1973 *Present :* **Pathirana, J. and Rajaratnam, J.**

D. SIRIWARDENA, Petitioner, *and* D. W. FERNANDO (Assistant Commissioner of Co-operative Development, Chilaw) and others, Respondents.

S. C. 711/72—Application for a Mandate in the nature of a Writ of Quo Warranto under Section 42 of the Courts Ordinance.

Co-operative Societies Ordinance (Chapter 124)—By-law framed thereunder—Appointment to perform functions of the Executive Committee of the Society—Office of a public nature—Availability of the Writ—Power of dismissal from office—Interpretation Ordinance Section 14 (f)—Observance of the rules of natural justice.

Held :

(1) Persons appointed under a by-law framed under the Co-operative Societies Ordinance (Chapter 124) to perform the duties and functions of the Executive Committee of the Co-operative Society hold an " office of a public nature " for the purpose of the issue of a Writ of quo warranto.

(2) The Assistant Commissioner of Co-operative Development who was empowered under the by-law to appoint persons to perform the duties and functions of the Executive Committee of the Co-operative Society had also the power to dismiss such persons by reason of the provisions of Section 14 (f) of the Interpretation Ordinance and was not obliged to observe the " rules of natural justice and in particular the rule of audi alteram partem ".

APPLICATION for a Writ of Quo Warranto.

Nimal Senanayake, with *Miss S. M. Senaratne,* for the Petitioner.

K. M. M. B. Kulatunga, Senior State Counsel, with *Douglas Halangoda,* State Counsel, for the 1st and 4th Respondents.

A. K. Premadasa, with *S. S. Wijeratne,* for the 2nd and 3rd Respondents.

Cur. adv. vult.

March 29, 1973. PATHIRANA, J.—

This is an application for a mandate in the nature of a writ of quo warranto directing the 2nd and 3rd respondents to show cause by what right they claim to hold the office of President and Vice-President respectively of the Nattandiya Coconut Producers Co-operative Society Limited, Lunuwila, and by what right they perform any of the powers, functions, duties and responsibilities of the 'Committee' of the said Society. The society is registered under section (6) of the Co-operative Societies Ordinance (Cap. 124). The petitioner also asks for an interim injunction under section 20 of the Courts Ordinance, restraining the 3rd and 4th respondents from performing in any manner the powers, functions, duties and responsibilities in the said offices. He also asks for an enjoining order to the same effect.

The 1st respondent is the Assistant Commissioner of Co-operative Development, Chilaw. The appointments challenged in this case were purported to have been made by the 1st respondent under by-law 29 (ඇ) of the by-laws of the Society. The 4th respondent was also a person appointed by the 1st respondent, but, the petitioner had by his affidavit dated 12.1.73 decided not to proceed against him.

According to the petitioner at a special general meeting convened by the 1st respondent on 27.1.72 the Society had resolved that all the powers, duties and functions of the 'Committee' of the Society be vested for a period of one year in three members who were to be nominated by the 1st respondent. This resolution was incorporated in the by-laws of the said Society, and this by-law 29 (ඇ) in Sinhala reads as follows:—

"29. (ඇ) මහා සභාව විසින් සම්මත කර ගන්නා ලද යෝජනාවක් පරිදි ඒ යෝජනාවේම සඳහන් කරන ලද කාලයට කොමසාරිස්තුමා විසින් නම් කරන ලද තිදෙනෙකුට පමණක් කාරක සභාව හැටියට කටයුතු කරන්නවද බලය ඇති වන්නේය".

In terms of the said by-law by letter dated 6.4.72 the 1st respondent nominated the petitioner, D. E. Perera, and S. A. C. de Saram as members of the said 'Committee'. S. A. C. de Seram died on 5.9.72, and for the remaining period, that is till 6.4.73, the 4th respondent was appointed.

