Hastings Law Journal

Volume 15 | Issue 2 Article 12

1-1963

Quo Warranto

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QUO WARRANTO

Of all the extraordinary remedies, the practitioner is probably least familiar with quo warranto—which is not surprising when one recalls the infrequency of its use and the limited attention given the subject by writers of recent years. An effort will be made to familiarize the reader with quo warranto in California. Of necessity our examination must begin with the common law, since the ancient writ, for better or worse, has not undergone the substantial changes that may be found in other states.[1]

History

Blackstone defines quo warranto as "a writ of right for the king, against him who claims or usurps any office, franchise or liberty, to inquire by what authority he supports his claim, in order to determine the right."[2] At first this remedy was civil,[3] and if a judgment were rendered for the king there was either a seizure by the crown or a judgment of ouster to eject the usurper;[4] but in no event would a fine or punishment be inflicted. Centuries later the writ fell into disuse, but in its place grew up an "information in the nature of quo warranto" which originally was a method of criminal prosecution that not only ousted and seized, but also imposed a fine.[5] In time the information again became a civil proceeding to try the right to a franchise or office.[6]

Scope

Section 803 of the Code of Civil Procedure[7] provides that the action in quo warranto

> may be brought by the attorney-general, . . . upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, . . . or any franchise, or against any corporation, . . . which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state.

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branch of government does not exist for the convenience of judges or even attorneys, but to dispose justly of controversies between litigants. When a petition for a writ is denied without opinion, the petitioner understandably feels himself short-changed, and probably takes his petition to a higher court to vindicate his wrath at an outrage to justice. If the petitioner were given an adequate reason for the denial of the writ, undoubtedly he would be less likely to appeal, and perhaps the ultimate result of the written opinion would be to conserve rather than to consume the time of the court. The written opinion would also perform the additional function of helping to establish needed precedent in an area in which virtually all the principles of equity apply, thereby increasing predictability in writ proceedings.

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[1] 5 BANCROFT, CODE PRACTICE AND REMEDIES § 4110 (1928)

[2] 3 BLACKSTONE, COMMENTARIES *262.

[3] State *ex rel.* City of St. Petersburg v. Noel, 114 Fla. 175, 154 So. 214 (1934).

[4] State v. Askley, 1 Ark. 279 (1839). See generally HIGH, EXTRAORDINARY LEGAL REMEDIES § 592 (3d ed. 1896).

[5] Ames v. Kansas *ex rel.* Johnston, 111 U. S. 49 (1883). See generally 6 CONSTANTINEAU, DE FACTO DOCTRINE 637 (1910).

[6] People *ex rel.* Attorney General v. Dashaway Ass'n, 84 Cal. 114, 24 Pac. 227 (1890).

[7] While the Code of Civil Procedure does not refer to this action as "quo warranto," the term is commonly used by courts and lawyers. See 3 WITKIN, CALIFORNIA PROCEDURE *Extraordinary Writs* § 2 (1954).

The cases leave no doubt that quo warranto is the proper method by which title to public office may be tried.[8] The courts require that the incumbent be *de facto* in office,[9] exercising some of the sovereign powers of government.[10] Since the primary purpose of the proceeding is to oust the defendant, if he voluntarily surrenders the challenged office after the proceeding has commenced, abatement will usually result.[11]

Whenever an action challenges a public office the courts may also determine the right of any person claimed entitled by the attorney general in the complaint,[12] yet the incumbent is not permitted to attack the relator's right.[13] He may defend only by proving the authority by which he claims the office. In the event judgment is rendered in favor of the relator he may recover any damages he has sustained and proceed to execute the office.[14] In such a case the defendant must pay the costs and the court may in its discretion impose a fine.[15] If the defendant should continue to exercise the office all future acts done under color of office would be void and he would be in contempt.[16]

It is by quo warranto that the attorney general may oust a private corporation from its franchise rights. The writ is available for this purpose independent of the criminal law; institution of a criminal prosecution does not bar quo warranto nor does the writ bar a criminal action.[17] It is to be noted that unlike the action challenging an office there is no requirement that the corporation be public, and consequently the scope and control of the writ can have far-reaching results.[18] However, the use of the writ is limited to situations where there is a continuing and substantial act which constitutes a clear violation of the franchise.[19]

