[NETTLETON, C.J. AND DICKINSON, P.J.]

NETTLETON, C.J. & DICKINSON, P.J. 1926 June 5

THEODOROS FRANGOS AND OTHERS

v.

CHRISTODOULOS HAJIPAVLOU AND OTHERS.

MUNICIPAL ELECTION PETITION—JURISDICTION OF DISTRICT COURT.

The District Court held that they had no jurisdiction to hear this election case.

From that judgment the plaintiffs appeal.

For Appellants *Triantafyllides* and *Pavlides.*

For Respondents *P. Kakoyannis, Z. Rossides, Tornarides, A. Zenon* and *F. Kyriakides.*

The facts are sufficiently set out in the judgment of this Court.

Judgment: This appeal arises out of a claim to assert, by action before the District Court, the alleged violation or infringement of a legal right or rights claimed by the persons named in the writ of summons as voters or electors or as candidates in the elections held on the 24th March, 1926, for the Municipal Council of Limassol under the Municipal Councils Law, 1882, and for consequential relief.

The short point in the appeal is whether the District Court had jurisdiction to hear the action. The parties thereto were:—

(1) Theodoro Frango, (2) Cleon Peristiani, (3) Irakli Araouso (unsuccessful candidates as such and as electors); (4) Iraklis Ioannides, who voted and was a voter qualified to vote at the Limassol elections of 1926, (5) Michael Fournaris, (6) Ioannis Tsiro, (7) Styllis Tsangaras, (as voters of Limassol),

Plaintiffs.

AND

(1) Christodoulos Hajipavlou, (2) Alecco Zenon, (3) Christianos Rossides, (4) Fidias Kyriakides, (5) Demetrios Nicolaides, (6) Socratis Tornarides, (7) Fotios Markides, all of Limassol (as successful candidates at the aforesaid Municipal elections of 1926); (8) Mustafa Safvet (as presiding officer of the Municipal elections of 1926), (9) Brewster Joseph Surridge, (as Commissioner of Limassol),

Defendants.

The plaintiffs claimed:—

" 1. That the Court should declare and adjudge that the poll and " election of the Christian members of the Municipal Council " of Limassol held at Limassol on the 24th March, 1926, is illegal,

" irregular, and abortive, because the said poll and election were " not carried out according to the law and Regulations and in " accordance with the spirit and the purpose of the said law and " regulations, and because during the said poll and election such " illegalities and irregularities took place, as to affect the expression " of the opinion of the electors the result and validity of the said " election;

" 2. That the Court should further declare and adjudge that defen- " dants 1, 2, 3, 4, 5, 6, 7, are not lawfully and duly elected or/and " entitled to hold the office of the Christian members of the " Municipal Council of Limassol or/and to exercise any of the " rights belonging to the said office for the period 1926–1929;

" 3. That the Court should order defendants 1, 2, 3, 4, 5, 6, 7, not to " interfere in any way with the management of the Municipality " and not to exercise any of the rights or duties of the Christian " members of the Municipal Council of Limassol for the said period " of 1926–1929;

" 4. That 9th defendant should be ordered—if and as far as same is " necessary—not to notify and report to the Colonial Secretary " according to law that the said defendants 1, 2, 3, 4, 5, 6, 7, are " duly elected as Christian members of the Municipal Council of " Limassol for the above-mentioned period, or if the said 9th " defendant has already reported as mentioned heretofore that " such report be amended or modified in such a way as to show " that from an accident or other inevitable cause or otherwise " no election was carried out according to the law;

" 5. That the said 9th defendant be ordered not to summon the " meeting of the Municipal Council of Limassol for the appointment " of the President and Vice-President of the Municipal Council " for the period 1926–1929 as aforesaid as provided by the law;

" 6. Plaintiffs claim the costs of this action."

The elections took place on the 24th March, 1926, and on the following day a declaration was posted outside the Commissioner's office at Limassol setting out the names of the defendants as being the successful candidates. On the 27th March, 1926, the plaintiffs filed the writ of summons set out above in the District Court of Limassol.

