Quo Warranto—Municipal Corporations—Necessity of Realtor to Prove Title to Office

In 1931 the city of Passaic abolished by ordinance the office of Assistant Superintendent of Weights and Measures. Notwithstanding the failure of the city to recreate the office as provided by statute,[1] in 1938 the three relators were appointed Assistant Superintendents of Weights and Measures by the director of the Department of Public Affairs. In 1940, relators were dismissed summarily and the three respondents were appointed in their stead by the new director of the Department of Public Affairs. Relators thereupon applied for and obtained leave of the Supreme Court to file an information in the nature of a quo warranto under section I of the Quo Warranto act[2] and also filed an information in the nature of a quo warranto under section IV of the act,[3] seeking to oust the respondents and asking a judicial declaration that title to the offices was in the relators. They contended that they had tenure of office and were entitled to the offices. Respondents, in their plea to the information, averred that the offices were never established by ordinance, and, therefore, the appointment of relators was invalid. To this plea, relators demurred. *Held*: Demurrer overruled; judgment for respondents. The offices are legally non-existent and thus relators have no tenure. Failure by relators to establish title to the offices which they claim is fatal in *quo warranto* proceedings. *Van Brookhoven et al v. Kennedy et al,* 125 N.J.L. 178, 14 Atl. 2d 789 (S. Ct. 1940); affirmed on mem., 125 N.J.L. 507, 17 Atl. 2d 152 (E. & A. 1941).

In 1795 there was passed by the New Jersey legislature "an act for rendering the proceedings upon information in the nature of a quo warranto more speedy and efficient."[4] In effect, it provided that any person might apply to the Supreme Court or a justice thereof for leave to file an information in the nature of a *quo warranto* in the name of the attorney-general against another unlawfully holding or executing any office or franchise in the state. This act, apart from a slight amendment in 1903,[5] has survived to the present day.[6] Seem-

1. R.S. 1937, 51:1-45; N.J.S.A., 51:1-45.
2. R.S. 1937, 2:84-1; N.J.S.A., 2:84-1.
3. R.S. 1937, 2:84-7; N.J.S.A., 2:84-7.
4. Chap. 545, P.L. 1795.
5. Chap. 194, P.L. 1903, Sec. 1.
6. R.S. 1937, 2:84-1; N.J S.A., 2:84-1.

ingly a carte blanche for any and all persons desiring to prosecute, the courts in order to prevent abuse have applied certain restrictions before leave will be granted. They state that, it being a prerogative writ, the decision as to whether leave should be granted lies entirely in the discretion of the court.[7] Generally, however, if the relator can show that he is a resident and a taxpayer[8] or is a claimant for the office[9] and that he is acting in good faith,[10] and if the interests of the public will not be affected adversely by a judgment of ouster,[11] leave will be granted.

To the Quo Warranto act of 1795 there was added in 1884 an amendment providing that any person believing himself entitled to a municipal office might file in the Supreme Court an information in the nature of a quo warranto against the usurper,[12] and this without leave of the Supreme Court as a matter of right. In *Davis v. Davis* (S. Ct. 1894),[13] the Supreme Court by Chief Justice Beasley interpreted this amendment as merely relieving the court of its discretionary powers of granting or withholding leave to file an information in just one specific instance, i.e., where the relator believed himself entitled to a municipal office, and that it did not even make possession of title in relator a prerequisite, so long as he had an "honest faith in the legality of his claim."[14]

Evidently, in order to circumvent a misuse of the privilege granted

7. State, *ex rel.* Mitchell v. Tolan, 33 N.J.L. 195 (S. Ct. 1868); State, *ex rel.* Bolton v. Good, 41 N.J.L. 296 (S. Ct. 1879); Tillyer v. Mindermann, 70 N.J.L. 512, 57 A. 329 (S. Ct. 1904).

8. McGuire v. Demuro, 98 N.J.L. 684, 121 A. 739 (S. Ct. 1923).

9. Attorney-General v. Fitzsimmons, 78 N.J.L. 618, 74 A. 924 (E. & A. 1909).

10. Beard v. Aldrich, 106 N.J L. 266, 149 A. 57 (S. Ct 1930), *aff'd*, 107 N.J.L 516, 154 A. 629 (E. & A. 1931). HARRIS, PLEADING AND PRACTICE IN NEW JERSEY (Rev. ed. 1939), Sec. 767.

11. Reihl v. Wynne, 105 N.J.L. 507, 146 A. 204 (S. Ct. 1929); State, *ex rel.* Mulsoff v. Sloat, 8 N.J.Misc. 554, 151 A. 113 (S. Ct. 1930), State, *ex rel.* Klair v. Bacharach, 10 N.J.Misc. 448, 159 A. 538 (S. Ct. 1932).

