

QUO WARRANTO IN MISSOURI

I. INTRODUCTION

Quo warranto is a proceeding in which the state determines the legality of a party's claim to a public office or franchise.¹ It is applied principally in two types of cases: suits to try a person's title to office² and litigation seeking to revoke a corporate charter.³ The standard remedy in suits brought upon a writ of quo warranto is ouster, although in some situations a fine is imposed. This note contains a brief historical description of quo warranto, an explanation of some of its attributes as used in Missouri, and a more detailed analysis of the two classic applications of the writ.

In England quo warranto was originally a writ of right⁴ for the Crown to determine the authority upon which one who claimed an office, franchise, or liberty of the Crown supported his claim.⁵ If the claimant could not show his right to the office or franchise, it was forfeited to the Crown. Since the original writ was a lengthy process and a judgment on the writ was conclusive even against the Crown, it fell into gradual disuse. A speedier and less conclusive information⁶ in the nature of quo warranto developed; its purpose was identical to the older writ. Originally these informations were considered criminal in nature, but gradually came to be recognized as civil proceed-

1. F. FERRIS, EXTRAORDINARY LEGAL REMEDIES § 101 (1926).

See *State ex rel. McKittrick v. Murphy*, 347 Mo. 484, 148 S.W.2d 527 (1941), for a discussion of the term "franchise." "A franchise has been defined as 'A special privilege conferred by government on individuals, and which does not belong to the citizens of the country generally by common right.' The term is applied by the courts to the powers granted by law to public officers and agencies of government." *Id.* at 490, 148 S.W.2d at 530. In *State ex rel. Wear v. Business Men's Athletic Club*, 178 Mo. App. 548, 163 S.W. 901 (1914), the court said, "The corporate franchise is the right to exist as an entity for the purpose of doing things which are permitted under the law authorizing the incorporation." *Id.* at 560, 163 S.W. at 907.

2. F. FERRIS, *supra* note 1, at § 145.

3. *Id.* at § 140.

4. The Crown Attorney was not required to obtain leave of court to file the writ, and the determination of ouster was a matter solely for the king. *Id.* at § 105.

5. The history in this paragraph is based on the text in J. HIGH, EXTRAORDINARY LEGAL REMEDIES §§ 591-603 (3d ed. 1896).

6. An information is defined as an accusation or complaint against a person for some criminal offense and differs principally from an indictment in that the latter rests on the accusation of a grand jury, whereas the former is grounded on the allegation of the officer who exhibits it. Originally an information in the nature of quo

ings. Before the Statute of Anne,⁷ these informations could be filed only by the attorney general on behalf of the Crown and could not be used by private individuals to test the title of a person claiming a public office or franchise. The statute allowed the filing of an information by the Crown's attorney general upon the relation of any person desiring to prosecute a quo warranto inquiry. Unlike the common law information, leave of court was required to file statutory quo warranto.

II. CURRENT STATUS OF QUO WARRANTO IN MISSOURI

As in England, two types of informations in the nature of quo warranto are recognized in Missouri:⁸ those filed pursuant to statute by the government attorney at the instance of a private relator; and those filed ex officio by a government attorney on his own initiative.⁹ Both are civil proceedings at law¹⁰ and are governed by the regular rules of pleading and civil procedure.¹¹

warranto was a special form of criminal information, but, as stated in the text, it is now a civil proceeding to try the right of a party to a public office or franchise. 5 M. BACON, ABRIDGMENT OF THE LAW 169-73 (with American notes and references by J. Bouvier 1856). See *State v. St. Louis Perpetual Marine, Fire & Life Ins. Co.*, 8 Mo. 330 (1843).

7. 9 Anne c. 20 (1710).

8. In *State v. St. Louis Perpetual Marine, Fire & Life Ins. Co.*, 8 Mo. 330 (1843), the supreme court held that the writ of quo warranto was still to be distinguished from the modern information in the nature of quo warranto and that both were still in use in Missouri. Subsequent cases, however, held that, the ancient writ having become obsolete before Missouri achieved statehood, the reference in the Missouri constitution to original remedial writs was to the more modern informations and not the ancient writ, though the term "writ" is still used to refer to the information. See *State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902, 1018 (1909); *State ex rel. Walker v. Equitable Loan & Inv. Ass'n*, 142 Mo. 325, 41 S.W. 916 (1897).

