ordering the performance of an official duty, by a public officer who had ceased to be such officer before the judgment was entered, is void, and does not bind his successor if the latter be not made a party to the proceeding and have due notice thereof and opportunity to be heard.[1] Strangers are neither bound nor estopped by a peremptory writ of *mandamus*.[2]

Supreme Court of the United States, Leavenworth Co. Comm'rs *v.* Sellew, 99 U. S. 624 (1879). *Supra*, secs. 861 *a*, 861 *b*.

Where a writ is ordered against the board of commissioners of a county, and there is a change of membership after the writ is awarded and before it is served, it must be obeyed by those who compose the board at the time when the duty to act arises. Pegram *v.* Cleaveland Co. Comm'rs 65 N. C. 114 (1871). *Supra*, sec. 861 *b*.

[1] The Secretary of the Interior *v.* McGarrahan, 9 Wall. 298, 313 (1869). In such a case the officer is treated as the real defendant, and notice to him, actual or constructive, is essential to jurisdiction. *Per Clifford*, J. *Ib.* See *supra*, secs. 861 *a*, 861 *b*. See Regina *v.* Eye, 9 A. & E. 676; State *v.* Gates, 22 Wis. 210; Beachy *v.* Lamkin, 1 Idaho, 48; State, *ex rel.* Soutter *v.* Madison Council, 15 Wis. 30; State *v.* Elkinton, 30 N. J. L. 335.

[2] Regina *v.* Heathcote, 10 Mod. 56; s. c. Fort. 290; Tapping, 403.

Error and Appeal from Judgment in Mandamus; Supersedeas. State *v.* Orleans Par. Dist. Judge, 21 La. An. 741; United States *v.* Addison, 22 How. 174; The Secretary *v.* McGarrahan, *supra*; Louisville *v.* Kean, 18 B. Mon. 9, 13; *supra*, sec. 874; Morris, *in re*, 11 Gratt. 292 (1854); Columbian Ins. Co. *v.* Wheelright, 7 Wheat, 534; Tapping, 397, 398, and cases cited; Moses, chap. xxxviii.; People, *ex rel.* Griffin *v.* Steele, 1 Edm. (N. Y.) Sel. Cas. 505; Milwaukee R. R. Co., *In re*, 5 Wall. 188; People *v.* Richmond Co. Sup., 28 N. Y. 112; People *v.* Seymour, 6 Cow. 579; Chance *v.* Temple, 1 Iowa, 179; State *v.* Marshall Co. Judge, 7 Iowa, 186; Harwood *v.* Marshall, 9 Md. 83; Blackerby *v.* People, 10 Ill. 266; Pinckney *v.* Henegan, 2 Strob. (S. C.) 250; *supra*, sec. 846, note. Judgment of Circuit Court in a proceeding for *mandamus* to carry into effect a judgment for a debt is a "*final judgment in a civil action*" within the meaning of that phrase as used in the statutes of Congress regulating writs of error to the Supreme Court, and such order is reviewable in error if the whole amount of tax ordered to be collected is sufficient to give the United States Supreme Court jurisdiction. Davies *v.* Corbin, 112 U. S. 36. In England, see Act 9 and 7 Vict. chap. lxvii., printed in Rawlinson Corp. Appendix, 730; 15 and 16 Vict. chap. lxxvi.

[NOTE. — Sections 885–887 in the last edition appear in this edition as sections 861 *a* 861 *c*.]

CHAPTER XXI.

QUO WARRANTO.

§ 888 (713). **At Common Law; Statute of Anne.** — In England, the ancient method of proceeding against *those who exercised any public franchise without the king's grant, or contrary thereto*, was by the writ of *quo warranto*, which is the foundation of the modern, more convenient, and improved remedy by information in the nature of a *quo warranto*.[1] In the ninth year of the reign of Queen Anne, the famous remedial statute on the subject of *informations* in the nature of a *quo warranto*, in cases of *usurpations or intrusions into the offices and franchises of municipal corporations*, was passed. In substance, this statute has been very generally re-enacted in this country.[2]

§ 889. **Same subject.** — It may be considered as settled that where any *public trust or franchise is exercised without authority*, an information will be granted for usurping it, whether it be a prior

[1] Willc. 453; Selwin's *Nisi Prius*, 872; 2 Kyd on Corp. 395; Angell & Ames, chap. xxi.; Buller's *Nisi Prius*, 210; 3 Black. Com. 262; Stephens's *Nisi Prius*, 2429; High Extraor. Rem. chaps. xiii., xiv.

