Present: Dalton J.

1927.

Application for a Writ of *Mandamus* on the GOVERNMENT AGENT, Northern Province.

Village Communities Ordinance—Change of venue without written notice—Validity of election—Mandamus—*Ordinance No. 9 of 1924, ss. 9 and 10 (1).*

Where, under the Village Communities Ordinance, a meeting was held for the election of a Village Committee and the requirements of the Ordinance, applicable to such meeting, as regards written notice within the proper time of the place of meeting, were not complied with,—

Held, that the election was void.

A writ of *mandamus* would lie in such a case to question the validity of the election.

APPLICATION for a writ of *mandamus* on the Government Agent of the Northern Province directing him to convene a meeting for the election of a Village Committee for the Tellippalai subdivision of the Province in conformity with the requirements of sections 9 and 10 (1) of Ordinance No. 9 of 1924. It appeared that the Government Agent had called a meeting of the male inhabitants of the subdivision to be held at the Court of the Village Committee on May 14 for the purpose of electing a new committee in conformity with the requirements of Ordinance No. 9 of 1924. The printed notice of the meeting was dated April 9, and was posted in such places as were, in the opinion of the Government Agent, best calculated to give publicity. The meeting was also advertised by beat of tom-tom. On May 7, the Government Agent, having formed the opinion that the Court of the Village Committee would not be spacious enough to hold the people likely to attend the election, made order that the election should be held at the Maha Jana English School, which was half a mile from the originally selected venue. This change was published by beat of tom-tom, but no written notices thereof were affixed in the subdivision. On May 14th the election was held, and the present application was made to have the election declared void on the ground that the requirements of section 10 (1) of the Ordinance were peremptory so far as the place and time of the election were concerned.

H. V. Perera (with *S. Rajaratnam*), in support.

Gnanapragasam, for respondents.

Mervyn Fonseka, C.C., for Government Agent, Northern Province.

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March 30, 1927. DALTON J.—

Application for Writ of Mandamus

This application was argued before me on December 17, 1926, the parties then before me being the petitioner and the Government Agent. The petitioner moves for a writ of *mandamus* on the Government Agent of the Northern Province, directing him to convene and hold a meeting for the election of a Village Committee for the Tellippalai subdivision of the Province, in conformity with the requirements of sections 9 and 10 (1) of Ordinance No. 9 of 1924.

It does not appear from the proceedings prior to December 17 that any *order nisi* has been made, or in fact that the English practice governing these proceedings is followed here. All the petitioner has asked for in this petition is that a writ of *mandamus* do issue, and on July 20 last this Court ordered that notice thereof be served upon the respondent.

On December 17 argument at considerable length was heard on behalf of both these parties, it being contended for the petitioner that the election already held was void, and it being argued on the other side that even if the election was void (which was not conceded) the remedy of the petitioner was by *quo warranto* and not by *mandamus*.

A Village Committee of twenty-nine members was in fact elected on May 14 last, and a chairman was appointed. It was clear therefore that, assuming the petitioner was successful, and order made that the writ do issue, the rights of parties would be affected who had had no opportunity of being heard. It has been laid down in *Rex v. Bankes* [1] that in a rule for a *mandamus* to elect a mayor, a subsisting mayor *de facto* must always be a party. The principle upon which that decision proceeded govern this case also. I therefore directed that the chairman and committee, being in possession of office, should be heard, if they wished, in defence of their rights. The matter thereupon stood down for notice to be given to them.

Thereafter, on February 11 the petition came before me again. Notice has been served upon the chairman and the twenty-nine committee men, and seventeen of them appeared to oppose the petition. Counsel thereupon informed the Court that on their behalf he wished to adopt the arguments placed before the Court on December 17 by Mr. Fonseka, and that he had nothing further to add.

The facts are as follows:—Applicant is a residence of Tellippalai West, a village comprised in the Tellippalai subdivision of the Northern Province. He is also qualified and entitled to vote in the election of a Village Committee, and to be elected a member of such committee.

In May last the first election was held under the provisions of Ordinance No. 9 of 1924 of a Village Committee for the subdivision of Tellippalai. There was a committee in existence when the Ordinance

[1] *3 Burr. 1452.*

came into force, and under the provisions of section 15 of the Ordinance that committee continued in existence until June 30, 1926. It therefore became necessary, under the provisions of section 20, to elect a new committee to come into office on July 1. By section 22 (2) it is provided that such election shall be held at a place within the subdivision and shall proceed in such manner, and be subject so far as the same are applicable, to such conditions as are provided by the Ordinance in the case of meetings of inhabitants.