12. Chap. 210, P.L. 1884, Sec. 1; R S. 1937, 2:84-7; N.J.S.A., 2:84-7.

13. Davis v. Davis, 57 N.J.L. 203, 31 A. 218 (S. Ct. 1894); Davis v. Davis, 57 N.J.L. 80, 30 A. 184 (S. Ct. 1894); Bonynge v. Frank, 89 N.J.L. 239, 98 A. 456 (S. Ct. 1916).

14. See also State, *ex rel* Edelstein v. Fraser, 56 N.J.L. 3, 28 A. 434 (S. Ct. 1893).

by this amendment, the legislature a year later passed another statute providing that the court could, if the pleadings were properly framed for the purpose, determine not only the title of the respondent to the office in question but also the title of the relator.[15] The court, in *Manahan v. Watts* (S. Ct. 1900),[16] one of the first cases decided after the passage of this amendment, stated that the amendment made it a condition precedent on the part of a relator to prove his title when he filed an information as a matter of right claiming title to a municipal office. This view was repudiated shortly thereafter in an opinion by Swayze, J.,[17] who stated that the legislature could not have meant that it was incumbent on the relator to place his own title in issue, but rather the respondent was given the right to put the relator's title in issue.[18] The distinction is, of course, procedural and not highly important. But from *Manahan v. Watts* there has come the rule to the effect that in all proceedings where an information in the nature of a quo warranto is filed as a matter of right by a relator claiming title to a municipal office and where the relator's title is put in issue by appropriate pleadings, the dispute is of a private nature involving not the public but only the parties and, unless relator can prove title in himself, judgment of ouster will not be entered against the respondent irrespective of whether respondent has title or not.[19]

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15. Chap. 21, P.L. 1895, Sec. 1; R.S. 1937, 2:84-17; N.J.S.A., 2:84-17.

16. 64 N.J.L. 465, 45 A. 813.

17. Bonynge v. Frank, *supra*, note 13.

18. The court cited as authority for this proposition: Magner v. Yore, 75 N.J.L. 198, 66 A. 948 (S. Ct. 1907); Bullock v. Biggs, 78 N.J.L. 63, 73 A. 69 (S. Ct. 1909); Dunham v. Bright, 85 N.J.L. 391, 90 A. 255 (S. Ct. 1914).

19. McCarthy v. Walter, 108 N.J.L. 282, 156 A. 772 (E. & A. 1931); Toomey v. McCaffrey, 116 N.J.L. 364, 184 A. 835 (S. Ct. 1936). See also: Florey v. Lanning, 90 N.J.L. 12, 100 A. 183 (S. Ct. 1917); McGlynn v. Grosso, 114 N.J.L. 540, 178 A. 86 (S. Ct. 1935); State, *ex rel.* Pellecchia v. Mattia, 118 N.J.L. 512, 193 A. 910 (S. Ct. 1937); Murphy v. Cuddy, 121 N.J.L. 209, 1 A. 2d 209 (S. Ct. 1938). But *cf.* Anderson v. Myers, 77 N.J.L. 186, 71 A. 139 (S. Ct. 1908), where court said the state was still a party so far as to give the court full control of the litigation in the public interest; and, Dunham v. Bright, 85 N.J.L. 391, 90 A. 255 (S. Ct. 1914), " . . . the proceeding has, nevertheless, a dual aspect. The rights of the public as well as those of the parties are involved. Thus it will be necessary to see whether the public interests would be subserved by entering judgment of ouster"; and Bullock v. Biggs, 78 N.J.L. 63, 73 A. 69 (S Ct. 1909); State, *ex rel.* Hawkins v. Cook, 62 N.J.L. 84,

In the instant case, therefore, had the relators merely filed their information as a matter of right as claimants to municipal offices, the judgment of the court in refusing to oust respondents because of relators' failure to prove title in themselves would have been justified.

As has been pointed out, there are two separate ways for persons other than the attorney-general to proceed in attempting to oust another who is unlawfully holding an office. The first is an information in the name of the attorney-general by leave of the Supreme Court at the instance of any person desiring to prosecute. The second, where the question is of usurpation of a municipal office, an information filed without leave of the court by any citizen believing himself entitled to such office.

It cannot be disputed that, although relators in the instant case had the privilege of filing an information under the special section of the act as claimants to the offices, they had also the privilege of filing under the general section. Thus, they qualified under each section and did actually file an information under each section. Chief Justice Brogan, in rendering the opinion, stated that when a relator claimed title to a municipal office it was unnecessary for him to file an information under the general section of the act and, also, that it was "poor practice" to do so. Thus, it would seem as though the relators were being penalized for having filed under both sections of the act. Yet it is contended that they had the right of so doing.

