1931 *Present:* **Drieberg J.**

WIJEYESEKERE *v.* COREA.

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPEAL TO THE PRIVY COUNCIL.

Privy Council—Election petition—Interlocutory order dismissing petition—Application for leave to appeal—Ceylon (State Council Elections) Order-in-Council, 1931, Article 75—Privy Council (Appeal) Ordinance, No. 31 of 1909, Rule 2.

The judicial powers conferred by Article 75 of the Ceylon (State Council Elections) Order-in-Council, 1931, on the Chief Justice or any other Judge of the Supreme Court he may nominate to act in a particular matter do not imply a jurisdiction in the Supreme Court as such.

An Appeal does not lie to His Majesty in Council from an order made by a Judge of the Supreme Court acting in exercise of such powers.

Where a person applies for conditional leave to appeal to the Privy Council, the notice served on the respondent must contain an intimation of the day on which such leave will be applied for.

APPLICATION for conditional leave to appeal to the Privy Council.

Petitioner in person in support.

H. V. Perera, for respondent.

December 23, 1931. DRIEBERG J.—

The petitioner filed an election petition in which he asked for a declaration that the respondent was not duly elected, that the election was void, that the petitioner was duly elected, and for a scrutiny. On August 7 last, the petition was dismissed on the ground that it was presented out of time. The petitioner moved to have this order vacated and on November 16 his application was refused.

On November 21 the petitioner moved for conditional leave to appeal to His Majesty in Council against the order of Novemebr 16.

The application must fail, if for no other reason, because the petitioner has failed to observe the requirements regarding notice to the respondent. Rule 2 of Schedule 1 of the Appeals (Privy Council) Ordinance, No. 31 of 1909, requires that " application to the Court for leave to appeal shall be made by petition within thirty days from the date of the judgment to be appealed from, and the applicant shall, within fourteen days from the date of such judgment, give the opposite party notice of such intended application ".

It was not stated in the petition that notice had been served, nor was the usual practice followed of filing a copy of the petition with the acknowledgment of receipt noted on it by the respondent's proctor.

In answer to an inquiry by me whether he had given the respondent notice of his application, the petitioner produced a copy of a telegram which he says he sent the respondent on November 21 in these words:— " Appealing Privy Council and Full Court against November 16 order ",

and a Post Office receipt of a telegram dispatched from Kochchikade where the petitioner lives, on November 21; it is a bare acknowledgment of 50 cents paid for an inland or foreign telegram with no mention of whom it is directed to.

This affords insufficient evidence, if any evidence at all, of the receipt by the respondent of a telegram in terms of the alleged copy; even if such a telegram was received by the respondent I cannot hold that it complies with the requirements of rule 2. The form of notice adopted in practice includes an intimation of the day on which the petitioner will move in the Supreme Court, and this is absolutely necessary in order that the respondent may be present or arrange for his representation on the day stated or any other day to which the hearing is adjourned. A mere notice by a petitioner that he is appealing against the order is, in my opinion, not sufficient. The petitioner has elected to act without a proctor, but I cannot regard this as a reason for relaxing in any way the requirements of the rule and relieving him from the duty of showing that the respondent has had due notice of his application.

The petitioner asked that the Court should issue notice of the application to the respondent but this would serve no good purpose, for the respondent has to be noticed within fourteen days of the order sought to be appealed from.

I do not wish, however, to base my order on this ground alone. Whether an appeal to the Privy Council will lie from such an order as this is a question of importance and I may well deal with it.

Rule 1 (*a*) of Schedule 1 of Ordinance No. 31 of 1909 provides that an appeal shall lie as of right from any final judgment of the Court in certain cases. The word "Court" is defined in section 2 of the Ordinance as meaning the Supreme Court consisting of not less than three Judges or not less than two Judges or of a single Judge " according as the matter in question is one which by virtue of the Ordinance or Ordinances constituting the Supreme Court or any rules made thereunder properly appertains to a Court of not less than three Judges or to a Court of not less than two Judges or to a single Judge ". The Supreme Court was created by the Charter of 1833 and its jurisdiction, original and appellate, and by what number of Judges that jurisdiction could be exercised is laid down in the Charter and in the Courts Ordinance. These are the Ordinances constituting the Supreme Court.

