1938 *Present:* **Poyser S.P.J.**

DEEN *v.* RAJAKULENDRAM *et al.*

IN THE MATTER OF AN APPLICATION FOR A WRIT OF *Quo warranto.*

Writ of quo warranto—Application in respect of appointment of Revenue and Works Inspector of Urban District Council—Office not of a public character—Local Government Ordinance, No. 11 of 1920, s. 47—Right of member to withdraw and refrain from voting.

An application for a writ of *quo warranto* will lie for usurpation of an office of a public nature and a substantive office and not merely the function or employment of a deputy or servant held at the will and pleasure of others. A writ will not lie in respect of an appointment of a Revenue and Works Inspector made by an Urban District Council under section 47 of the Local Government Ordinance.

A member present at a meeting of the Urban District Council during the discussion of a resolution may withdraw when the voting takes place.

The Court has a discretion to refuse to grant a writ where there is a remedy equally appropriate and effective.

THIS was an application for a writ of *quo warranto* to have a resolution passed at a meeting of the Urban District Council, Nawalapitiya, expunged and declared void, and a declaration that the added respondent was disqualified from acting as Revenue and Works Inspector.

H. V. Perera, K.C. (with him *J. R. Jayawardana*), for first and ninth respondents (on a preliminary objection).—Does a writ of *quo warranto* lie to declare null and void a resolution passed at an Urban District Council meeting ? In the first place, the office must be of a public nature created by Charter or by Crown with the consent of the Legislature, viz., by Statute. (*Short on Mandamus, ch. III.*).

The Urban Council selected a candidate for the post of Revenue Inspector by the casting vote of the Chairman. Such a post is created neither by Charter nor by Statute.

[POYSER J.—The holder of such a post is removable at the pleasure of the Council.]

Under section 47 of Ordinance No. 11 of 1920, an Urban Council possesses large powers to appoint all its necessary officers, to remove any such officers so appointed to fix their salaries, &c., subject to certain restrictions. Assuming such a writ is granted, then it must necessarily be available even against a cooly working under an Urban District Council. No doubt such officers and servants are not holding public offices.

A *quo warranto* cannot lie on a contract by a mere employee of such an institution.

The appointment is not a permanent one and can be terminated by the body responsible for its appointment and therefore no *quo warranto* is available. (*R. v. Fox* [1]; *Ex parte Richards* [2].)

[1] *8 E. & B. 939.*

[2] *L. R. Q. 3, Q. B. D. 368.*

The writ is limited or restricted, and therefore cannot be applied universally. Such a writ lies for usurping any office of a public nature. It must be a substantive office and not one which is held at the will and pleasure of others. (*Darley v. The Queen* [1].)

The allegation must be actually against the person possessing that office. (*Ukku Banda v. Government Agent, Southern Province* [2].) What is the test to be applied for a writ of *quo warranto*? Has there been a usurpation of an office of a public nature and an office substantive in character, viz., an office independent in title. (*R. v. Speyer; R. v. Cassel* [3].)

[POYSER J.—Should all members present at a meeting exercise their votes?]

A member may withdraw at any time before a decision is taken and return after the voting is over. That does not mean such a member participated in the decision of a particular matter.

C. V. Ranawake (with him *M. M. I. Kariapper*), for petitioner. Where a breach of statutory duty or violation of statutory procedure is alleged the remedy by way of *quo warranto* lies to test it.

Here there has been a resolution which clearly violates the procedure laid down under section 23 of the Local Government Ordinance. The party responsible for the resolution is the Council who are made respondents. Any member of the Council dissociating himself from the resolution is entitled to say so and admit its irregularity. A declaration by Court that the resolution is bad must necessarily affect the officer appointed; hence he is also made a respondent. Even if he is not a proper party to the application the Court can decide it as against the Council. If the application is against the officer it is still possible for the Council to be made a party.

See *R. v. Speyer and Cassel* [4], where the Home Secretary responsible for the appointment in question was noticed and represented. (*Regina v. Burrows* [5].) *Cf. Wijeratne v. Obeysekere* [6], *Jayewardene v. R. M. of Katugampola* [7], *Albert de Silva v. Mudaliyar Wijetunge* [8].