Quo warranto is also the exclusive remedy against the improper exercise of a municipal corporation's authority.[20] It is employed most often to challenge

[8] Stout v. Democratic County Cent. Comm'n, 40 Cal. 2d 91. 251 P.2d 321 (1952); Barendt v. McCarthy, 160 Cal. 680, 118 Pac. 228 (1911); People *ex rel.* Swift v. Bingham, 82 Cal. 238, 22 Pac. 1039 (1889); Hull v. Superior Court, 63 Cal. 174, 11 Pac. Coast L. J. 25 (1883); Satterlee v. San Francisco, 23 Cal. 314 (1863); People *ex rel.* Smith v. Olds, 3 Cal. 167 (1853); Klose v. Superior Court, 96 Cal. App. 2d 913, 217 P. 2d 97 (1950).

[9] See Jarrett, *De Facto Public Officers*, 9 So. CAL. L. REV. 189, 212 (1936).

[10] Stout v. Democratic County Cent. Comm'n, 40 Cal. 2d 91, 251 P. 2d 321 (1952) (party committeeman not such an officer).

[11] People v. Muehe, 114 Cal. App. 739, 300 Pac. 829 (1931) (abatement results); People *ex rel.* Drew v. Rodgers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668 (1897) (action not dismissed even though office is abolished before trial, as defendant may still be fined and claimant may receive damages as provided by §§ 807 and 809 of the Code of Civil Procedure).

[12] CAL. CODE CIV. PROC. §§ 804-05.

[13] People *ex rel.* Bledsoe v. Campbell, 138 Cal. 11, 70 Pac. 918 (1902).

[14] CAL. CODE CIV. PROC. §§ 806-07.

[15] CAL. CODE CIV. PROC. § 809.

[16] *Ex parte* Henshaw, 73 Cal. 486, 15 Pac. 110 (1887); 6 CONSTANTINEAU, DE FACTO DOCTRINE 653 (1910).

[17] See 28 CAL. S. BAR J. 89 (1953).

[18] See, *e.g.*, People v. White Circle League of America, 408 Ill. 564, 97 N. E. 2d 811 (1951) (non-profit corporation ousted for circulating inflammatory publications attacking negroes). See also Comment, CALIF. L. REV. 120 (1923) (unlawful practice of law).

[19] HIGH, *op. cit. supra* note 4, at § 649.

[20] Gurtz v. City of San Bruno, 8 Cal. App. 2d 399, 48 P. 2d 142 (1935).

the annexation proceedings of a city. Before these proceedings are complete any private person may test their validity by a petition in mandate or certiorari, but after they become complete, a corporation *de facto* is deemed created, which may be attacked only by quo warranto.[21]

In 1937 the legislature enacted section 811 of the Code of Civil Procedure, which permits an action of quo warranto to be maintained by "the board of supervisors of any county or city and county or the legislative body of any municipal corporation" against a party intruding unlawfully into their territorial limits. This step toward modernization was favorably received by the writers because the attorney general was understandably cautious in exercising his prerogative, and frequently time was wasted informing him of the facts.[22] Also it relieved the busy state machinery from the burden of acting and permitted a well informed local body to right a wrong done to itself.[23]

Effects

A peculiarity of quo warranto is that the burden of proof may be shifted from the plaintiff to the defendant.[24] The state may charge usurpation in general terms and require the defendant to allege and prove his right to the privilege in question. While this practice has been frequently criticized, the California Supreme Court has never rejected it,[25] probably because the state may allege (as is commonly done) specific grounds and thereby assume the burden of proof.[26]

Another peculiarity of the writ is that neither lapse of time,[27] the conduct[28] and stipulations[29] made by the relator, nor even prior judgments against the relator[30] will be binding upon the people. So, as a general rule it may be said that no statute of limitation or doctrine of estoppel will tie the hands of the state.

Since quo warranto is a civil action, a new trial may be granted according to the ordinary rules and an appeal may be taken to the district court of appeals.[31] But the relator is not entitled to appeal from a judgment in favor of the defendant without approval from the attorney general; an attempted appeal would be "ineffectual." [32] Yet, an intervener who unites with the defendant in resisting the

[21] American Distilling Co. v. City Council, 34 Cal. 2d 660, 213 P. 2d 704 (1950); People *ex rel.* Mosk v. City of Santa Barbara, 192 Cal. App. 2d 342, 13 Cal. Rptr. 423 (1961); People v. Clemons, 182 Cal. App. 2d 808, 6 Cal. Rptr. 727 (1960).

