Present : Mr. Justice Wood Renton.

1908.
October 31.

In the Matter of an Application under Section 42 of Ordinance No. 7 of 1887.

GOONEWARDENE *et al. v.* THE CHAIRMAN, Municipal Council, Galle.

Municipal Councils' Ordinance (No. 7 of 1887), ss. 13, 15, 16, 17, 18, 41, and 42—Refusal to insert names of voters—Application to the Supreme Court—Jurisdiction of Supreme Court.

The Supreme Court has no power to revise orders made by the Chairman of the Municipal Council, under section 42 of Ordinance No. 7 of 1887, refusing to insert the names of voters in the list prepared for the triennial elections.

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October 31.

APPLICATION by a number of voters in Ward No. 5 of the Municipality of Galle to revise certain orders made by the Chairman, under section 42 of the Municipal Councils' Ordinance (No. 7 of 1887), refusing to insert their names in the triennial list of voters.

H. Bartholomeusz, for the applicants.

W. S. de Saram, for the Chairman.

Cur. adv. vult.

October 31, 1908. WOOD RENTON J.—

In the present case, I am invited on behalf of a number of voters in Ward No. 5 of the Municipality of Galle to revise certain orders made by the Chairman, under section 42 of the Municipal Councils' Ordinance, No. 7 of 1887, refusing to insert their names in the triennial list of voters which has been prepared with a view to the ensuing Municipal elections. At the very threshold of the case I am faced with the question whether, under the law as it now stands, the Supreme Court has any jurisdiction to entertain such an application at all. I am indebted to Mr. Bartholomeusz for having put clearly and forcibly before the Court all that can be urged in favour of an affirmative answer to this question. But I have come to the conclusion that it must be answered in the negative; and I propose to state the grounds of my decision as clearly and as briefly as I can.

Sections 13, and the following sections of the Municipal Councils' Ordinance provide machinery for the settlement and publication of the list of persons who are respectively entitled to be elected and to vote on the original constitution of a Municipality. As they stood in the unamended Ordinance of 1887 ; sections 15 to 18 enabled any voter (I am confining myself to the particular class of case now before me) who was dissatisfied with the omission of his name from the original list to apply in writing within seven days from the date of the publication of the notice of its completion, to the Chairman or Government Agent, whoever should have prepared the list, in question, to have his name inserted in such list, and in the event of his application being refused, he had the right to apply to a Magistrate—a term defined in section 3 of the Ordinance as the Police Magistrates having jurisdiction within the Municipality—for an order for its insertion. The Ordinance went so far as to provide for a summary inquiry by the Magistrate into the merits of the application, and empowered him, after such inquiry, to make such order, as to the insertion or omission of the name of the applicant, and as to the payment of the costs of the inquiry, as he thought just. And it further provided that, such order, "if it direct the insertion of any name in such list," shall be forthwith complied with "by the Chairman or the Government Agent, as the case may be."

Section 42 of the original Ordinance dealt with a different state of things. It related to the new lists of voters which, under section 41, the Chairman is directed to prepare with a view to the triennial election in the month of September in every third year; and it provided that any person claiming to be qualified to vote, whose name had been omitted from such list, may, "in accordance with the provisions contained in sections 15 and 16, apply to the Chairman to insert any such name, and, if need be, to a Magistrate for an order of insertion; and every order made by such Magistrate on any such application directing the insertion of any name in the said list shall be forthwith complied with by the Chairman." It was conceded, if I understood him aright, by Mr. Bartholomeusz in one part of his argument that the effect of the reference back, in section 42, to the provisions of sections 15 and 16 was to confer on the Magistrate an appellate jurisdiction in regard to decisions of the Chairman under the first of the three sections, which I have just named. He contended, however, that sections 15, 16, and 42 must be read as a whole; that section 42 is the accessory to sections 15 and 16; and that, but for the existence of these later sections, and the incorporation of their provisions in section 42, there would be no right of appeal under that section from the Chairman to the Police Magistrate.

I will take this argument as it stands, and proceed to consider its legal effect on the changes which have been made in the Municipal Councils' Ordinance of 1887 by Ordinance No. 1 of 1896. This case has come before me on circuit and I have unfortunately been unable to obtain access in Tangalla to the Volume of Ordinances for the year 1896, in which Ordinance No. 1 of that year must have been textually published. It is true that the Ordinance has been scheduled in part of that of 1887 at pages 346 to 354 of the 2nd volume of the Revised Edition of the Legislative Enactments of the Colony; but in the reprint there given, the very sections which are of importance here are not reproduced. At the same time through the whole argument before me this morning, it has been assumed that the affect of Ordinance No. 1 of 1896 on the material sections of the Ordinance of 1887 has been correctly set out in the amending text of that Ordinance itself, and as it is necessary that this case should be disposed of to-day, in view of the provisions I decide it on that basis.

