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Quo Warranto

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the defendant's argument that there was no basis for the "necessity" exception where the marriage occurred after the date of the offense.

Mr. Chief Justice Warren, in a dissenting opinion,[30] concurred with the majority's reasoning but disagreed with their conclusions. He felt that there was no congressional support for the Court's decision, and that without it this decision represented an intrusion into what was essentially a legislative area. He states: "It is more properly Congress' business, not ours, to place comparative values upon the quest for facts in the judicial process as against the safe-guarding of the marriage relationship. . . ."[31] The dissent also pointed out that under section 1328[32] the testimony of the spouse is made admissible and competent, but not compulsory.[33]

Rule 26 of the Federal Rules of Criminal Procedure gives to the federal courts the right to interpret the common law in the light of "reason and experience." In the instant case, the Court did exactly that. Finding little or no authority in either the common law or congressional acts, the Court exercised its power in a very limited area to reach a just and logical result. It is difficult to conceive of a more vicious offense than that of inducing a woman to prostitute herself for the benefit of another, and the crime takes on an added repugnancy when the female is the wrong-doer's wife. On the grounds of public policy and morality the decision in the *Wyatt* case should receive approval as an effective method of curtailing these offenses.

George M. McClure III.

QUO WARRANTO

The unsuccessful candidates for offices in an unincorporated labor union local asked the district attorney to bring an action under the Rule of Civil Procedure[1] which abolishes the ancient writ of quo warranto and allows a civil action against officers allegedly elected through use of unfair election procedures and in violation of the organization's constitution. When the district attorney refused the unsuccessful candidates brought their own action as permitted by the rule. *Held*: Judgment for defendants affirmed. The action was not properly brought because quo warranto applies only to public, not private, offices. *People ex rel. Mijares v. Kniss*, 357 P. 2d 352 (Colo. 1960).

Quo warranto is traditionally viewed as a proceeding to test a party's right to a public office or franchise.[2] It is an extraordinary and highly prerogative writ,[3] warranted only when a wrong against

30 With whom Mr. Justice Black and Mr. Justice Douglas joined.
31 Wyatt v. United States, 362 U.S. 525, 535 (1960).
32 66 Stat. 230 (1952), 8 U.S.C. §1328 (1952).
33 Wyatt v. United States, 362 U.S. 525, 538 (1960).

1 Colo. R. Civ. P. 106(a)(3) provides: "Special forms of pleadings and writs in . . . quo warranto . . . are hereby abolished. In the following cases relief may be obtained by appropriate action or by an appropriate motion under the practice prescribed in these rules:
". . . (3) When any person usurps, intrudes into, or unlawfully holds or exercises any office or franchise. The district attorney . . . may . . . bring an action against such person in the name of the people of the state, but if the district attorney declines so to do, it may be brought upon the relation and complaint of any person . . . . When such an action is brought against a defendant alleged to usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise it shall be given precedence over other civil actions . . . ."
2 2 Spelling, Extraordinary Relief in Equity and At Law § 1765 (1893).
3 People *ex rel.* v. Blake, 128 Colo. 111, 260 P.2d 592 (1953).

the public appears.[4] When only a private interest reveals itself, the action cannot be entertained.[5] The code section adopted by the Colorado Legislature was interpreted at an early date as providing a civil action to replace the common law proceeding formerly used in such cases.[6] That code section was the source of Rule 106(a)(3) when the rules were adopted in 1941.

Many cases have dealt with the issue of whether a position was a public office or employment.[7] While not deciding whether quo warranto should lie to test a private office, they do illuminate which offices can be tested. Essentials of a public office have been stated as an office (1) created by the constitution, legislature, or some other body by means of authority conferred upon it by the legislature; (2) containing a delegation of a portion of the sovereign power; (3) having duties defined by the legislature or by one given authority to so define; (4) to be performed without control by a body other than the legislature, unless the legislature has created the position under the general control of a superior body; and (5) having some permanence and continuity.[8] The element deemed to be most important in the definition of a public office is that it must possess some portion of the sovereignty.[9] Quo warranto can cause a forfeiture of the franchise of a corporation[10] and can also be used against an unincorporated body which is purporting to exercise a franchise.[11]

The Colorado Supreme Court found the action proper against an invalid election of corporate officers on the theory that the privileges conferred upon a private corporation are unlawfully exercised whenever a person wrongfully undertakes to act as such officer.[12] In England quo warranto will not lie to test the right to a corporate office since the sovereign neither aids nor reserves any control over it.[13] All American courts except Massachusetts allow such action in these instances.[14]

In Nebraska an action was allowed against the head of the English department of a state normal school, but only because the