[22] CAL. S. BAR J., March 1938, p. 32.

[23] Work of the 1937 Legislature, 11 So. CAL. L. REV. 50 (1938).

[24] People v. Reclamation Dist. No. 136, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085 (1898); People *ex rel.* Attorney General v. Dashaway Ass'n, 84 Cal. 114, 24 Pac. 277 (1890); People *ex rel.* Palmer v. Woodbury, 14 Cal. 43 (1859).

[25] People *ex rel.* Stephenson v. Hayden, 9 Cal. App. 2d 312, 49 P. 2d 314 (1935).

[26] *Cf.* People *ex rel.* Skelton v. Los Angeles, 133 Cal. 338, 65 Pac. 749 (1901).

[27] People v. Bailey, 30 Cal. App. 581, 158 Pac. 1036 (1916).

[28] People *ex rel.* Leavitt v. Bass, 15 Cal. App. 62, 113 Pac. 695 (1910).

[29] People *ex rel.* Budd v. Holden, 28 Cal. 123 (1865).

[30] People *ex rel.* Drew v. Rodgers, 118 Cal. 393, 46 Pac. 740 (1897).

[31] CAL. CONST. art. VI, § 4b; People v. City of Oakland, 123 Cal. 145, 55 Pac. 772 (1898).

[32] CAL. ADM. CODE tit. 11, ch. 1; People v. Reclamation Dist. No. 136, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085 (1898); People *ex rel.* Cage v. Petroleum Rectifying Co., 21 Cal. App. 2d 289, 68 P. 2d 984 (1937).

charges may avail himself of appeal and any other procedural practices, as can the defendant.[33] In most instances the perfecting of an appeal (where permitted) stays proceedings in the lower court upon the judgment or order appealed from; however, the appeal does not stay proceedings without a writ of supersedeas where it adjudges the defendant a usurper of a public office.[34]

The Attorney General's Discretion

Under the Administrative Code[35] a private party, whether personally interested or not, must submit an application for "leave to sue" to the attorney general. If the application is approved the relator must use the complaint accepted and he may not make changes without the attorney general's approval. Further, the code obligates the relator to keep the attorney general constantly informed on all motions, filings and the like, thereby subjecting him to restrictive influence even when his application is approved. At any time during the proceeding the attorney general may discontinue, dismiss or assume the management of the suit and by so doing thwart the relator who may have already expended considerable time and money.

Since the relator's application and the final decision are handled exclusively by the office of the attorney general,[36] the situation presents an opportunity for abuse, though no such instance can be found. There may be a warning in the fact that although quo warranto is a relatively uncommon remedy, denials of "leave to sue" have been repeatedly issued in recent years, not only in the more common annexation proceedings,[37] but also in applications to test title to public office.[38]

Protection against capricious action by the attorney general should be available in the form of mandamus, which is an appropriate action to correct abuse of discretion by a government officer.[39] However, it appears that mandamus has never been issued to force the attorney general to bring an action in quo warranto. Only limited judicial attention has been directed to this subject; until recently only one case in California had discussed the matter of the attorney general's discretion.

In that case, *Lamb v. Webb*,[40] a disappointed candidate for the office of county

[33] People *ex rel.* Fogg v. Perris Irrigation Dist., 132 Cal. 289, 64 Pac. 399 (1901).

[34] CAL. CODE CIV. PROC. § 949; Day v. Gunning, 125 Cal. 527, 58 Pac. 172 (1899) (not applicable when removal is because of malfeasance); *Ex parte* Henshaw, 73 Cal. 486, 15 Pac. 110 (1887); Covarrubias v. Board of Supervisors, 52 Cal. 622 (1878). Compare Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58 (1896) (action stayed by appeal if office is not public).

[35] CAL. ADM. CODE tit. 11, ch. 1 (1945).

[36] 1 OPS. CAL. ATT'Y GEN. *Foreword* (1943).