[2] People *v.* Thompson, 16 Wend. 655 (1837). The cases in which *quo warranto* lies, and the nature and mode of proceeding, pleading, practice, and judgment, will be found discussed, and the authorities collected by the reporter, in a valuable note to The People *v.* Richardson, 4 Cow. (N. Y.) 100–123. *Infra*, sec. 905. See, also, Stephens's *Nisi Prius*, 2430–2480. The statute of 9 Anne, chap. xx. does not extend to private corporations. In *South Carolina*, the statute of 9 Anne, chap. xx. is in force, and usurpations by public corporations of unauthorized powers may be tried upon information. State *v.* Charleston, 1 Const. R. 36 (1817), approving Rex *v.* Tenterden, 8 Mod. 114. See, also, State *v.* Christ Ch. Par. R. Comm'rs, 1 Mill Const. (S. C.) 55, 62 (1817). In *Louisiana*. Reynolds *v.* Baldwin, 1 La. An. 162. In *Pennsylvania*. Commonwealth *v.* Jones, 12 Pa. St. 365 (1849); Commonwealth *v.* Central Pass. Ry. Co., 52 Pa. St. 506; 9 Anne, chap. xx. now in force; Commonwealth *v.* Cluley, 56 Pa. St. 270 (1867). In *New York*. People *v.* Utica Ins. Co., 15 Johns. 358; Attorney-General *v.* Same, 2 Johns. (N. Y.) Ch. 371; People *v.* Richardson, 4 Cow. (N. Y.) 101, 122, 133. In *Massachusetts*. Goddard *v.* Smithett, 3 Gray (Mass.), 116. In *New Jersey*. State *v.* Pat. & H. Turnp. Co., 21 N. J. L. 9; State *v.* Tolan, 33 N. J. L. 195 (1868). *Information*. State *v.* Pritchard, 36 N. J. L. 101. *Plea, Replication, and Rejoinder*. State *v.* Crowell, 4 Halst. (N. J.) 390, 392; *Ib.* 432. In *Iowa*. Cochran *v.* McCleary, 22 Iowa, 75 (1867). In *Ohio*. State *v.* Cinc. Gasl. & C. Co., 18 Ohio St. 262. In *Maine*. 9 Anne, chap. xx. not in force; Dane *v.* Derby, 54 Me. 95 (1866). Practice in that State. *Ib.* In *Wisconsin*. State *v.* Milw. L. S. & W. Ry. Co., 45 Wis. 579. In *Illinois*. "Our statute is a substantial if not literal copy of 9 Anne, chap. xx." *Per Scott*, J., in People *v.* Waite, 70 Ill. 25 (1873).

franchise of the crown or one under an Act of Parliament. Thus, where, by private Act of Parliament for enlarging and regulating a port, several persons were appointed trustees, and a particular method of filling vacancies was prescribed, and the defendants took upon themselves to act as trustees without such an election as the statute required, leave was given to file an information in the nature of a *quo warranto* against them.[1] The same doctrine exists, as we shall see, in this country, except where it is modified or controlled by statute.

§ 890 (714). **Municipal Offices and Public Franchises.** — Under *the legislation and practice in the different American States*, an information in the nature of a *quo warranto* or an equivalent civil action is the appropriate remedy both for the *usurpation of municipal and other public offices*, and for the usurpation of a *public franchise*.[2] Thus this remedy will lie to test the right of a member of a city council to a seat in that body,[3] or to test the right of a person to preside over or to vote in a meeting of a municipal body.[4] In such cases equity has, ordinarily, no jurisdiction.[5]

[1] Rex *v.* Nicholson, 1 Stra. 299. See, also, Rex *v.* Bedford, 1 Barnard. 242, 280; People *v.* Utica Ins. Co., 15 Johns. 358, 388 (1818); Buller's *Nisi Prius*, 210. Various instances in which *quo warranto* informations, in England, have been exhibited against a corporate officer, to show by what authority he held a franchise which he assumed to exercise in his official capacity, are collected and stated in Stephens's *Nisi Prius*, 2442, 2443.

The necessity of resorting to the remedy by *quo warranto* under the N. Y. Code, cannot be evaded by disabling one from entering upon an office, and then claiming that because he has not made an actual entry into the office, the action will not lie. People *v.* Ferris, 16 Hun, 219; *post*, sec. 891.

[2] Reynolds *v.* Baldwin, 1 La. An. 162 (1846); followed, Cochran *v.* McCleary, 22 Iowa, 75 (1867); Bartlet *v.* State, 13 Kan. 99 (1874); State *v.* Camden, 35 N. J. L. 217; State *v.* Ocean, 39 N. J. L. 75; *ante*, secs. 272, 275, and cases cited, sec. 844; Rex *v.* Williams, 1 Burr. 407; s. c. 2 Kenyon, 75; State *v.* Deliesseline, 1 McCord (S. C)., 52 (1821); Demarest *v.* Wickham, 63 N. Y. 320 (1875); People *v.* Hall, 80 N. Y. 117; s. c. 21 Alb. Law J. 484 (1880); Worthley *v.* Steen, 43 N. J. L. 542; State *v.* De Gress, 53 Tex. 387. At *common law* the Attorney-General has the right to file an information, for the usurpation of an office, in the name and on behalf of the Commonwealth, at his own discretion, leave to file which the court has no authority to grant or to withhold; the mention of relators is mere surplusage, and does not affect the validity of the information or the form of the judgment. Commonwealth *v.* Allen, 128 Mass, 308; and see State *v.* Anderson, 45 Ohio St. 196; *infra*, sec. 899. Under the code of *Georgia* the writ may issue "at the suit of some person either claiming the office or interested therein," and the Supreme Court of that State has held that *every citizen is sufficiently interested in municipal offices* to be qualified to apply for the writ. Churchill *v.* Walker, 68 Ga. 681; *infra*, sec. 900, note.

[3] Commonwealth *v.* Meeser, 44 Pa. St. 341; s. c. Brightley's Election Cases, 659.

[4] Reynolds *v.* Baldwin, 1 La. An. 162 (1846); Cochran *v.* McCleary, 22 Iowa, 75 (1867), referred to, *arguendo*, with approval, in *Re* Sawyer, 124 U. S. 200, by *Gray*, J.; *ante*, sec. 272.