By agreement of all parties the case was heard as a foreign action, and before the full District Court. Plaintiffs 2, 3, and 4 sued as unsuccessful candidates and as persons who had a right to vote at the election. Plaintiffs 7, 8 and 9 sued as persons entitled to vote, but who did not

vote for reasons with which this Court is not concerned. Plaintiffs 1 and 5 on their own motion were struck out as parties.

The action being a foreign action, it must be dealt with in accordance with English Law as defined by the Order in Council of 1882.

At this stage, and especially as defendants 8 and 9 have been struck out as parties since notice of this appeal was given, it may be of interest to point out that, in several cases before this Court on appeal from the decisions of the District Court, this Court appears to have recognized without question the jurisdiction of the District Court in non-foreign actions to hear and determine actions in which objection was raised to the validity of elections to School Committees: (*Committee of the Greek Christian Schools of Nicosia, Antoni Theodotou and others*, 7 C.L.R., 35, and *the Bellapaise School v. Loizou*, 8 C.L.R., 47, to mention only two). In these cases, as in the case out of which this present appeal arises, the District Court was invited to pronounce its decision on the question of the validity of an election under a particular law, the Education Law, 1905, in which no specific procedure was provided for the presentation of such question, or for avoiding it. This Court cannot take it upon itself to assume that the learned and experienced Judges of the Supreme Court, who decided these cases on appeal, did not take into consideration the question whether the District Court had jurisdiction or not, merely because the point was not argued: on the contrary we must assume that they did so, and we hold that, had the present case come before the District Court as a local or non-foreign action, we should have held, on the authority of these cases, that it had jurisdiction to hear it and in the form in which it was presented. The judgments of the Court in *Symeon v. Georghi*, VI. C.L.R. 70, and in *Skoupharides v. District Education Committee of Nicosia*, IX. C.L.R., 15, might also be referred to in connection with the ousting or otherwise of the jurisdiction of the District Courts in certain cases.

In the present case the defendants pleaded in bar that the District Court had no jurisdiction to try the subject matter of an action in which the plaintiffs in substance sought to have the election held on the 24th March, 1926, set aside. They maintained that if the plaintiffs had any legal right they ought to have proceeded by petition to the Supreme Court, and not by action, in manner similar to election petitions arising out of the elections of members of the Legislative Council. Alternatively, if the District Court had jurisdiction, plaintiffs should have asserted their right by petition and not by action, and should have furnished security for costs.

Further they submitted that the action was frivolous and vexatious as being premature and a mere abuse of process.

Stress was laid on the point that no provision for avoiding a Municipal election is made in Law 6 of 1882, or the Regulations made thereunder under which Municipal elections are to be conducted.

English Law, as defined by the Order in Council, 1882, and English procedure were, it was maintained, alone applicable to this case and the Supreme Court alone competent to deal with it.

The Order in Council published on the 1st May, 1925, in the *Cyprus Gazette* was also referred to in this connection as indicating how and before what Court proceedings should be taken.

For the plaintiffs it was contended that the absence of provision in the law affecting Municipal elections for the avoidance of an election must be construed in their favour, and the Nicosia and Bellapaise School cases and *Haji Symeo v. Haji Yeorghi*, 6 C.L.R. 70 were cited on the point. In them the District Court decided upon the validity of an election under a particular law in which no special procedure was provided.

The Supreme Court, it was submitted, had jurisdiction only when it is provided by special enactment or letters patent, and jurisdiction of a special character is given under the Order in Council of the 1st May, 1925. But this would not apply to the present case. A distinction was sought to be drawn between an election petition and an action such as this. What was claimed was a legal right and relief from the Court by way of injunction, and this the Supreme Court would not have jurisdiction to give. The proper procedure had been followed, *i.e.*, by action before the District Court and in accordance with the Rules of Court.

The Attorney-General invited the attention of the Court to the Order in Council, 1883, clause 2: " No special provision made " for trial of election petitions, and submitted that the case was not covered by binding authority, that no legal remedy or relief was sought, and that the only relief provided by law is by section 26 of Law 6 of 1882.

The first three issues to which, and particularly the first one, the above arguments were directed, were framed by the Court as follows:—

1. Has this Court (the District Court) jurisdiction to entertain the subject matters of this action ?

2. If yes, have the plaintiffs adopted the proper procedure ?

3. If yes, is the action premature ?

The judgment of the District Court was as follows:—

" We find that all the items in the writ of summons herein may pos-
" sibly be the subject matter of an election petition but not of an action.

