief would arise if the position were otherwise. And it is this: If it were possible for the N.W.U. to be the plaintiff in this action, the right of the first defendant under the poll agreement would be an answer to the claim. But none of the plaintiffs being a party to the poll agreement and without being able to join the N.W.U. as a plaintiff, the same right which the first defendant could use as a shield against the N.W.U. cannot be relied upon by them against the plaintiffs' claim. The law is not so astute to entertain such a preposterous result.

It was contended by Mr. Coore that the Minister had no authority either in law or under the poll agreement to offer any advice or tender any opinion to the first defendant's general manager. This view is shared by my Lord Graham-Perkins. I am unable to agree with this contention. When the result of the poll was announced both unions put in a claim that they were winners. The N.W.U. ~~argued~~ ^{argued} that since 50% of the registered workers had voted "yes" in its favour, the B.I.T.U. had been ousted as exclusive bargaining agent. The B.I.T.U. argued that since the N.W.U. received less than 50% of the listed workers as at August 23, 1970, it retained representational rights. The general Manager was now faced with a problem; a new situation had developed. He sent a letter to the Minister (charged with the subject of labour relations) and asked for advice "in view of all the

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the circumstances" which he clearly outlined. And the Minister tendered his advice on the same day it was requested, namely, the 6th November, 1970. The substance of the advice which the Minister tendered to the general manager is as follows:

"The results of the poll show that the National Workers Union has failed to obtain from among the total number of workers whose names appeared on the company's payroll for the week ending 23rd August, 1970 - which payroll was designated in the agreement by the parties concerned as the official Voters' List - the number of votes necessary to entitle that union to be accepted by your company as being the exclusive representative of the employees covered by the agreement.

In such circumstances, the status quo remains."

On the receipt of this advice the company requested the B.I.T.U. to resume negotiations which had been suspended following the temporary closing of the plant site. The realities of the situation must be faced. Everybody knows that the Minister to whom the call for help was directed has experienced officers in conciliation procedure to assist him. The conciliation arm of the Ministry is well known to every employer and worker in Jamaica. It is the duty of the Minister and his officers to give every form of assistance to parties in a trade dispute in order that they may settle their differences quickly so that the industrial sector of the economy may function as efficiently and peacefully as possible for the good of the country. Apart from the numerous recommendations issued by the International Labour Organisation from time to time touching the duty of an appropriate department of government to help parties to settle their disputes, there is a provision in the constitution which requires a Minister charged with a subject to do what he thinks is right in any given situation. Section 93 (1) of the Constitution states in part:

"Where any Minister has been charged with the responsibility for a subject or department of Government, he shall exercise general direction and control . . .

over the work relating to that subject and over that department."

The general control over a subject may require the Minister dealing with a matter himself instead of asking his Permanent Secretary or a Senior Officer to attend to it. The advice was not requested, of the Minister of Agriculture and Fisheries or of the Minister of Education. May be each of those Ministers could have tendered sound opinion. But the appropriate minister in the appropriate circumstances was asked to give his advice in this new development. And what is more, in my view, the advice which was in fact tendered was and is sound. Put in a nutshell and in another form what the Minister was saying to the general manager was this:

"Hold the N.W.U. to its agreement. A variation of its terms will prejudice other interests."

Counsel for the first and second defendant have urged that the Constitution has only guaranteed a worker the right to form or belong to a trade union. But what happens after he has exercised that right, is not guaranteed. To put it in another way: I understand both Mr. DaCosta and Mr. Pershadsingh to be saying that if a carpenter or a mason joins a trade union he cannot demand any right of recognition for his union nor can he be allowed to usurp the function of the Union Officers in the area of collective bargaining and in matters leading up to it. Both Counsel have also contended that in any event the refusal of an employer to recognise a trade union is not a subject for litigation but one for negotiation and settlement outside the walls of the Court. I am in full agreement with these contentions. Freedom of contract is not guaranteed under the constitution. Act 48 of 1964, "the work permit Act" (calling it by its popular name) which was enacted shortly after independence should be a reminder to those who seek to argue that the constitution has guaranteed freedom of contract. No man can legally compel another to talk to him. The employer who refuses to talk with the trade union leader may

court industrial action at his plant. A crippling strike may force him to have second thoughts but to attempt to ^{have} ~~hard~~ the employer before the Court would turn out to be a useless and expensive exercise.