Prior to the enactment of the Ordinance No. 1 of 1896, I take it that there were two independent rights of appeal created by and existing under the Ordinance of 1887. In the first place, there was the right of appeal in connection with the omission of names from the lists of voters in a newly-constituted Municipality. In the second place, there was the right of appeal under section 42 as regards the omission of names from the new lists, for whose preparation provision was made in section 41. In each of these cases the right of appeal was to the Police Magistrate. But there

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was a difference between the two sections of provisions in regard to what I may call the Court of first instance. In cases coming under sections 15 and 16 it was competent for the dissatisfied voter to apply either to the Chairman or to the Government Agent, whereas, in cases coming under section 42 provision was made for applications for the insertion of names being presented to the Chairman alone. If I had to construe the provisions of sections 15 and 16, on the one hand, and section 42 on the other, in the original form, I should have been disposed to hold that they create entirely independent rights of appeal, and that the express interference of the Legislature with one of those rights could have no effect by implication upon the other. It may be true, as Mr. Bartholomeusz argued, with so much force, that, in order to find the right of appeal to the Magistrate under section 42, you have to fall back on the provisions of sections 15 and 16, although, I am not sure that the language of the last clause in section 42 which directs the Chairman, in terms closely following the words used in section 17, to "comply forthwith" with any "order" for the insertion of a name, which the Police Magistrate may have made, taken in conjunction with very different language used by the Legislature, for example, in the amendment, by section 8 of Ordinance No. 26 of 1890, or section 130 of the Ordinance of 1887, when it intended to create powers of a concurrent character, would not be sufficient of itself to create an independent right of appeal. But however that may be, it is clear to my mind that when once a right of appeal under section 42 of the Ordinance of 1887 had been constituted, it was a right, separate and independent from that created by sections 15 and 16 although subject to the same conditions as to the time within which it must be exercised, and as to the form of the inquiry in which it was to be adjudicated upon. We have to turn now to the provisions of Ordinance No. 1 of 1896, and we find that what the Legislature has done in that enactment is to substitute in the case of applications under sections 15 and 16 of the Municipal Councils' Ordinance, an appeal summarily to a Judge of the Supreme Court for the former application to a Magistrate. The Ordinance of 1896 has, however, left the provisions of section 42 severely alone; and as a matter of statutory interpretation, I am unable to hold that the Supreme Court has any jurisdiction to entertain applications under that section. Apart from mere considerations of statutory construction, there may be, I think, substantial grounds of policy to which the silence of the Legislature in 1896 in regard to cases coming under section 42 may be attributed. It may well have been thought desirable that when the original list of electors and of voters in a new Municipality were being settled there should be a right of appeal to the Supreme Court, which would be quite unnecessary when the limits of the electorate in the new body had once been fairly established. But whether

intentional or inadvertent, the fact of the silence of the Legislature remains.

I will say one word in conclusion with regard to the alternative ground on which, although somewhat faintly, Mr. Bartholomeusz at the close of his argument rested his case. He said, in effect, that the language of section 42 is insufficient to create a right of appeal, and that all that it did, at least in the absence of corroboration from sections 15 and 16, was to invest the Magistrate with a concurrent jurisdiction, if the Chairman of the Municipal Council, owing to absence or some other cause was unable or unwilling to act, and that as it was clearly intended in 1896 to give a right of appeal under section 42, the court should supply the hiatus. I have already touched incidentally on this branch of Mr. Bartholomeusz's argument in dealing with what is really the substantial case put forward by the applicants, and I will now only add that, if it were sound, it appears to me that there would still be no right of appeal under section 42 at all. It is clear law that a right of appeal must be created by language which, if not express, is at least strong enough for the purpose, and if the Chairman and the Magistrate possess, under section 42 of Ordinance No. 7 of 1887, only a concurrent jurisdiction, there is, in my opinion, nothing in sections 15 and 16 as amended by Ordinance No. 1 of 1896 which could confer the right for which the appellants contend. As I have already pointed out, under those sections in their original form, the dissatisfied voter may apply either to the Chairman or Government Agent, the appeal is to the Magistrate, whose decision (see section 18) is final. I confess that I do not see how from the mere reference to sections 15 and 16, which we find in section 42, it would be possible to hold that the right of appeal created by the two former sections in their amended form is carried forward by necessary implication into the latter. We could still find a clear and simple interpretation of the reference, in section 42, to the provisions of sections 15 and 16 in the intention of the Legislature to impose the same conditions as to the time within which application to the Chairman must be made, and the form of application itself in the case of both the classes of procedure which the Ordinance prescribes. If there was no appellate jurisdiction under section 42 in its original form, assuredly none is created by Ordinance No. 1 of 1896. I have endeavoured to touch upon all the points that were pressed upon me in the course of the argument.