" We find that this Court has no jurisdiction to entertain an election
" petition in the absence of any statutory powers to that effect. In
" the absence of such statutory authority we must turn to English
" Law for guidance; there we find that questions arising out of Municipal
" and Parliamentary elections are treated, broadly speaking, in the
" same way, that is to say, by election petitions.

" Now, according to Cyprus Statute Law in the Letters Patent,
" dated 1st May, 1925, Art. 13, all questions which may arise as to the
" right of any person to be or to remain an elected member of the
" Council shall be referred to and decided by the Supreme Court.

" It is also provided in the said Letters Patent that such matter
" should be presented by way of an election petition and heard by a
" Judge of the Supreme Court. By analogy we hold that any question
" arising out of Municipal election must be dealt with in the same way.
" In any event although it is not necessary to enter into it now, we
" find that claim 3 of the action is premature.

" Judge Demetriou is of opinion that the District Court has no
" jurisdiction to entertain the subject matter of the 1st, 2nd, 4th and
" 5th items on the writ of summons in their present form in the absence
" of statutory powers to that effect. He further takes the view that
" the claim on item 3 is premature on the ground that the newly
" elected members of the Municipal Council have not come to office yet,
" and no substantial act of interference has taken place which would
" give right to the plaintiffs to claim an injunction.

" The action is therefore dismissed. We think that in the circum-
" stances of this case we shall make no order as to costs."

This appeal has been fully argued on both sides before the Court, and it is not necessary to recapitulate the submissions made in the course of such argument.

The plaintiffs asserted the existence of a legal right, and claimed a legal remedy for its alleged infringement, within the principles laid down in *Ashby v. White*, and the doctrine of " *ubi jus, ibi remedium.*" In effect they claimed a legal right in themselves as candidates or as electors at a Municipal election to ask the District Court to consider and decide whether, as they alleged, this election had not been carried out in accordance with the law applicable thereto at the time it was held, and, in the event of its so deciding, to ask for a declaration to that effect, *i.e.*, to declare the election void by the common law applicable

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to elections, and to ask for consequential relief by injunction, interim or otherwise.

In our view this claim of the plaintiffs is to be supported. That an election can be declared void at Common Law on various grounds is clear in English Law. I cite from Rogers on Elections, 19th Ed., Vol. II., p. 254:—

" As a general rule it may be said that to whatever extent the pro-
" visions of an Act of Parliament are violated, even wilfully, which
" does not enact that the consequences of those acts avoid the election,"
(as in the case of the Municipal Councils Law applicable to this election,
apart from the narrow provisions of section 26 thereof) " the election
" will not be invalidated: *Woodward v. Sarsons* (1875), L.R. 10, C.P.
" 743–45; Islington (1901), 5 O'Malley and Hardcastle 125. But "
(and I quote at length from the judgment of the Court of Common
Pleas in the Birmingham Municipal Election case of *Woodward v.
Sarsons* the leading authority on the point, just cited) " an election is to
" be declared void by the common law applicable to parliamentary
" elections if it was so conducted that the tribunal which is asked to
" avoid it, is satisfied, as a matter of fact, either that there was no
" real *electing* at all, or that the election was not really conducted
" under the subsisting election laws. As to the first, the tribunal
" should be so satisfied, *i.e.*, that there was no electing by the consti-
" tuency at all, if it were proved to its satisfaction that the constituency
" had not in fact had a fair and free opportunity of electing the candidate
" which the majority might prefer. This would certainly be so, if a
" majority of the electors were proved to have been prevented from
" recording their votes effectively according to their own preference,
" by general corruption or general intimidation, or by being prevented
" from voting by want of the machinery necessary for so voting, or by
" polling stations being demolished, or not opened, or by other of the
" means of voting according to law not being supplied or supplied with
" such errors as to render the voting by means of them void, or by
" fraudulent counting of votes or false declaration of members by a
" returning officer, or by other such acts or mishaps. And we think
" the same result should follow if, by reason of any such or similar
" mishaps, the tribunal, without being able to say that a majority had
" been prevented, should be satisfied that there was reasonable ground
" to believe that a majority of the electors *may have been* prevented
" from electing the candidate they preferred. But if the tribunal
" should only be satisfied that certain of such mishaps had occurred,
" but should not be satisfied either that a majority had been, or that
" there was reasonable ground to believe that a majority might have