[5] *Ante*, chap. x. sec. 272. But see sec. 275; People *v.* Galesburg, 48 Ill. 485 (1868); Markle *v.* Wright, 13 Ind. 548 (1859); Hagner *v.* Heyberger, 7 Watts & Serg. (Pa.) 104 (1844).

The holding of an election will not be enjoined by a court of equity, since *quo warranto* is a complete remedy. People *v.* Galesburg, 48 Ill. 485 (1868); Dickey *v.* Reed, 78 Ill. 261 (1875); Darst *v.* People, 62 Ill. 306 (1872); Walton *v.* Develing, 61 Ill. 201 (1871). *Ante*, sec. 202, note. Where the remedy at law is inadequate, a court of equity may, for that reason, in proper cases, take jurisdiction. *Ib. obiter; ante*, sec. 275. *Re* Sawyer, 124 U. S. 200 (1887). The governor will not be restrained from granting a commission to an officer who has been improperly elected, any more than the courts would restrain the legislature from passing an unconstitutional act. Grier *v.* Taylor, Gov., 4 McCord (S. C.), 206 (1827), *per Bay*, J.; Chicago *v.* Evans, 24 Ill. 52 (1860); Smith *v.* McCarthy, 56 Pa. St. 359.

§ 891 (715). **Cumulative Statutory Remedies.** — In a previous chapter we have had occasion to consider *when statutes providing special proceedings with respect to municipal elections* will or will not be held to oust *the revisory or superintending jurisdiction of the superior courts* of law over such proceedings and elections; and we may here repeat that this salutary jurisdiction should not be deemed to be taken away, except in cases where the legislative intent to this effect is plainly manifest.[1]

[1] *Ante*, sec. 200 *et seq.*

The cases show some conflict of opinion in respect to when a special mode of contesting elections will exclude the mode by *quo warranto*. See on this subject, State *v.* Marlow, 15 Ohio St. 114 (1864); distinguished, People *v.* Hall, 80 N. Y. 117 (1880); Commonwealth *v.* Garrigues, 28 Pa. St. 9; Commonwealth *v.* Baxter, 35 Pa. St. 263; distinguished, People *v.* Hall, *supra;* Commonwealth *v.* Leech, 44 Pa. St. 332; Commonwealth *v.* Meeser, 44 Pa. St. 341; s. c. Brightly's Election Cases, 659, 663, which the learned editor of the volume last cited regards as in conflict with the Commonwealth *v.* McCloskey, 2 Rawle (Pa.), 369, two judges dissenting; approved, People *v.* Holden, 28 Cal. 123. *Ante*, secs. 202–205; Steele *v.* Martin, 6 Kan. 430; *post*, sec. 926.

In *New York* it is held that it is only the *form of proceeding* by *quo warranto* that is done away with by the code. People *v.* Hall, 80 N. Y. 117; s. c. 21 Alb. Law J. 484 (1880). The jurisdiction of the superior courts is not touched by legislation of the State. The charter of New York city provides that the board of aldermen shall be the judge of the election returns and qualifications of its own members, subject, however, to the review of any court of competent jurisdiction. The courts are not ousted thereby from an inquiry, in the first instance, as to the right to the office of alderman. The following summarizes the views of the court: The fact that the words used are similar to those in the State and Federal Constitutions, conferring a like power on each house of the legislature as to its members, does not exclude the jurisdiction of the courts. In the one case the jurisdiction is conferred by the people upon each branch of the legislature as a co-ordinate body with the courts, and is necessarily exclusive. In England the power of the commons has been acquiesced in as exclusive in relation to this matter, though it was at times claimed and exercised by the king and council, by the House of Lords, and by the chancellor. The power is a necessary incident to every body of that description which emanates directly from the people. But this does not apply to a municipal corporation which is a creation of the legislature. The charter provision above mentioned does not give *exclusive* power in the first instance to the board of aldermen. The jurisdiction of the courts formerly existing is not taken away unless by express or plain provision to that effect. "It is a maxim in the common law that a statute made in the affirmative without any negative, expressed

§ 892 (716). **Proper Remedy to try the Title to Public or Municipal Offices.** — We have seen already that it is the doctrine of the English law, quite generally adopted in this country, where *a person is in the actual possession of an office under an election or a commission*, and is thus exercising its duties *under color of right*, that the validity of his election or commission cannot, in general, be tried or tested on a *mandamus* to admit another, but only by an information in the nature of a *quo warranto*.[1] The certificate of election of an