If it were not for the fact that I do not wish to overburden this judgment with unnecessary details, I would outline not less than nine examples in each of which it would be permissible for an employer to take a certain action with regard to his relationship with his worker who is a member of a trade union or who wishes to join one. In each case, on Mr. Coore's premise, an argument could be founded that there would be a "hindering" of the enjoyment of the workers right to form or belong to a trade union and yet in my view, the fundamental right of freedom of peaceful association to form or join a trade union would not be breached.

I will make one comment at this stage. If the contentions put forward on behalf of the plaintiffs were to be accepted, then those very arguments could be employed to destroy the position of the N.W.U. where it now enjoys the right to represent the workers in certain areas of the Island, as the exclusive bargaining agent. And nothing short of industrial chaos would result with the blessing of the Court. But the duty of this Court is to keep the law in harmony with the enlightened common sense of the nation. It should not do anything which would make the trade union movement impotent. We are to uphold the constitution and not to do violence to the intention of the founding fathers.

In E. 112/68 Re Shipping Association of Jamaica and the Port workers on the Kingston Water Front, (written judgment delivered on January 23, 1969,) I said this at p.21:

"The common law of Jamaica must be so developed and the interpretation of the enactments of Parliament must be such that it is made clear to the public that the Judges do appreciate and note the rapid changes which are taking place in the economic and

and social sectors of the community."

I think the words which I used in 1969 are still applicable today. I hope I have touched all of the main contentions of Counsel which were canvassed during the proceedings. There is no need, in view of the conclusions to which I have arrived, to examine the interesting arguments which were put forward on the question of remedies, the legal enforceability of collective bargaining, the history of trade unions and the political overtones and undertones which were said to be involved in the proceedings. Authorities from India were discussed by Dr. Barnett with lucidity and skill; he even took us to the United States in his wide and roving dissertation. It is not out of disrespect when I say, as I hinted earlier in this judgment, that most of what was argued on the matters I have just mentioned were interesting and attractive but not very helpful to the issues we had to decide.

Before I conclude this portion of my judgment I should advert to a matter which Mr. Coore and Mr. Thompson brought forcefully to our attention. Mr. Coore complained that there is no statutory enactment in Jamaica which seeks to regulate a settlement of jurisdictional dispute between unions or representational disputes between unions and employers. Mr. Thompson was forceful and trenchant in his criticism of the position. He spoke of the "inexcusable neglect" by Government to pass suitable trade union legislation and of the reason:

"Why this Court finds itself attempting to solve a question concealed in an atmosphere of hostility and danger."

The tone of Mr. Thompson's strictures suggested that he was inviting us to make some comments in our judgment. I am afraid - speaking for myself - that I am unable to join in the controversy. Judges must interpret the law as they find it. They may in a suitable case, and from the Bench, urge that some reform in the law is necessary. Last year while I was on

vacation in Canada, I had the opportunity to examine briefly the Labour Relations Act of the Province of Ontario. All questions touching matters like collective bargaining, representational and jurisdictional disputes and unfair Union practices are set out clearly in the Act. It is an excellent piece of legislation. Perhaps I could make comments on certain provisions of this Canadian legislation. However, attractive as Mr. Thompson's invitation is, I will not accept it because I am satisfied that these proceedings are ill-advised and should not have been pressed if, on calm reflection, it was apparent, that an error had been made.

When the plaintiff Banton filed his writ, the first defendant was negotiating with the B.I.T.U. with a view to concluding an ^{agreement} ~~argument~~ on behalf of the workers including the plaintiff himself. But the ^{plaintiff} ~~plaintiff~~ Banton sought an injunction to restrain the first defendant from recognizing the B.I.T.U. as the exclusive bargaining agent for the workers. An interim injunction was granted and this was followed by an interlocutory injunction. The glimmer of hope that work would resume at the plant as soon as the collective agreement was concluded, was shattered. In the meantime the other three plaintiffs filed their motions in which they sought almost identical relief. An injunction against the first defendant was earnestly prayed for as in the case of the plaintiff Banton. In order to pray for an injunction an undertaking had to be given that the first defendant would be compensated for any loss sustained should an injunction be obtained to which the plaintiffs were not entitled.

