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November 25.

In the Matter of the Election of a COUNCILLOR FOR THE GALUPIADDA WARD OF THE GALLE MUNICIPALITY.

Quo warranto—Mandamus—*Election of Municipal Councillor—Qualifications—Contracts with Municipality—Powers of the Supreme Court—Courts Ordinance* (*No.* 1 *of* 1889), *s.* 46—*Municipal Councils Ordinance* (*No.* 7 *of* 1887), *ss.* 22, 23, 31, 33, 39, 63-68—*Ordinance No.* 7 *of* 1902, *s.* 20.

The Supreme Court has power to issue a mandate in the nature of *quo warranto*.

Neither section 22 nor section 23 of the Municipal Councils' Ordinance debars the Supreme Court from issuing a mandate in the nature of a prerogative writ in an appropriate case.

Where an office which it is sought to vacate is already filled, the appropriate remedy is a mandate in the nature of *quo warranto* and not a *mandamus*.

Under section 41 of Ordinance 7 of 1887 it is necessary, for the purpose of the name of a candidate being put upon the list of those qualified to be elected, that he should be duly qualified to be elected at the time when those lists are prepared.

It is, in any event, necessary that he should be qualified at the date of the election itself, even if he does not commence to exercise the duties of the office until after that date.

Section 31 of Ordinance No. 7 of 1887 enacts that "no person shall be qualified to be or continue to be a Councillor who has been sentenced to imprisonment for any infamous crime, or is or becomes bankrupt or insolvent, or who without the permission in writing of the Standing Committee is interested, otherwise than as a shareholder in a Joint Stock Company, in any contract or work made with or done for the Municipal Council, nor, unless the Council otherwise decide, shall any person continue to be a Councillor who fails to attend three consecutive general meetings."

Held, that a lease would come within the meaning of the term "contract" in the above section.

The term "contract" should receive its full interpretation, and should not be restricted to those contracts alone which a Municipality is authorized by sections 63 to 68 to enter into.

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It is not necessary that the contract should be under the corporate seal of the Council. It is sufficient if it is one that may possibly create a conflict between the duty of the individual and his interest as a contractor.

Where a person, who had entered into a contract with the Municipal Council—to wit, had purchased the rent of certain tolls belonging to the Council from January 1 to December 31, 1905—at the date of the preparation of the lists of those qualified to be elected as Councillors, and also at the date of the election, was elected a member for one of the wards of the said Municipality:

Held, that the said person was not qualified to be elected a Councillor, and that his election was null and void.

Held, also, that a mandate in the nature of *quo warranto* should issue to declare the election null and void, and that a *mandamus* should issue to erase the name of the said person from the list of persons qualified to be elected Councillors.

THIS was an application by one Denister Perera to have the election of T. de S. Amarasuriya as a member of the Municipal Council of Galle declared null and void, and to have his name erased from the list of persons qualified to be elected as members of the Municipal Council. The following affidavit was submitted in support of the application:—

"I, Edward Denister Perera of Galle, not being a Christian, solemnly, sincerely, and truly affirm, declare, and say as follows:—

1. The sitting Member, Mr. Francis Perera, for the Galupiadda Ward of the Galle Municipality having resigned his office, the Chairman of the said Municipality notified in the *Ceylon Government Gazette* of the 20th day of October, 1905, that a Councillor for the vacant seat would be elected at an election to be held at the office of the said Municipality on the 4th day of November, 1905, at 8.30 A.M., and one Mr. T. D. S. Amarasuriya of Galle and I were the only candidates for the said vacant seat at the said election.

2. The Municipal Councils' Ordinance, No. 7 of 1887, and the amending Ordinances require the Chairman of a Municipality to prepare in the month of September of every third year lists of persons qualified to vote at an election of the Councillors and of persons qualified to be elected as Councillors; and the lists so prepared, when certified under the hand of the Chairman, supersede the pre-existing list of voters and Councillors as provided by section 43 of the Ordinance No. 7 of 1887.

3. At the election above described the Chairman of the Galle Municipality (the respondent above-named) held that the list which applied to the election was the one prepared by him in September, 1905, and certified under his hand on the 6th day of October, 1905.

