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Present: The Hon. Mr. A. G. Lascelles, Acting Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

IN the Matter of an Application under Section 46 of "The Courts Ordinance, 1889," and under "The Municipal Councils' Ordinance, 1887."

G. E. ABEYEWARDENE *v.* THE CHAIRMAN OF THE MUNICIPAL COUNCIL, GALLE, AND F. E. ABEYESUNDARA.

Quo warranto—*Jurisdiction of Supreme Court—Refusal to inquire into claim to vote—Dicision of Chairman—Conclusiveness—Persons acquiring qualification subsequent to preparation of revised list—Municipal Councils' Ordinance* (*No.* 7 *of* 1887), *ss.* 22 *and* 38—*Courts Ordinance* (*No.* 1 *of* 1889), *s.* 46.

Held, that section 38 of "The Municipal Councils' Ordinance, 1889," which enacts that "the Chairman shall immediately notify the fact of a vacancy to the Governor, and if the vacancy be of an elected Councillor shall take the necessary steps for holding an election," does not apply where the election is held in pursuance of an order of the Supreme Court; and that, even if it did apply, an election will not be set aside on the ground of irregularity, unless such irregularity has affected the result of the election or has given rise to some unfairness or mischief.

Reg. v. Cousins (1) and *Reg. v. Ward* (2) followed.

Section 22 of Ordinance No. 7 of 1887 enacts as follows:—

"If at any such election any question shall arise as to the identity or right of any person claiming to be qualified to be elected or to vote, the President shall have power to inquire into the same and, if it appears expedient to him, to administer an oath or affirmation to any person present at such meeting whom he shall think fit to examine with reference to such claim. Any person giving false evidence on oath or affirmation at such inquiry shall be liable to be prosecuted under the provisions of the Ceylon Penal Code. The decision of the President on any such claim shall, for the purpose of the said meeting and no further, be final."

Held, that this section was intended to empower the Chairman to investigate the claims of persons who had acquired qualification after the preparation of the revised lists, or who, being disqualified at that date, had since got rid of their disqualification, and not to compel the Chairman to investigate the claims of persons whose names are omitted from the revised list, without any good cause for such omission.

Held, also, that a decision of the President, acting under the above section, is final and conclusive, and not liable to be reviewed by the Supreme Court.

(1) 42 *L. J. Q. B.* 124. (2) *L. R.* 8 *Q. B.* 210.

Reg. v. Collins (1) followed.

In the matter of the application for a writ of quo warranto *to declare the election of Danister Perera as Member of the Municipal Council of Galle null and void* (2) overruled.

Quære, by Lascelles A. C. J. and Middleton J., whether the Supreme Court has power, under section 46 of the Courts' Ordinance (No. 1 of 1889), to issue a prerogative writ in the nature of *quo warranto*.

THIS was an application for the issue of a mandate in the nature of *quo warranto* calling upon the respondents to show cause why the election of the second respondent as a member of the Municipal Council of Galle should not be declared void. The grounds of the application are stated in the following petition filed by the applicant:--

"1. The petitioner is a person duly qualified to be elected a Councillor of the Municipal Council of Galle under the provisions of section 9 of the Municipal Councils' Ordinance, No. 7 of 1887 (hereinafter called the Ordinance).

"2. That the triennial election of a Councillor for ward No. 5, or the Kumbalwella Ward, for the years 1906—1908 was duly held on the 4th day of December, 1905, when the petitioner was duly elected member for the said ward.

"3. That thereupon the second respondent challenged the validity of the said election and obtained a mandamus from this Court declaring your petitioner's election void and directing the Chairman, the first respondent, to hold a meeting to elect a member for the said ward.

"4. That the Chairman, first respondent, purporting to act in obedience to the writ of mandamus issued by this Court, advertised for and held a meeting for the election of a Councillor for the said Kumbalwella Ward, or ward No. 5, on the 10th day of March, 1906.

"5. That no notice of the vacancy caused by the judgment of this Court was given to the Governor as required by section 38 of the Municipal Councils' Ordinance.

"6. That the election so advertised for was illegal and not provided for by the Ordinance, and counsel on behalf of the petitioner protested against and objected to the holding of the election.

"7. That the proper procedure for filling up the vacancy caused by the judgment of this Court is by nomination by the Governor, as provided for by section 24 of the Ordinance.

"8. That the petitioner's protest and objection to the holding of the election were overruled, and the Chairman proceeded to hold the same.