The applications are therefore dismissed, and I think that they must be dismissed with costs.

Applications disallowed.

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Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice.

IN the Matter of the Application of Allanson Herbert Gomes of Bambalapitiya, Colombo, for a writ of *Mandamus* on the Chairman of the Municipal Council of Colombo, and in the Matter of the Election of a Councillor for the Colpetty Ward.

ALLANSON HERBERT GOMES of Bambalapitiya..... Petitioner.

Vs.

(1) THE CHAIRMAN of the Municipal Council of Colombo ; (2) Dr. DAVID ROCKWOOD of Maradana, Colombo.....Respondents.

Municipal election—Mandamus—Quo Warranto—*Elections under ss. 37 and 40 of Ordinance No. 7 of 1887—Proxies—Conclusiveness of Chairman's order.*

Where a statutory election has taken place and an office is full, the remedy of *mandamus* does not lie.

A proxy granted by a person for the purpose of voting at an election to be held as provided by section 37 of the Municipal Councils' Ordinance (No. 7 of 1887), cannot be made use of for the purposes of an election held under the provisions of section 40 of the said Ordinance.

ON December 15, 1908, the Supreme Court (Hutchinson C.J. and Wood Renton J.) issued an Order *Nisi* on the respondents in the following terms :—

" Upon reading the petition and affidavit of Allanson Herbert Gomes (copies whereof are hereto annexed), and upon hearing counsel on behalf of the said Allanson Herbert Gomes, it is ordered that the Chairman of the Municipal Council of Colombo and Dr. David Rockwood of Maradana do show cause before Our Supreme Court at Hulftsdorp on Monday, January 18, 1909, at 11 o'clock of the forenoon, why a writ of *mandamus* should not issue directing the Chairman of the Municipal Council of Colombo (1) to accept the 726 votes, and to declare Dr. William Paul Rodrigo duly elected as member of the Municipal Council of Colombo for the Colpetty Division of the Municipality for the triennial period commencing January 1, 1909, or in the alternative (2) why a writ of *mandamus* should not issue directing the said Chairman to hold a fresh meeting for the election of a member for the said Colpetty Division of the Municipality of Colombo for the triennial period aforesaid."

The affidavit referred to was as follows :—

"I, Allanson Herbert Gomes of Bambalapitiya, Colombo, being a Christian, make oath and say as follows :—

"1. That I am a resident in the Colpetty Division of the Colombo Municipality, and am a person duly qualified under section 11 of Ordinance No. 7 of 1889, as amended by section 2 of Ordinance No. 26 of 1890, to vote at the election of a member of the Municipal Council of Colombo for the said Division, and my name appears in the certified list prepared under sections 41 and 43 of Ordinance No. 7 of 1887 as a duly qualified voter.

"2. That the meeting for the triennial election of a Councillor for the Colpetty Ward for the years 1909, 1910, 1911 was held on December 5, 1908, at the Town Hall, Colombo.

"3. That in the exercise of my right as a voter, I duly executed a power of attorney appointing the Hon. Mr. Abdul Rahiman, M.L.C., or in his absence R. H. Morgan, or in his absence Dr. J. B. D. Fairlie, or in his absence J. E. Richard Pereira, or in his absence L. W. A. de Soysa, or in his absence J. P. de Vos, or in his absence A. E. de Silva, or in his absence J. C. Ebert, or in his absence S. L. Neina Marikar, or in his absence T. A. J. Noorbhai, or in his absence H. J. Pieris, or in his absence C. A. Pereira, or in his absence J. H. Senanayake, or in his absence D. Frederick Pereira, or in his absence William Dias, or any one of them my agent to appear at the said meeting to be held on December 5, 1908, and to vote thereat for the election as Councillor of the said Division of Dr. William Paul Rodrigo, he being a person duly qualified to be elected as Councillor for the said Division under section 9 of Ordinance No. 7 of 1887, and fully and effectually to all intents and purposes as I might or could lawfully do if present at the said election and voting in person, I hereby ratifying, confirming, and agreeing to allow, ratify, and confirm all and whatsoever might be done in the premises by my agents aforesaid or any of them. The printed portions of documents A and C annexed to the certified copy of the minutes filed herewith marked Z are a true copy of the form of the power of attorney executed by me as aforesaid.