The petitioner's case is that on 1.11.72, by letter marked 'E' the 1st respondent, without any lawful authority, illegally, improperly and wrongfully purported to remove the petitioner from the said 'Committee'. He states that the purported removal

is in contravention of the by-laws governing the said Society. The petitioner further states that the 1st respondent proceeded thereafter by letter dated 1.11.72 to nominate the 2nd and 3rd respondents as 'Committee' members. In terms of the said by-law and by the same letter he appointed the 2nd respondent as the President and the 3rd respondent as the Vice-President of the said Society. The petitioner alleges that these appointments are in contravention of the by-laws of the said Society.

The 1st, 2nd and the 3rd respondents have filed affidavit in which they state that the 1st respondent had acted lawfully in removing the petitioner and D. E. Perera from the said 'Committee' on 1.11.72 under by-law 29 (ඌ) and further that the 1st respondent acted within his right in appointing the 2nd and 3rd respondents to the said Committee, under by-law 29 (ඌ) for the remaining period, that is till 6.4.73.

The petitioner also stated that the 1st respondent had acted at the instance of influential politicians who resented the petitioner's conduct in taking disciplinary action against certain members of the said Society, and, therefore, the 1st respondent had acted mala fide in removing the petitioner and D. E. Perera from the said Committee and the offices they held. The 1st respondent in his affidavit denied the allegation of mala fide and set out the facts and circumstances under which he stated he acted bona fide in the interests of the said Society.

Mr. Nimal Senanayake, appearing for the petitioner, made his submissions on the following grounds:— Firstly, that the 1st respondent had only the power of nominating three persons and not the power of appointing three persons as members of the 'Committee'. His position is that the 1st respondent merely nominated three persons while the act of appointment was done by the Society at a general meeting under the by-laws of the said Society. His argument was that the use of the word 'nominate' could never be equated to mean 'to appoint'. Secondly, he submitted that under the by-law in question the 1st respondent could not remove or dismiss any member of this so called 'Committee' as under the relevant by-law (24) of the said Society, the executive committee could only be appointed by the Society at a general meeting, and the power of dismissal under this by-law is also vested in the Society, which could do so only at a general meeting. Further, by-law (30) of the Society sets down the conditions under which a member ceases to be a member of the executive committee. Thirdly, he submitted that in dismissing the petitioner the 1st respondent had acted mala fide, for the reasons stated in the affidavit. Fourthly, his submission was that even granting that the 1st respondent had the

power of removal he could do so only after giving an opportunity to the petitioner to show cause and as this was not done there was a violation of the principles of natural justice, and in particular the rule of audi alteram partem.

Mr. Senanayake's position therefore is that the petitioner and D. E. Perera still continue to hold the offices which are now being unlawfully usurped by the 2nd and 3rd respondents.

Mr. Kulatunga, learned State Counsel, appearing for the 1st respondent, while maintaining that the 1st respondent had acted legally within his powers, raised a preliminary objection that a writ of quo warranto was not available on the ground that the 2nd and 3rd respondents were not holding office of a public nature. He further took up the position that the petitioner had alternative remedies under the Co-operative Societies Law, No. 5 of 1972, as by section 36 (2), any dispute arising out of the interpretation of a by-law of a registered society should be referred to the Registrar for his decision, and his decision is final and conclusive in law. He also submitted that under section 60 (2) of the same law where any question arises as to whether a member has ceased to be a member or officer of the Society that question shall be decided by the Registrar whose decision shall be final. The remedy by quo warranto was therefore not available to petitioneer.

There appears to be considerable misconception in the letters written both by the petitioner and the 1st respondent and in the affidavits filed by the parties in this application as to the exact nature of the office to which the 2nd and the 3rd respondents were appointed or nominated by the 1st respondent under the purported powers of by-law 29 (කැ).

Before I deal with the submissions made by Counsel in this case, I would first like to clarify the meaning and purpose of by-law 29 (කැ) under which the 1st respondent had purported to act. Although the letter of appointment by the 1st respondent dated 6.4.72 in respect of the petitioner and the letter dated 1.11.72 removing the petitioner from office, and the letter of appointment dated 1.11.72 in respect of the 3rd and the 4th respondents refer to appointments to the 'Executive Committee', in fact, these appointments were never meant to be appointments to the "Executive Committee". By-law 29 (කැ) never contemplated an 'Executive Committee' to which the 1st respondent had the power to nominate or appoint three persons, but it only gave the 1st respondent the power to appoint three persons to function "like the executive committee" (කාරක සභාව හැටියට), in other words to perform the powers, duties and functions of the executive committee of the Society.

