Present : Wood Renton A.C.J.

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Application for a Mandamus on the Chairman of the Municipal Council.

Nomination of candidates for election as councillors—Rejection of all but one nomination paper—One candidate declared duly elected—Application for a mandamus—Office full—Mandamus does not lie— Quo warranto.

On the day appointed for nomination of candidates for election as councillors three nomination papers were submitted to the Chairman of the Municipal Council of Colombo, nominating A, B, and C. The Chairman rejected A's nomination paper on the ground that it was not valid, as the seconder's name did not appear in the list of qualified voters for 1911, and as the lists for 1912 and 1913 were not properly certified. The Chairman also rejected B's nomination paper, as B's name did not appear in the list for 1911, and declared C duly elected. C acted as councillor since his election.

On application by the signatories of the rejected nomination papers for a mandamus on the Chairman to fix a place and date for election of a councillor,—

Held, (1) That the election of C was not merely "colourable," and that a mandamus would not lie, even if the office were not filled.

(2) That the Chairman had jurisdiction to entertain and dispose of such objections to the reception of the nomination papers as those urged against the nomination of A and B.

Where a person has been elected *de facto* to a corporate office, and has accepted and acted in the office, the validity of the election and the title to the office can be tried only *quo warranto*, and a mandamus will not lie unless the election can be shown to be merely colourable. The election will not be "colourable" where the party whose conduct is challenged has the right to elect and acts in good faith, even if he has proceeded upon an erroneous construction of the law.

THE facts are set out in the judgment.

Drieberg, for the first respondent (Chairman of the Municipal Council), took a preliminary objection.—The applicants ask that the respondent be ordered to appoint a date and hour for the election of a councillor; and secondly, that the election of Mr. Perera be declared null and void. The first part is an application for a mandamus, and the second an application for a *quo warranto*. Mr. Perera has been elected, and he has exercised the functions of a councillor. A mandamus will not lie, because there has been a

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de facto election. The only remedy open under the circumstances is the remedy of *quo warranto*. But the Supreme Court has no jurisdiction to grant a writ in the nature of a *quo warranto*. See *Gomes v. Chairman of the Municipal Council of Colombo and Rockwood*,[1] *In re Jaffna Local Board Election*,[2] *R. v. Beer*.[3] Counsel also referred to *8 N. L. R. 300*, *9 N. L. R. 159*, *Reg. v. Chester (Mayor of)*.[4] Rules 8 and 9 in the Schedule B (section 21) give the Chairman a right to exercise his discretion in deciding the question as to the validity of a nomination paper. The powers of the Supreme Court were strictly defined by the Courts Ordinance. The Supreme Court cannot by mandamus compel the Chairman to exercise his discretion in a particular way.

H. J. C. Pereira (with him *Elliott*) took the same objection on behalf of the second respondent (Mr. J. A. Perera).—The use of the word "valid" nomination in rule 9 clearly implies that the Chairman is to judge upon the validity of the nomination paper. Counsel referred to *Reg. v. Welchpool (Mayor of)*.[5]

Hayley (with him *Zoysa*, *Arulanandam*, and *V. Grenier*), for the petitioner.—The Chairman had no power to decide on irregularities which did not appear on the face of the nomination paper. If ten voters only had subscribed to the nomination paper, whereas the law required twenty, the paper may be rejected as invalid. The Chairman had no power to decide upon any matter which the Ordinance did not specially submit to his decision. In England the receiving officer decides only on questions appearing *ex facie* on the nomination paper. *2 Rogers on Election 96; Howes v. Turner*;[6] *Prichard v. Bangor (Mayor of)*;[7] *Encyclopaedia of Local Government Board, vol. III., p. 26; Halsbury's Laws of England, vol. XII., p. 343.*

Under the Ordinance a certified list is "final and conclusive," and the law makes special provision if the elected councillor has no qualification. Sections 31 and 32 provide a penalty.

The Chairman is only a ministerial officer, and has no discretion to exercise on matters which the Ordinance does not expressly give him the power to decide.