The Ceylon (State Council Elections) Order-in-Council, 1931, Article 75, in dealing with election petitions, did not bring them within the jurisdiction of the Supreme Court; it in no way extended the jurisdiction of the Supreme Court. What it did was to create a special tribunal for the purpose, called the Election Judge, who is the Chief Justice or any Judge of the Supreme Court nominated by him for the purpose.

Article 75 (5) provides for interlocutory matters connected with an election petition being dealt with by any Judge of the Supreme Court unless otherwise ordered by the Chief Justice. I cannot regard the judicial powers conferred by the Order-in-Council on the Chief Justice or on any other Judge whom he may nominate or permit to act as implying a

jurisdiction in the Supreme Court as such, and the order sought to be appealed from is not an order made by the Court within the meaning of section 2 of Ordinance No. 31 of 1909.

I may here refer to the judgment of Lord Blanesburgh in the case of *Strickland v. Grima* [1], in which he deals with the question of appeals to the Privy Council from orders such as this made by special tribunals created for the purpose of dealing with questions regarding elections to Colonial Legislative Assemblies. Dealing with the case of *Theberge v. Laudry* [2], where a candidate who had been found guilty of corrupt practices by the Superior Court of Quebec sought leave to appeal to the Privy Council, he said " In that case, which dealt, as this does, with questions relating to the membership of legislative bodies, it is pointed out that decisions upon such matters are not decisions of mere ordinary civil rights: that such an enactment as this Article 33 creates an entirely novel jurisdiction, the history of which, in cases where the Legislative Assembly it not itself then created for the first time, has been that the Assembly has, by its own consent, concurred in vesting in the Court the jurisdiction hitherto inherent in itself of determining the status of those who claim to be its members. The jurisdiction is extremely special: it is of a character that ought, as soon as possible, to become conclusive, in order that the constitution of the Assembly may be distinctly and speedily known. There is another reason for finality in such a jurisdiction. It concerns what, according to British ideas, are normally the rights and privileges of the Assembly itself, always jealously maintained and guarded in complete independence of the Crown so far as they properly exist, and, as Lord Cairns adds in delivering the judgment of the Board in *Theberge v. Laudry* [3], " it would be a result somewhat surprising, and hardly in consonance with the general scheme of the legislation, if, with regard to rights and privileges of this kind, it were to be found that in the last resort the determination of them no longer belonged to the Legislative Assembly, no longer belonged to the Superior Court which the Legislative Assembly had put in its place, but belonged to the Crown in Council, with the advice of the advisers of the Crown at Home, to be determined without reference either to the judgment of the Legislative Assembly, or of that Court which the Legislative Assembly had substituted in its place . . . . Their Lordships have to consider, not whether there are express words here taking away prerogative, but whether there was ever the intention of creating this tribunal with the ordinary incident of an appeal to the Crown. "

" It is true that these words were spoken in a case where the special tribunal had been created with the consent of the Legislative Assembly, and not as, in this instance, where the Assembly is itself brought into existence by the Letters Patent, which also confer this jurisdiction on the Court of Appeal. But, as it appears to Their Lordships, His Majesty, in these Letters Patent is merely adopting principles, to which all Lord Cairns' reasoning applies. He assumes that any enlightened Legislative body would itself choose just such a tribunal as he himself prescribes for

[1] *(1930) A. C. 285, 296.* [2] *(1876) 2 A. C. 102.*
[3] *2 A. C. 108.*

the determination of all such questions: accordingly, he creates a jurisdiction in terms of finality which leave no room for any review by himself. "

In *Strickland v. Grima* (*supra*) the Malta Constitution Letters Patent, 1921, Article 33, provides " all questions which may arise as to the right of any person to be or remain a member of the Senate or the Legislative Assembly shall be referred to and decided by our Court of Appeal in Malta ".

In connection with the observation that questions relating to the membership of Legislative bodies are not concerned with mere ordinary civil rights, it should be remembered that under section 52 of the Charter of 1833 appeals to the Privy Council lie of right only from rules or orders made in civil suits or actions.

The application is refused.

Application refused.