The evidence of the Personnel Manager of the first defendant is that a substantial sum of money in wages overhead expenses, profit and delay in completing the construction would be suffered daily by the non-resumption of work. It was this daily substantial sum, e.g. \$30,000 (U.S.) in salaries and overheads as one item along with other losses that these workers had undertaken to make good if they did not succeed in obtain-

should fail, the damage to be suffered by them would be minimal. But if the first defendant should succeed - as it has done - and should find that the undertaking is inadequate, the damage to the company could be irreparable and perhaps could have spelt ruin for any business which has no solid financial base. And the decomposition would set in before the company's just and proper stand is established in Court. In my judgment, therefore, to ask for an injunction in all the circumstances is an extravagance. To pray for a declaration of the rights of parties would be more in ^{line} ~~live~~ with reason. An injunction would be bound to take into the balance the public interest generally, and the immediate interests of other workers who would be prejudiced if there is a delay in work resumption as against the personal interest of the four plaintiffs. To press for too much, therefore, was risky and to continue with the matter where good judgment should have resumed its seat, was unwise.

The fundamental rights and freedoms entrenched in the constitution are not different from those which were known and observed prior to independence. Some of them had already been put on a statutory basis before independence. For example, the right to join a trade union; the compulsory acquisition of property without adequate compensation; the right of a person not to be convicted of an offence without certain safeguards.

If the right was not enforceable in a Court of law, it was to some extent protected by the force of public opinion, e.g. refusing to employ a man, otherwise suitable, on the ground of his race or the district he was born. What the Constitution has done is to entrench the right which had already existed, not for the purpose of enlarging its content or its area but for the purpose of making it difficult for a Parliament to abrogate, vary or otherwise interfere with these rights unless it should pass a special act amending the constitution and following the elaborate ^{procedure} laid down by the constitution itself in Sec. 49.

History has shown that men are inclined to be drunk with power and that sudden passions may drive the rulers of the people to foolish and dangerous actions. In order to safeguard the people of Jamaica against the emergence of men like these, the framers of the constitution very wisely and following the pattern of emerging nations, guaranteed certain basic rights and freedoms. But the ~~mere allegation~~ ^{mere allegation} that a fundamental right or freedom has been or is likely to be contravened is not enough. There must be facts to support it. The framers of the Constitution appear to have had a careful and long look on several systems operating in other countries before they finally agreed to Part 3 as it now stands.

It seems to me that the position may be summarised as follows:

Before an aggrieved person is likely to succeed with his claim before the Constitutional Court, he should be able to show:

- (1) That he has a justiciable complaint; that is to say, that a right personal to him and guaranteed under chapter 3 of the Constitution has been or is likely to be contravened. For example, what is nothing more than naked politics dressed up in the form of a right is not justiciable and cannot be entertained;
- (2) That he has a "standing" to bring the action; that is to say, he is the proper person to bring it and that he is not being used as the tool of another who is unable or unwilling to appear as the litigant;
- (3) That his complaint is substantial and adequate and has not been waived or otherwise weakened by consent, compromise or lapse of time;
- (4) That there is no other avenue available whereby adequate means of redress may be obtained. In this connection, if the complaint is against a private person it is difficult, if not impossible, to argue that adequate means of redress are not available in the ordinary court of the land. But if the complaint is directed against the state or an agent of the state

it could be argued that the matter of the contravention alleged may only be effectively redressible in the Constitutional Court.

- (5) That the controversy or dispute which has prompted the proceedings is real and that what is sought is redress for the contravention of the guaranteed right and not merely seeking the advisory opinion of the Court on some controversial, arid or spent dispute.

It is sometimes said that a written constitution is not a prolix code in which every general statement is exemplified or explained. Merely reciting a provision and then resorting to logic and a dictionary will not necessarily give an adequate solution to a problem. Once the premise is remembered that the Bill of Rights in the Constitution does not purport to grant or confer a freedom ^{or right} greater than what existed or was enjoyed before independence, the correct path to travel when a dispute arises for solution would have been selected. With this as a torch and as a guide the journey should not be hazardous nor winding.

The particulars constituting the dreams of King ^{Nebuchadnezzar} Nebuchanezzar which Daniel was asked to interpret may have been enigmatic. It is possible that there may be posers arising under some provision of the constitution which may be puzzling as the dreams of King ^{Nebuchadnezzar} Nebuchanezzar. I am glad to say, however, that the facts and arguments placed before us did not offer any puzzle and thus at the completion of all the submissions on the 15th January, judgment was entered for the defendants on the claim; the motions were dismissed, and the interlocutory injunction granted on the 27th November, 1970 against the first defendant was discharged.