The conditions governing meetings of inhabitants are, so far as this application is concerned, set out in sections 9 and 10 of the Ordinance:—

> 9. The Government Agent shall, one month at least before the day of holding any such meeting, give notice by beat of tom-tom, and by causing written notices to be affixed in such places within the subdivision as are in his opinion best adapted for giving the greatest publicity thereto, of the time and place appointed for holding such meeting and of the objects for which the same is to be held, and shall, in such notices, call upon the inhabitants to attend in person at such meeting.
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> 10. (1) Every such meeting shall be held at the time and place so appointed and shall be presided over by the Government Agent.
>
> (2) Such Government Agent shall, for reasons to be recorded in the minutes hereinafter referred to, have power to adjourn any meeting, as often as need be, to a time and place to be mentioned by him at the time of directing such adjournment.

In conformity with these requirements, the Government Agent called a meeting of the male inhabitants of the subdivision to be held at the Court of the Village Committee in Tellippalai on May 14 for the following objects:—

(1) To elect a Village Committee to consist of not less than six persons to hold office for three years from July 1;

(2) To decide whether the power of making rules should be delegated to such committee; and

(3) To decide whether the chairman of such committee should be elected by the committee, or whether the chief headman of the subdivision should continue to be *ex officio* chairman.

The printed notice of this meeting is dated April 9, notices being posted in the subdivision at such places as were in the opinion of the Government Agent best adapted for giving publicity thereto. The meeting was also advertised by beat of tom-tom. The place of election thus notified was the Court of the Village Committee.

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Some time, however, between April 9 and May 7 the Government Agent formed the opinion that the Court of the Village Committee would be too small to hold the people likely to attend the election. He states that in previous years little interest was taken in the elections, but the earlier elections in 1926 in other subdivisions showed that more public interest had been aroused. On May 7, therefore, the election being fixed for May 14, he made order that the election would be held at the Maha Jana English School, which is approximately half a mile from the originally selected venue for the election. This change was published by beat of tom-tom, but no written notices were affixed in the subdivision giving notice of the change. On May 14 the election was held, 1,200 voters being present out of about 2,500 eligible voters. Votes are given by show of hands. A committee of twenty-nine members was elected, and it was decided that the Maniagar should continue as *ex officio* chairman. It is stated that a Village Committee officer was present at the Court of the Village Committee on the 14th to direct any voter who came there to proceed to the English school, but the evidence as to whether he was in fact there is contradictory. Although he may have been told to see that people who went to the Court were re-directed on to the school I am not satisfied he was there himself as he states. The evidence shows he was actually present at the meeting in the school, which is far more likely to be true. Applicant does not say whether he was present and voted, or whether he was prevented from voting by the change in venue and insufficient notice thereof. He does urge, however, that numerous voters absented themselves from the meeting as they were unaware of the change. Although there are affidavits from persons present to the effect that unauthorised persons voted, there is no affidavit by anyone entitled to vote, who did not vote, to support the allegation that anyone was prevented from attending by the change made in the place of election. It still remains to be decided, however, whether or not the election was a valid one. It seems to me that the requirements of section 10 (1) are peremptory, so far as the place and time of the election are concerned. The place appointed is the place published in the notice, of which due publication must be given at least one month before the day of the election meeting. The election was in fact held at a place of which only one week's notice was given, and that only by beat of tom-tom. There was no written notice of the change. Although the change was made in what seemed to the Government Agent the best interests of the voters, it is impossible to say that there were not voters who were misled by the change and so failed to exercise their right of voting. Whether or not the provisions of section 10 (2) are applicable to an election meeting, it is clear that the provisions of the Ordinance which are applicable to such meetings have not been

complied with as regards written notice within the proper time, of the place at which the election was held. The election was in fact held at a place which was not the place appointed. In view of the explicit terms of section 10 (1), in my opinion the election was therefore void.

Objection has been taken, however, on behalf of the original respondent that in any case a *mandamus* does not lie, and that the only remedy open to applicant is that of *quo warranto*. When this objection was taken at the argument on December 17 the twenty-nine committee men and the chairman were not parties to the application, although they had in fact been functioning since July 1 last, and no steps were taken by petitioner between May 14, the date of election, and July 8, the date of his petition. It was urged that where a person or persons has or have been elected *de facto* to a corporate office, which office has been accepted and acted in, the validity of the election and the title to the office can be tried only by *quo warranto*. If a *mandamus* is granted, it was urged it would result in a fresh election, and there would be in existence two committees and possibly two chairmen.

