

1921.

Present : Ennis J.

SOYSA v. PERERA.

*Order in Council, 1920, s. 13—Qualification of elected Member of Council—
Ordinarily resident within the constituency for three years.*

Section 13 of the Ceylon (Legislative Council) Order in Council, 1920, was as follows: "No person shall be capable of being elected a Member of Council who has not been ordinarily resident within the area for a period of three years immediately preceding the date of nomination as a candidate for election."

The usual and customary residence of the respondent, who was elected as a Member of Council for Western Province (B) Division, was at Cotta (within the division), and he was nominated as a candidate on March 31. He was absent in England from July, 1915, to May, 1919, but he was under no legal obligation to stay there during that period, and was free to return at any time.

Held, that he was ordinarily resident within the area, and that he was qualified to be a candidate for election.

Actual inhabitancy during every one of the days is not necessary. It is sufficient if the claimant can make out a constructive inhabitancy. In order to make out a constructive inhabitancy there must be an intention of returning after a temporary absence and a power of returning at any time without breach of any legal obligation.

MR. WALTER DE SOYSA presented an election petition to the Governor in Executive Council complaining of the undue election of the Hon. Mr. E. W. Perera for the Western Province (B) Division, on the ground that he had not been ordinarily resident within the constituency for a period of three years immediately preceding.

Ennis J. was appointed under section 35 of the order to report on the petition.

The report sent by Ennis J. was published in the *Ceylon Government Gazette* of June 10, 1921, and is as follows:—

In the Matter of the Election for the Constituency of the Western Province (B) Division holden on April 21, 1921.

James Samuel Walter de Soysa, of Sunnyside, Moratuwa . . . Petitioner.
Vs.

Edward Walter Perera Senanayake Wijeratna Jayatilleke, presently of Cotta Respondent.

Whereas an election petition complaining of the undue election of the above-named respondent for the Western Province (B) Division, on the ground that the said respondent had not been ordinarily resident within the said constituency for a period of three years immediately preceding the date of his nomination as a candidate for election, was presented to the Governor in Executive Council on May 6, 1921, by the above-named petitioner :

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And whereas, under and by virtue of the provisions of clause 35 of the said Order in Council, the Governor in Executive Council did appoint the Honourable Mr. Justice Ennis, a Puisne Justice of the Supreme Court of Ceylon, to inquire into and report on the ground on which the validity of the said election was brought into question :

And whereas the said Honourable Mr. Justice Ennis has duly held such inquiry as aforesaid and made his report dated May 31, 1921, which is set forth in the schedule to this Notification :

And whereas the Governor in Executive Council has duly considered the said report; and decided that no further inquiry is necessary :

Now, therefore, We, Sir William Henry Manning, G.C.M.G., K.B.E., C.B., Governor as aforesaid, do hereby confirm the conclusions arrived at in the said report, and declare the said Edward Walter Perera Senanayake Wijeratna Jayatilleke to have been duly elected to serve as Member for the said Western Province (B) Division.

Given at Colombo, in the said Island of Ceylon, this Sixth day of June, in the year of our Lord One thousand Nine hundred and Twenty-one.

By His Excellency's command,

GRAEME THOMSON,
Colonial Secretary.

SCHEDULE.

The COMMISSIONER to HIS EXCELLENCY THE GOVERNOR.

Chief Justice's Chambers,
Colombo, May 31, 1921.

SIR,—IN pursuance of the Commission appointing me to inquire into and report on the grounds on which the validity of the election of Mr. E. W. Perera as Member of the Legislative Council for the Constituency of the Western Province (Division B) have been brought in question by Mr. J. S. Walter de Soysa as set out in the election petition presented by him, I have the honour to inform Your Excellency that I inquired into the matter on May 30 in the presence of Mr. B. W. Bawa, K.C., and Mr. B. F. de Silva for the petitioner, and Mr. Samarawickreme and Mr. Cooray for the respondent.

2. In the absence of any rules under section 35 of "The Order in Council, 1920," I adopted the procedure for an ordinary civil trial.

3. The following issue was framed :—

Was the respondent ordinarily resident within the area of the Western Province (B Division) for the period of three years immediately preceding March 31, 1921 ?

4. Certain other issues proposed by Mr. Samarawickreme for the respondent relating to Mr. Obeyesekere's claim to be declared elected, in the event of Mr. Perera's election being declared void, I refused to frame, as they were outside the scope of my Commission.

5. The onus of proof on the issue framed being on the respondent, Mr. Samarawickreme called Mr. E. W. Perera. After Mr. Perera's evidence had been taken, Mr. Bawa for the petitioner accepted all the facts as stated by Mr. Perera.

6. I enclose for Your Excellency's information a transcript of the shorthand notes of Mr. Perera's evidence.*

* Not reproduced.

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7. During the three years immediately preceding March 31, 1921, Mr. Perera was in England up to May, 1919, and actually lived in Cotta, within the constituency, from May, 1919, to March 31, 1921.