or implied, does not take away the common law." Coke Inst. 199, chaps. xx.–xxiv.; Rex *v.* Morely, 2 Burr. 1040; Heath, *In re*, 3 Hill, 52; People *v.* B. & R. T. Road, 23 Wend. 222. That rule applies here. The Supreme Court is not deprived of jurisdiction; a cumulative jurisdiction is created. The phrase in the charter, "subject, however, to the review of any court of competent jurisdiction," does not imply that the words giving the power would, without some restriction, have conferred sole, exclusive, and final jurisdiction. Whenever a new jurisdiction is erected, whether by public or private act, it is subject to inspection by the proper court by writ of error, *certiorari*, or *mandamus*. Lawton *v.* Comm'rs, 2 Caines, 181. The rule that where a new right, or the means of acquiring it, is conferred, and an adequate remedy for its invasion given by the same statute, parties injured are confined to the statutory redress (Dudley *v.* Weston, 3 N. Y. 9), does not apply. State *v.* Fitzgerald, 44 Mo. 425; Hummer *v.* Hummer, 3 Greene (Iowa), 42; Wammack *v.* Holloway, 2 Ala. 31; Murfree *v.* Leeper, 1 Overt. (Tenn.) 1; Burginhofen *v.* Martin, 3 Yeates (Pa.), 479; Commonwealth *v.* McCloskey, 2 Rawle, 369. In this case the relator, who claimed the office of alderman against the respondent, had instituted proceedings before the board of aldermen for the office, and this board had decided adversely to the relator, which proceedings had not been reversed when the proceedings in this suit were instituted. While the decision might be *res adjudicata* as to relator, it was not so as to the State. Duchess of Kingston's Case, 20 How. St. Tr. 355; Barr *v.* Jackson, 1 Phillips, 582; King *v.* Clarke, 1 East, 38; State *v.* Hardie, 1 Ired. 42. *Ante*, chap. ix., sec. 202 *et seq.*, where the subject referred to in the text is considered at large.

[1] *Ante*, sec. 202, and note; secs. 838, 842–846; Regina *v.* Leeds, 11 A. & E. 512; Regina *v.* Derby, 7 A. &. E. 419; Regina *v.* Chester, 5 El. & Bl. 531; Asken *v.* Manning, 38 Up. Can. Q. B. 345, and see Biggar, *In re*, 3 U. C. Q. B. 144; Regina *v.* O'Hare, 24 P. R. 18; Regina *v.* Lindsay, 18 U. C. Q. B. 51; Regina *v.* St. Martin, 17 A. & E. 149; Regina *v.* Hertford, Col. L. R. 2 Q. B. Div. 590; State *v.* Moffitt, 5 Ohio, 358: Warner *v.* Myers, 3 Oreg. 218 (1870); State *v.* Choate, 11 Ohio, 511; State *v.* Bryce, 7 Ohio, Part 2, p. 82; People *v.* New York, 3 Johns. Cas. 79 (1802) (*mandamus* to admit aldermen). In the case last cited, the *reason for the rule* is thus stated by the court: "Where the office is already filled by a person who has been admitted and sworn, and is in by color of right, a *mandamus* is never issued to admit another person, because the corporation, being a third party, may admit or not, at pleasure, and the rights of the party in office may be injured, without his having an opportunity to make defence. The proper remedy, in the first instance, is by information in the nature of a *quo warranto*, by which the rights of the parties may be tried." People *v.* New York, 3 Johns. Cas. 79, 80. *Quo warranto* lies to terminate right further to hold an office, notwithstanding the officer abandons the office. State *v.* Graham, 13 Kan. 136 (1874). See, also, People *v.* Sweeting, 2 Johns. 184; People *v.* Van Slyck, 4 Cow. (N. Y.) 297, 323; French *v.* Cowan, 79 Me. 426; Brennan *v.* Bradshaw, 53 Tex. 330, quoting the text; Stephens's *Nisi Prius*, 2445 *et seq.*, where the validity and invalidity of corporate elections are fully treated.

officer, or his commission, coming from the proper source, is *prima facie* evidence in favor of the holder; and in every proceeding, except a direct one to try the title of such holder, it is conclusive; but in *quo warranto* the court will go behind the certificate or commission, and inquire into the validity of the election or appointment, and decide the legal rights of the parties upon full investigation of the facts.[1]

[1] People *v.* Van Slyck, 4 Cow. (N. Y.) 297 (1825); People *v.* Vail, 20 Wend. (N. Y.) 12 (1838); People *v.* Richardson, 4 Cow. (N. Y.) 100, 101, note; *Ib.* 297; People *v.* Seaman, 5 Denio (N. Y.), 409 (1848); People *v.* Thacher, 55 N. Y. 525 (1874); State *v.* Marston, 6 Kan. 524 (1870); Low *v.* Towns, Gov., 8 Ga. 360 (1850); Bonner *v.* State, 7 Ga. 479; *ante*, sec. 202, and note; secs. 204, 205, 221, 846. When the legislature validates the title of an officer to an office, his right cannot afterwards be questioned on a *quo warranto*. People *v.* Flanagan, 66 N. Y. 237 (1876); People *v.* Bull, 46 N. Y. 57, distinguished.

In the People *v.* Van Slyck, *supra*, which was an information in the nature of a *quo warranto* against one intruding into an office by reason of an unlawful decision of the board of canvassers, *Woodworth*, J. said: "It was contended on the argument that the decision of the board of canvassers was conclusive until reversed, *and could only be reviewed by certiorari*. [See *post*, chap. xxii. sec. 925; *ante*, sec. 202.] This objection cannot prevail. They are required by the act to attend at the clerk's office, and calculate and ascertain the whole number of votes given at any election, and certify the same to be a true canvass. This is not a judicial act, but merely ministerial. They have no power to controvert the votes of the electors. If they deviate from the directions of the statute, and certify in favor of an officer not duly elected, he is liable to be ousted on an information in the nature of a *quo warranto* where the trial is had upon the right of the party holding the office. The court will decide upon an examination of all the facts." 4 Cow. 297, 323.

