§ 900 (722). **Same subject.** — Accordingly, in proceedings in the nature of *quo warranto*, even the rule to show cause will not be granted in all cases, though the incumbent be ineligible and the relator have sufficient interest to prosecute; the court will look at the relator's motive and the public good in the exercise of the discretion confided to it.[1] On this ground, a rule was refused against the defendant, the acting mayor, where it appeared there was no adverse claimant to the office.[2] So the court refused to allow an information in the nature of a *quo warranto* where the election day was suffered to lapse, and the election was held in good faith on the wrong day.[3]

[1] Commonwealth *v.* Jones, 12 Pa. St. 365 (1849); Commonwealth *v.* Cluley, 56 Pa. St. 270 (1867); People *v.* Waite, 70 Ill. 25 (1873), applying the doctrine of the text. Rex *v.* Parry, 6 Ad. & El. 810; 2 N. & P. 414; Rex *v.* Brown, 3 D. & E. T. R. 574, note; Rex *v.* Sargent, 5 D. & E. T. R. 466; Rex *v.* Wardroper, 4 Burr. 1964; Rex *v.* Dawes, *Ib.* 2022.

Who may be a relator, and what will constitute a sufficient interest to give a private relator the writ in the case of public right, or to test the right to a public or municipal office. Commonwealth *v.* Cluley, 56 Pa. St. 270 (1868), and cases cited. As to right of *defeated candidate* to bring *quo warranto* against the successful candidate. Commonwealth *v.* Jones, 12 Pa. St. 365 (1849); Commonwealth *v.* Meeser, 44 Pa. St. 341 (1863); s. c. Brightly's Election Cases, 659, and note, and cases cited. The chief burgess of a borough has the right to take proceedings in the nature of a *quo warranto* to oust a councilman for being interested in a contract for furnishing materials to said borough. He has a sufficient interest to make him a competent relator. Commonwealth *v.* Shepp, 10 Phila. (Pa.) 518. See, also, as to interest of relator, Brightley's Election Cases, 146, 289, 664; Eaton *v.* State, 7 Blackf. 65 (1843); State *v.* Schnierle, 5 Rich. L. 299 (1852). A citizen who claims a seat in the select council of Philadelphia, in place of one who has removed from the ward, has sufficient interest to entitle him to a writ of *quo warranto* to determine the question of forfeiture. Commonwealth *v.* Bumm, 10 Phila. (Pa.) 162. Private citizens, having no special interest to be affected, have not the right to ask for a *quo warranto* to oust a member of council. Commonwealth *v.* Horne, 10 Phila. (Pa.) 164. *A voter in a city* was held to have a sufficient interest in the due election of members of the city council to become the relator in *quo warranto* against persons exercising the duties of councilmen. State *v.* Tolan, 33 N. J. L. 195 (1868); *post*, sec. 910 *et seq.*

See, also, as to relator. *Supra*, sec. 890. Rex *v.* Hodge, 2 B. & Ald. 344, note; Rex *v.* Parry, 6 A. & E. 810; Queen *v.* Quayle, 11 A. & E. 508; Rex *v.* Ogden, 10 B. & C. 210; Rex *v.* Marten, 4 Burr. 2120; Rex *v.* Trevenen, 2 B. & Ald. 482; Rex *v.* Slythe, 6 B. & C. 242; Regina *v.* Anderson, 2 Q. B. 740; Regina *v.* Greene, 2 Q. B. 460. See rule of Queen's Bench of November 8, 1839; 11 A. & E. 2; Rawlinson on Corp. (5th ed.) 359, 360; Willc. 476; Stephens's *Nisi Prius*, 2433; *ante*, sec. 266, note, as to right of freeman in borough to call a meeting and mode of enforcing the right. A civil action in *quo warranto* in the plaintiff's private right must be brought in the county in which the defendant resides or is summoned. State *v.* Thompson, 34 Ohio St. 365.

[2] State *v.* Schnierle, 5 Rich. L (S. C.) 299 (1852). Where the town claims an organization and existence under it, *quo warranto* will lie against an individual for usurping the office of mayor; and in that proceeding the question of a corporate existence of the town can be tried and passed upon. State *v.* McReynolds, 61 Mo. 203 (1875). *Ante*, sec. 894.