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Robotham, J

On 15th January, 1971, we unanimously dismissed the claim of Plaintiff Fabian Banton, the motions brought by Devon Hope Grant, Cecil Lewis and Joseph Wright, and entered judgment for the three defendants in each cause. The injunction was also discharged.

I have had the opportunity of reading the judgments of my learned Brothers Graham Perkins and Parnell. The facts and the reasoning resulting in our conclusion are fully set out between their respective judgments and I wish to add nothing further.



J. Robotham.

On the same day Henry J awarded an interim injunction by which Alcoa was restrained -

- (i) from recognizing the B.I.T.U. as the exclusive bargaining agent and/or representative of the plaintiff and/or construction workers employed by the defendant and/or its contractors; and
- (ii) from concluding an agreement exclusively with the B.I.T.U. and/or granting the B.I.T.U. exclusive bargaining rights on behalf of the plaintiff and/or construction workers employed by the defendant and/or its contractors.

On the 20th November 1970 three Motions (M.53 of 1970; M.54 of 1970; and M.55 of 1970) were filed by Devon Hope Grant, Cecil Alexander Lewis and Joseph Augustus Wright respectively. For the sake of convenience these applicants will hereinafter be referred to as "plaintiffs". Each of these Motions claimed, as against Alcoa, the identical relief claimed by the plaintiff Banton in Suit M. 50 of 1970

On the 10th of December 1970 Parnell J. made

- (i) an Order that the action M. 50 of 1970 proceed to trial without pleadings, and that the affidavits filed by the plaintiff and Alcoa on the application for the injunction abovementioned stand as pleadings;
- (ii) Orders in respect of the writ and the three Motions adding the B.I.T.U. as a defendant; and
- (iii) similar Orders adding Leslie Grant, a member of the B.I.T.U. and one of the workers on the construction project, as another defendant.

It is almost always a very difficult task in the absence of full pleadings, to determine what are the precise issues that the parties to a cause desire to have resolved. This task is no less difficult, in a case such as this, where the court is driven to rely on affidavits filed for one purpose and used for a quite different purpose, and which contain much of what is so obviously hearsay. Indeed, I was constrained to observe during the arguments that affidavits appear to be taking on a completely new dimension. Deponents appear to feel free even to argue points of law

therein. In the result the arguments and submissions, sometimes resting on those affidavits and sometimes on premises quite unsupported by any evidential foundation, have ranged over an extraordinarily wide area involving both the relevant and irrelevant, the axiomatic and the esoteric, the logical and illogical, the subtle generalisation and the dangerous over-simplification. From the maze of affidavit evidence through which this court has had to travel very warily and from the submissions advanced, it appears, however, that there is really only one principal question that requires to be answered. There are, of course, several other questions that arise but I think that the answer to the principal question necessarily involves the answers to those other questions. In my view the principal question is: Have the plaintiffs, or any of them, been hindered in the enjoyment of their freedom of association? Before attempting to answer this question it is perhaps desirable, at least for the sake of completeness, to establish the status of each of the plaintiffs, although in view of the conclusion at which I have arrived, their status assumes no particular importance. In addition to the allegations in their respective affidavits, an agreed statement as to the status of each plaintiff was submitted to the court. From these it appears that:-

- (i) Banton at all material times was a member of the B.I.T.U.;
- (ii) Devon Grant was a member of both the N.W.U. and the B.I.T.U.;
- (iii) Cecil Lewis was a member of the B.I.T.U.; and that
- (iv) Joseph Wright was a member of the N.W.U. and the B.I.T.U.

It is necessary, too, to set out the relevant provisions of Chapter 111 of the Jamaica (Constitution) Order in Council 1962, the rubric of which is "Fundamental Rights and Freedoms". Section 13 provides:-

"Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others, and for the public interest, to each and all of the following, namely -

... (a) life...

- (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
- (b) freedom of conscience, of expression and of peaceful assembly and association; and
- (c) respect for his private and family life,

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

Section 23(1) provides :-

"Except with his own consent, no person shall be hindered in the enjoyment of his freedom of peaceful assembly and association, that is to say, his right peacefully to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests."