4. It was submitted on my behalf that the list which should apply to the election was not this list, but the list prepared in the year 1902, and that, the new list of 1905 not having superseded the list of 1902, Mr. Amarasuriya was not qualified to come forward for election, as his name did not appear in the list for 1902. The learned Chairman, however, overruled this objection.

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5. It was also submitted that Mr. Amarasuriya was disqualified for election, inasmuch as he resided at Unawatuna, outside the Municipality; but this objection too was overruled.

6. Objection was also taken that Mr. Amarasuriya was disqualified, as he had entered into a contract with the Galle Municipality, to wit, a contract to collect tolls on the Galle-Morawak korale roads in consideration of certain monthly payments made by Mr. Amarasuriya to the Council (a certified copy of the said contract is hereto annexed marked "A"). This objection too was overruled by the Chairman.

7. I thereupon withdraw from the contest, as I did not seek election at the hands of voters whom I considered disqualified to vote, to wit, the voters whose names appear in the new list of 1905, and Mr. Amarasuriya was declared elected Councillor for the said Galupiadda Ward.

8. On the same day I tendered to the Chairman a *protest* against Mr. Amarasuriya's election, and under section 33 of Ordinance No. 7 of 1887 applied that Mr. Amarasuriya's name be erased from the list of Councillors, and that the election be declared null and void.

9. The Chairman by his letter of the 6th November, 1905 (which is hereto annexed), declined to erase the name of Mr. Amarasuriya or to declare the election null and void, and further added that the list for 1905 was certified under his hand on the 28th day of October, 1905, and not on the 6th October, 1905, as was mentioned at the election.

10. I am advised (*a*) that the list for 1902 cannot be superseded by the list produced at the said election certified on the 6th October, 1905, as the list for 1902 can only be superseded by a new one if certified during the last week of October. The list produced at the election having been certified on the 6th October, 1905, could not therefore supersede the list for 1902. Mr. Amarasuriya's name not having appeared in the 1902 list as a qualified Councillor, he could not therefore have sought election, and the voters whose names appeared in the list for 1905 were not duly qualified to vote.

(*b*) If, as mentioned by the Chairman in his letter of 6th October, 1905, the list was certified on the 28th October, 1905, the election is null and void because notice of not less than fourteen days thereof was not given in the Ceylon *Government Gazette* after the said lists had been certified.

(*c*) Of the voters whose names appeared in the list for 1902, forty-one of them had given their proxies in my favour. In the list for 1905 the names of about fifteen persons appear as qualified voters whose names do not appear in the list for 1902, and of whose qualification there was no other proof than the appearance of their names in the said list of 1905.

(*d*) Mr. Amarasuriya, being a contractor with the Galle Municipality, was disqualified to be a Councillor under the provisions of section 31 of Ordinance No. 7 of 1887.

(*e*) It was the Chairman's duty to have acted in accordance with the provisions of the Municipal Councils' Ordinance, No. 7 of 1887 and the amending Ordinances, and in certifying the list on the 28th October, 1905, and holding the election on the 4th November, 1905, without due notice, he has acted contrary to the provisions of the said Ordinances.

A certified copy of the proceedings of the election is hereto annexed.

(Signed) E. D. PERERA."

Dornhorst, K.C., and *Bawa*, for applicant.

A. St. V. Jayewardene and *A. Drieberg*, for respondents.

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In the present case the petitioner claims a two-fold remedy. He seeks to have the election of Mr. Thomas de Silva Amarasuriya as a Municipal Councillor of Galle in the month of November last declared null and void. He seeks also to have that gentleman's name erased from the list of persons qualified to be Municipal Councillors under the Ordinance of 1887.

In view of the fact that the office, which it is sought to vacate, is at present filled, the first point of relief claimed cannot be accomplished by *mandamus* (see the case of the *The King v. Beer*, (1903) 2 *K. B.* 693). It can only be effected by a mandate in the nature of *quo warranto*. I have, therefore, first to consider the question whether the Supreme Court of this Colony has power to grant a mandate in the nature of *quo warranto*. No express mention is made of that writ in section 46 of The Courts Ordinance; but it seems to me that even under the terms of that section I have the power to grant the relief claimed. The section in question authorizes this Court to grant or to issue mandates in the nature of certain prerogative writs which it names. It seems to me to be fairly arguable that a mandate in the nature of *quo warranto* might be allowed under this provision; I do not think that the enumeration in that section is exclusive. But even if such relief cannot be graanted under The Courts Ordinance, I think it comes under the inherent powers of this Court as the Supreme Court of jurisdiction in the Island—inherent powers which have been declared and affirmed in the case of contempts, not committed in *facie curiæ*, by the Full Court in the case of *Ex parte John Ferguson*, (1874) 1 *N. L. R.* 181. In England, of course, the old writ of *quo warranto* has been superseded by an information in the nature of *quo warranto*, now mainly regulated by legislation. But that circumstance cannot affect the position of matters in Ceylon. There has been no such legislation here. I think there must be some means of trying title to office in such cases as the present.