[3] State *v.* Tolan, 33 N. J. L. 195 (1868). The requirement to give *notice of the regular annual election*, of which the time is fixed by charter, is directory. People *v.* Hartwell, 12 Mich. 508 (1864); People *v.* Witherell, 14 Mich. 48; *ante*, secs. 197, 217, 221, 839; Stephens's *Nisi Prius*, 2446, 2447. So where the election was held at the wrong place when the rule was applied for by a defeated candidate. People *v.* Waite, 70 Ill. 25 (1873); High Extraor. Rem., sec. 646. Where the Attorney-General is the relator, a *quo warranto* may issue without a rule to show cause. As the law officer of the Commonwealth, he is presumed to be impartial. Commonwealth *v.* Bank of America, 10 Phila. (Pa.) 156.

[1] State *v.* Tolan, 33 N. J. L. 195, 198, *per Depue*, J.

[2] Rex *v.* Williams, 1 W. Black. 95; Rex *v.* New Radnor, 2 Ld. Kenyon's Notes, 498; Rex *v.* Harris, 6 Ad. & El. 475 (33 Eng. C. L. 117); Rex *v.* Powell, Sayer, 239; Rex *v.* Warlow, 2 M. & S. 76; Rex *v.* Payne, 2 Chitty, 367; Angell & Ames, sec. 744. Present state of legislation and adjudications in England on the effect of delay in commencing proceedings. Rawlinson on Corp. (5th ed.) 357; Stephens's *Nisi Prius*, 2432. In Regina *v.* Blizard, L. R. 2 Q. B. 634, it is held that although the officer had disclaimed, the relator was entitled to judgment of ouster.

[3] Commonwealth *v.* Swasey, 133 Mass. 538.

§ 901. **Same subject. Rules to guide Judicial Discretion.** — Accordingly, where it appeared that an election for municipal officers was held on the wrong day, but the mistake was not discovered by any one, either officers, candidates, or voters; and there was no fraud, and the election was participated in by a large majority of the voters, — *the court refused to allow an information against an alderman* chosen at such election, the refusal being strengthened by the consideration that the proceeding, if successful, would leave the council without a quorum for nearly a year. The rules which usually guide the discretion of the court in such cases are thus stated: (1) The relator must not be a mere stranger or intermeddler; (2) He must not have concurred in the act of which he now complains; (3) Unless there is fraud or intentional violation of law, it must appear that public or private interests will not be seriously affected by the ouster of the incumbent.[1]

§ 902 (723). **Where there can be no Trial during Officer's Term.** — In England there is a discretion in the court to grant an information in the nature of a *quo warranto* although the case cannot be tried until *the term of the officer is at an end*, satisfactory reasons for the delay being given; and it has even been granted though the office be determined at the time the application for the information is made.[2] In this country the authorities are conflicting. In some of the States it has been held that an information will not be granted when it is not possible to enter a judgment before the term of the officer proceeded against expires. In other cases it has been adjudged, and we think correctly, that *quo warranto* may be properly brought during the official term of the officer, and if so brought, that it may be tried, and the proper judgment entered afterwards.[3] In

North Carolina the doctrine of the English courts above mentioned has been followed, and it has not been considered absolutely necessary that the information should be applied for while the defendant is continuing to hold the office. The cases on this subject are referred to in the note.[1]

§ 903 (724). **User by Defendant necessary.** — Under the statute of 9 Anne, chap. xx. sec. 4, re-enacted in many of the States literally or in substance, it is settled that there must be some *act* of usurpation — a *user* or *possession* of the office or franchise — to authorize an information in the nature of a *quo warranto*. It is not sufficient to allege *merely* that the defendant *claims* to use or exercise the office or franchise.[2]

§ 904 (725). **Effect of Judgment.** — The judgment of ouster on *quo warranto*, until reversed, conclusively and finally determines the right as to all persons whomsoever; and it may be given in

[1] "The resignation of the incumbent, or even the termination of his office, will not prevent the information being prosecuted to a final judgment, if the proceedings were commenced prior to the resignation, or the expiration of the term." *Per Wagner*, C. J. Hunter *v.* Chandler, 45 Mo. 452 (1870); s. c. 10 Am. L. Reg. (N. S.) 440; s. P. Commonwealth *v.* Smith, 45 Pa. St. 59; People *v.* Hartwell, 12 Mich. 508 (1864). But in *Georgia* it is held that the title to an office will not be tried on *quo warranto*, when at the time of trial the term of office is expired and no judgment of *ouster* can be rendered. Morris *v.* Underwood, 19 Ga. 559 (1856). In *Massachusetts* an information was refused, for reasons partly peculiar, where the office was annual, and there could be no determination during the year. Commonwealth *v.* Athearn, 3 Mass. 285 (1807); Howard *v.* Gage, 6 Mass. 462. See, also, People *v.* Sweeting, 2 Johns. (N. Y.) 184; State *v.* Jacobs, 17 Ohio, 143. Compare People *v.* Loomis, 8 Wend. (N. Y.) 396 (1832).