Section 25(1) provides :-

"Subject to the provisions of sub-section (4) of this Section, if any person alleges that any of the provisions of Sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

I now recall here the submissions advanced by Mr. Coore and Mr. DaCosta.

Mr. Coore put the case for the plaintiffs this way Section 13 proceeds on the assumption that prior to the coming into force of the Constitution there resided in every citizen of Jamaica certain well recognized rights and freedoms which reflect the principles fundamental to our society. The subsequent provisions of the Chapter were designed to protect the continued enjoyment of those rights and freedoms, while at the same time ensuring that the area within which each right or freedom operated was so defined that the enforcement of one would not lead either to the deprivation of another or

make orderly government impossible. Where a particular right or freedom had already been the subject of adequate protection and definition by existing law it will be found that the relevant section of Chapter 111 involves a mere restatement of that existing law. Examples are to be found in sections 14, 15, 16, 19 and 20. There are, however, other cases where a particular right or freedom, although recognized as one to which the citizen was entitled, suffered either the lack of clear definition by the ordinary law, or the lack of adequate legal remedy for its protection. In these cases the relevant constitutional provision, while not purporting to create any new right or freedom, has sought to define with more precision the boundaries of the right or freedom and to give a more adequate remedy for its infringement than that which had existed hitherto. Examples of this second category are sections 17, 18, 21, 22, 23 (the section with which we are here concerned) and 24.

Section 25, the remedial section, clearly recognizes the existence of a state of affairs in which (a) some rights are already adequately protected but others are not, and (b) some forms of infringement are amenable to the sanctions of the ordinary law, but others are not. Sections 21, 22 and 23, unlike sections 17, 18 and 24, do not seek merely to prohibit the taking away of the right or freedom therein stated. They prohibit, subject to specified exceptions, any hindering of its enjoyment. Up to this point I find myself in a fairly large measure of agreement with Mr. Coore. He continued as follows. With particular reference to section 23 its effect is to prohibit not only any direct action involving a complete denial of the right to free association, but also any collateral action calculated to substantially interfere with the enjoyment of the right so as to significantly reduce its value. In this connection Mr. Coore relies quite resolutely on *Olivier v Buttigieg* (1966) 2 A.E.R. 459. It will be necessary to examine that case later in this judgment.

Section 25 gives a cause of action to a person who is able to show that section 23 has been contravened in relation to him. The contravention alleged by the plaintiffs is put this way:

"Alcoa has asserted by word and by conduct that it will not deal with any trade union except the B.I.T.U. We used to be members of the B.I.T.U. We are dissatisfied with them and we wish to join the N. W. U. This is our constitutional right. Alcoa's refusal to deal with any union other than the B.I.T.U. in relation to matters which affect our interest, if allowed to continue, will deprive our membership in the N.W.U of virtually all value. By depriving membership in the trade union of our choice of its essential value in this way, we are being hindered in the enjoyment of our right to belong to the trade union of our choice."

Mr. Coore here relies somewhat strongly on the reasoning of Dhavan J. in *Uttar Pradeshiya Shramik Maha Sangh v State of Uttar Pradesh* (1960) A. I. R. Allahabad 45 (V 47 C 4). I have considered it desirable to set out Mr. Coore's submissions at some length in view of my earlier observations on the absence of full and precise pleadings. These submissions are to be taken as having been assented to by Mr. Thompson and Dr. Barnett.

When carefully examined it becomes manifest that the second branch of these submissions, embracing as they do the true scope of the right and the extent of the contravention alleged, involves the following propositions: (i) That the content of the right of a worker to belong to a trade union of his choice must be determined not only by reference to the essential value of the right, but also by reference to the way in which its effective exercise by that worker contributes to its value; (ii) that inherent in that right so determined is the right of the worker to be represented by the trade union of his choice in negotiations with his employer in all matters touching on the terms and conditions of his employment; and (iii) that there is a correlative duty in the employer to recognize and treat with the trade union of an employee's choice. This third proposition necessarily follows from the second, which in turn necessarily follows from the first, since in terms of the essential value of the right any right of representation must, from the point of view of the jurisprudential concept of a positive enforceable right, involve a corresponding enforceable duty of recognition. There are, of course, other equally far reaching implications but I do not pursue them. I am content to say that I incline to the view that there is little that would have been more surprising to the architects

of our Constitution than to have been told that they were entrenching a right that would give rise to such dramatic consequences.