In any case, if the discretion has been exercised wrongly on a mistaken view of the law, this Court has the power to interfere. The question whether a candidate's name was legally on a list is a question of law.

Counsel cited *Short on Mandamus, pp. 257, 258, 261, 302, 303, and 309; R. v. Deputies of the Freemen of Leicester*;[8] *Reg. v. Mayor of*

[1] *(1911) 12 N. L. R. 8.*
[2] *(1907) 1 A. C. R. 128.*
[3] *(1903) 72 L. J. K. B. 608.*
[4] *(1855) 25 L. J. Q. B. 61.*
[5] *(1876) 35 L. T. N. S. 594.*
[6] *(1876) 1 C. P. D. 670.*
[7] *(1886) 18 Q. B. D. 349, 57 L.J. Q. B. 313.*
[8] *(1850) 15 Q. B. 671.*

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Monmouth;[1] *Queen v. West Riding;*[2] *King v. Wiltshire;*[3] *Jayawardene v. Government Agent, Southern Province;*[4] and *Reg. v. Harwich (Mayor of).*[5]

The election was only a colourable one, and therefore a mandamus lies. In fact there was no election at all. The Chairman has decided that there was no need for an election under the circumstances. Counsel cited *Short on Mandamus 290, 293; 10 Halsbury 81; King v. Mayor of Bedfordshire;*[6] *Re Balow;*[7] *King v. Rector of Birmingham.*[8]

The Chairman must not be allowed to go behind his own acts and declare the lists invalid. Even if there was a mistake in the certifying of the lists, the lists do not become invalid. The provisions of the Ordinance regarding the certification of lists is only directory, and not imperative. *Maxwell on Interpretation of Statutes 554, 564.* See also *10 C. P. 733, 30 L. J. C. P. 33, 25 L. J. C. P. 141.*

The provision of the Ordinance as to the date of revising the list is merely directory. See *16 Q. B. D. 244, 12 Halsbury 200, 7 B. & C. 10.*

The Chairman was wrong in holding that the lists for 1912 and 1913 were invalid. The irregularity in the lists does not annul them altogether.

H. J. C. Pereira, in reply.

Cur. adv. vult.

November 21, 1913. WOOD RENTON A.C.J.—

The applicants move for a writ of mandamus directing the first respondent to fix a place, date, and hour for the election of a councillor for the New Bazaar Division of the Colombo Municipal Council, and declaring the election of the second respondent as councillor for that division null and void. The office became vacant in consequence of the death of Mr. Hector Jayewardene, Advocate. On the day fixed for the nomination of candidates three nomination papers were tendered to the Chairman of the Municipal Council. The candidates nominated were Mr. T. G. Jayewardene, Mr. E. W. Jayewardene, and the second respondent, Mr. J. A. Perera. The applicant, Mr. Brito, was one of the signatories of the nomination paper of Mr. T. G. Jayewardene. The Chairman of the Municipal Council held that Mr. Jayewardene's nomination paper was not valid, since the name of the seconder did not appear in the certified list for 1911 of qualified voters. The name of the seconder did appear in the list for 1913. But the Chairman held that that list was invalid, on the ground that it had not been prepared in accordance with the requirements of the Municipal Councils Ordinance, 1910 (No. 6 of 1910). The list was

[1] *(1870) L. R. 5 Q. B. 251.*
[2] *5 B. & A. 667.*
[3] *10 East 404.*
[4] *5 S. C. C. 19.*
[5] *(1853) 1 E. & B. 617.*
[6] *6 East 366.*
[7] *30 L. J. (Q. B.) 271.*
[8] *7 A. & E. 254.*