Though a Revenue and Works Inspector is not a direct creature of the statute, still where the Council is empowered (*vide* section 47) to appoint the officers necessary for the purposes of the Ordinance, an officer so appointed becomes a creature of the statute. The office in question emanates from the Crown, not immediately, but through the Council acting under its powers. "What is done by the donee of a power is supposed to be done by the donor"—Lord Campbell C.J. in *The Queen v. The Guardians of St. Martins* [9].

The older cases are no authority for the contention against the propriety of the writ being allowed. The test is whether the office is of a public nature and substantive in character, not whether it is held at pleasure. See *Wood Renton, Encyclopædia of the Laws of England, vol. XII, p. 186.*

[1] (1846) 12 C. L. & F. R. 520, at 537.
[2] 29 N. L. R. 168.
[3] (1916) 1 K. B. D. 595, at 609.
[4] (1916) 1 K. B. 595.
[5] (1892) 1 K. B. 399.
[6] (1928) 30 N. L. R. 153.
[7] (1930) 32 N. L. R. 148.
[8] (1930) 32 N. L. R. 159.
[9] (1851) 17 Q. B. 149, at 155.

Obviously the writ does not lie against a cooly, for instance, employed by the Council. The Ordinance in fact draws a distinction between "officers" and "servants".

The true test is referred to by Earle J. in *The Queen v. The Guardians of St. Martins* (*supra*) at p. 163.

On this point Counsel also relied on *Darley v. Regina*[1]; *R. v. Speyer and Cassel* (*supra*).

In *Reg. v. Burrows* (*supra*) the history of the remedy is set out. It is difficult to see what other remedy there is in a matter of this kind. *Cf. Everett v. Griffiths*[2]; *10 Halsbury* (*Hailsham ed.*) *811.*

Even if there is such other remedy the jurisdiction of this Court is not taken away. (*Q. v. Hampton*[3].)

[POYSER J.—The remedy lies in the Council itself, viz.; to rescind the earlier resolution and select another officer.

This no doubt is possible, but there is nothing to compel them to do so, especially where there was a majority party responsible for the appointment and will not rescind a resolution by which a favourite was appointed.

The resolution itself is clearly *ultra vires* under section 23; it was not carried by a majority of those present. The occasion for a casting vote did not arise where nine members were present and four voted for and four against, the ninth member not voting; the resolution fell. There is a clear difference between a "majority of those present" and a "majority of those present and voting". *The English Local Government Act of 1933* provides that a resolution to be valid must be carried by a majority of those present and voting. A similar provision exists under our Municipal Councils Ordinance, No. 6 of 1935, section 7. A member may of course withdraw before a decision is taken, but here the member who did not vote was actually present. The English cases have definitely decided this point.

Counsel cited *Q. v. Griffiths*[4]; *Reg. v. Overseers of Christ Church*[5]; *In re the Rate-payers of Eynsham Parish*[6]; *Laboucher v. Wharncliffe*[7].

Schokman, C.C., for the Attorney-General, on notice.—An officer or servant appointed by an Urban District Council under section 47 of Ordinance No. 11 of 1920 cannot be said to hold an office of a public and substantive nature. He would be in the position of a deputy or servant of the Urban District Council. In regard to such an appointment it has been held that an information in the nature of *quo warranto* would not lie—*vide* the cases referred to in note (*f*) on page 806 of *9 Halsbury* (*Hailsham ed.*).

C. Ranganathan, for second, third, fourth, fifth and eighth respondents.

G. P. J. Kurukulasooriya, for seventh respondent.

Gilbert Perera, for sixth respondent.

Cur. adv. vult.

[1] (1846) 12 C. L & F. R. 520 (*see argument at 528.*)
[2] (1924) 1 K. B. 441.
[3] (1865) 6 B. & S. 929, at 932.
[4] (1857) 17 Q. B. 164.
[5] (1857) 7 E. & B. 409.
[6] (1349) 18 L. J. Q B. 210.
[7] (1879) 13 Ch. D. at 354.

September 27, 1938. POYSER S.P.J.—

This is an application for a writ of *quo warranto* to have a resolution passed at a meeting of the Urban District Council, Nawalapitiya, held on April 11, 1938, expunged and declared null and void, and a declaration that the added respondent is disqualified from acting as the Revenue and Works Inspector of the said Council.