Effect of choosing or electing a *disqualified* person; *ante*, sec. 196; Commonwealth *v.* Cluley, 56 Pa. St. 270 (1867); Stephens's *Nisi Prius*, 2454.

Acts of officers de facto are valid, unless directly questioned by proceedings against them. Burke *v.* Elliott, 4 Ired. L. 355; Burton *v.* Patten, 2 Jones L. (N. C.) 124. Difference between *de facto* and *de jure* officers is well stated by *Ruffin*, C. J.; *Ib.* Stephens's *Nisi Prius*, 2448. See, also, *ante*, sec. 221, note; secs. 273, 274, 276; State *v.* Tolan, 33 N. J. L. 195; Cole *v.* Black River Falls, 57 Wis. 110; State *v.* Goodwin, 69 Tex. 55 (an election of municipal officers regularly held, declared valid, though ordered by *de facto* officers exercising the powers of mayor and aldermen). A *de facto* officer may be compelled to perform an official duty by *mandamus*. He cannot plead in defence to the proceeding that he does not hold his office *de jure*. Kelly *v.* Wimberly, 61 Miss. 548. Hence, a *de facto* treasurer cannot refuse to pay an order drawn upon him on the ground that the act incorporating the borough is unconstitutional. *Mandamus* lies to him as a *de facto* officer to compel its payment to the same extent as if there was no question about the validity of the organization. State *v.* Philbrick, 49 N. J. L. 374.

An officer *de facto* must be submitted to as such, until displaced by a regular direct proceeding for that purpose. Moore, *In re*, 62 Ala. 471; Duke *v.* Cahawba Nav. Co. 16 Ala. 372; Dillard *v.* Webb, 55 Ala. 468; Rex *v.* Miller, 6 D. & E. T. R. 269; Rex *v.* Osbourne, 4 East, 327; Buncombe *v.* McCarson, 1 D. & B. (N. C.) 306; Robinson *v.* London Hosp. Gov., 21 Eng. L. & Eq. 371; Heath *v.* State, 36 Ala. 273. The acts of an officer, *de facto*, are valid only so far as the rights of the public and of third persons having an interest therein are involved. He can claim nothing for himself. His title cannot be inquired into collaterally, but may be in a suit in his own right as officer. People *v.* Weber, 86 Ill. 283. For an exhaustive and valuable review of the English and American authorities upon the question, *What is essential to constitute an officer de facto?*

§ 893 (717). **Defendant's Pleas or Answer.** — In a proceeding by information in the nature of a *quo warranto the defendant must either disclaim or justify*. If he disclaims, the State is at once entitled to judgment. If he justifies, he must set out his title specifically. It is not enough to allege generally that he was duly elected or appointed to the office. He must plead facts, showing on the face of the plea that he has a valid title to the office. The State is not bound to show anything. Therefore it is no answer to the information that the relator is not entitled to the office. The defendant is called upon to show by what warrant *he* exercises the functions of the office; he must exhibit good authority, or the State is entitled to a judgment of ouster.[1]

§ 894 (718). **In Cases where the Municipal Corporation does not legally exist; Rex v. Saunders.** — In England it was held, in Rex *v.* Saunders (in which an information in the nature of a *quo warranto* was moved against the defendant, to show by what authority he claimed to be an alderman of Taunton), where the relator showed that the corporation was dissolved and extinct, and that no corporate body in fact existed, or claimed to exist, at the time of the application,

see the learned opinion of *Butler*, C. J., delivering the judgment of the Supreme Court of *Connecticut*, in the State *v.* Carroll, with note of Judge *Redfield*, 12 Am. L. Reg. (N. S.) March, 1873, pp. 165, 183; S. C. 38 Conn. 449. It was held in this case where judges were by the Constitution required to be elected by the General Assembly, and a judge of a city court was so elected, and where it was further provided by law that in case of his absence or sickness a justice of the peace should temporarily hold the city court, that the judgments of such justice were not void; that he was an officer *de facto* if not *de jure*, and that he was a *de facto* officer even if the law authorizing him to act was unconstitutional. The court distinctly decided that the acts of an officer appointed [to a *de jure* office] pursuant to an unconstitutional law, and before its unconstitutionality has been adjudged, are valid as respects the public and third persons. The opinion of *Butler*, C. J., is declared by Mr. Justice *Field* in Norton *v.* Shelby County, 118 U. S. 425, 445, 448 (1885), to be "an elaborate and admirable statement of the law, on the validity of the acts of *de facto* officers, however illegal the mode of their appointment." But its doctrine is, and was meant to be, limited "to the unconstitutionality of acts appointing the officer," and it does not extend to unconstitutional "acts creating the office," since there can be no *de facto officer* unless there is a *de jure office*. See, also, State *v.* Douglass, 50 Mo. 593; approved, County of Ralls *v.* Douglass, 105 U. S. 728. Official acts of a person disqualified to hold office for participation "in the rebellion" are not void. Lockhart *v.* Troy, 48 Ala. 579 (1872). Whether officers *de facto* can enforce payment of salary. Samis *v.* King, 40 Conn. 298 (1873); *ante*, chap. ix. sec. 235, note.