This by-law was framed by the Society under the Co-operative Societies Ordinance pursuant to a resolution passed at a general meeting of the said Society convened by the 1st respondent on 27.1.70. In fact, the petition of the petitioner correctly sets out the position as it refers to the Society having resolved that "all the powers, duties and functions of the Committee of the Society will be vested for a period of one year in three members nominated by the 1st respondent". The minutes of the annual general meeting (A1) which contain this resolution fully support this meaning and purpose of by-law 29 (ඇ).

The wording of by-law 29 (ඇ) in my mind leaves no room for any ambiguity as to the 1st respondent's power to appoint the three persons. He had the power to appoint directly the three persons to perform the functions, powers and duties of the Executive Committee. The by-law did not restrict his power merely to nominate the three persons while the actual act of appointment was to be done by the Society at a general meeting. In my view, in the context under which this by-law was passed, with the background of the resolution of the general meeting held on 27.1.70, the word "nominate" in the by-law can only mean to 'appoint', and, in fact, one of the dictionary meanings of the word 'nominate' is to 'appoint'.

I shall next deal with the preliminary objection raised by the learned State Counsel that the petitioner is not entitled to the remedy by way of quo warranto as the 2nd and 3rd respondents do not hold office of a public nature. In this connection it will be useful to understand the origin and the scope of the Writ of Quo Warranto.

In early times the writ of quo warranto was in the nature of a writ of right for the Sovereign against any subject who claimed or usurped any office, franchise or liberty to inquire by what authority he supported his claim in order to determine the right. It was a civil writ at the suit of the Crown.

In *Darley v. The Queen* (1845)—12 Cl. & Fin. 520—a report of which is found in 8 English Reports (House of Lords, p. 1513), the House of Lords adopted the opinion delivered by Tindal, C.J. who expressed the enlarged scope of the Writ in the oft-quoted words—

> "After the consideration of all the cases and dicta on this subject, the result appears to be, that this proceeding by information in the nature of a quo warranto will lie for usurping any office, whether created by charter alone, or by the Crown, with the consent of Parliament, provided

the office be 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 ".

This case lays down the principle that while formerly a quo warranto was held to lie only where there was an usurpation of a prerogative of the Crown, or of a right of franchise, a proceeding by information in the nature of a quo warranto has long since been extended beyond that limit and is a remedy available to private persons within the limits stated by Tindal C.J. and subject always to the discretion of the Court to refuse or grant it. The test therefore to be applied whether a writ is available is whether there has been a usurpation of an office of a public nature and an office substantive in character, that is, an office independent in title and not merely the function or employment of a deputy or a servant held at the will and pleasure of others. These same requirement have been adopted by this Court by Poyser, S.P.J., in *Deen v. Rajakulendren*—40 N. L. R. 25.

No doubt, in England, the information in the nature of a quo warranto has been abolished. Instead, section 8 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, provides that when a person acts in an office to which he was not entitled to and a quo warranto information would formerly have lain against him, the High Court can grant an injunction restraining him from so acting, and, if necessary, declaring the office to be vacant. But, nevertheless, the old rules and the substantive laws continue to apply.

Learned State Counsel submitted that the office in respect of which the writ is sought in this case is not one of a public nature. It was conceded by both sides at the argument that this office is one which has been created under a statute. A by-law enacted under a statute is a written law within the meaning of section 2 (*gg*) of the Interpretation Ordinance.

