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Quo Warranto--Persons Entitled to Relief

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In other jurisdictions, at least, the view has obtained that in passing on an application for a certificate of public convenience and necessity, the public's interest rather than that of the applicant is paramount. See, e.g., *H. & K. Motor Trans. v. Public Util. Comm'n*, 135 Ohio St. 145, 153, 19 N.E.2d 956, 960 (1939). Possibly an economically healthy trucking industry might even be in the public interest as much as an economically healthy railroad.

J. K. B.

QUO WARRANTO—PERSONS ENTITLED TO RELIEF.—Proceedings on an information in the nature of quo warranto by the state, on the relation of certain Clarksburg city councilmen, to try title of two other members of the council on the ground that they were not freeholders of record in the city when elected, as required by the city charter. *Held*, that a duly qualified member of a city council has such an interest as to enable him, as relator, to prosecute such a proceeding. *State ex rel. Morrison v. Freeland*, 81 S.E.2d 685 (W. Va. 1954) (3-2 decision).

W. VA. CODE c. 53, art. 2, § 4 (Michie, 1949), provides that "any person interested" may bring such an action to try title of a public officer. The West Virginia court has aligned itself with the great weight of authority under similar statutes in interpreting this to mean interested other than as a citizen and taxpayer. *State ex rel. Depue v. Matthews*, 44 W. Va. 372, 29 S.E. 994 (1898) (holding a defeated candidate has no such interest); *State ex rel. Scanes v. Babb*, 124 W. Va. 428, 20 S.E.2d 683 (1942) (holding a *de facto* officer does not possess the requisite interest). The precise question in this case was whether relators held an interest distinct from that of citizens and taxpayers. The court found such an interest in the fact that councilmen are peculiarly interested in having only properly elected members on the council.

The dissent emphatically objects that this holding is "un-sound", "completely unsupported", leads to "intolerable consequences", and is contrary to the weight of authority under similar statutes. The dissent relies heavily on a Washington case in which a mayor sought to oust a councilman but was held not to be a competent relator as he had no special interest in the office. *Mills v. Washington*, 2 Wash. 566, 27 Pac. 560 (1891). However, the statute there was not similar for it contemplated institution of such actions only by a claimant to the office. As quoted within

the *Mills* case, Section 708 of the Washington Code of 1881 says, "If judgment be rendered in favor of the relator, he shall proceed to exercise the functions of the office. . . ." *Id.* at 573, 27 Pac. at 562. Thus, the case is inapplicable here, where the West Virginia legislature has evinced no such limitation to claimants of an office, but allows any person interested to prosecute by an information in the nature of quo warranto. The dissent also quotes at length from an Illinois case, claiming the interest of the parties there is legally identical with the relators in this case. A town clerk and a justice of the peace, who was also a member of the township board of auditors, were denied quo warranto relief for lack of interest, because ". . . the office of supervisor might be occupied by an usurper yet . . . plaintiffs could perform their official duties. . . ." *People ex rel. Hiller v. Bevirt*, 297 Ill. App. 335, 341, 17 N.E.2d 629, 631 (1938). While it seems quite probable that a town clerk, justice of the peace, or town auditor could very well perform his duties while an alleged usurping town supervisor holds office, it is hard to see how duly qualified councilmen could properly carry out their official duties while sitting with two usurpers when the city charter requires only a quorum of five members with a majority vote sufficient for the transaction of business. The interest of the councilmen in preventing illegal or unauthorized participation in the voting constitutes the peculiar interest required by the legislature, and is a far more substantial interest than that of the general public, according to the majority opinion.

Holdings of the Pennsylvania court are in direct accord with this case. A Pennsylvania statute allows "any person" to prosecute in quo warranto actions, but the relator is confined by judicial interpretation to one who has an interest to be affected. *Commonwealth v. Chuley*, 56 Pa. 270 (1867). The Pennsylvania court, in allowing four managers of a municipal corporation to prosecute another person claiming to be a manager, said, ". . . they certainly have such an interest. . . . Taxes are to be levied, moneys collected and distributed . . . and it is a matter of no small importance to all of the managers . . . to have the question determined whether the board has been legally constituted." *Commonwealth v. Bowditch*, 217 Pa. 527, 533, 66 Atl. 867, 869 (1907). Though the majority in the instant case says it has found no authority in point, it proceeds upon the same reasoning as the *Bowditch* case which has stood nearly half a century without any disastrous harrassment of public officers by disgruntled constituents such as the minority opinion thinks will surely result from this decision.

In Virginia, it has been said the object of its legislation, which is almost identical to that of this state, was to simplify the procedure, not narrow the common law writ of quo warranto. *Watkins v. Venable*, 99 Va. 440, 39 S.E. 147 (1901). The instant case is in line with the view enunciated by the *Matthews* decision, that it is not necessary for the relator to show title in himself, but he must have a special interest in the office. It is submitted that while this holding develops a facet not heretofore used in this jurisdiction for trying title of public officers, it is not an unreasonable interpretation of legislative intent, but rather the case represents a proper extension of a little-used extraordinary remedy.

E. W. C.

STIPULATIONS—OPERATION AND EFFECT—ADMINISTRATIVE COMPARED WITH JUDICIAL PROCEEDINGS.—In a proceeding before the Tax Court the parties stipulated that the taxpayers' books showed accounts receivable of certain amounts and that they had been charged off as bad debts. The Tax Court found the evidence so confusing as to disclose no basis for this debt and declared it invalid and no basis for a bad debt deduction. The taxpayers claimed this was error, saying they were misled by the pleadings (stipulations), believing that the Bureau conceded the validity of the debt and were not prepared to present evidence on that issue. The taxpayers argued that the burden of showing the debt was sustained by the stipulation. *Held*, that while the stipulation prevents the Bureau from challenging the entries on taxpayers' books, it cannot prevent the Bureau from questioning the factual basis of the entries. Concession of the existence of the entries did not also concede the basis for the entries. This was for the taxpayers to prove in order to get the deductions for the bad debts. *Russell Box Co. v. Comm'r of Internal Revenue*, 208 F.2d 452 (1st Cir. 1953).

Tax Court Rule 31 (b) directs that parties shall endeavor to stipulate evidence to the fullest extent to which either complete or qualified agreement can be reached. This requirement and the doctrine of the principal case taken together may seriously embarrass a prospective litigant who is to stipulate if possible, but must use extreme care in construction and analysis and may assume nothing not stated with explicit literalness.

Except for jurisdiction and matters offending sound public policy, the power of parties to stipulate in a civil action is practically unlimited and parties may stipulate away statutory or even constitutional rights. *Budá v. State*, 105 N.Y.S.2d 956, 278 App.