4 People *ek rel.* Weisbrod v. Lockhard, 26 Colo. App. 439, 143 Pac. 273 (1914).

5 People *ex rel.* Union Pacific Ry. v. Colorado E. Ry., 8 Colo. App. 301, 46 Pac. 219 (1896).

6 Atchison, T. & S.F. R.R. v. People *ex rel.* Att'y Gen., 5 Colo. 60 (1879).

7 People *ex rel.* Chapman v. Rapsey, 16 Cal.2d 636, 107 P.2d 388 (1940), where positions of city judge and city attorney were public offices; State *ex rel.* Nagle v. Page, 98 Mont. 14, 37 P.2d 575 (1934), in which state boiler inspector was not a public officer; State *ex rel.* Gibson v. Fernandez, 40 N.M. 288, 58 P.2d 1197 (1936), where state tax attorney appointed by the state tax commission was not a public officer since all duties had been delegated to the state tax commission; State *ex. rel.* Mathews v. Murray, 70 Nev. 116, 258 P.2d 982 (1953), in which director of driver's license division of the public service commission was employment and not public office mainly because the statutes created public service commission but did not mention a driver's license division; Application of Milwaukee Chapter, Izaak Walton League of America, 194 Wis. 37, 216 N.W. 493 (1927), wherein state conservation director was not a public officer.

8 State *ex rel.* Nagle v. Page, 98 Mont. 14, 37 P.2d 575 (1934).

9 State *ex rel.* Gibson v. Fernandez, 40 N.M. 288, 58 P.2d 1197 (1936).

10 Canon City Labor Club v. People *ex rel.*, 21 Colo. App. 37, 121 Pac. 120 (1912), in which club received franchise to operate as a social club but actually dispensed liquor in violation of an ordinance.

11 People *ex rel.* Cory v. Colorado High School Activities Ass'n, 141 Colo. 382, 349 P.2d 381 (1960), wherein a type of franchise was found when, to be able to engage in interschool activities, the school districts joined and paid public monies into this association which operated independently of statutory authority.

12 Grant v. Elder, 64 Colo. 104, 170 Pac. 198 (1918). Here a conflict arose between two factions of stockholders—each group claiming proxies held by the other. A dissenting opinion stated that the majority did not take notice that other states that had allowed an action against a corporate officer had done so because of a statutory provision, while the Colorado code could not be so interpreted. Then, in Wolford v. Bankers Sec. Life Co., 91 Colo. 532, 17 P.2d 298 (1932), Mr. Justice Butler, while upholding the rule of Grant v. Elder, remarked that he, when presiding at the trial of Grant v. Elder as district court judge, had been much impressed by the line of argument expressed in that dissent, but that, nevertheless, the case had been the law for fifteen years and the court should not then depart from it.

13 Ferris, Extraordinary Legal Remedies § 154 (1926).

14 *Ibid.*

statute had considerably extended the scope of quo warranto to test any office.[15] The court said it would ordinarily seem to cover "any position where authority is coupled with duty and where duty is for a public purpose."[16]

Since quo warranto lies even against a person or corporation claiming and exercising privileges of a public nature without legislative authority, the Florida Supreme Court found it would also lie against a nominee for public office because statutes of that state bestowed upon the nominee certain privileges, such as the exclusive right to a place on the ballot.[17]

In Georgia the action has also been used successfully to test the right of a person to exercise the political party office of state Democratic executive committee chairman.[18] Although it was expressly found to be a private office, an analogy was drawn to private corporate offices. So the action would also lie where the legislature had imposed upon the chairman of a state committee of any political party certain specified duties, thus giving the office a status equivalent to the office in a private corporation.[19] However, most courts have not extended the doctrine to this extreme.[20]

By contending in the instant case that the rule should allow a civil action against a private officer, the relators created a case of first impression. In comparing the political party nominee and officer with a labor union officer, is there imposed upon the latter any duty or privilege? In Colorado the legislature has stated that the policy of the Labor Peace Act is to recognize interests of the public, the employee, and the employer, and that members of labor organizations have the right to elect officers by secret ballot.[21] But the supreme court has held that provisions requiring labor unions to incorporate were unconstitutional, because rights of free speech, press and assembly were removed.[22] While the recent Landrum-

15 Eason v. Majors, 111 Neb. 288, 196 N.W. 133 (1923).

16 *Id.* at 133.

17 State ex rel. Watkins v. Fernandez, 106 Fla. 779, 143 So. 638 (1932). The court said, at page 640, "There is nothing sancrosanct or mystical about a proceeding in the nature of quo warranto. It is subject to like canons of common sense application as the other ancient prerogative writs. The acid test determinative of whether or not it will relieve against the exercise of privileges claimed to be established as matters of publici juris by statute is found in the answer to these questions: (1) Has the Legislature prohibited its exercise by citizens generally, either with or without condition? and, if it has, (2) Were the evils in view as a reason for the prohibition of a public or private character?"