[37] 40 OPS. CAL. ATT'Y GEN. 78 (1962); 39 OPS. CAL. ATT'Y GEN. 85 (1962); 35 OPS. CAL. ATT'Y GEN. 115 (1960); 29 OPS. CAL. ATT'Y GEN. 204 (1957); 26 OPS. CAL. ATT'Y GEN. 201 (1955); 26 OPS. CAL. ATT'Y GEN. 180 (1955); 25 OPS. CAL. ATT'Y GEN. 107 (1955); 24 OPS. CAL. ATT'Y GEN. 254 (1954); 24 OPS. CAL. ATT'Y GEN. 74 (1954); 23 OPS. CAL. ATT'Y GEN. 300 (1954).

[38] 30 OPS. CAL. ATT'Y GEN. 319 (1957) (mayor); 25 OPS. CAL. ATT'Y GEN. 223 (1955) (city council); 12 OPS. CAL. ATT'Y GEN. 340 (1948) (city judge); 8 OPS. CAL. ATT'Y GEN. 221 (1946) (city supervisor).

[39] See Inglin v. Hoppin, 156 Cal. 483, 105 Pac. 582 (1909).

[40] 151 Cal. 451, 91 Pac. 102 (1907).

supervisor applied to the attorney general for leave to sue his successful opponent in quo warranto. Upon denial of his application he petitioned for a writ of mandamus to compel the attorney general to grant leave to sue under section 803 of the Code of Civil Procedure, which reads:

> [T]he attorney-general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, . . . or when he is directed to do so by the governor.

The court ducked the question whether section 803 gave it power to review the exercise of discretion by the attorney general. The petition was denied on the ground that there had been no abuse, the court saying:

> Clearly . . . this was not a sufficient showing to warrant a court in holding that the attorney-general ought to have been convinced that he had 'reason to believe' that [the incumbent] had unlawfully intruded into and usurped [the] office of supervisor.[41]

Recently, in *City of Campbell v. Mosk*,[42] the subject was again discussed, and the court expressly recognized that the attorney general's action in denying leave to sue is subject to review. The appellant city sought leave to sue the City of San Jose, which had allegedly annexed inhabitated territory adjacent to the two municipalities by the less formal procedure provided for annexing uninhabitated territory. When the attorney general rejected the application, the applicant petitioned the superior court for a writ of mandamus to compel the granting of leave to sue. The superior court sustained the attorney general's demurrer and on appeal the district court of appeals affirmed the judgment; however, it rejected the attorney general's argument that a court should never compel him to grant leave to sue in quo warranto. The court said:

> [W]e believe that there reposes in the Attorney General the right to exercise discretion in permitting the institution of suit in quo warranto. Only in the event of an extreme abuse will the courts intervene to set aside the result of the exercise of such discretion.[43]

While the court stated it intended to "define the nature of the obligations of the Attorney General to grant such leave,"[44] it does not appear to have reached that goal. Further, the opinion does not consider whether the attorney general had "reason to believe"[45] that Campbell's franchise had been usurped. Instead, the decision was based on the broad ground that suit by the appellant "would not promote the public interest."[46]

The decision in *City of Campbell* is probably sound,[47] for it is not unreason-

[41] *Id.* at 456, 91 Pac. at 104.

[42] 197 Cal. App. 2d 640, 17 Cal. Rptr. 584 (1961).

[43] *Id.* at 642, 17 Cal. Rptr. at 585.

[44] *Ibid.*

[45] See CAL. CODE CIV. PROC. § 803.

[46] City of Campbell v. Mosk, 197 Cal. App. 2d 640, 648, 17 Cal. Rptr. 584, 589 (1961). The grounds given to reach this conclusion are to be noted. For example, (1) suit would involve three governmental agencies, and (2) only the appellant objected to the annexation.

[47] The court pointed out that the statutory scheme for annexation has many built-in protections against abuse, none of which was utilized by the appellant prior to completion of the annexation proceedings. For this reason the case was probably a poor sounding board for a discussion on the nature of the attorney general's discretion.

able to allow a state officer to be an arbitrator in a dispute between two municipalities. However the broad ground on which the decision rests contains disquieting implications for a case where the rights of an individual claimant are at stake, and his only means of relief is quo warranto. Clearly, a court should not employ this "public interest" rationale of *City of Campbell* to deny the right of a claimant to public office to sue in quo warranto, in a case in which the attorney general *does* have "reason to believe" that the office has been usurped.