(1) *L. R.* 2 *Q. B. D.* 30.

(2) (1906) 9 *N. L. R.* 142.

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" 9. At the election two candidates were duly proposed and seconded as Councillors for the said ward No. 5, one of whom was the petitioner and the other was Frederick E. Abeyesundara, the second respondent abovenamed.

" 10. That at the said election, after the votes of persons whose names appear in the certified list made under section 43 of the Ordinance had been recorded, petitioner tendered the votes of persons whose names do not appear in the said certified list above referred to, but who claimed the right to vote under section 22 of the Ordinance.

" 11. The second respondent objected to the votes of such persons being received or inquired into, and the Chairman, first respondent, upheld the objection and refused to consider their claims to vote in the following terms: ' In accordance with the ruling of Mr. Justice Wendt, I rule that I can inquire into the claims only of such voters who may have acquired the right to vote subsequent to the publication of the revised list certified under the hand of the Chairman.'

" 12. That the Chairman's ruling is wrong and the said votes have been wrongly and improperly rejected.

" 13. That in consequence of the rejection of the said votes, the second respondent was improperly elected by a majority of 7 votes, the petitioner having polled 27 and the second respondent 34.

" 14. That the voters whose claims the Chairman refused to consider are fifteen in number and were duly qualified to vote under section 11 of the Ordinance.

" 15. That if the said votes had been accepted, petitioner would have been elected by a majority of votes.

" 16. The second respondent has not been elected by a majority of legal votes, and at the election referred to the petitioner had a majority of legal votes.

" 17. The second respondent has accepted and acted in the office of Councillor of the Municipal Council of Galle and attended a meeting of the said Council on the 17th day of March, 1906, and taken part in the proceedings thereof.

" 18. A certified copy of the proceedings of the election is hereto annexed marked A.

" Wherefore petitioner prays—

" (1) That a mandate in the nature of a *quo warranto* do issue on the respondents to show by what authority the second respondent claims to have, use, and enjoy the office, liberties, and privileges of a member of the Municipal

Council of Galle, and why his election should not be declared null and void and the second respondent declared not entitled to have, use, and enjoy the office, liberties, and privileges aforesaid.

"; (2) For costs of these proceedings; and

" (3) For such other and further relief as to Your Lordships shall seem meet."

Bawa (with him *A. St. V. Jayewardene*), for the applicant.

Walter Pereira, K.C., S-G. (with him *F. J. de Saram*), for Abeyesundara.

Van Langenberg, for the Chairman.

Cur. adv. vult.

29th August, 1906. LASCELLES A.C.J.—

This is a petition for the issue of a mandate in the nature of *quo warranto* calling upon the respondents to show cause why the election of the second respondent as a Member of the Municipal Council of Galle should not be declared void.

The first objection to the election of the second respondent is taken on the ground that the Chairman did not comply with section 38 of Ordinance No. 7 of 1887 by immediately notifying the fact of the vacancy to the Governor. In my opinion the provisions of section 38 are not applicable to a case like the present one, where the election was held in pursuance of the order of this Court. But, assuming that this section is applicable to the present case, it is quite clear that non-compliance with its provisions would not entitle petitioner to have the election vacated.

The issue of a writ of *quo warranto* is within the discretion of the Court; and the Court will not set aside an election merely because there has been an irregularity; it must be shown that the irregularity affected the result of the election, or gave rise to some unfairness or mischief: *Reg. v. Cousins* (1) and *Reg. v. Ward* (2). There is no proof that the delay on the part of the Chairman in giving notice of the vacancy to the Governor in any way affected the results of the election or prejudiced the rights of the petitioner with regard to the election.

The election is also impeached on the ground that the Chairman improperly rejected certain voters who claimed, under section 22 of the Ordinance, to be qualified to vote. It appears that petitioner, after the votes had been counted, applied to the Chairman to record the votes of some fifteen persons whose names were not on the

(1) 42 *L. J. Q. B.* 124. (2) *L. R.* 8 *Q. B.* 210.

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revised list, but who were prepared to establish their qualification to vote. The Chairman rejected these votes considering that under a previous ruling of this Court he could inquire only into the claims of persons who had acquired their qualification after the publication of the revised list of voters. It was not claimed, with regard to any of these voters, that they had acquired their qualification after the publication of the list, nor was any special reason advanced for their omission to have their names placed on the list.