[1] Clark *v.* People, 15 Ill. 213 (1853); Cole on Crim. Inf. 210, 212; Willc. 486, 487, 488, where the requisites of pleas are stated; Angell & Ames on Corp. sec. 756; Stephens's *Nisi Prius*, 2431, 2464; 2 Kyd, 399. It is not sufficient for the defendant to aver that he is "duly elected." Commonwealth *v.* Gill, 3 Whart. (Pa.) 228; Crook *v.* People, 106 Ill. 237. Atty.-Gen. *v.* Foote, 11 Wis. 14; State *v.* Gleason, 12 Fla. 190; People *v.* Thacher, 55 N. Y. 525.

that the information should be refused.[1] This case was referred to in South Carolina, and the opinion expressed that *quo warranto* would not lie against one claiming office under a private corporation which has no legal existence.[2] In New York, however, under the legislation in that State, it is expressly decided that *the question whether a municipal or public corporation has been legally created or erected* may be tested in an action or proceeding in the nature of *quo warranto* brought against any one exercising an office in such corporation.[3]

[1] Rex *v.* Saunders, 3 East, 119 (1802). In this case the relator, in 1802, stated that the defendant had been elected alderman in 1788, and that the corporation was dissolved in 1792, since which no acts had been attempted to be done by the corporate body, but that the defendant had made his appearance at Taunton at the last election for members of Parliament, and had there claimed, as alderman, to be returning officer, and had received votes as such, and had executed a separate return. Lord *Ellenborough*, C. J., delivering the judgment of the court, observed that "the corporation being stated to be actually dissolved, and no corporate body, claiming to be such, in existence, the act of this individual person was a mere nullity, and of no more effect than if a mere stranger had come into the town and claimed to be an alderman and returning officer. Here are no civil rights in controversy, which would warrant the court to interfere by their own authority; but what he claimed was a mere nullity. There was no such office in existence, and therefore no ground for our interference;" and the rule was refused.

[2] State *v.* Lehre, 7 Rich. L. 234, 324 (1854), *per Glover*, J., who said: "It was contended, in argument, that there was no corporation, and that the election [for bank directors and president] is therefore void. If no corporation exist it would be nugatory and fruitless to proceed any further in the *quo warranto*, and call in question a harmless and pretended claim, where no civil right is in controversy. If there was no such corporation, there was no such officer, and it would be, as was said by Lord *Ellenborough*, in Rex *v.* Saunders (3 East, 119), as if a stranger had come into town and claimed to be president or director."

[3] People *v.* Carpenter, 24 N. Y. 86 (1861). This action was in the nature of *quo warranto* in the name of the people, and was brought to test the right of the defendant to exercise the duties and powers of supervisor of the town of Afton, and the case turned upon the sole point whether that town had been legally created. It was contended in argument that *this form of action* was not the appropriate remedy to bring up that point for decision. Defendant's argument was, that if there was, as the plaintiffs allege, no such town as Afton, then it was impossible that defendant should exercise the duties of an office which had no existence. "But," says *Davies*, J., "we think the objection too technical. The object of the framers of the code, in the provisions in reference to these actions, manifestly was to provide a speedy and effective mode of determining the claims of persons to exercise the duties of any office within this State, and this necessarily involves the determination of the existence of the particular office." See, also, where same view was taken, The People *v.* Draper, 15 N. Y. 532, an action of like character, to test right of the defendants to the office of police commissioners under the Metropolitan Police District Act. And see note in 4 Cow. 100 *et seq.*; State *v.* Carbindale Indep. Sch. Dist., 29 Iowa, 264 (1870); People *v.* Albertson, 55 N. Y. 50 (1873); People *v.* Clute, 52 N. Y. 576 (1873). The *New York* rule, stated in the text, is adopted and followed in *Minnesota*, where the provision of the statute in respect to *quo warranto* is taken from the *New York* code, and is considered by

In Missouri it is admitted, in the opinion of the judge who delivered the judgment of the court, that in a proceeding in the nature of *quo warranto* against the trustees of a town, to oust them from exercising the powers of such trustees on *the ground that the town was not legally incorporated*, the question of the existence or non-existence of the supposed town corporation may be put in issue; and it is furthermore admitted that, if in such case there is no corporation either *de facto* or *de jure*, the relator would be entitled to judgment; but it was held that where the town corporation is actually in existence under the order of a court, regular on its face, establishing it, the question whether such order was procured by fraud, or was void because the petition for the incorporation was not signed by the requisite number of taxable inhabitants, cannot be inquired into and determined in a proceeding against the trustees, but only, it is to be inferred, in a direct proceeding against the corporation itself.[1]

Berry, J., to enlarge the common-law scope of the proceeding. State *v.* Parker, 25 Minn. 215 (1878); see State *v.* Brown, 31 N. J. L. 355, 356; People *v.* Maynard, 15 Mich. 463; People *v.* Bennett, 29 Mich. 451 (1874); s. c. 18 Am. Rep. 107. The legality of an incorporation under the General Village Act must, it seems, be tested, not in equity, but by *quo warranto*. People *v.* Clark, 70 N. Y. 518 (1870).

In *Massachusetts* it was held that where a new county had been created by an act of the legislature which contained a provision that it should not take effect until a future day mentioned, an appointment by the governor to an office for such county before the act took effect was void, and that an information in the nature of a *quo warranto* would lie to remove the appointee. Commonwealth *v.* Fowler, 10 Mass. 290 (1813); s. c. 11 Mass. 339. In People *v.* Maynard, 15 Mich. 463, which was a *quo warranto* against a person acting as county treasurer, the result depended upon the constitutionality of a statute creating a new county, and the statute was held to be unconstitutional.