Following the decisions in England, it has been held that an information in the nature of a *quo warranto* may, in certain cases, be filed against public officers after the expiration of their office, or against special commissioners after they have acted. Burton *v.* Patton, 2 Jones (N. C.) Law, 124 (1854). In The King *v.* Williams, 1 W. Black. 93, there was a judgment of ouster, although the usurpation (for unlawfully holding a court in the corporation of Denbigh) was not continued to the trial, Lord *Mansfield* observing, "Judgment of ouster must be given, lest the defendant repeat the act." *Ib.* 95.

Effect of acquiescence and lapse of time on the remedy by quo warranto. People *v.* Oakland Co. Bank, 1 Doug. (Mich.) 285; People *v.* Bank of Pontiac, 12 Mich. 527; State *v.* Pawtuxet Turnp. Co., 8 R. I. 521; State *v.* Cinc. Gasl. & C. Co., 18 Ohio St. 285 (1868); Angell & Ames Corp. sec. 743.

[2] Rex *v.* Ponsonby, 1 Vesey, 1, leading case, where defendants were charged with usurping a municipal office, cited and approved and followed by Supreme Court of *New York*, in The People *v.* Thompson, 16 Wend. 655 (1837). See, also, Rex *v.* Whitwell, 5 T. R. 86; Buller's *Nisi Prius*, 211; Willc. on Mun. Corp. 462, pl. 254 *et seq.*; Angell & Ames Corp. sec. 744; Stephens's *Nisi Prius*, 2457. The statute of Anne commences, "If any person or persons shall usurp, or intrude into, or unlawfully hold and execute, the offices of," &c.

evidence by the parties and others, without being pleaded, on an issue involving the rights upon which it has passed.[1]

§ 905 (726). **Practice.** — It does not belong to the present work to treat of the practice in proceedings in informations in the nature of a *quo warranto*. This is regulated to a considerable extent by the statutes of the different States, which modify and render more simple, speedy, and effectual the common-law modes of procedure. But the nature of the remedy, and the principles which govern it, remain substantially as at common law, as amended by remedial Acts of Parliament; and the practice, as near as practicable, is the same as in the King's Bench, except when altered by the legislation of the particular State.[2] It must suffice to refer the reader to some of the sources of information on this subject.[3]

[1] Utica Ins. Co. *v.* Scott, 8 Cow. (N. Y.) 709, 721 (1826), *per Colden*, Senator, and authorities there digested. In *Missouri*, see Hunter *v.* Chandler, 45 Mo. 452. A former judgment on an individual relation in *quo warranto* by the district attorney was held to be no bar to a public proceeding by the Attorney-General. State *v.* Cinc. Gasl. & C. Co., 18 Ohio St. 285 (1868). And a decree of a Federal court enjoining a party from obeying an ordinance does not affect the right of the State, not a party to that proceeding, to proceed by *quo warranto* to test the validity of the ordinance. *Ib.* A judgment of ouster in a proceeding on *quo warranto* is not evidence against one who in no way holds under the defeated party. People *v.* Murray, 73 N. Y. 535; Dodge *v.* People, 113 Ill. 491. See, also, Herman on Estoppel, Index thereto, title *Quo Warranto*.

[2] Commonwealth *v.* Jones, 12 Pa. St. 365 (1849), where the practice under the Act of 1836 is stated. Former practice no longer obtains under code of *New York*. People *v.* Conover, 6 Abb. Pr. R. 220.

[3] Willc. 453 *et seq.*; Angell & Ames, chap. xxi.; 3 Black. Com. 262; Buller's *Nisi Prius*, 210; Stephens's *Nisi Prius*, 2429 *et seq.*, 2460. *Rule to show cause.* Commonwealth *v.* Jones, 12 Pa. St. 365. When dispensed with. State *v.* Gummersall, 24 N. J. L. 529 (1854).