In my opinion the decision of the President under section 22, so far as it affected the election then being carried on, is not liable to review by this Court. The guiding principle as laid down by Mellish L.J. in *Reg. v. Collins* (1) is that what is done ministerially by the Chairman may be questioned, but, if he acts judicially, then his decision is binding and conclusive unless an appeal is given. That the duties of the President under section 22 are judicial and that the President in this case acted judicially is beyond question.

In the judgment of this Court on the application of Danister Perera (2), the jurisdiction of this Court to review the decision of the President under section 22 was founded upon the concluding sentence of that section, which runs as follows:—" the decision of the President on any said claim shall *for the purpose of the said meeting, and no further, be final and conclusive.*"

I cannot read the words " for the purpose of the meeting and no further " as indicating an intention on the part of the Legislature that the President's decision shall be subject to appeal or review.

What is denoted by the words " for the purpose of the said meetting?" Surely the election for which the meeting is held. The natural meaning of the words, I think, is that for the purpose of the meeting, that is for the election then in hand, the President's decision as to the qualification of a claimant to vote is final, but that the decision only holds good for the purpose of that particular election and is not a final adjudication on the claimant's status as a voter. The President was given a power of summarily deciding claims made in the course of an election, and in order to prevent the litigation and delay which would follow if the decisions were subject to review, the decision was made final, but with the view to minimize the risk of injustice being done in the course of what must necessarily be a hasty inquiry, the effect of the decision is limited to the election then being held.

With regard to the contention that it is the duty of the President under section 22 to inquire into any claims to vote made by persons whose names are not on the voting list, without any special reason

(1) *L. R.* 2 *Q. B. D.* 30. (2) (1906) 9 *N. L. R.* 142.

for the omission of their names from the voting lists, it would in my opinion be unreasonable and contrary to the tenour of the Ordinance to impose such a duty on the President. Claimants to vote have the fullest opportunity of asserting their claims at the annual revision of the voters lists. If all persons who have omitted to have their names placed on the list in the manner provided by the Ordinance are allowed to assert their claim to the President on the day of the election, the whole machinery of the Ordinance will be dislocated and an intolerable burden placed upon the President. It is obviously impossible for that officer, at the time when an election is being actually carried on, to investigate any considerable number of claims. It is reasonable and consistent with the Ordinance that the President should investigate the claims of persons to have acquired qualification after the review of the revised lists, and the claims of persons who, being disqualified at that date, have since got rid of their disqualification. There may be other claims, such as that of a person to vote from a Joint Stock Company under section 13, into which the President should inquire under section 22, but in my opinion the President was right in refusing to entertain the claims of persons who did not show some special reason for the absence of their names from the voters' list.

I would discharge the rule with costs. I wish to add that, although the jurisdiction of this Court to issue a mandate in the nature of *quo warranto* was not questioned by the respondents, I have grave doubts whether we possess any such jurisdiction. I cannot assent to the view that section 46 of "The Courts Ordinance, 1889," gives this Court jurisdiction with regard to prerogative writs other than those specified in the section. The expression "mandates in the nature of mandamus, &c.," is a form of words which is to be found in the enactments relating to this Court from the Charter of 1801 onwards. In the Charter of 1833, for example, clause 49 authorizes the issue of "mandates in the nature of Habeas Corpus," the meaning obviously being that the mandate shall be in effect, though not necessarily in form, the same as the corresponding English writ.

The words "in the nature of" in section 46 of the Courts Ordinance have clearly the same meaning, and should not be construed so as to enlarge the enumeration of prerogative writs given on the section.

The question whether this Court has inherent jurisdiction in this respect is one on which I am not prepared to express an opinion without full argument.

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I have thought proper to place on record the doubts which I entertain on this point, which is of considerable constitutional importance, lest it should be argued hereafter that this Court at a full sitting has unanimously affirmed its power to issue mandates in the nature of *quo warranto*.

MIDDLETON J.—

The only question in this case which was reserved for the opinion of the Full Court was whether the decision of the Chairman of a Municipality under section 22 of Ordinance No. 7 of 1887 can be called in question through the medium of proceedings in the nature of *quo warranto*, or whether they are absolutely final as the section expresses them to be.

The other points were not argued before me, and I am not in a position, nor do I propose, to go into them.

Under section 22 the President has power to inquire into any question that shall arise as to the identity or right of any person to be elected or to vote, and if it appears expedient to him to administer oaths and affirmation to any person present whom he shall think fit to examine with reference to such claim.