[1] State *v.* Weatherby, 45 Mo. 17 (1869). It may be suggested in reference to the opinion in this case that, notwithstanding what is said on this subject in the opinion, the logical effect of the decision seems to be that the question whether a corporation has been legally created or not cannot be tried in proceedings against persons assuming to act as officers in such a corporation. See, however, State *v.* McReynolds, 61 Mo. 203; State *v.* Coffee, 59 Mo. 59. The London Law Times, vol. liv. p. 228, referring to sec. 894 of the text, somewhat inaccurately remarks: "A curious example of the different views which have been taken in the two countries is afforded by *quo warranto* informations in cases where no corporation exists. It has been held in England in Rex *v.* Saunders, 3 East, 119, and more recently in Lloyd *v.* The Queen, 6 L. T. Rep. N. S. 610, that an information may go where there is no corporation in existence. Rex *v.* Saunders was referred to in a case in *South Carolina*, and the opinion was expressed that *quo warranto* would not lie against one claiming office under a private corporation which has no legal existence. But in *New York* the English doctrine was accepted, it being expressly decided (People *v.* Carpenter, 24 N. Y. 86) that the question whether a municipal or public corporation has been legally created or erected may be tested by an action or proceeding in the nature of *quo warranto* brought against any one exercising an office in such corporation." Legal existence of a corporation must, in *Illinois*, be tested by *quo warranto*. Renwick *v.* Hall, 84 Ill. 162 (1877). In *Connecticut* an information in the nature of a *quo warranto* will not lie to try the right to an office that is not a legally authorized public office. State *v.* North, 42 Conn. 79 (1875); see Norton *v.* Shelby County, 118 U. S. 425, 445–448 (1885), noticed *supra*.

§ 895 (719). **Usurpation of Franchises; Distinction.** — It is held in England that if the information be for usurping a franchise by a corporation, it should be *against the corporation;* but if for usurping the franchise to be a corporation, it should be *against the particular persons* guilty of the usurpation.[1] In Ohio, under the statutes of the State, the proceeding to question the franchise of being a private corporation must be against the individuals who usurp the franchise; and information in the nature of *quo warranto* will not lie against a *de facto* corporation, in its assumed corporate name, to compel it to show by what title it exercises the franchise to be a corporation. The court admitted, however, that in such cases municipal corporations might be an exception; but the point was not decided.[2]

§ 896 (720). **No Forfeiture of Municipal Charter or Franchises.** — In no instance known to the author have the courts of this country declared *forfeited the charter or franchises* of a municipal corporation for the acts or misconduct of its agents or officers. That this was done by the English courts prior to the revolution of 1688 is well known. The case of the city of London is the most conspicuous historical example. It is believed by the author that such a remedy is not applicable to our corporations, created, as they are, by statute, for the benefit not of the officers or a few persons, but of the whole body of the inhabitants residing therein, and the public. If the officers usurp rights which belong to the State, the law, by *quo warranto*, by injunction, by action, by declaring their acts void, and in other

[1] Rex *v.* Cusack, 2 Roll. R. 113, 115; People *v.* Richardson, 4 Cow. 109, note. See Mr. *Willcock's* observations, Willc. 500, pl. 488.

An information in the nature of *quo warranto* will not lie against an alleged township whose organization is invalid on the face of the record; it will lie, however, against the several town officers for usurping franchises. Scrafford *v.* Gladwin County, 41 Mich. 647.

[2] State *v.* Cinc. Gasl. & C. Co., 18 Ohio St. 262; Commonwealth *v.* Central Passenger Railway, 52 Pa. St. 506. *Scott*, J., in the first case says this question was left open in The City of London's Case, 8 How. St. T. 1039, and it seems to have been decided otherwise in Rex *v.* Chester, cited 2 D. & E. T. R. 565, but that in this country the weight of authority is otherwise. People *v.* Saratoga & R. R. R. Co., 15 Wend. 114; People *v.* Richardson, 4 Cow. (N. Y.) 97, 109, note; Angell & Ames, sec. 756. And he admits that municipal corporations may be an exception, because the inhabitants of the place may be so numerous that it would be impossible to proceed against them individually.

Judgment in *quo warranto* against a municipal corporation and officers therein acting under a charter which had not legally been accepted by reason of fraudulent voting. State *v.* Bradford, 32 Vt. 50. Acceptance of charter. *Ante*, sec. 44.

ways, can correct the usurpation, and should do it, without forfeiting the rights and franchises of the citizens, who are blameless.[1]

§ 897 (721). **Against Municipal Corporations for Excess of Power.** — We have elsewhere treated of the mode in which illegal or unauthorized corporate acts may be prevented, and the remedies afforded by the law in respect thereto;[2] but it may be here observed that an information in the nature of a *quo warranto* has in some cases been *resorted to as a remedy for the illegal usurpation*, by a municipal corporation, *of the powers not granted* to it by its charter or the law. Thus, in South Carolina it has been adjudged that the right of a municipal corporation to exercise public powers — as, for example, its right under its charter to tax certain descriptions of property, — may be determined on an information in the nature of a *quo warranto*, filed by the Attorney-General against the corporation.[3] Such use of the remedy is very rare. But in Massachusetts it is held that an information in the nature of a *quo warranto* will not lie against a municipal corporation to *enforce the performance of a corporate duty* neglected by the corporation. The court distinguish between such neglect and