The petitioner, Mr. A. B. Deen, is a duly elected member of the Urban District Council of Nawalapitiya. He states that at a special meeting of the Council held on April 11, 1938, all the members, namely, nine in number, were present, and that the Council had met to decide on the appointment of a person to perform the duties of Revenue and Works Inspector. The previous holder of this post had retired on December 31, 1937.

Various candidates were considered by the Council and eventually the added respondent, A. J. Setunga, was declared to be appointed to the post. The voting was four members in favour of Mr. Setunga and four members in favour of another candidate, Mr. Weerasinghe. Mr. Jansz, who is an *ex-officio* member of the Council, by virtue of his position as District Engineer, did not vote, the entry in the minutes being "Mr. P. D. Jansz. D. E. was neutral". As there was an equality of votes, the Chairman, in accordance with the provisions of section 23 of the Local Government Ordinance, No. 11 of 1920, in addition to giving his own vote, gave the casting vote in favour of Mr. Setunga.

Mr. H. V. Perera, who appeared for the first and ninth respondents, has raised certain preliminary objections to this application, viz., that the writ will not lie as the person who has been appointed Revenue and Works Inspector does not hold an office of a public nature and is not an officer appointed by the Crown or under any Statute. He also argued that there was no material before the Court to prove that the added respondent was actually acting in such appointment, and further argued that in any event the first to the eighth respondents were improperly made parties to the proceedings as it was not alleged that they had usurped any office.

In regard to the material set out in the petition and the alleged irregularity of the appointment of Mr. Setunga, he was not called upon to argue as I considered that these preliminary points should first be disposed of.

The writ of *quo warranto* will only lie "for usurping any office, whether created by Charter alone, or by the Crown, with the consent of Parliament, provided the office is of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others".

The above is an extract from an opinion delivered by Tindal C.J., in the House of Lords, in the case of *Darley v. The Queen* [1], which was quoted with approval by Lord Reading in the case of *Rex v. Speyer* and *Rex v. Cassel* [2]. Lord Reading, further in the course of his judgment, laid down that "the test to be applied is whether there has been usurpation of an office of a public nature and an office substantive in character, that is, an office independent in title".

[1] (*12 C. L. & F. R. 537*).

[2] (*1916*) *1 K. B. D. 595.*

In this matter the Council were acting under the powers conferred on them by section 47 of the Local Government Ordinance, No. 11 of 1920. The material part of that section is as follows :—" For the purpose of the discharge of its duties under this Ordinance, a District Council (without prejudice to any other powers specially conferred upon it) shall have the following powers :—

" (*a*) To appoint all necessary officers and servants, and from time to time to remove any such officer or servant, and to assign to any office or service such salary, allowance, or remuneration as to the Council may seem fit. Provided that in any case in which any such salary, allowance, remuneration, either separately or in the aggregate, shall exceed in value the rate of one hundred rupees per month, the approval of such assignment by the Local Government Board shall have been previously obtained ".

It will be seen that the Council are given powers, subject to certain restrictions, to appoint officers and servants from time to time and to remove such officers and servants. It certainly does not appear that any appointment made under that section is an appointment of a permanent nature, for it is an appointment which can be determined at any time by the body responsible for the original appointment, and there is ample authority that the writ of *quo warranto* will not lie in respect of such appointments. (*R. v. Fox* [1]; *Ex parte Richards* [2].)

Therefore, I think that the first preliminary objection taken by Mr. Perera must succeed and that the issue of this writ cannot be allowed. It is unnecessary to consider the further point raised in regard to whether Mr. Setunga had in fact taken up the position to which he had been appointed. There was an affidavit filed to the effect that he had, but such affidavit is only dated to-day and was apparently only served on the first respondent's Proctor this morning. Mr. Perera therefore had no opportunity of meeting the allegations that were made in that affidavit.

However, as the material that is contained therein has not affected my decision, it is unnecessary to consider it.

Mr. Schokman, who appeared for the Attorney-General, also supported Mr. Perera's argument that this writ would not lie in regard to officers and servants appointed by an Urban or District Council under the provisions of section 47 of the Local Government Ordinance.