Procedures in Other States

Many states permit the relator to make application where the attorney general has refused to bring quo warranto, provided that he has an interest in that which he challenges.[48] Such a procedure permits the relator who is wronged in his private rights to avoid the necessity of resorting to a mandamus proceeding and does not permit the individual to correct a wrong common only to the public.[49] The decisions in the states that permit the interested party to maintain the action on his own relation differ as to what constitutes sufficient personal interest. Some limit the proceeding to a claim to office, while others liberally permit any taxpayer to maintain the action. It would appear wise to construe narrowly the elements constituting sufficient personal interest, in order to protect public officials from frequent unmerited attacks that might discourage capable men from seeking public office.[50]

Another excellent procedure places the burden of proof on the relator if he comes in on his own relation, thereby assuring that the determination is of private rights.[51] Such legislation not only allows a liberal method of determining the claim, but also permits the courts to decide if the action should be maintained in the first instance.[52]

Finally, it would seem wise to prohibit the attorney general from dismissing the action, even under our existing law, once he has given the relator the green light.[53]

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[48] People *ex rel.* Barton v. Londoner, 13 Colo. 303, 22 Pac. 764 (1889); Clarke v. Long, 152 Ga. 619, 111 S. E. 31 (1922); Rowan v. City of Shawneetown, 378 Ill. 289, 38 N. E. 2d 2 (1941); State v. Home Brewing Co., 182 Ind. 75 (1914); State *ex rel.* White v. Barker, 116 Iowa 96, 89 N. W. 204 (1902); Vrooman v. Michie, 69 Mich. 42, 36 N. W. 749 (1888); State *ex rel.* Gall v. Barnes, 136 Minn. 438, 162 N. W. 513 (1917); Dorris v. Lloyd, 375 Pa. 481, 100 A. 2d 599 (1953); Smith v. Reid, 60 S. D. 311, 244 N. W. 353 (1932); State *ex rel.* Murdock v. Ryan, 41 Utah 327, 125 Pac. 666 (1912); Hammer v. Commonwealth *ex rel.* Hoover, 169 Va. 355, 193 S. E. 496 (1937); State *ex rel.* Brown v. Warnock, 12 Wash. 2d 478, 122 P. 2d 472 (1942); State *ex rel.* Morrison v. Freeland, 139 W. Va. 327, 81 S. E. 2d 685 (1954); State *ex rel.* Williams v. Samuelson, 131 Wis. 499, 111 N. W. 712 (1907); Note, 33 N. D. L. Rev. 98 (1957).

[49] Rowan v. City of Shawneetown, 378 Ill. 289, 38 N. E. 2d 2 (1941).

[50] Comment, 40 Minn. L. Rev. 735 (1956).

[51] Vrooman v. Michie, 69 Mich. 42, 36 N. W. 749 (1888).

[52] See State *ex rel.* Morrison v. Freeland, 139 W. Va. 327, 81 S. E. 2d 685 (1954).

[53] See Limbaugh, *Extraordinary Legal Remedies,* 8 Mo. L. Rev. 247, 261 (1943). *Cf.* People *ex rel.* Garrison v. Clark, 72 Cal. 289, 13 Pac. 858 (1887); People *ex rel.* Van Valer v. Jacobs, 2 Cal. Unrep. 672, 12 Pac. 222 (1886); both were actions to set aside a patent for state swamp land in which the state had no direct interest. Though they were not quo warranto actions the attorney general was held not to have authority to withdraw his permission.

Conclusion

While other states have modified quo warranto procedure to allow the action to be brought by private individuals, California has continued to employ the procedure of the past—basically the same procedure which enabled financially embarrassed rulers to strengthen the crown by use of the writ.[54] Nevertheless, since the function of the writ is "to protect the interests of the people as a whole and guard the public welfare," [55] it is difficult to quarrel with the California system requiring the action to be brought by the attorney general. However the position the court has taken in reviewing the attorney general's discretion, as unfolded in the *Campbell* case, should not be extended to cases involving the right of an individual claimant to sue in quo warranto.

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[54] See HIGH, *op. cit. supra* note 4, at § 679.

[55] State R. R. Comm'n v. People, 44 Colo. 345, 354, 98 Pac. 7, 11 (1908).

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