It is to me a matter of regret that there is apparently no right of appeal from my decision on this point, but I thought it due to the parties that I should record my opinion. It may serve at least as a basis for argument in some future case.

With regard to the question of *mandamus*, no such difficulty arises under section 46 of The Courts Ordinance. Section 46 is conclusive on that point, and, in determining whether or not a writ of *mandamus* should go, I have to be guided by the principles of the law of England.

In the present case quite a variety of objections to the election in question were placed before me. At the date of the election itself,

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however, and in the petitioner's protest which followed, two objections only seem to have been insisted on—in the first place, that Mr. Amarasuriya did not in fact reside within the Municipality; and in the second place, that he was interested in a disqualifying contract within the meaning of section 31 of the Ordinance of 1887. At the hearing of the argument yesterday the question of residence was abandoned, and I propose to decide the case on the ground of the contract alone. But having regard to the very full and able arguments that were put before me on both sides on some of the other issues I think I ought to record, merely as *obiter dicta*, what the view I take of these issues is. It appears to me—in the first place, that in section 38 of the Ordinance of 1887, which deals with what I may call by-elections, the word "forthwith" only means that the seat is not to remain vacant; in the second place, that questions of qualification for being elected or for voting at such by-elections are to be determined by the previous lists, and not by new lists which have been framed with a view to an ensuing triennial election; in the third place (even if my opinion on that point is not correct), that it is necessary that the lists which are to form the basis of any such by-election should be certified under section 43 of the Ordinance of 1887 during the last weeks of October following the September in which the lists are to be prepared; and lastly, that fourteen days' notice of any such election should be given. I think that section 38 of the Ordinance points to these requirements when it speaks of the Chairman taking "the necessary steps" for filling up the vacancy. As I have said, these observations are merely *obiter dicta*, and I have made them simply out of deference to counsel on both sides.

I pass now to the question as to whether Mr. Amarasuriya was interested in a disqualifying contract within the meaning of section 31 of the Ordinance. Section 31 seems to indicate two points of time at which the disqualification may arise, viz., either at the date of election, or while the person elected continues to hold his office as Councillor. I interpret section 31 in that sense; and I think further that, under section 41 of that Ordinance, it is necessary, for the purpose of the name of a candidate being put upon the list, that he should be, in the language of that section, duly qualified to be elected at the time when these lists are prepared. It is, in any event, necessary that he should be qualified at the date of the election itself, even if he does not commence to exercise the duties of the office until after that date. Now here it is, *ex concessis*, that the alleged contract —I shall speak of its nature immediately—with the Municipality was in force both at the date when the new lists were prepared and at

the date of the election itself. If, therefore, that alleged contract was a disqualifyig contract, it follows—first, that the election itself is void; and secondly, that Mr. Amarasuriya's name ought not to appear in the new list of qualified Councillors. It follows also that the case is one in which both the remedy of *quo warranto* and the remedy of *mandamus* will lie, subject, as to a *mandamus*, to certain considerations affecting the issue of a prerogative writ, which is not *ex debito justitiæ*.