Process upon filing information. Willc. 264; Commonwealth *v.* Smead, 11 Mass. 74; State *v.* Gummersall, 24 N. J. L. 529 (1854). *Forms of information; Pleas and Replication in proceedings in quo warranto.* People *v.* Bank of Niagara, 6 Cow. (N. Y.) 196, approving precedent used in the celebrated case against the city of London (3 Hargr. St. Tr. 545), and in Rex *v.* Amery (2 D. & E. T. R. 515). For further forms, see learned and valuable note to the People *v.* Richardson, 4 Cow. (N. Y.) 106 *et seq.*, and authorities there cited; People *v.* Van Slyck, 4 Cow. (N. Y.) 297. See, also, Eaton *v.* State, 7 Blackf. (Ind.) 65 (1843); Lavalle *v.* People, 68 Ill. 252 (1873). In a proceeding by *quo warranto*, an information based on the allegation that a certain law, in point of fact, will apply to but a single city, and is therefore "local" and unconstitutional, must set forth the facts in a traversable form, showing this to be the fact. State *v.* Parsons, 40 N. J. L. 1. An information in the nature of *quo warranto* is a civil suit in such a sense that it may if other requisites exist be removed from the State to the Federal courts under the Act of March 3, 1875. Ames *v.* Kansas, 111 U. S. 449; Foster *v.* Kansas, 112 U. S. 201.

Form of verdict. Thompson *v.* People, 23 Wend. (N. Y.) 537, reversing s. c. 21 Wend. 235.

Form of judgment of ouster. 2 Kyd on Corp. 407; Utica Ins. Co. *v.* Scott, 8 Cow. (N. Y.) 721; Commonwealth *v.* Fowler, 10 Mass. 290 (1813); s. c. 11 *Ib.* 339, where the form of judgment is

given. See, also, as to form of judgment, Miner's Bank *v.* United States, 5 How. (U. S.) 213 (1847). If relators are successful, they are entitled to *costs*, and hence are entitled to a judgment of *ouster*, although the term of office in question has expired. People *v.* Loomis, 8 Wend. (N. Y.) 396 (1832); People *v.* Clute, 52 N. Y. 576 (1873). *Contra*, State *v.* Jacobs, 17 Ohio, 143. Angell & Ames Corp. sec. 745; *supra*, sec. 902. In *quo warranto* to try title to office, if the defendant is adjudged to have unlawfully intruded himself into the office, costs must be awarded to the relator, even if he fails to establish his own right to the office, the terms of the statute being express. State *v.* Jenkins, 46 Wis. 616. Judgment, under statute, of *ouster* against the defendant without passing upon the plaintiff's right. Gano *v.* State, 10 Ohio St. 237.

The refusal of the court to allow a claimant to a public office to file an information is a *final judgment*, reviewable on error, and this, notwithstanding the court has a discretion in granting or refusing leave. State *v.* Burnett, 2 Ala. 140 (1841); Ethridge *v.* Hill, 7 Port. (Ala.) 47.

CHAPTER XXII.

REMEDIES TO PREVENT, CORRECT, AND REDRESS UNAUTHORIZED OR ILLEGAL CORPORATE ACTS.

This subject will be considered in the following order: —

1. Of the Remedy in *Equity* — secs. 906–924.
2. Of the Remedy by *Certiorari* — secs. 925–929.
3. Of the Remedy by *Prohibition* — sec. 930.
4. Of the Remedy by *Indictment* — secs. 931–934.

The remedy by *mandamus* and *quo warranto* has already been considered. The remedy by *private or civil action* is treated in the next chapter.

Remedy in Equity.

§ 906 (727). **Equity Jurisdiction exceptional.** — Courts of equity will sometimes interfere to prevent the municipal authorities from transcending, or from making a wrongful use of, their powers, and will in proper cases relieve against their unauthorized or wrongful acts; but on a principle well known in our jurisprudence, there must, in the absence of controlling legislation, be *some distinct ground or head of equity* to justify a resort to this jurisdiction, such as the want of an adequate remedy at law,[1] multiplicity of suits, irreparable injury, fraud, breach of trust, or the like.[2]

§ 907. **Usual Remedy is at Law, not in Equity.** — Usually the question whether municipal and public corporations are acting, or have acted, within the limits of the authority which the law confers upon them, involves an examination of purely legal principles, unmixed with equity. Therefore, the Court of Chancery has no general jurisdiction to restrain, review, or set aside, even if irregular or illegal, the proceedings of such a corporation. Such jurisdiction belongs, except in special cases which will be mentioned, and which

[1] Stubenrauch *v.* Neyenesch, 54 Iowa, 567. If *mandamus* will lie to compel payment of municipal indebtedness or a levy of taxes for that purpose, there is an adequate remedy at law, and injunction will not be awarded. Hausmeister *v.* Porter, 21 Fed. Rep. 355; *ante*, secs. 826, 829, 849, 850.

[2] *Infra*, secs. 907, 907 *a*; *Re* Sawyer, 124 U. S. 200 (1887).