The questions raised are not without considerable difficulty. Mr. Fonseka relied principally upon the decision in *Application for a mandamus on the Chairman of the Municipal Council*,[1] and the authorities cited therein. But that case, it seems to me, is essentially different from this case on the facts. Here, as I have pointed out, in my opinion the election was void, whilst there it was held that the election was not merely "colourable." The gist of the decision relied upon to support the argument in this case is 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 by *quo warranto*, and a *mandamus* will not lie unless the election can be shown to be merely colourable. Wood Renton C.J. held there on the facts before him that the election was not colourable and the office was full.

I understood, however, that Mr. Fonseka was prepared to go further, and to argue that even if the election was void still the remedy of applicant was by *quo warranto*. The English authorities, however, do not in my opinion support that contention. *Regina v. Mayor of Leeds* [2] was cited. There, in an election of councillors for a ward in the borough, the presiding alderman, after the election, published, under statute, a declaration containing a list of councillors elected, including the name of one Potts. Thereafter, discovering an alleged error in counting the legal votes, the alderman signed and published a second list omitting the name of Potts and substituting that of one Richardson. Richardson attended meetings of the council and acted in the office. In proceedings for a *mandamus* on behalf

[1] *18 N. L. R. 97.*

[2] *11 Ad. & E. 512.*

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of Potts it was held that the action of the returning officer was void, and that the proceedings therefore could only be colourable, and that the proper remedy was by *mandamus*. Lord Denman C.J. had actualy suggested when the *order nisi* was obtained that counsel had better take a *quo warranto*, and added he was glad counsel had not taken his advice. This case followed the decision of *Rex v. Mayor of Oxford*.[1] There it was held that it had not been shown that the disputed election was merely colourable and void; it could not then be said that the office was not *de jure* full of the councillor in possession. There the proper remedy therefore was by *quo warranto*.

As I have already pointed out, there is no question whatsoever as to the *bonâ fide* action of the Government Agent, but that does not make the election not colourable, if in fact it is void. The remarks of James L.J. in his judgment in *Etherington v. Wilson*[2] should be read in this connection.

A second local authority relied upon for the respondents is *In re Jaffna Local Board Election*.[3] It is a decision of three Judges, and of course binding upon me. It has given me some difficulty in view of the reference to it made by Hutchinson C.J. in *Gomes v. Chairman of Municipal Council, Colombo*.[4] He is reported to state in the course of his judgment—

> "Whether or not this Court has jurisdiction, in a case of this kind where the office is full, to grant a *mandamus* for a fresh election, on the ground that the one which had been held was improperly held or was void, there is on the one hand the authority of a decision of Wendt J. reported at *9 N. L. R. 156*, and on the other hand the decision of three Judges, including Wendt J., in *1 Appeal Court Reports 128*. My present opinion is, on the authority of the last case, that the Court has no jurisdiction to grant a *mandamus* in such cases, but I will not go into that question at length, because I think that this rule should be discharged on the ground that the chairman's decision is right."

From that reference, one, so it seemed to me, might reasonably infer that the Court of three Judges held that this Court had no jurisdiction to grant a *mandamus* in a case where the office is full, even if it be held that the election was void. The learned Chief Justice was himself one of the three Judges. I have read the decision in *In re Jaffna Local Board Election* (*supra*) with the greatest care, and I must admit I can find no such conclusion. The only point decided appears to be that the Court had then no power (since given it by statute), either inherent in it or expressly or impliedly given it by statute, to issue writs of *quo warranto*. The opinion of

[1] *6 Ad. & E. 349.*
[2] *45 L. J. Ch. 153.*
[3] *1 A. C. R. 128.*
[4] *12 N. L. R. 8*

Wendt J. in *In re Denister Perera* [1] was overruled, but there is no reference to his decision in the case reported at *9 N. L. R. 156*, in which he held the election to be void and directed that a writ of *mandamus* do issue. I can find, therefore in the local decisions nothing contrary to which I conceive the law to be as laid down by the English authorities to which I have referred.

I have therefore come to the conclusion here that the proper remedy is by *mandamus*, the election already held being void. The difficulty anticipated by Mr. Fonseka, prior to my order of December 17, that the persons already *de facto* councillors and chairman be made parties to these proceedings, no longer exists.

The application is therefore granted, with costs, and the writ applied for will issue.

Rule absolute.