"4. That at the time of signing the said power of attorney, I was fully aware that there was no meeting to be held for a bye-election, as provided for under section 37 of Ordinance No. 7 of 1887, and that the only meeting to be held on December 5, 1908, was the usual meeting for the triennial election of a Councillor for the Colpetty Division, and that I fully intended that the said agents or agent should, on the authority of the said power of attorney, vote for me at the said triennial meeting, and no other. That the said meeting was duly advertised by the Chairman of the Municipal Council, Colombo, both in the *Government Gazette* and in the local newspapers, and it was a matter of common notoriety that the

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meeting that was to be held on December 5, 1908, was for the purpose of electing a Councillor for the Colpetty Division for the triennial period aforesaid, and it was the only meeting so advertised.

"5. That I am credibly informed and verily believe, and the minutes filed herewith marked Z prove, that at the said meeting that was held on December 5, 1908, 94 personal votes tendered on behalf of the said Dr. William Paul Rodrigo were registered, and 726 votes of persons, including myself, duly qualified to vote for the election of a Councillor, were duly tendered by agents holding duly executed powers of attorney in favour of the said Dr. William Paul Rodrigo, and proxies or powers of attorney representing 726 votes were handed in in favour of Dr. Rodrigo, and they were marked X by the Chairman and taken charge of by him, but he recorded that for the reasons he was about to record he rejected them, and he thereafter recorded his reasons as follows :—

"'With a full sense of the important bearing which my decision on the point raised may have upon the present election, I do not see my way to hold that the 726 proxies tendered on behalf of Dr. Rodrigo are valid documents. They purport to be authorities to vote at a meeting to be held on December 5, 1908, as provided by section 37 of Ordinance No. 7 of 1887, and I cannot hold that they authorize votes at the meeting now being held under section 40.

"'Nor do I see my way to put aside the objection as merely a technical one. An election held under section 37 is a different matter to one held under section 40. The former often covering a short period only, while the latter deals with the full period of three years, and in the absence of the evidence of the person signing as to what his intentions were, I can only be guided by the ordinary meaning of the words to which he has subscribed.

"'I therefore hold, not without reluctance, that the 726 proxies tendered are invalid, and that the votes cannot be recorded.'

"6. That after 157 votes were recorded in favour of Dr. David Rockwood, the opposing candidate; further votes were called for by the presiding Chairman, and none being tendered the poll was closed at 2.10 P.M., and thereafter the Chairman declared Dr. Rockwood duly elected Councillor for the Colpetty Division of the Municipality of Colombo.'

"7. That I am also informed and verily believe, and the said minutes marked Z prove, that the said proxies representing 726 votes had been duly signed by persons all duly qualified to vote as their names appear in the list certified and published under sections 41 and 43 of Ordinance No. 7 of 1887, and that if they were taken into account, Dr. William Paul Rodrigo, and not Dr. David Rockwood, would be the person duly elected Councillor for the said Division.

" 8. The total number of votes for the Colpetty Ward, according to the list certified under the provisions of Ordinance No. 7 of 1887, for the said election of December 5, 1908, is 1,190.

" 9. The document marked Z hereto annexed is a true copy of the minutes of the said meeting held on December 5, 1908."

In showing cause against the rule, the following affidavit sworn to by Dr. Rockwood was read :—

" I was duly declared Councillor for the Colpetty Ward of the Colombo Municipality at the triennial election held on December 5, 1908, for the years 1909 to 1911, and I have accepted and acted in the said office of Councillor.

" Although only 157 votes were recorded for me, I had altogether over 600 votes, but in view of the Chairman's expression of opinion on the first objection raised to the proxies presented by Mr. Rodrigo's attorneys, counsel representing me at the meeting did not think it necessary to record any further votes, as such a course would have involved an unnecessary waste of time.

" The 726 votes referred to in paragraph 5 of the petitioner's affidavit consisted of proxies signed by some of the qualified voters of the Colpetty Ward, and a large number of them purported to be signed on the very day of the election, which took place at 8 A.M.

" The said number of proxies in favour of Dr. Rodrigo included (*a*) proxies of persons who had already recorded their personal votes, (*b*) proxies which had been expressly revoked by the persons who had granted them, (*c*) proxies of persons who were out of the Island or not in the Island on the dates on which they purport to have been signed in Colombo, (*d*) proxies bearing dates of execution prior to November 10, 1908, being the date on which the Chairman had fixed December 5, 1908, as the date for the election.