9. Both the attorney general and a prosecuting attorney may file these informations, but a prosecuting attorney does not have authority equal to that of the attorney general. He is limited to cases specially affecting his county. See *State ex rel. Schneider's Credit Jewelers, Inc. v. Brackman*, 272 S.W.2d 289 (Mo. 1954), in which the court held that a prosecuting attorney may not file quo warranto to oust a corporation authorized to do business statewide.

10. *State ex rel. McNutt v. Northup*, 367 S.W.2d 512 (Mo. 1963); *State ex rel. Killam v. Consolidated School Dist.*, 277 Mo. 458, 209 S.W. 938 (1919); *State ex rel. Walker v. Equitable Loan & Inv. Ass'n*, 142 Mo. 325, 41 S.W. 916 (1897); *State ex rel. Attorney General v. Vail*, 53 Mo. 97 (1873); *State ex rel. Bornefeld v. Kupferle*, 44 Mo. 154 (1869); *State ex rel. Brison v. Lingo*, 26 Mo. 496 (1858).

11. A quo warranto action is initiated by the filing of an information containing the relator's name. The court then requires the defendant to appear and answer. If a private person desires to initiate proceedings, he must first contact the attorney general or prosecuting attorney and request permission to bring action. The regular rules of civil procedure govern suits filed in circuit court. If the action is originally filed in appellate court, Rules 84.22-84.25 of the Missouri Rules of Civil Procedure

Initially the circuit courts of Missouri exercised common law jurisdiction over ex officio informations,¹² but in 1945 they were granted constitutional jurisdiction.¹³ The circuit courts have statutory jurisdiction of quo warranto actions brought under the Missouri statute governing suits at the relation of private persons.¹⁴

The Missouri Supreme Court and the state courts of appeal also are granted original jurisdiction to issue writs of quo warranto under the state constitution.¹⁵ Constitutionally authorized jurisdiction over ex officio informations was never seriously questioned; but the supreme court, in *State ex rel. McIlhane v. Stewart*,¹⁶ expressed doubt whether the constitution referred to original informations at the relation of a private individual. The statute governing suits of this nature confers jurisdiction in these cases upon the circuit courts and "other courts having concurrent jurisdiction therewith in civil cases."¹⁷ In a case which did not directly present the question of jurisdiction, the court interpreted the above language to include the supreme court.¹⁸ Other

are controlling. Rule 84.24 requires that the opposing party be given five days notice before the writ issues. There is, however, a provision for waiver of notice if it would defeat the purpose of the writ.

An information seeking the ouster of a public official must contain the name of the person holding the office in question and a general allegation that he holds the office without lawful authority. If the information seeks ouster of a corporation, it must contain the name of the corporation (if original incorporation is attacked, the information should be directed at the individuals purporting to act as a corporation) and the specific acts or omissions producing forfeiture of the corporation's charter. In both cases, if there is a private relator, his name and special interest must be alleged in the information. The answer is prepared as in other civil cases. It should set out all affirmative defenses including an allegation of facts sufficient to demonstrate defendant's legal right to the office or franchise in question. MOBARCLE, MISSOURI APPELLATE PRACTICE & PROCEDURE AND EXTRAORDINARY REMEDIES §§ 916-24 (1963); M. VOLZ, J. LOGAN & C. BLACKMAR, 2 MISSOURI PRACTICE, METHODS OF PRACTICE §§ 2022-25 (1961); C. WHEATON & C. BLACKMAR, 10 MISSOURI PRACTICE, PROCEDURAL FORMS 548-67 (1962).

12. *State ex rel. Norman v. Ellis*, 325 Mo. 154, 28 S.W.2d 363 (1930); *State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 246 Mo. 168, 151 S.W. 101 (1912); *State ex rel. McIlhane v. Stewart*, 32 Mo. 379 (1862).

13. MO. CONST. art. V, § 4.

14. MO. REV. STAT. §§ 531.010 to 531.060 (1969); MO. R. CIV. P. 98.

15. MO. CONST. art. V, § 4:

Superintending control of superior over inferior courts—original remedial writs. The supreme court, courts of appeals, and circuit courts shall have a general superintending control over all inferior courts and tribunals in their jurisdiction, and may issue and determine original remedial writs.

16. 32 Mo. 379 (1862).