In *Queen v. Guardians of St. Martin's* (1851)—17 QB. 154, a report of which is found in CXVII, English Reports, 1238—it was held that quo warranto lies for an office though not immediately derived from the Crown (as where Commissioners are empowered by Act of Parliament to direct that such office be created) ; if it be an independent substantive office ; if it be of a public nature. Here the office in question was that of a Clerk to the guardians elected by the guardians under an order of the Commissioners by virtue of a statute. This case discusses what the office of a public nature is. Lord Campbell, C.J. said,—

" Then, is the office of a public nature ? We must look to the functions, and compare them with those which were

held to constitute such an office in Darley v. The Queen (12 Cl. & Fin. 520). The House of Lords laid down no criterion in that case; but they held that the office there in question was public within the rule they laid down; and I think the present office is not distinguishable. Whether the district for which it is exercised be a parish, or a hundred, or several parishes in a union, appears to me to form no ground of distinction, *if it be an office in which the public have an interest*".

Patterson, J. observed—

"Then, is it a public office?". He proceeded to answer the question as follows—

"The question here is not whether the body for which the officer acts is public; it is whether his duties are of a public nature; and, *as the exercise of them materially affects a great body of persons, I think they are so*".

Coleridge J. recited the duties of the clerk, which were, among other things,—

"to communicate to the persons engaged in the relief of the poor throughout the parish all orders and directions of the commissioners and guardians, and to give instructions for the execution; to conduct the elections of guardians; to be the channel of communication between the board and parish officers and the commissioners upon questions which may arise respecting the administration of the poor law or other parochial business; and to manage the communications also between his board and all other poor law boards or parochial bodies throughout the kingdom".

He proceeded to hold—

"Therefore, without going further, or deciding anything as to the other cases, which must be taken as they arise, I entirely agree that, in this instance, the remedy by quo warranto applies".

Erle, J. observed—

"If the execution of an office secures the proper distribution of a fund *in which a body of the public have an interest*, the office may be deemed public".

In *Bridley v. Sylvester* (1871), 25, Law Times Reports, 459, it was held that a quo warranto was available to show cause by

what authority a person acted as clerk to the school board of borough appointed under a statute. Cockburn, C.J. observed—

> "Upon consideration of the case of Darley v. The Queen, and the provisions of this statute, it may be that a writ of quo warranto may be applicable to the office of clerk to a school board".

In *Chandrasena v. S. F. de Silva*—63 N.L.R. 308—it was held that a writ of quo warranto does not lie against the Director of Education if he purports to exercise the functions of a Manager of an unaided school contemplated in Section 5 of the Assisted Schools and Training Colleges (Special Provisions) Act No. 5 of 1960. It was pointed out that the Statute nowhere refers to a Manager of an unaided school, and section 6 of Act No. 5 of 1960 which imposes certain duties in respect of the administration of an unaided school, had imposed those duties not on the Masager of such school but on the proprietor. The proprietor of an unaided school may, for his own purposes, of for the convenience of administration employ a person as Manager. But, where a person is so employed he does not become the holder of office of a public nature. It was therefore held that an office of Manager of an unaided school was not one created by the statute, and further that a writ of quo warranto did not lie as the office was not of a public nature.

In the case before me the 3rd and 4th respondents have been appointed under a by-law framed under the Co-operative Societies Ordinance. The growing importance of the Co-operative movement with its impact on the economic life of the country and the recognition given to it even by the Constitution of Sri Lanka under Article 16 (2) as one of the principles guiding state policy, bring the co-operative organisations and those who administer its affairs under the spotlight of public interest. The activities of co-operative societies particularly societies like the Nattandiya Coconut Producers Co-operative Society Limited have for their object the promotion of the economic interests of the members and the public have an interest in these activities as they directly or indirectly affect them. Public Funds are used for the promotion of their activities and it is in evidence from the Minutes (A1) of the annual general meeting of this Society that a loan of twelve lakhs of rupees from public funds had been approved for this society. The activities of the said society are supervised by a Government Department. The three persons who have been appointed by the 1st respondent to function and perform the duties of the Executive Committee are persons responsible for the administration of the affairs of the Society

and to do the work of the Executive Committee. Section 75 of the Co-operative Societies Law defines the 'Committee' as a governing body of a registered society to whom the management of the affairs is entrusted. The offices therefore held by the 2nd and 3rd respondents are those in which 'the public have an interest' and the "exercise of them materially affects a great body of them" and the "execution of the offices secures the proper distribution of a fund in which the body of the public have an interest".