It is clear then that his functions are judicial and not ministerial, and even more so than the terms of section 27 of 11 and 12 Victoria ch. 63 made the Chairman's functions in England on the construction of which the decision in *Reg. v. Collins* (1) was given.

In that case it was held, in the words of Lord Justice Mellish, that where a statute appointed a particular person as the tribunal to decide the validity of the votes, *i.e.*, the Chairman, the ordinary distinction holds good that what is done by an officer ministerially may be questioned, but if he acts judicially his decision is binding and conclusive unless an appeal is given.

Here the President, who was the Chairman of the meeting at which the election was held, gave a decision based on the ruling of a Judge of this Court. It cannot be doubted that, whether he decided rightly or wrongly, he gave a decision as a Judge would on the best legal authority produced before him.

In the words of Lord Justice Mellish " notwithstanding the imperfection of the tribunal, I am of opinion that the certificate is conclusive, and the Legislature may well have thought the expense, delay, and inconvenience of further inquiry outweighed that objection."

The meeting at which the decision was given was that held for the purposes of the election, in fact the election itself, and it appears

(1) *L. R.* 2 *Q. B. D.* 30.

to me clear that the word " meeting " in section 22 must be construed to mean the election as determined at that meeting.

I fail, moreover, to see any merits in the case disclosed by the petitioner. No claim was made to the President that the fifteen voters had acquired their qualification subsequent to the certifying of the lists, and it seems to me that if they had not they had only themselves to blame for not being in the voters' lists.

It could never also have been the intention of the Legislature that those persons who had not taken the trouble to conform to the regulations for recording their capacity to vote should be allowed to make their claims on the very day of the election. If so the clauses in the Ordinance as to the preparation of the lists are mere surplusage.

I think that the President was right in refusing these persons a right to vote unless they showed some good cause why their names had been omitted from the voters' lists, and I would discharge the rule with costs.

In regard to the jurisdiction of this Court to issue writs in the nature of *quo warranto*, I share with the Chief Justice—and for the same reasons—the doubts he has expressed that under section 46 of the Courts Ordinance, the Supreme Court of Ceylon has power to issue such writs. Whether the Court has inherent jurisdiction to issue them, I am not without further argument prepared to hold.

WOOD RENTON J.—

The question of the jurisdiction of the Supreme Court to grant mandates in the nature of *quo warranto* was not argued before us. I see no reason meanwhile to alter the opinion that I have already expressed on the subject [*In re Galle Municipality Election* (*No.* 1) (1) *In re Galle Municipality Election* (*No.* 2) (2)]. But I do not propose to discuss it further now. The issue may, at some future time, come up for formal determination by the Full Court, and, lest I should happen to be one of the Judges who have to decide it, I should wish to be able to consider it, as far as possible, with an open mind. I am the more disposed to this course because of what has been said on the question by my Lord the Chief Justice and my brother Middleton. For the purpose of the present judgment, I assume that the jurisdiction exists. The only issues that we have now to decide are these. I shall express my opinion on each of them in stating it:—(i.) Under the circumstances before us, was the President acting judicially or ministerially ? I think that he was acting judicially. He was interpreting a decision of the

(1) (1905) 8 *N. L. R.* 300. (2) (1906) 9 *N. L. R.* 142.