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published in the *Gazette* of October 17, 1913. The publication was notified in two local newspapers on October 23, and the list was certified on the 31st. There was, therefore, a curtailment by some days of the period of two weeks allowed by section 15 (3) of the Ordinance for the presentation of claims and objections. Section 42 provides that the new revised list "so prepared shall be certified under the hand of the Chairman during the last week of the month of October of each year, and when so certified shall be final and conclusive, and the only evidence of the qualification of the persons . . . . . whose names appear therein to vote." The Chairman held that, in the circumstances above stated, the list for 1913 had not been prepared in accordance with the provisions of the Ordinance, and, therefore, could not be certified under section 42, inasmuch as, under that section, it is only a list that has been "so prepared" that is capable of certification. In point of law that ruling is clearly right. It was contended, however, that the Chairman was wrong in holding that the irregularity in the certification of the list was of such a character as to annul it altogether. The Chairman further held that the list for 1912 was invalid, inasmuch as, while section 42 of the Ordinance required it to be certified under the hand of the Chairman during the last week of October, it had not been signed and certified till the 4th of the following November. The result of these rulings was that Mr. T. G. Jayewardene's application stood or fell by the list for 1911. That list had been duly certified on October 31, 1911. It did not contain the name of Mr. Jayewardene's seconder. On this ground Mr. T. G. Jayewardene's nomination paper was held to be invalid.

I come now to the facts material to the consideration of Mr. Brouwer's application. He was one of the signatories of the nomination paper of Mr. E. W. Jayewardene. The name of Mr. E. W. Jayewardene was not in the list for 1911 or 1912 of persons qualified to be elected as councillors, nor was it originally in the list for 1913. It was, however, added to the list for 1913 on October 22, 1913, and appears in that list as certified on October 31. The Chairman held that as, for the reasons above stated, the list for 1913 was invalid, and as Mr. Jayewardene's name did not appear in the valid list for 1911, his nomination, like that of Mr. T. G. Jayewardene must be rejected.

The name of Mr. J. A. Perera appears in the list for 1911. The Chairman, therefore, held that there had been only one nomination, and, in accordance with the provisions of rule 8 of schedule B of the Municipal Councils Ordinance, 1910, declared Mr. Perera duly elected. Mr. Perera has since his election acted as councillor. The certified copy of the minutes of the proceedings, which has been put in evidence, shows that all parties appeared by counsel, and that the rulings of the Chairman on the several questions above noted were given after Counsel had addressed him.

Up to a certain point there is no dispute as to the law. Except in so far as the rules laid down by them have been modified by local enactment, the Court must be guided, in determining whether or not mandamus lies, by English decisions. It is an inflexible rule of English law that where a person has been elected *de facto* to a corporate office, and has accepted and acted in the office, the validity of the election and the title to the office can be tried only *quo warranto*, and that mandamus will not lie unless the election can be shown to be merely colourable. (*Reg. v. Chester (Mayor of)*,[1] *R. v. Beer*,[2] *Reg. v. Welchpool (Mayor of)*.[3]) The election will not be " colourable " where the party whose conduct is challenged has the right to elect and acts in good faith, even if he has proceeded upon an erroneous construction of the law. (*R. v. Oxford (Mayor of)*, [4] *R. v. Leeds (Mayor of)*[5]). The Supreme Court will not grant a mandamus where the office is full, and has no power to grant a *quo warranto*. (*In re Jaffna Local Board Election*,[6] *Gomes v. Chairman of the Municipal Council of Colombo and Rockwood*.[7]) An inferior Court may by mandamus be compelled to exercise the jurisdiction which it possesses, but will not be compelled to exercise that jurisdiction in a particular way. (*Encyclo. Laws of England. 2nd ed., art. " Mandamus," p. 532.*).

Counsel for the applicants, while admitting the propositions of law which I have just stated, contended in the first place, that the election of Mr. Perera as councillor for the New Bazaar Division was only colourable; in the next place, that under the Municipal Councils Ordinance, 1910, the Chairman had no right to entertain such objections as those on the strength of which he rejected the list for 1912 and 1913; and in the last place, that, even if he did possess such a jurisdiction, he had exercised it illegally.

