A TREATISE

ON

EXTRAORDINARY

LEGAL REMEDIES,

EMBRACING

MANDAMUS, QUO WARRANTO,

AND

PROHIBITION.

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THE

LAW OF QUO WARRANTO.

CHAPTER XIII.

OF THE ORIGIN AND NATURE OF THE JURISDICTION IN QUO WARRANTO.

municipal government in the city for a long period of time, may properly be taken into account in deciding upon the application.[1]

§ 606. The right of the court to exercise its discretion, in granting or withholding leave to file an information, is not limited, even by a statute authorizing the granting of the remedy at any time on "proper showing made." The spirit of such a statute is held to contemplate the right of the court to refuse the application, if it shall see fit, and since the remedy is in no sense a matter of absolute right, on the part of a claimant to an office, he must, notwithstanding such a statute, present to the court such facts as will enable it to decide the right to the office in question.[2] It is, however, important to observe that when the court has, in the exercise of its discretion, allowed the information to be filed, it has exhausted its discretionary powers, and the issues of fact and of law presented by the pleadings must then be tried and determined in accordance with the strict rules of law, in the same manner and with the same degree of strictness as in ordinary cases.[3]

§ 607. In Alabama, a distinction is taken, in applying the doctrine of judicial discretion above considered, between cases where the proceedings retain the character of a prosecution in behalf of the state, where the franchise or office in controversy involves no question of private right, as in the case of corporations, and cases where only private rights are involved. And it is held that the doctrine of discretion should be limited to the former class of cases, and that when the application is made in behalf of one claiming the right to a particular office or franchise, it is to be considered rather as a matter of right than of discretion.[4]

§ 608. Informations in the nature of a quo warranto as now used in England, in lieu of the ancient writ, are of two kinds: first, such as are exhibited by and in the name of the attorney general, *ex officio*, without any relator, and which are filed without leave of the court and without entering into any

[1] State *v.* Tolan, 4 Vroom, 195.
[2] Stone *v.* Wetmore, 44 Geo. 495.
[3] State *v.* Brown, 5 R. I. 1.
[4] State *v.* Burnett, 2 Ala. 140.

recognizance; second, informations in the name of the queen's coroner and attorney, sometimes known as the master of the crown office, upon the relation of private citizens. The latter class can only be filed by leave of court first obtained for that purpose, as provided by the statute of Anne,[1] and by entering into a recognizance in conformity with the statute 4 and 5 William and Mary, ch. 18. The most frequent use to which the information is put in England is to determine the right to municipal offices and franchises, and its use as a means of testing the title to the franchises of private corporations in that country is of comparatively rare occurrence.

§ 609. In this country, the principles governing the jurisdiction under discussion have been somewhat confused, by the failure of many of the courts to properly discriminate between the original or ancient writ of quo warranto, and the information in the nature of a quo warranto, and the terms have been used often as synonymous and convertible terms. The distinctive features of the two remedies are clearly defined and have already been noticed.[2] And although the quo warranto information has almost entirely usurped the place of the original writ, yet the latter is, in substance, still recognized and employed as an existing remedy in some of the states of this country.[3] But whether resort be had to the ancient writ of quo warranto, or any process analogous thereto, or to the more modern and convenient remedy by information, the object of the proceeding is substantially one and the same, viz., to correct the usurpation, non-user or misuser of a public office or of a corporate franchise. And it is doubtless due to the comparatively short tenure of most offices in this country, as well as to the method of popular elections which forms the distinctive feature of the American system, that the jurisdiction is more frequently invoked for the determination of disputed questions of title to public offices, in this country, than for all other causes combined.

[1] 9 Anne, ch. 20, Appendix A, *post*.

[2] See State *v.* Ashley, 1 Ark. 279.

[3] See State *v.* Ashley, 1 Ark. 279; State *v.* St. Louis Insurance Co. 8 Mo. 330. See also Commonwealth *v.* Burrell, 7 Pa. St. 34.