17. MO. REV. STAT. § 531.010 (1969).

18. *State ex rel. Norman v. Ellis*, 252 Mo. 154, 28 S.W.2d 363 (1930).

cases indicate that the statute refers only to the circuit courts and does not authorize the supreme court to exercise original jurisdiction.¹⁹ Despite hesitation in *Stewart* and despite the lack of an explicit statutory grant of jurisdiction, the supreme court has claimed constitutional authority over these informations,²⁰ but since it is easier to try issues of fact in a circuit court, the supreme court has often declined to exercise its jurisdiction.²¹ If it does accept jurisdiction, the court may appoint a commissioner to make findings of fact,²² but his conclusions are only advisory and not binding upon the court.²³

The courts of appeal have general appellate jurisdiction over quo warranto actions except for those over which the supreme court has exclusive appellate jurisdiction by article five section three of the constitution.²⁴ The latter cases include suits which involve title to state offices. For purposes of appellate jurisdiction, city offices are not considered "offices under this state."²⁵ Although an early constitutional provision granted the supreme court exclusive appellate jurisdiction when "any state officer as such is a party" to the suit, the supreme court held that it did not have exclusive appellate jurisdiction of quo warranto suits at the relation of a private person.²⁶ The private party, not the government attorney, was deemed the real party in interest.

19. *E.g.*, *State ex rel. McIlhane v. Stewart*, 32 Mo. 379 (1862); *State ex rel. Lawrence v. Balcom*, 71 Mo. App. 27 (1897).

20. *State ex rel. Attorney General v. Claggett*, 73 Mo. 388 (1881); *State ex rel. Young v. Buskirk*, 43 Mo. 111 (1868); *State ex rel. Lawrence v. Balcom*, 71 Mo. App. 27 (1897).

21. *E.g.*, *State ex rel. Young v. Buskirk*, 43 Mo. 111 (1868); *State ex rel. Hequembourg v. Lawrence*, 38 Mo. 535 (1866).

22. *E.g.*, *State ex rel. Otto v. Kansas City College of Medicine & Surgery*, 315 Mo. 101, 285 S.W. 980 (1926).

23. *State ex rel. Eagleton v. Elliott*, 380 S.W.2d 929 (Mo. 1964); *State ex rel. Miller v. St. Louis Union Trust Co.*, 335 Mo. 845, 74 S.W.2d 348 (1934); *State ex rel. Union Elec. Light & Power Co. v. Grimm*, 220 Mo. 483, 119 S.W. 626 (1909).

24. Mo. CONST. art. V, § 3:

Jurisdiction of the supreme court. The supreme court shall have exclusive appellate jurisdiction in all cases involving the construction of the Constitution of the United States or of this state, . . . the title to any office under this state, . . . and except as provided in this section, in other classes of cases provided by supreme court rule unless otherwise changed by law. The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.

25. *State ex rel. Tucker v. Mattingly*, 268 S.W.2d 868 (Mo. 1954); *State ex rel. Ragsdale v. Walker*, 132 Mo. 210, 33 S.W. 813 (1896). It must be emphasized that this is only a question of jurisdiction and that quo warranto is the proper remedy to oust city officeholders from office, *see* note 102 *infra* and accompanying text.

26. *State ex rel. Tucker v. Mattingly*, 268 S.W.2d 868 (Mo. 1954).

Whatever confusion existed was resolved by an amendment to section three of article five removing cases involving state officers from the supreme court's exclusive appellate jurisdiction.²⁷

The judgment in quo warranto cases is within the discretion of the court. The standard judgment is ouster, but courts are reluctant to grant ouster unless it will serve a public purpose.²⁸ In suits against both public officials²⁹ and corporations,³⁰ the judgment may be partial ouster—the officer or corporation may be ordered to cease exercising particular usurped powers while otherwise allowed to retain office or corporate charter. In addition to ouster, the court may impose a fine if there is a finding of evil intent or improper motive,³¹ or the court may choose merely to impose a fine and condition ouster upon failure to pay.³² The amount of the fine is commensurate with the seriousness of the transgression.³³

Quo warranto informations at the relation of a private individual must be filed pursuant to statute.³⁴ The private relator is required to obtain approval of the government attorney to maintain a quo warranto proceeding,³⁵ such approval being completely discretionary.³⁶ Unlike ex

27. See note 24 *supra*.

28. *State ex rel. City of Lebanon v. Missouri Standard Tel. Co.*, 337 Mo. 642, 85 S.W.2d 613 (1935); *State ex rel. Harrington v. School Dist.*, 314 Mo. 315, 284 S.W. 135 (1926); *State ex rel. Crain v. Baker*, 104 S.W.2d 726 (Mo. App. 1937).