The relators were qualified to file an information under the general section; if they were not residents and taxpayers, they were certainly interested to the requisite extent in that they claimed the offices. Evidently, the justice or justices of the Supreme Court, to whom was made application for leave to file, was or were also of this opinion, for leave was granted. And by granting the relators leave to file, it was, by implication, decided that the relators made their application in good faith,[20] that the interests of the public would not be adversely affected were a judgment of ouster entered at the trial.[21]

That section of the act giving a claimant to a municipal office the

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40 A. 781 (S Ct. 1898), where judgment of ouster was given though the relator failed to prove title in himself.

20. Beard v Aldrich, *supra*, note 10.

21. Reihl v. Wynne, *supra*, note 11.

right to file an information without obtaining leave of the court is permissory in nature and not mandatory.[22] It cannot be stated that those persons claiming title to a municipal office must file an information under this section of the Quo Warranto act. There have been only two cases which state this rule. Both of them were hearings on applications for leave to file an information under the general section. In the first of the two, *McGuire et al v. Demuro* (S. Ct. 1923),[23] where it appeared incidentally that the petitioner-relator claimed title to the municipal office, it was not alleged that he was a resident and taxpayer, and leave was denied because, the court stated, in order to obtain leave it must appear that the relator is a resident and taxpayer and that he is not a claimant. This decision was propounded on the authority of numerous cases which the court cited. But all of the cited cases merely held that in order for a relator to obtain leave he must show that he has a sufficient interest in seeing that an office is not held unlawfully and that, if he can show that he is a resident and a taxpayer, such a showing will establish his interest. It would seem, therefore, that the court in stating that, in order to qualify, a relator must not be a claimant was merely inadvertently injecting dictum loosely without any previous authority whatsoever. The second case, *State v. Godfrey* (S. Ct. 1939),[24] a per curiam opinion, held that where a relator claimed title to a municipal office his remedy was to proceed under the special section of the act and they denied leave to file the information under the general section. In so doing, the court relied on two cases which actually were no authority for such a holding.

Though these decisions might be controlling on the court in the instant case, the question of whether relators should be given leave by the court to file an information under the general section of the act is unimportant. It is unimportant for the reason that leave was already granted to them and the court, at trial of the issue, should not now make inquiries as to the advisability of their having received leave from this same court. Nor for the same reason should it be held to be "poor practice" to obtain leave with a consequent refusal to oust the respondents.

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22. Davis v. Davis, 57 N.J.L. 203, 31 A. 218 (S. Ct. 1894).
23. 98 N.J.L. 684, 121 A. 739.
24. 11 N.J.Misc. 283, 165 A. 724.

It is apparent that the court in the instant case should have given a judgment of ouster against the respondents on the basis of the case of *Attorney-General v. Fitzsimmons* (E. & A. 1909).[25] In the Fitzsimmons case, the relator, who claimed title to a municipal office, was granted leave by the Supreme Court to file an information against the alleged intruder. The relator's title was drawn into issue and it was found that neither the relator nor the respondent was entitled to the office. The court, thereupon, in a unanimous decision held that relator was not entitled to the office nor was respondent entitled to the office and that a *judgment of ouster would be entered against the respondent.* The facts in the instant case are directly parallel. In both cases the relators were claimants to municipal offices; in each instance leave was granted to the relators by the Supreme Court to file an information under the general section of the Quo Warranto act; in neither was leave denied because relators could file an information under the special section of the act; in each case, relators were unable to prove title in themselves; in both, the respondents were unlawfully holding the office; and in the Fitzsimmons case, the Court of Errors and Appeals entered a judgment of ouster against the respondent irrespective of the fact that the relator had no title; the case under review held that failure by the relators to establish title in themselves was fatal and gave judgment for respondents. The court in the instant case in so holding failed to follow a case decided with complete unanimity by the highest court in the state and permitted respondents, who are, by their own statement, unlawfully holding an office,[26] to continue to exercise the prerogatives of said office.

Unless, therefore, the relators are subject to a penalty for having filed an information under both the general and special sections of the act, no good reason can be advanced for this decision. Manifestly, if a penalty is to be levied, it most certainly should fall on the shoulders of respondents through a judgment of ouster against them

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25. *Supra*, note 9.

26. By respondents admitting that they are unlawfully holding the office, the question of relators collaterally attacking the existence of the office, which cannot be done through quo warranto proceedings except at the instance of the attorney-general ex officio, is not raised. State, *ex rel.* Moore v. Seymour, 69 N.J.L. 606, 55 A. 91 (S. Ct 1903).