" The attorneys of Dr. Rodrigo presented a proxy purporting to be signed by one W. Rany in December, 1908, but the said person was out of the Island, having left Ceylon some months previously. There were other proxies which stood on the same footing.

" Counsel who appeared for me at the election meeting did not deem it necessary to take that and other objections to which the said proxies were open in view of the Chairman's opinion on the first objection raised, which applied to all the proxies in favour of Dr. Rodrigo, and my counsel, in the presence of the counsel on the other side, and of Mr. Harry Creasy who acted as legal adviser to the Chairman, and in the hearing and presence of several others, specially requested the Chairman who presided at the election to make a note in the record of the proceedings of the meeting to the above effect, and that a large number of proxies signed in my favour were with him.

" The proxies granted in favour of Dr. Rodrigo and presented at the election were proxies intended for a bye-election under section 37

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of the Ordinance No. 7 of 1887, and not for a triennial election under section 40 of the said Ordinance, and, as a matter of fact, there was a bye-election during the year 1908, to wit, on July 10, 1908, to fill the vacancy created by the death of the late Dr. W. H. de Silva."

H. J. C. Pereira (with him *F. H. B. Koch* and *R. L. Pereira*), for the applicant.

VanLangenberg, for the Chairman, did not wish to take part in the argument, and expressed his willingness to abide by any order made by the Court.

H. Jayewardene (with him *C. B. Elliott*), for Dr. Rockwood.

January 18, 1909. HUTCHINSON C.J.—

There was a meeting to be held at the Town Hall on December 5, 1908, for the election of a Councillor for the Colpetty Division of the Municipality of Colombo. The election was for a Councillor under section 40 of Ordinance No. 7 of 1887, who was to hold office for three years from January 1, 1909. The Ordinance enacts that at these elections every voter shall vote either in person or by his agent holding a duly executed power of attorney, and that the Chairman shall preside. At the meeting on the appointed day there were two candidates. After some personal votes had been recorded, a proxy was tendered on behalf of one of the candidates, Dr. Rodrigo, to which the other candidate took objection, on the ground that it was a proxy granted for the purpose of an election to be held under section 37 of the Ordinance. The Chairman upheld the objection; and he upheld the same objection afterwards to a large number of other proxies which were tendered on behalf of the same candidate; and the result of his rejecting these proxies was that the other candidate, Dr. Rockwood, had a majority, and was declared duly elected. Mr. Gomes, who is a voter, then applied for and obtained a rule *nisi* for a *mandamus* requiring the Chairman to accept the votes which he had rejected, and to declare Dr. Rodrigo duly elected, or, in the alternative, to hold a fresh meeting for the election; and I have heard arguments to-day against and in support of that rule. On the first question, 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 in *9 N. L. R. 156*, and on the other 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. All the proxies which

were rejected were on printed forms, with blanks for the names of the voter and his address, and, in some cases, for the date of election and for the date when the proxy was signed ; and they all authorize the attorneys in the name of the voter to appear at the meeting to be held on December 5, 1908, at the Town Hall, as provided by section 37 of Ordinance No. 7 of 1887, for the election of a Councillor for the Division or Ward, or on any day or at any place for which the meeting for the said election may be advertised, or adjourned or postponed, and then to vote for Dr. Rodrigo. There was an election to be held on December 5, 1908, but it was an election under section 40 and not under section 37, section 37 being that which refers to bye-elections. It is impossible to say now, without taking the evidence of the voters, that it is clear what was intended by these proxies. Certainly it is not clear without evidence that the proxies were intended to apply to an election under section 40, and there was no evidence taken or, so far as appears from the Chairman's notes, offered. It is urged on behalf of the applicant that the words " section 37 " are only a technical or clerical error ; that the voters knew what the election was which was to be held on December 5 ; and that it is clear from the proxies themsleves that the voters intended to authorize their attorneys to vote in their names at the election under section 40. To my mind that is not at all clear, although it may perhaps seem so to persons who know more than appears on the papers before me of all that had taken place before and at the time of the election. It seems to me that if there had been only one such proxy tendered, and the Chairman had read it through and had seen that it was a proxy for an election under section 37, he would without hesitation have said that it was not available for an election under section 40, and that everybody would have thought he was right.

I think, therefore, the rule must be discharged. The applicant to pay the costs of both the respondents.

Rule discharged.