In my opinion all those contentions fail. I will deal with each of them in turn. Was Mr. Perera's election " colourable "? It would not be " colourable " if the Chairman had a legal right to declare him elected, and exercised that right in good faith, even although he was wrong in law in supposing that the circumstances justified its exercise. The Chairman's good faith is not impeached. Rule 8 of Schedule B of the Ordinance provides that: " If only one candidate is nominated for a division, and the nomination paper is in order, the Chairman shall declare such candidate duly elected." This rule undoubtedly gives to the Chairman the right to elect in the state of matters which it contemplates. Rightly or wrongly, but in either case honestly, the Chairman held that this state of matters existed, and that only one candidate had been nominated for the division, and declared Mr. Perera duly elected. In my

[1] *(1855) 25 L. J. Q. B. 61.*
[2] *(1903) 72 L. J. K. B. 608.*
[3] *(1876) 35 L. T. N. S. 594. 598.*
[4] *(1837) 6 Ad. & E. 349.*
[5] *(1841) 11 Ad. & E. 512, and cases cited in Note 1.*
[6] *(1907) 1 A. C. R. 128.*
[7] *(1911) 12 N. L. R. 8.*

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opinion Mr. Perera's election in these circumstances was not "colourable," and the office is full. He has admittedly acted as councillor since his election.

My finding on this point is sufficient to dispose of the case. But even if the office were not full, I should be of opinion that mandamus would not lie. I think that, under the Municipal Councils Ordinance, 1910, the Chairman had jurisdiction to entertain and dispose of such objections to the reception of nomination papers as those that were urged against the nominations of Mr. T. G. and Mr. E. W. Jayewardene. Counsel for the applicants relied strongly on the cases of *Howes v. Turner*[1] and *Pritchard v. Bangor (Mayor of)*[2] as establishing the propositions that the only question in regard to a nomination paper which a mayor has a right to consider is whether it is in order in point of form, and that he is not entitled to reject it on the extrinsic ground of an alleged disqualification of the person nominated. These and similar authorities depend, however, on the language of special enactments defining the functions of a mayor in regard to the reception of nomination papers, and excluding from those functions by necessary implication any jurisdiction over questions as to the personal disqualification of candidates by providing another tribunal before which such questions may be raised and determined. Admittedly the Chairman of the Municipal Council must possess the power, which has been held to be inherent even in the English mayor (*cf. Harford v. Linskey*[3] *and Hobbs v. Morey*[4] to reject a nomination paper on grounds of palpable invalidity, such as the fact that the persons nominated had notoriously been dead for a long time, or was a woman. But the question is not, in Ceylon, merely one of inherent powers. The Legislature has expressly empowered the Chairman to dispose, subject to an appeal to the Supreme Court, of claims and objections in connection with the preparation of the revised lists (sections 15 to 18). He is the only authority constituted by the Ordinance for receiving and dealing with nomination papers. Such language as we find in rule 9—"if there is no valid nomination paper at all for a division, the Governor may nominate a councillor for such division—clearly implies a power to consider whether a nomination paper is valid or not, on any ground other than that of personal disqualification, for an adjudication on which, here (section 31) as in England, the Legislature has made other provision. If the Legislature has invested the Chairman of the Municipal Council with jurisdiction of this character, that jurisdiction cannot be reviewed by the Supreme Court by mandamus, unless there has been an actual or a practical refusal to exercise it. The long series of authorities ranging from *Reg. v. Harwich (Mayor of)*[5] to *R. v.*

[1] *(1876) 1 C. P. D. 670.*
[2] *(1886) 18 Q. B. D. 349; (1888) 13. App. Cas. 241.*
[3] *(1899) 1 G. B. at p. 862.*
[4] *(1904) 1 K. B. 74.*
[5] *(1853) 1 E. & B. 617.*

Board of Education[1] place that proposition beyond the reach of controversy. In no case that I am aware of has it been held that an erroneous view of the law adopted by a judicial tribunal having jurisdiction to deal with the matter to which that law relates is a good ground for a mandamus, unless the view so taken has led to a practical refusal to exercise jurisdiction at all. (*Reg v. Monmouth (Mayor of)*,[2] *R. v. Deputies of the Freemen of Leicester*,[3] and see *Howard v. Bodington*[4].