In my view, therefore, the 2nd and 3rd respondents hold office of a public nature. I, therefore, overrule the preliminary objection raised by learned State Counsel.

Mr. Senanayake made his next submission that in the event of the 1st respondent having the power of dismissal he could have done so only after having given the petitioner an opportunity to show cause. This he submitted was a violation of the principle of audi alteram partem. He strongly relied on the well-known case of *Ridge v. Baldwin* (1963), 2 A.E.R. 66. In this case the relevant statute provided that "the watch committee may at any time dismiss any borough constable whom they think negligent in the discharge of his duty or otherwise unfit for service".

H. N. G. Fernando, J. in *Kulatunga v. The Board of Directors of the Co-operative Wholesale Establishment and another*— 66 N. L. R. 170, at 172—has summarised the principles governing the rule of audi alteram partem in relation to dismissals laid down by Lord Reid in Ridge v. Baldwin under 3 categories. They are—

"(1) The pure case of master and servant, where (in the words of Lord Reid) the contract can be terminated "at any time and for any reason or for none", and where the only remedy would be damages for breach of contract if there is termination not warranted by the contract. In such cases there is no question of a need to hear the servant in his defence, and the principle audi alteram partem does not apply.

(2) The case of an office held at pleasure in which it has always been held that such an officer has no right to be heard before he is dismissed, this because the person having power of dismissal is not bound to disclose his reasons.

(3) The case of dismissal from an office where there must be something against a man to warrant his dismissal. It is in this case that the principle of audi alteram partem applies".

In *Ridge v. Baldwin* it was decided that before it can be decided that there has been a neglect of duty it is prerequisite that the question should be considered in a judicial spirit. In Kulatunga's case the petitioner was appointed to the staff of the Co-operative Wholesale Establishment constituted under Act No. 47 of 1949 (Chap. 126). The Board of Directors of the Establishment wrote to the petitioner informing him that his appointment (as Security Officer in the Establishment) was terminated with effect from a certain date. So far as Chapter 126 affected the Petitioner the only provision in the Act was that in Section 11 :— " Every appointment to the staff of the Board shall be made by the Board ". There was no provision as to dismissal of a person in the position of the petitioner, and if any statutory provision did apply it was to be found in the Interpretation Ordinance (section 14 (f)) which declared that the power to appoint shall include the power to dismiss. It was held in this case that the duty to act judicially did not arise and that in the absence of any express provision in the statute (Chap. 126) specifying either the grounds of dismissal or the procedure to be followed prior to a decision to dismiss, the Board had no duty to inform the petitioner of the grounds of his dismissal or to give the petitioner an opportunity of being heard, or to act judicially in reaching its decision. H. N. G. Fernando, J. cited *Lord Hodson* in *Ridge v. Baldwin* at p. 112 where he observed,—

> " I entirely accept the reasoning of the Lords Justices (the Court of Appeal) that if a statute gives an unfettered right to dismiss at pleasure without more, there is an end of the matter ".

H. N. G. Fernando, J. further observed—

> " It will be seen therefore that in the view of Lord Reid a provision which confers a power of removal simpliciter and does not prescribe either grounds for removal or the procedure to be followed, is regarded as being equivalent to the power to remove from an office held at pleasure. With much respect, I cannot think of any consideration which is in reason opposed to this view ".

In *Sri Pragnarama Thero v. The Minister of Education*—71 N. L. R. 506—the question arose before My Lord the Chief Justice whether the rule of audi alteram partem should be observed by the Minister for the dismissal of the Vice-Chancellor of the Vidyalankara University who was appointed by the Minister in accordance with the provisions of section 42 of the Higher Education Act, No. 20 of 1966. The argument of Counsel for the petitioner in this case was that sub-section (6) fixes a term of five years as the period during which a person appointed to be

Vice-Chancellor will hold office and that no authority has the power to limit that period of office. Sub-section (6) itself, it was argued, provided for two means by which the period may be reduced, one being the event of resignation by the person appointed, and the other being the eventuality that the person appointed, may complete his 65th year before the end of his five-year term. The sub-section it was argued did not contemplate any other means by which the term of office can be reduced. It was held that there would be much force in these arguments if sub-sections (6) and (7) were the only provisions of law which are apparently applicable. But that was not the case, since consideration must necessarily be given to the Interpretation Ordinance which applies for the construction of all Acts of Parliament. Section 14 of that Ordinance provides in paragraph (*f*) that—

> " for the purpose of conferring power to dismiss, suspend, or re-instate any officer, it shall be deemed to have been and to be sufficient to confer power to appoint him ".