18 Morris v. Peters, 203 Ga. 350, 46 S.E.2d 729 (1948). Statutes had imposed upon the chairman of any state political party committee the duty to consolidate and publish the results of primary in a newspaper, see that candidates' names were on the ballot, file a certificate of the primary votes with the secretary of state, and receive and publish the reports of recount committees. In Ritchie v. Barker, 216 Ga. 194, 115 S.E.2d 539 (1960), the court followed *Morris* and found similar statutory duties imposed upon members of a county Democratic executive committee.

19 *Ibid.*

20 Stout v. Democratic County Cent. Comm., 40 Cal.2d 91, 251 P.2d 321 (1952); People ex rel. Brundage v. Brady, 302 Ill. 576, 135 N.E. 87 (1922); Attorney Gen. v. Drohan, 169 Mass. 534, 48 N.E. 279 (1897).

21 Colo. Rev. Stat. § 80-5-1 (1953) provides: "The public policy of the state as to employment relations and collective bargaining, in the furtherance of which this article is enacted, is declared to be as follows:

"(1) It recognizes that there are three major interests involved, namely: That of the public, the employee, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of others. . . . .

"(4) All rights of persons to join labor organizations or unions and their rights and privileges as members thereof, should be recognized, safeguarded and protected. No person shall be denied membership in a labor organization or union on account of race, color, religion, sex or by any unfair or unjust discrimination. Arbitrary or excessive initiation fees and dues shall not be required, nor shall excessive, unwarranted, arbitrary or oppressive fines, penalties, or forfeitures be imposed. The members are entitled to full and detailed reports from their officers, agents or representatives of all financial transactions and shall have the right to elect officers, by secret ballot and to determine and vote upon the question of striking, not striking, and other questions of policy affecting the entire membership."

22 AFL v. Reilly, 113 Colo. 90, 155 P.2d 145 (1945).

Griffin Act imposes obligations upon union officers for internal affairs and states certain minimum election requirements,[23] the Colorado statutes provide for none of these.

The Landrum-Griffin Act provides a remedy after the internal processes of the union have been exhausted.[24] The only other remedy found was in a few cases where equity had entertained questions arising from labor union elections on the basis of the important economic interest (i.e., a property right) which a member has in the person selected to lead.[25]

Since, by statute,[26] the court cannot formulate rules of procedure in such a way as to enlarge the substantive rights of the litigants, it is not surprising that quo warranto will not lie here against a labor union officer as long as his organization is unincorporated. Cases of the political party officers and nominees are of little aid in this situation, since they carry the flavor of a public office. Indeed, in the South, the nominee from the Democratic party is very likely to become the public officer.

The public has been interested in labor-management relations for some time, but only recently has it turned to look toward the internal labor organization. It was found that membership in a union was really not voluntary. The union had become the bread winner. It was also found that union democracy was sometimes lacking, but there was no remedy except in a few cases where equity could be shown a property right.[27] If quo warranto will not work, a party will have to resort to the Landrum-Griffin Act where he may find a satisfactory answer.

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23 Labor Management Reporting & Disclosure Act of 1959 § 104, 73 Stat. 523, 29 U.S.C. § 414 (Supp. I, 1959), requires that the secretary of each labor organization must deliver a copy of each collective bargaining agreement to any employee requesting it; § 201, 73 Stat. 524, 29 U.S.C. § 431 (Supp. I, 1959), requires that the constitution, the bylaws, a report on several aspects of the internal procedures, and an annual financial report be filed with the Secretary of Labor and that the same information be available to the members; and § 401, 73 Stat. 532, 29 U.S.C. § 481 (Supp. I, 1959), requires an election of national officers at least every five years and local officers at least every three years by secret ballot. It also requires no discrimination between candidates by the present officers and includes adequate election safeguards, including the preservation of ballots for one year.

24 Labor Management Reporting & Disclosure Act of 1959 § 420, 73 Stat. 534, 29 U.S.C. § 482 (Supp. I, 1959) provides:

"A member of a labor organization—(1) who has exhausted the remedies available . . . or (2) who has invoked such available remedies without obtaining a final decision . . . may file a complaint with the Secretary . . . alleging the violation of any provision of section 481 of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers) . . . .

"The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, . . . bring a civil action against the labor organization . . . ."

25 Bianco v. Eisen, 190 Misc. 609, 75 N.Y.S.2d 914 (Supp. Ct. 1944); Dusing v. Nuzzo, 177 Misc. 35, 29 N.Y.S.2d 882 (Sup. Ct. 1941).

26 Colo. Rev. Stat. § 37-2-8 (1953) provides: " . . . Such rules shall neither abridge, enlarge, nor modify the substantive rights of any litigants . . . ."

27 Cox, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609 (1959).