8. The only question for consideration was whether Mr. Perera's absence in England within the three-year period affected his claim to be elected under the provisions of the Order in Council.

9. Many cases were cited, but they all related to the right of a voter to vote by being resident within a certain district for a prescribed time, *i.e.*, cases which would be more appropriate to a consideration of section 24 (e) of the Order in Council, in which the word "ordinarily" is not found.

10. The principles to be applied in such cases were set out in the case of *Ford v. Barnes*,¹ viz. :—

- (a) That actual inhabitancy during every one of the days is not necessary.
- (b) That it is sufficient if the claimant can make out a constructive inhabitancy.
- (c) That in order to make out a constructive inhabitancy there must be an intention of returning after a temporary absence and a power of returning at any time without breach of any legal obligation.

11. In the case of *Whithorn v. Thomas*,² Erle J. said :—

"The word 'residence' comprises in some respects the ordinary idea attached to home. Sleeping in a place may not be necessary at all to constitute a residence there; the man might be absent the whole six months, perhaps from illness, but if he has all the time the intention to return, and it be occupied by his wife and family, it might still be his residence."

12. I am of opinion that the use of the term "ordinarily" found in the Order in Council to describe the kind of residence necessary to qualify for election does not make these principles any less applicable. It seems rather to point to the necessity for applying them and to indicate that the customary (or ordinary) place of residence is to count notwithstanding temporary absences.

13. In this connection the case of *Ford v. Hart*³ is instructive. In that case it appeared that an officer in the Army was in the habit of always living with his mother when on leave from his regiment, and had actually resided there during the entire period qualifying for a vote, but it was held that as he could not return at his own option, but only with the permission of his Commanding Officer, he was not entitled to vote.

14. Looking at the facts of the present case in order to apply these principles, I find that the Perera Walawwa is in Cotta, within the constituency; that the respondent has an interest in it under a *fidei commissum*, subject to a life interest in favour of his grandmother; that he has resided there, on and off, from his boyhood; that from 1910 he has paid for the upkeep of it and for the maintenance of his grandmother there; that from September, 1912, to July 2, 1915, he lived in the Walawwa; that from July 2, 1915, to May, 1919, he was absent in England, but was under no legal obligation to stay there during that period, and was free to return at any time; that on his return he went home to Cotta and found his belongings there just as he had left them; and that he has lived there ever since.

¹ 53 *Law Times* 675.

² 14 *Law Journal Common Pleas* 38.

³ 29 *Law Times* 685.

15. From these facts it would seem that the family-Walawwa was Mr. Perera's usual and customary residence. I was not impressed by the argument, addressed to me by Mr. Bawa for the petitioner, that Mr. Perera could not return to the family residence without the permission of his grandmother. I am of opinion that he had full liberty to return to the family home, and was expected to so return, without any question of permission.

16. The fact that he had lived there for some years prior to his departure for England, that he left his belongings there and returned to live there, showed that he had an intention to return.

17. It was further argued that an absence of nearly four years was too long to be merely a temporary absence. On this argument the observations of Erle J. in *Whithorn v. Thomas*¹ are in point. Mr. Perera is not a married man, but the family Walawwa was clearly his home, and he does not appear to have abandoned his intention of returning to it, or to have done any act indicative of any intention to set up a home for himself elsewhere. The home at Cotta was open to his return at any time, and he was under no legal obligation to reside in England. Mr. Perera's stay in England was, in the circumstances, but a temporary absence from his customary abiding place, to which he was at liberty to return at any time.

18. The concluding argument addressed to me was that the term "resident" was not a technical term, that it was a word adopted from the popular language, and therefore to be interpreted in its ordinary sense, and that in popular language no one would say that a person who had been absent from a particular locality for over one year out of three was ordinarily resident there for three years. This argument was a paraphrase of certain observations in one of the judgments in *Whithorn v. Thomas*.¹ The original observations were based on the facts of that case, where an attempt had been made to obtain the residential qualification by renting a small closet in the residential area and sleeping there for a few nights away from home during the period, *i.e.*, sham circumstances with an absence of any real intention to live in the place, I gathered that the argument really meant that there must be some period of actual occupation, and that the whole term cannot be made up of constructive residence. In the present case there is an actual residence in Cotta of nearly two years within the three-year period, so I am unable to see the application of the argument to the facts in this case. Here there was an actual residence at Cotta for a long period immediately before and immediately after the period of absence, an intention to return, and no legal impediment either at Cotta or in London to prevent the return. There was nothing sham about the actual residence, and there is a clear case of constructive residence, which, in my opinion, would not be set aside on a "popular" construction of the words "ordinarily resident," for even such a construction recognizes that some absences, *e.g.*, from illness, can be made without affecting the real residence of a person, and the legal principles merely enunciate the rules for such a construction.

19. I would answer the issue in the affirmative, and have the honour to report accordingly.

I have, &c.,

G. F. M. ENNIS,

Acting Chief Justice,
Commissioner.

¹ 14 *Law Journal Common Pleas* 38.

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