The Chief Justice referred again to the House of Lords decision in Ridge v. Baldwin, and said that the rule of audi alteram partem must be observed in the third class of case, means only that where a statute provides for dismissal on some specific ground or after observance of some specific procedure, an officer must be heard in defence unless the need for such a hearing is expressly excluded by the prescribed procedure. He went on to observe,—

> " Moreover it seems to me that in every case where the unfettered power of dismissal from an office which s. 14 (*f*) of the Interpretation Ordinance confers is exercisable, that is to say where the Legislature has said nothing concerning the ground or mode of dismissal, the office is held at pleasure or is at the least held on terms equivalent to the terms of an office held at pleasure ".

The Chief Justice held that the Petitioner was validly removed from office by the Minister, and that there was no necessity to observe the rule of audi alteram partem.

Applying the principles in these cases to the facts of the application before me, I am of the view that under this by-law the 1st respondent had the power to appoint the petitioner to

the office in question. The by-law itself does not provide for dismissal, nor for dismissal on specific grounds or after observance of some specific procedure. Under these circumstances, I hold that the 1st respondent need not have observed the rules of natural justice and in particular the rule of audi alteram partem before he dismissed the petitioner. In my view applying the provisions of section 14 (*f*) of the Interpretation Ordinance, the 1st respondent, having had the power to appoint the petitioner to the office in question under by-law 29 (ඌ), he had the power also to dismiss him. It is inconceivable that the 1st respondent should not be given the power of removal in this case. If the three persons or any of them who were appointed to function as the Committee were guilty of acts of dishonesty or acting detrimental to the interests of the Co-operative Society, surely, in these circumstances, the Commissioner should have the power of removal, and, he, therefore, certainly can act under Section 14 (*f*) of the Interpretation Ordinance in order to dismiss such persons from their offices. I am fortified in advancing this argument by the observations made by My Lord the Chief Justice in *Sri Pragnarama Thero v. Minister of Education*—71 N. L. R. 506, at 509—

> "In considering this argument, I have unfortunately to take into account an unpleasing possibility, however theoretical it may be, that a person appointed as Vice-Chancellor can conceivably become permanently of unsound mind or be convicted of a crime. If Counsel's argument be correct, then there would be no lawful means of removing from office a person whose continuance therein has become completely objectionable in the public interest. I cannot agree that a Court should attribute to Parliament any intention to exclude the operation of s. 14 (*f*) of the Interpretation Ordinance in such an event".

I, therefore, hold that the 1st respondent who had the power to appoint the petitioner to this office under by-law 29 (ඌ) had also the power to dismiss him ; he had also the power thereafter to appoint the 2nd and the 3rd respondents under the same by-law for the remaining period, that is till 6.4.73. The unfettered right of dismissal given to the 1st respondent by by-law 29 (ඌ) read with section 14 (*f*) of the Interpretation Ordinance shuts out the necessity for the observance of the rule of audi alteram partem or the consideration of the relevance of mala fides, if any, on the part of the 1st respondent.

I must also express the view that section 36 (2) and section 60 (2) of the Co-operative Societies Law No. 5 of 1972 do not provide alternative remedies which are equally effective and appropriate, as contended by learned State Counsel, had the petitioner's contention been upheld.

I dismiss the application of the petitioner with costs fixed at Rs. 105 payable to the 1st respondent, Rs. 105 payable to the 2nd respondent, and Rs. 105 payable to the 3rd respondent.

RAJARATNAM, J.—I agree.