29. *State ex rel. McKittrick v. Murphy*, 347 Mo. 484, 148 S.W.2d 527 (1941). Here officers of the Unemployment Commission were ousted "from locating or attempting to locate the central office of the Commission outside the City of Jefferson." *Id.* at 493, 148 S.W.2d at 532.

30. *State ex rel. McKittrick v. C.S. Dudley & Co.*, 340 Mo. 852, 102 S.W.2d 895 (1937). In this case a corporation chartered as a general collection business was ordered to refrain from the illegal practice of law but was otherwise allowed to retain its charter "and conduct its business according to law on penalty of the forfeiture of its charter and franchise." *Id.* at 865, 102 S.W.2d at 903. See also *State ex rel. McKittrick v. American Colony Ins. Co.*, 336 Mo. 406, 80 S.W.2d 876 (1934).

31. *State ex rel. Taylor v. Salary Purchasing Co.*, 358 Mo. 1022, 218 S.W.2d 571 (1949); *State v. McBride*, 4 Mo. 303 (1836).

32. *State ex rel. Miller v. Mercantile-Commerce Bank & Trust Co.*, 335 Mo. 873, 74 S.W.2d 362 (1934).

33. *State ex rel. Dalton v. Riss & Co.*, 335 S.W.2d 116 (Mo. 1960), *appeal dismissed*, 364 U.S. 338 (1960).

34. MO. REV. STAT. §§ 531.010 to 531.060 (1969); Mo. R. Crv. P. 98. The statute of Anne was never part of Missouri common law though it was virtually copied by the legislature as early as 1825. See *State ex rel. McIlhaney v. Stewart*, 32 Mo. 379 (1862).

35. *State ex rel. Black v. Taylor*, 208 Mo. 442, 106 S.W. 1023 (1907); *State ex rel. Smith v. Gardner*, 204 S.W.2d 319 (Mo. App. 1947). See also Spiking

officio proceedings, the government attorney must obtain leave of court.³⁷ Once the proceeding is commenced, however, it is essentially in the control of the private relator and may not be discontinued without his permission.³⁸ The private relator is also required to have a special interest in the subject matter of the proceeding.³⁹ Although it is not completely clear what constitutes the requisite special interest, a rival claimant to a public office has sufficient interest to serve as relator in a suit to challenge a person's title to that office;⁴⁰ residents of a municipality have the requisite interest to attack a municipality's corporate existence;⁴¹ and taxpayers have sufficient interest to attack the existence of a taxing agency such as a school district.⁴² Taxpayer status, however, does not confer the requisite interest to challenge a

School Dist. v. Purported "Enlarged School Dist.," 362 Mo. 848, 245 S.W.2d 13 (1952).

36. *State ex rel. Clare v. Consolidated School Dist.*, 277 Mo. 458, 209 S.W. 938 (1919); *State ex rel. Black v. Taylor*, 208 Mo. 442, 106 S.W. 1023 (1907).

37. *State ex rel. City of Campbell v. Arkansas-Missouri Power Co.*, 339 Mo. 15, 93 S.W.2d 887 (1936); *State ex rel. Berkley v. McClain*, 187 Mo. 409, 86 S.W. 135 (1905); *State ex rel. Attorney General v. Balcom*, 71 Mo. App. 27 (1897).

38. *State ex rel. Clare v. Consolidated School Dist.*, 277 Mo. 458, 209 S.W. 938 (1919); *State ex rel. Perkins v. Long*, 275 Mo. 169, 204 S.W. 914 (1918); *State ex rel. Black v. Taylor*, 208 Mo. 442, 106 S.W. 1023 (1907).

39. *State ex rel. Clare v. Consolidated School Dist.*, 277 Mo. 458, 209 S.W. 938 (1919); *State ex rel. Dearing v. Berkley*, 148 Mo. 184, 41 S.W. 732 (1897) (dictum); *State ex rel. Schneider's Credit Jewelers, Inc. v. Brackman*, 260 S.W.2d 800 (Mo. App. 1953); *State ex rel. White v. Small*, 131 Mo. App. 470, 109 S.W. 1079 (1908).