" been, prevented from electing the candidate they preferred, then we " think that the existence of such mishaps would not entitle the tribunal " to declare the election void by the common law of Parliament. " As to the second, *i.e.*, that the election was not really conducted under " the subsisting election laws at all, we think, though there was an " election in the sense of there having been a selection by the will of the " constituency, that the question must in like manner be, whether the " departure from the prescribed method of election is so great that the " tribunal is satisfied, as a matter of fact, that the election was not " an election under the existing law. It is not enough to say that great " mistakes were made in carrying out the election under those laws: " it is necessary to be able to say that, either wilfully or erroneously, " the election was not carried out under those laws, but under some " other method . . . So now, when the election is to be an election by " ballot, if either wilfully or erroneously, a *whole constituency* were to " vote, but *not by ballot at all*, the election would be a free exercise of " their will, but it would not be an election by ballot, and therefore not " an election under the existing election laws. But, if in the opinion " of the tribunal the election was substantially an election by ballot, " then no mistakes or misconduct, however great in the use of the " machinery of the Ballot Act, could justify the tribunal in declaring " the election void by the common law of Parliament."

If, as we have found, the right to present this claim exists, the appropriate tribunal to entertain it, in the absence of special Statute or Order in Council, is the District Court, who will decide it, inasmuch as it has been treated as a foreign action, by English Law. Its jurisdiction, in our view, is not ousted in the present case by clause 2 of the Courts Order in Council, 1883, nor is it affected by the Order in Council of 1st May, 1925, which applies to the Legislative Council only. The Municipal Councils (Amendment) Law, 1926, could not be held to apply to the present case without violating our Interpretation Law and the accepted Rules, for the Interpretation of Statutes.

Under the Rules of Court all proceedings before a District Court must be by action and writ of summons; and the appropriate procedure has been followed.

Proceedings by way of petition can only be taken under a special law, *e.g.*, Malicious Injury to Property Law, and the Municipal Councils (Amendment) Law just referred to or Letters Patent prescribing such procedure.

We are unable to agree that claim (3) in the writ of summons, for an order restraining the defendants from interfering in any way with the

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management of the Municipality and from exercising any of the rights or duties of members of the Municipal Council is premature, inasmuch as, in substance, the Court was invited to grant an interim injunction to restrain defendants from doing something which plaintiffs knew well they were about to or likely to do. They were right in losing no time in presenting their claim, whatever it may be worth, by action; delay in such a case might have been construed unfavourably by the Court.

We allow this appeal on the question of jurisdiction, but make no order as to costs. Into the merits of the case it is not our province to enter.

In conclusion we think we may invite attention to the following passage in Rogers on Elections, Vol. II., at p. 257:—

" It is to be borne in mind by the tribunal which has to consider the " validity of elections that it ought to act with great caution."

In the words of Mr. Baron Martin in the Warrington case (1869), " I adhere to what Mr. Justice Willes said at Lichfield, that a judge " to upset an election ought to be satisfied beyond all doubt that the " election was void; and that the return of a member is a serious matter, " and not likely to be set aside."

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[NETTLETON, C.J. AND DICKINSON, P.J.]

SAID MOULLA

v.

AHMED RASHID.

ART. 213 OF THE ORDER IN COUNCIL, 1882—MEHKEME-I-SHERIE (SHERI COURTS).

Application ex parte for an order of the Supreme Court to issue, ordering respondent (the editor of a newspaper) to appear before the Court and show cause why he should not be punished for publishing a statement in his newspaper which, it was stated, was likely to prejudice the fair trial of a case pending before the Mahkeme-i-Sherie.

Amirayan for Applicant.

HELD: Following the ruling in *Moustafa Masha v. Haji Kadin Haji Hussein & another* reported in Vol. I. C.L.R., p. 24, that the Mahkeme-i-Sherie are not Courts within the meaning of clause 213 of the Cyprus