The Chairman has exercised both his implied jurisdiction to decide on the validity of the nomination papers and his express jurisdiction to declare the candidate whose nomination paper he has held valid, to be duly elected. In my opinion mandamus would not lie in the present case, even if the difficulty as to the office being full could be got rid of.

I may add that the decision of the Chairman seems to me to be sound in law on the merits. The lists for 1913 were not prepared in conformity with the requirements of Ordinance No. 6 of 1910. Counsel for the applicants strenuously argued, however, that the irregularity was only a technical one, and that the provisions of the Ordinance as to the preparation and certification of the lists should be treated as directory and not imperative. I would respectfully adopt the language of Lord Campbell in dealing with a similar argument in *Liverpool Borough Bank v. Turner*[5]: "No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

The effect of the irregularity committed in the present case was to abridge the time allowed by the law for the presentation of claims and objections. The applicants' counsel was unable to cite any authority showing that a statutory provision of this character could be treated as being only directory. In view of the language of the Ordinance of 1910 in regard to the preparation and certification of the lists as a whole, and, in particular, of the effect given to the lists when certified by section 42, I hold that it is imperative.

Counsel for the applicants strongly pressed upon me the hardship that might be caused to voters and candidates if the Chairman were recognized as possessing the right to decide without appeal, when an election has reached the stage of the presentation of nomination papers, whether the lists of voters and persons qualified to be elected as councillors were valid. He contended also that,

[1] *(1913) 2 K. B. 165.*
[2] *(1870) L. R. 5 Q. B. 251.*
[3] *(1850) 15 Q. B. 671; (1859-60) 29. L. J. Ch. 827.*
[4] *L. R. 2 P. D., at pp. 210, 211*
[5] *(1860) Johnson & Hemming's Rep. 159.*

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if the irregularity in the preparation and the certification of the lists for 1913 were treated as a fatal one, it would have the effect of disfranchising, through no fault of their own, a large number of otherwise qualified electors.

These are quite legitimate arguments, and I have given them due consideration. But they cannot, in my opinion, avail the applicants in the present case. In delivering his judgment in *In re Jaffna Local Board Election*,[1] Wendt J. made use of the following language: "In view of the multiplication of Municipalities, Local Boards, and similar institutions, it is most desirable that the law should provide some such simple means for determining the validity of a disputed election as the procedure by *quo warranto* would afford, and perhaps this consideration may induce an amendment of the law."

The Legislature has since then had two opportunities of introducing such an amendment of the law as Wendt J. suggested. The Municipal Councils Ordinance, 1887 (No. 7 of 1887), has been repealed and re-enacted in substance by the Municipal Councils Ordinance, 1910 (No. 6 of 1910), and the Courts Ordinance of 1889 (No. 2 of 1889) has also been amended. But no remedy in the nature of a *quo warranto* has been granted. Nor has any authority other than the Chairman of the Municipal Council been constituted for the purpose of receiving and dealing with nomination papers. It may well be that the Legislature considered that, having made careful provision for the settlement of claims and objections and for the erasure of the name of a disqualified councillor by a judicial inquiry, subject in either case to an appeal to the Supreme Court, all other objections to the validity of a nomination paper might safely be left to the arbitrament of the Chairman, subject to the right of the Supreme Court to grant a mandamus where that remedy is appropriate. But, be that as it may, in spite of the pointed invitation addressed to the Legislature by Wendt J. in *In re Jaffna Local Board Election*,[1] the law stands where it did in 1907. The Supreme Court has no power to step in where the Legislature has declined to tread. Nor can I, merely because of the inconvenience or hardship which a ruling to that effect may cause to individual electors or candidates, hold that a curtailment of the statutory period for the presentation of claims and objections in connection with the preparation and certification of the revised lists is anything else or less than a denial of a substantive right, rendering any lists, in the preparation of which such an irregularity has occurred, incapable of being certified as having been prepared in accordance with the provisions of the Ordinance.

The applications are dismissed with costs.

Applications refused.

[1] *(1907) 1 A. C. R. 128, p. 133.*