Mr. Ranawake, who supported this application, has raised a number of points. Apart from his arguments in regard to the preliminary objections, he has also in support of the petition argued that having regard to the provisions of section 23 of the Ordinance, the appointment of Mr. Setunga was invalid as Mr. Jansz abstained from voting. That section is as follows :—

" All acts whatsoever authorized or required by virtue of this or any other Ordinance to be done by any Council may and shall be decided upon and done by the majority of members present at any duly convened meeting thereof, such members being not less than the quorum prescribed by any by-law to be made by the Council as hereinafter provided, or in the absence of such by-law, not being less than two-

[1] *8 E. & B. 939.* [2] *L. R. 3 Q. B. D. 368.*

thirds of the members of the Council. Provided that when the votes of the members present in regard to any question shall be equally divided, the presiding officer shall, besides his vote as a member, have a casting vote ".

In regard to the provisions contained in that section that the members present at any duly convened meeting should vote on any matter coming before such meeting, he has referred to certain English cases in which members of a Council or a body were present at a meeting and did not vote. In the case of *Reg v. Friffiths* [1], the Chairman of a meeting held for the election of an officer did not vote although he continued to preside over the meeting. It was held that as he had not withdrawn from the meeting, that the election was void.

In the case of *Labouchere v. Earl of Wharncliffe* [2], it was held that if at a general meeting of a club certain members did not vote on a resolution for the expulsion of a member and did not withdraw from the meeting, that their presence must be taken into account in the consideration of whether two-thirds of the members present voted for such expulsion.

Mr. Ranawake invited me to express an opinion as to whether a resolution passed at a meeting of any Municipal Council at which one or more members although present did not vote was in fact invalid. Actually what happened in this particular case was that Mr. Jansz, the District Engineer, preferred not to vote although it is not clear whether he withdrew from the Council Chamber or not. I can see nothing in either the Ordinance or the by-law or in any of the cases that have been cited to indicate that any member of the Council who is present at any meeting may not withdraw from such meeting at any time he desires.

In my opinion he can so withdraw although he may have been present at the discussion on a resolution he is not bound to vote if he withdraws before the voting takes place.

There is a further matter. It has been suggested in the course of the argument that the proceedings in regard to the appointment of Mr. Setunga were not only irregular but were in fact corrupt and that improper motives have actuated the Chairman and presumably those members who supported the appointment of Mr. Setunga. These allegations are not supported by the facts and I am unable to find any evidence of any irregularity or of any injustice. It is true that the District Engineer, according to the minutes, appeared to consider Mr. Weerasinghe a more suitable candidate than Mr. Setunga. He did not actually use those words but he stated that if T. P. Hunt was omitted—this candidate withdrew—he would place Weerasinghe first and Setunga second. On the other hand, according to the affidavit that was filed this morning, the person appointed to this post would, not only have to perform duties in connection with public works but would also be largely responsible for the collection of municipal revenue. Presumably the District Engineer was best qualified to express an opinion in regard to a candidate's qualifications as Works Inspector, but he would not necessarily be best qualified to express an opinion in regard to a candidate's qualifications in regard to the collection of revenue. The fact that he recommended the appointment of Mr. Weerasinghe in preference to Mr. Setunga is not therefore any

[1] *17 Q. B. 164.*

[2] *13 Ch. D. p. 346.*

evidence of any improper or irregular conduct on the part of those who supported Mr. Setunga. The Chairman certainly did propose that Mr. Setunga be appointed and he also gave the casting vote in his favour, but then the law permits him to do so.

I mention these matters although I am of opinion that the writ of *quo warranto* will not lie, yet assuming it did, the Court always has a discretion according to the facts and circumstances of the case whether it will grant its issue. The Court has refused to grant such writ where its issue will be futile and where there is a remedy equally appropriate and effective—see *Halsbury, vol. 9, p. 810,* and the cases therein cited. In this case there is a remedy, assuming there was anything irregular in the appointment of Mr. Setunga. In the first place it was stated in the course of the argument that he is at present only on probation and whether he is so or not the Council have powers under section 47 to terminate his appointment at any time. It is not a case such as is visualized by Lord Reading in the case of *Rex v. Speyer,* and *Rex v. Cassel* (*supra*) "where to refuse the issue of the writ might be to perpetuate an illegality."

For the above reasons the application must be refused. The petitioner and the sixth and seventh respondents who supported the application will pay the costs of all the other respondents.

Application refused.