It is well to recall at this point certain historical factors that have combined to leave their indelible mark on the development of industrial relations as we have come to know them today.

1. The briefest historical survey of the growth of trade unions in the United Kingdom will reveal that the Report of the Royal Commission on Trade Unions in 1869 which led to the passing of the Trade Union Act of 1871 was the result of one of the very few demands made by British trade unions for the positive intervention of the law in their affairs. Legislation affecting trade unions in the United Kingdom had always been rather more negative than positive in the sense that it sought to remove some rule of the common law which trade unions regarded as inimical to their interests. From the first quarter of the nineteenth century the attitude of the law had passed from the stage of determined suppression to one of calculated abstention. Trade unions certainly had not sought the legal enforcement of their "recognition" as organs of collective bargaining by employers. Nevertheless, their dedicated struggle won for them a large measure of recognition by the State. After 1870 trade unionism began to become "respectable". This was accompanied by a change in the judicial approach towards trade unions. The movement was from abstention to control. To this day it remains a matter of great doubt to what extent the courts succeeded in maintaining any effective control over trade unions.

2. The British Parliament has been more or less content to leave the general legal nature of the relationship of employer and employee to the common law the elementary rules of which were shown to be too imperfect to accommodate the multitude of legal niceties that arose when, following upon the industrial revolution, there began a pronounced drift from domestic and agricultural service toward employment in industry. The legal content and effects of the relationship of employer and employee have nevertheless been radically altered by statutory intervention. But there is not, and never has been, the remotest suggestion that the common law or any statute has ever sought, as between employer and employee, or as between employer and trade unions, to impinge upon the freedom of the former in the particular sphere of his consensual relations with the latter to the extent of seeking to

impose on either a positive enforceable duty to assume binding obligations to the other. It is the fact that from the moment that trade unions ceased to be criminal conspiracies and were recognized by the State, their raison d' être has been fortified principally by those social and economic sanctions which they had good reason to regard as safeguards stronger than any assistance that the courts would be able to give them.

3. As between employer and trade union it was these very sanctions which impinged in a real sense upon the former's freedom of contract to the extent that it is, in this context, no longer true to say that

".....there must be such liberty of choice as to create a reasonable presumption that the party exercising it has chosen that which he desires, and not merely submitted to that which he cannot avoid." See Salmon on Jurisprudence 11th Edn. at p. 391.

But this is not to identify, as a matter of legal theory, the social and economic implications of trade unionism with the imposition of legally enforceable duties giving rise to legally enforceable rights. In "Industrial Relations in Great Britain" by Flanders and Clegg (1963) there appears, at pp. 52 - 53, the following:

"3. COLLECTIVE BARGAINING AND THE LAW

That there is a public interest in the smooth functioning of the process of collective bargaining and in the observance of negotiated agreements is recognized by Parliament and by the Courts. The question is whether and to what extent the machinery of the law can be used with a view to furthering these aims.

(a) Collective bargaining presupposes the willingness of employers to settle terms and conditions of employment by negotiation with trade unions. In other words, the first condition which must be fulfilled is what is commonly called the 'recognition' by the employers of the unions as bargaining partners. In practice this problem is today of smaller importance in this than in many other countries. It is rare for large firms in Britain to refuse to bargain with unions. But the law does not compel an employer or group of employers to recognise unions and to bargain collectively.

English and Scottish Law may implicitly recognize the moral right of employees 'to bargain collectively through representatives of their own choosing', but they do not translate it into a legal duty imposed upon employers to bargain with the unions.....

The recognition of trade unions, then, which is the linchpin of industrial relations today, does not rest on a "legal" foundation."

All that I have said above is as true of the situation in Jamaica as it is of that which exists in the United Kingdom. If this situation seeks a remedy, that remedy must be sought in the Parliament of this country through the coercive force of a strong and enlightened public opinion.