[1] See, on this subject, Commonwealth *v.* Pittsburgh, 14 Pa. St. 177 (1850); *ante*, chap. vii. on the Dissolution of Municipal Corporations, secs. 165–168; City of London's Case, *ante*, chap. i. sec. 8. A municipal corporation cannot, in any collateral proceeding, be declared or held to have forfeited its charter for non-user or other cause; it retains its corporate character until it is repealed or the forfeiture declared by direct judicial proceeding. Harris *v.* Nesbit, 24 Ala. 398 (1854) (ferry controversy). Under the code of *Alabama*, an information in the nature of a *quo warranto* will not lie to vacate the charter of a municipal corporation on account of the passage of unauthorized ordinances by the council. State *v.* Cahaba Council, 30 Ala. 66 (1857). Performance of omitted duty cannot be enforced by *quo warranto*, as judgment of forfeiture would be inapplicable. Attorney-General *v.* Salem, 103 Mass. 138 (1869). Explained, Attorney-General *v.* Boston, 123 Mass. 460 (1877).

[2] *Post*, chaps. xxii., xxiii.

[3] State *v.* Charleston Council, 1 Mill Const. R. (S. C.) 36 (1817); Buller's *Nisi Prius*, 212. See in *Iowa*, State *v.* Lyons, 31 Iowa, 432 (1871), where the nature of the remedy was discussed, and it was held that proceedings in *quo warranto* will not be entertained for the purpose of *annulling a city ordinance* passed in the irregular and improper exercise of a power conferred by law. In *Illinois* it has been held that the constitutionality of an act extending the corporate boundaries cannot be tried in *quo warranto*, questioning the right of the city officers to act within the extended boundary. People *v.* Whitcomb, 55 Ill. 172 (1870).

Quo warranto will not lie against a corporation for taking land without making compensation as required by law; trespass is the remedy. People *v.* Hillsdale, &c. Co., 2 Johns. (N. Y.) 190 (1807). This remedy is not appropriate to test the legal right of a gas company under municipal sanction to lay down its pipes in a public street. People *v.* Mut. Gasl. Co., 38 Mich. 154. As to remedy, see chapter on *Mandamus*, *ante*.

Simple error of judgment on the part of officers of municipal corporations as to the extent of their powers will not authorize the court, on *quo warranto*, to declare a forfeiture of their offices. State *v.* Town Council, 30 Ala. 66 (1857).

the usurpation of a franchise not granted, and remark that they "do not feel called upon to consider whether under our political system this remedy can, under any circumstances, be maintained against a municipal corporation."[1]

§ 898. **Same subject. Must be instituted by Attorney-General.** — The right to be a municipal corporation is a franchise which the State may withhold or grant at its pleasure. The right to file an information in the nature of a *quo warranto*, or to institute a civil action or proceeding to arrest a usurpation of such a franchise, does not belong to the individual citizen; the right to institute such proceedings against an existing *de facto* municipal corporation is in the State, and the institution of the action is a matter in the discretion of the Attorney-General.[2]

§ 899. **Discretion to grant; How exercised.** — Leave to grant an information in the nature of a *quo warranto* is within the sound discretion of the court or judge. Leave is not granted as a mere matter of right; on the other hand, the court cannot arbitrarily refuse it. It must exercise a sound discretion, in accordance with the principles of law.[3]

[1] Attorney-General *v.* Salem, 103 Mass. 138 (1869), *per Morton*, J. This case is commented on and explained and in some respects limited by the more recent case of the Attorney-General *v.* Boston, 123 Mass. 460 (1877), referred to *infra*, sec. 920.

[2] Robinson *v.* Jones, 14 Fla. 256 (1872). In *California* the statutory action for usurpation — in the nature of *quo warranto* — may be maintained against the defendant in its assumed corporate name without joining the trustees. People *v.* Riverside, 66 Cal. 288.

[3] People *v.* Waite, 70 Ill. 25; People *v.* Callaghan, 83 Ill. 128; People *v.* No. Chicago Ry. Co., 88 Ill. 537; Commonwealth *v.* McCarter, 98 Pa. St. 607. Opposing affidavits may be taken into consideration in determining whether the writ should be issued. Where a corporation, by the exercise of powers not conferred by its charter, does no private injury, but commits an offence against the public alone, the State may proceed or waive the right to do so, as may be deemed by the proper public officials most beneficial to the public interest. If a wrong is done by the abuse of a franchise, it is a public wrong, and a proceeding by *quo warranto* must be by the public prosecutor or other authorized officer of the State, who may act either on his own motion or at the instance of a private relator, but he must act in his official capacity, under a sense of official duty, and not merely lend his name for the use of a private party. The proceeding must be official in fact, and not in form only. The law has wisely placed the control of all matters that concern the public alone in the hands of its officers chosen for that purpose; and public proceedings ought not to be used for the promotion of private ends. The court in the exercise of its discretion should take into consideration the circumstances showing the character of the proceeding; and if satisfied that the purpose is merely to allow a private party to institute proceedings in a matter concerning the public alone, its duty is to refuse to allow the information to be filed. People *v.* No. Chicago Ry. Co., 88 Ill. 537 (1873), *per Scholfield*, J.; Dorsey *v.* Ansley, 72 Ga. 460; see *supra*, sec. 890, note; *infra*, secs. 900, note, 901.