I come now to the alleged contract itself. Mr. Jayewardene in his able argument pressed me to say that the contracts indicated in section 31 are those contracts alone which a Municipality is authorized by sections 63 to 68 of the Ordinance to enter into, and that in any case this particular contract was invalid because it did not bear the corporate seal of the Municipality. I am unable to give effect to either of these conditions. Section 31 speaks of " any contract," and I see no reason for placing on these words any narrower interpretation than was given in the English case of *The Queen v. York* (1842) 11 *L. J., Q. B., pp.* 129 *and* 130, under the old Municipal Corporations Act of 1835. It was there held that the word " contract " must receive its full interpretation, and that it included such transactions as a lease. Mr. Jayewardene called my attention to the fact that, under the English Municipal Corporations Act of 1882, there is now an express exception of leases. It appears to me that that argument is almost sufficient in itself to dispose of his point, for it means that without the aid of such legislative interference the term " contract " would include lease. There has been no such legislation in Ceylon, and I hold that the present case on this point is governed by *The Queen v. York*. With regard to the absence of the corporate seal, it was expressly held in England in *The Queen v. Francis* (1852) 18 *Q. B., p.* 526, that the absence of the corporate seal made no difference. I hold that on this point also English authority is conclusive.

As to the terms of the contract itself, Mr. Jayewardene contended that I ought to restrict the meaning of section 31 to cases in which the contract is of such a character as to create a clear possible conflict between the interest and the duty of the contractor. Even if I accept that test, it seems to me that this contract answers to that description. For under articles 5 and 12 of the instrument in question alternative powers are given to the Council, in case of default by the contractor, either to re-enter on the toll without notice, or to resell part of the toll, or to set off, as against any sums of money which might be due by the contractor, part of his deposit, and to do this without the necessity of any legal process whatsoever. I think

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it impossible to hold that powers of that wide character are not such as might quite well create that very conflict between the duty of the individual as a Councillor and his interest as a contractor which it is the object of the Legislature to prevent. I hold that this is a disqualifying contract under section 31 of the Ordinance of 1887.

The case is therefore one in which a writ of *mandamus* should issue, unless there are circumstances which make it inequitable that effect should be given to the petitioner's application. Three such circumstances were stated in Mr. Amarasuriya's affidavit—first, an allegation of undue delay on the part of the petitioner; secondly, an absence of *bona fides;* and thirdly, an allegation that even if the writ were granted it would be ineffective, inasmuch as the triennial election of principal Councillors ensues early next month. Of these three grounds, the two first were abandoned in argument. I have now to deal with the last alone. It appears to me that for several reasons the relief I propose to grant will not be ineffective. In the first place I decide the question of law, which I think ought to be decided, as to the meaning of the word " contract " in section 31; in the second place I decide the question of the right of Mr. Amarasuriya to have his name retained on the list; I think that also is a question that the petitioner has a right to have decided. It appears to me that the procedure which has been taken in the present case before the Municipal Council falls partly under section 22 and partly under section 33 of the Ordinance of 1887. The objections which were taken at the time of the election fall under section 22, and these are more especially dealt with by a mandate in the nature of *quo warranto*, which declares the election itself null and void. On the other hand, the protest, which the petitioner lodged after the election, seems to me to come under section 33, and it is there especially that the remedy of *mandamus* will apply. I am unable to interpret either section 22 or section 33 as barring the right of this Court to deal with such a case as the present by any appropriate remedy in the nature of a prerogative writ.

I am of opinion that in the first place a mandate in the nature of *quo warranto* must issue declaring the election in question null and void, and in the second place there must be a mandate in the nature of a *mandamus* for the erasure of Mr. Amarasuriya's name from the list of persons qualified to be elected Councillors. It will be observed that by this decision I leave entirely open the question whether a candidate at the date of the election itself could not be entitled to claim election, even although his name was not on the list of Councillors, provided that his disqualification had ceased at that date (see *Whalley v. Bramwell*, 15 *Q. B., p.* 775). My attention was called in

the course of the argument to the possibility of a disqualification of this character under section 31 being got rid of by the permission in writing of the Standing Committee. It seems, however, that this clause as to the Standing Committee has been repealed by section 20 of Ordinance No. 7 of 1902. I have, however, decided as regards the issue of a *mandamus* nothing more than this—that Mr. Amarasuriya's name ought to be erased from the list of Councillors. With reference to the view taken by the Courts in England of the position of matters when a disqualifying contract has terminated, I desire to call the attention of both sides to the decision of the Court of Appeal in the case of *Lewis v. Carr* (1876) 1 Ex. Div., p. 484.

I only desire to add that I very greatly regret that I have had to decide this case alone. I have given it my most careful and anxious consideration, and if it had been in my power to facilitate an appeal I should have exercised that power without a moment's hesitation. The costs of the petition must be borne by Mr. Jayewardene's client; the respondent will bear his own costs of this application.