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Supreme Court. That is a judicial act. Before passing from this point I may say that I think that (*a*) at any inquiry, under section 22 of the Municipality Ordinance, the President may take cognizance of the claims of electors or voters whose title to be elected or vote has arisen, or whose disqualification for so being elected or voting has ceased, since the adjustment of the lists—this is, I think, a fair inference from the decision in *Whally v. Bramwell* (1), though it was only an action for penalties; and (*b*) persons who without reasonable cause fail to secure the registration of their names have no *locus standi* under the section. (ii.) If the President is acting judicially and not ministerially, can any decision of his under section 22 be challenged in the Supreme Court ? Clearly, it cannot be challenged by appeal. A right of appeal must be conferred in express terms. But can it be revised by means of a mandate in the nature of a *quo warranto*? The answer to that question depends on whether the present case is distinguishable from *Reg. v. Collins* (2). *In re Galle Municipality Election* (No. 2) (3), my brother Wendt and I held that it was. The concluding paragraph of section 22 makes a decision under it " final for the purpose of the said meeting and no further." It appeared to me (as Wendt J. is not sitting in the present case, I speak only for myself) that the effect of this provision was to limit the conclusive character of decisions under the section to the actual election itself. The proceedings were not to be arrested by any such application as is now before us; the election was to be validly completed, and nothing done in consequence of it would be affected by the result of any subsequent proceedings. A decision under the section would not be appealable in the absence of an express creation of a right of appeal. But the Court in its discretion could revise it on *quo warranto*. I confess that I see nothing absurd or strained in this construction of the section, and certainly nothing obvious in the alternative construction, which requires us to read the concluding paragraph of section 22 either as "final for the purpose of the purpose of the said meeting," or as " final for the purpose of the said *election*." If I could have found in the preceding sections the origin of the words " the said meeting," or any clear distinction drawn between the meeting and the election, I should have been in favour of holding the Legislature to the words that it has used, in their ordinary English acceptation, leaving it, if it thought proper, to amend the Ordinance and to express its meaning in unequivocal terms. But, after careful reconsideration, I have failed to discover any clear line of distinction in the earlier sections between the " meeting " and the " election," and I have therefore come to the conclusion that

(1) (1850) 15 *Q. B.* 775. (2) (1876) 1 *Q. B. D.* 336, 2 *Q. B. D.* 330.
(3) (1906) 9 *N. L. R.* 142.

the limitation which I placed on section 22 cannot be maintained. It follows that the present case is indistinguishable from *Reg. v. Collins* (*ubi sup.*), and that *quo warranto* will not lie. The reasoning in *Reg. v. Collins* derives support, by way of analogy, from another branch of prerogative law. In *Cushing v. Dupuy* (1) it was held by the Privy Council that the prerogative right of the Crown to grant special leave to appeal in civil cases was not excluded by a statutory provision that the judgment of the Canadian Court of Appeal in matters of insolvency should be "final and conclusive". But in *Theberge v. Laudry* (2), the same tribunal pointed out that the well-known rule as to express words being necessary to bar the prerogative of the Crown might not apply to the construction of a statute in which the Legislature created a special judicial body for the determination of questions of election law, if the fair inference from the language of the enactment was that the decisions of that body were meant to be final. I desire to add something on the argument *ab inconvenienti* with which the learned Solicitor-General pressed us. He told us that if we held that decisions under section 22 could be challenged, the Court would be flooded with applications like the present. I am not impressed with the reality of this prospect. Like many imposing apparitions, if it is steadily looked at, it soon assumes, I think, strictly normal proportions. The Court is strong enough to protect itself against any such inundation if, and when, it arises. The issue of a writ of *quo warranto* is discretionary. A comparatively small body of judicial decisions would settle the class of cases in which it could be successfully applied for. And there are well-recognized means of dealing with vexatious litigants and abuse of process. On the other hand, if we are to take account of considerations *ab inconvenienti*, there are serious practical objections to the view of the law which *Reg. v. Collins* compels us to adopt. It bars *quo warranto* equally under section 22 and under section 33, which deals with the disqualification of Councillors. Now, as every lawyer knows, questions as to title to be elected or to vote, and more particularly questions as to the existence of disqualifying contracts, are not matters of which any man of ordinary intelligence can dispose by the light of nature. They frequently present difficult and important issues of law. The effect of our present decision is that all such questions arising under sections 22 and 33 will be finally decided by an officer who is not necessarily a lawyer, and, for the most part, will be so decided in the hurry and in the electric atmosphere of a contested Municipal election. Take the case of an application to the Chairman under section 33 for the erasure of the

(1) (1880) 5 *A. C.* 409.

(2) (1876) 2 *A. C.* 102.

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name of a Councillor alleged to be interested in a disqualifying contract. The section gives a right of appeal if the name is erased. But suppose that the Chairman maintains it and makes a mistake in doing so, what is the remedy? None. There is no appeal. *Quo warranto* will not lie. There can be no prosecution for penalties under section 34 during the period for which the Councillor is elected, for the decision upholding his qualification is final. And, even after that period has expired, what Court would convict him of having "knowingly" acted while disqualified, in view of the previous judicial decision in his favour? I am not prepared to say that any difficulty which the Supreme Court could have encountered in coping with applications for *quo warranto* outweighs the risks incidental to the unchecked growth of a body of Municipal election law under such auspices.

Subject to these observations, I concur in the judgment of the Court, on the only points now before us.