There is another, and perhaps even more fundamental, fallacy that emerges from the propositions I find to be involved in the submissions advanced on behalf of the plaintiffs. The fallacy results from ignoring the true significance of the words "that is to say" in section 23(1). Before examining those crucial words, however, it must be recalled that what were prior to the enactment of the Constitution of Jamaica, the so-called liberties of the citizen were no more than implications resulting from the two fundamental principles that the citizen could say or do what he pleased so long as he did not offend against the substantive law or infringe the legal rights of others, whereas public authorities could act only in pursuance of the authority of a rule of common law or statute. To the extent that public authorities were not authorised to interfere with the citizen it may be said that the citizen enjoyed those liberties. The four great Charters - Magna Carta, the Petition of Right, the Bill of Rights, and the Act of Settlement, dealt with particular problems between the Crown and the people. The so-called freedoms, however, remained undefined and depended, - for the most part, for their protection on the force of public opinion and certain refinements of the common law aided by particular statutory provisions. See Halsbury's Laws of England 3rd Edn. Vol 7 pp. 195 et seq.

The particular freedom recognized as the freedom of association grew out of that process. It is one of those freedoms now entrenched in our Constitution, but ^{which} still remains undefined. I do not share Mr. Coore's view

that section 23(1) defines "freedom of association" with any more precision than the phrase appears to have in section 13. In my view section 23(1) does no more than demonstrate the perimeter of the constitutional protection within which the freedom is to be enjoyed. The enjoyment of the freedom is to proceed unhindered for only so long as the citizen withholds his consent, expressed or implied, to any hindrance in the way of that enjoyment.

I now come to the words "that is to say". If language is explicit the court must give effect to it and in so doing the court gives effect to the intention of Parliament, but the court may only elicit that intention from the actual words of the statute. One of the cardinal rules of construction is that the phrases and sentences of any enactment must be construed according to the rules of grammar. See R.V. Ramsgate (Inhabitants) (1827) 6B & C 712. "The length and detail of modern legislation" wrote Lord Evershed M. R., "has undoubtedly reinforced the claim of literal construction as the only safe guide". See Maxwell 11th Edn.p.vi. The foregoing observations were, of course, made with reference to Acts of Parliament. They apply with equal force to the interpretation of the Constitution. In the 3rd edition of Stroud's Judicial Dictionary Vol. 4 at p. 3007 there appears the following :-

" THAT IS TO SAY. 'That is to say' is the commencement of an ancillary clause which explains the meaning of the principal clause. It has the following properties:
(1) It must not be contrary to the principal clause;
(2) it must neither increase nor diminish it; (3)
but where the principal clause is general in terms it may restrict it;"

The authority quoted for these propositions is Stukeley v Butler, Hob. 171. This case will be found in Volume 80 of the English Reports at p. 316. See also the Oxford English Dictionary Vol 9 p. 153 where it is clear that the words 'that is to say' are used to introduce a more explicit or intelligible restatement of what immediately precedes, or a limiting clause necessary to make the statement correct. I accept the foregoing as

accurate statements of the relevant rule of grammar. It follows, in my view, that nothing that appears after the words 'that is to say' in section 23(1) can in any way extend or qualify the freedom therein stated. The words following merely restate the freedom in terms of a "right to associate with other persons and in particular to form or belong to trade unions or other associations for the protection of (a worker's) interests", the contravention of which right is amenable to the redress contemplated by section 25. They add nothing to the concept of freedom of association. In their absence I apprehend that freedom of association must necessarily involve the right of a worker to belong to the trade union of his choice for the protection of his interests.

What, therefore, is the meaning to be ascribed to the words "freedom...of association" in sec. 23(1)? For the answer to this question I turn to the decision of the Privy Council in *Collymore et al v the Attorney General of Trinidad and Tobago* (1969) 2 A.E.R. 1207. Section 1 of the Constitution of Trinidad and Tobago provides: "It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist..... the following human rights and fundamental freedoms, namely, (j) freedom of association and assembly;"

Sec. 2 provides: "Subject to the provisions of sections 3, 4 and 5 of this Constitution, no law shall abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognized and declared...." The appellants contended, inter alia, that the Industrial Stabilisation Act, 1965 abrogated, abridged or infringed their freedom of association, contrary to the terms of sec. 2 of the Constitution and was therefore void.

In dealing with the submissions advanced by the appellants and the respondents, Lord Donovan (at p. 1210) said:

"The argument (of the appellants) runs thus: 'Freedom of association' must be construed in such a way that it confers rights of substance and is not merely an empty phrase. So far as trade unions are concerned, the freedom means more than the right of individuals to form them; it embraces the right to pursue that object which is the main *raison d'être* of trade unions, namely, collective bargaining on behalf of their members