§ 681. The statute of Anne extended the remedy by quo warranto information, which had before been considered much in the nature of a prerogative one, to private citizens desiring to test the title of persons usurping or executing municipal offices and franchises, and rendered any person a competent relator in such proceedings who might first obtain leave of

to this court, invaded the rights or privileges of any other corporation, nor the rights or privileges of the people at large. It has used no franchise, or privilege, that did not belong to the corporation. It has done nothing more than use privileges and franchises, unquestionably belonging to the corporation, and incident to the emergencies and requirements of its beneficial existence, to wit: the appointment of a night watch. That the corporation possessed this power, will hardly be questioned by any reasonable man. That two of the functionaries, the legislative department, the councils, and the executive department, the mayor, have disputed about their respective powers in the matter, is admitted. But the charter was not granted for the benefit of the mayor or the councils either, but for the benefit of the people of the great municipality. The law has abundant means and power of settling this dispute between the functionaries, without detriment to the people or corporation. Then why should the people be punished for the wrangling of the officers. The charter is the charter of the people, and shall they be punished by wresting it from them, and throwing their whole concerns into confusion and disorder, because the mayor and council dispute? The municipality of the city government has been built up and perfected through a course of many years, and by many acts of assembly; and by many by-laws and ordinances, as they were suggested by experience and time. And shall all this fair fabric, on which lay so many duties and obligations, on which most of the welfare and security of the citizens of a great community depend, be torn down and destroyed by the turbulence of any officer or officers? A case has been cited from the reign of the Stuarts in England, as authority and precedent, in the instance of the forfeiture of the charter of London, for irregularity in passing some ordinance. But it must be recollected that the object and policy of the royal government at that time, was to circumvent the liberties of the people, and one means of doing that was to forfeit the franchises of corporations, through the instrumentality of pliant judges who then held the office at his will, to the use of the king, who granted them out to his creatures upon principles less favorable to liberty. But after the revolution in 1768, when that race was driven from the throne, the parliament reversed this decision or judgment, and enacted that thereafter, the franchises of the city should not be forfeited for any cause by the courts. And why should the franchise of any municipal government be forfeited on account of the

the court to file an information. It also provided for judgment of ouster, as well as a fine against persons found guilty of usurping or intruding into such offices and franchises, and authorized the court to grant a reasonable time for pleading, besides fixing the costs of the proceedings.[1] The object of the statute of Anne, in as far as relates to the usurpation of corporate franchises, was held to be the promotion of speedy justice against such usurpation, as well as to quiet the possession of those who were lawfully entitled to the exercise of the franchise.[2] And the effect of the act was to vest the court with discretionary powers as to granting leave to file the information, which is not allowed as of course, but only in the exercise of a sound judicial discretion applied to the particular circumstances of each case.[3]

§ 682. In England, the rule is believed to be absolute that an information will not lie against persons for claiming to act as a private corporation, unless the proceedings are instituted in the name of the attorney general.[4] A distinction, however,

misconduct, alleged or real, of its officers? The usurpation of officers can be corrected by suitable means, leaving untouched the rights, franchises, and liberties of the citizens and corporators. If the mayor, who we must believe from the force of the suggestion, is the real complainant, had filed a suggestion against the council for usurping his functions, this court could, under the eighth section of the act relating to writs of quo warranto, have made him, although the relator, a party respondent also, and then determined on his rights and authority, as well as on those of the councils; and could have pronounced judgment of ouster against whoever was in the wrong; and in such case, by the 15th section of the act of April 13, 1850, being a supplement to the act relating to orphan's courts, this court could have appointed trustees from among the citizens eligible to office in the corporation, as trustees to take charge of the corporation, until new officers were chosen according to the provisions of the charter. But in this proceeding we could pronounce no judgment, except forfeiture of franchises and of the charter, against the corporation, which would dissolve it and return it to its original elements. We can not think of such a result; there is not the slightest cause for it. The proceeding has worn a grotesque appearance, in my judgment, from the beginning. The rule is therefore discharged."

[1] See Appendix A.

[2] Rex v. Wardroper, Burr. 1964.

[3] Id.

[4] See King v. Ogden, 10 Barn. & Cress. 230.