See State ex rel. Patterson v. Ferguson, 333 Mo. 117, 65 S.W.2d 97 (1933), *cert. denied*, 291 U.S. 682 (1934), for a case holding that an information may state a valid cause of action despite failure to aver the relator's special interest. Failure to satisfy the special interest requirement was not fatal. The court treated the information as actually filed by the government attorney, *ex officio*, for the protection of the public interest. The designation of private relators was treated as surplusage. *Ferguson* was a case seeking ouster of a city mayor submitted to the supreme court by stipulation of the parties. The court failed to indicate what would be required to save such an information from dismissal other than it appeared to be brought by the government attorney for the protection of the public interest; since all quo warranto suits are for the protection of the public interest, carried to its logical extreme, this reasoning would seem to abrogate the special interest requirement. This rationale has not been expressed in any other Missouri decision.

40. *See State ex rel. Attorney General v. Claggett*, 73 Mo. 388 (1881); *State ex rel. Attorney General v. Balcom*, 71 Mo. App. 27 (1897).

41. *State ex rel. Tucker v. Mattingly*, 268 S.W.2d 868 (Mo. 1954).

42. *State ex rel. Marbut v. Potter*, 191 S.W. 57 (Mo. 1916); *State ex rel. Berkley v. McClain*, 187 Mo. 409, 86 S.W. 135 (1905); *State ex rel. White v. Small*, 131 Mo. App. 470, 109 S.W. 1079 (1908). *See note 94 infra* and accompanying text for a more detailed discussion of the special interest requirement as it relates to suits trying title to office.

public official's right to office.⁴³ This result has been justified as preventing unnecessary harassment of public officials,⁴⁴ though arguably such abuse could be avoided by careful screening by the government attorney.

Corporations

Quo warranto is the proper method in Missouri to oust a private corporation from its corporate franchise and privileges.⁴⁵ It may be used against domestic corporations and foreign corporations licensed to do business in Missouri.⁴⁶ A corporation may be ousted on grounds of invalid incorporation⁴⁷ or abuse of corporate charter.⁴⁸ In the latter instance the charter is forfeited on the theory that the corporation, by abusing its charter, violates an implied contract with the state to adhere to the state's laws and the purposes for which the corporation was organized.⁴⁹

Quo warranto is the exclusive method to determine the validity of a municipal corporation⁵⁰ and may be used to challenge the original incorporation,⁵¹ an extension of boundaries,⁵² or both in the same pro-

43. See *State ex rel. Pickett v. Cairns*, 305 Mo. 333, 265 S.W. 527 (1924).

44. See *State ex rel. Pickett v. Cairns*, 305 Mo. 333, 265 S.W. 527 (1924); *State ex rel. Thompson v. Heffernan*, 243 Mo. 442, 148 S.W. 90 (1912).

45. *E.g.*, *State ex rel. Hadley v. Delmar Jockey Club*, 200 Mo. 34, 92 S.W. 185 (1905), *appeal dismissed*, 210 U.S. 324 (1908); *State ex rel. Wear v. Business Men's Athletic Club*, 178 Mo. App. 548, 163 S.W. 901 (1914).

46. *State ex rel. Dalton v. Riss & Co.*, 335 S.W.2d 118 (1960); *State ex rel. Taylor v. America Ins. Co.*, 355 Mo. 1053, 200 S.W.2d 1 (1947).

47. See *State ex rel. McKittrick v. Koon*, 356 Mo. 284, 201 S.W.2d 446 (Mo. 1947); *State ex rel. Clements v. Clardy*, 267 Mo. 371, 185 S.W. 184 (1916); *State ex rel. Beach v. Citizens Benefit Ass'n*, 6 Mo. App. 163 (1878).

48. *State ex rel. Barker v. Armour Packing Co.*, 265 Mo. 121, 176 S.W. 382 (1915), *appeal dismissed*, 242 U.S. 663 (1916); *State ex rel. Attorney General v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S.W. 145 (1914); *State ex rel. Hadley v. Delmar Jockey Club*, 200 Mo. 34, 92 S.W. 185 (1905).

49. *State ex rel. Hadley v. Delmar Jockey Club*, 200 Mo. 34, 92 S.W. 185 (1905).

50. *E.g.*, *State ex rel. Eagleton v. Champ*, 393 S.W.2d 516 (Mo. 1965); *State ex rel. Taylor v. Cumpton*, 362 Mo. 199, 240 S.W.2d 877 (1951); *State ex rel. Tucker v. Mattingly*, 275 S.W.2d 34 (Mo. App. 1955); *State ex rel. Jackson v. Town of Mansfield*, 99 Mo. App. 146, 72 S.W. 471 (1903). Willful misconduct by a public official results in automatic forfeiture and ouster. *State ex rel. Dalton v. Mosley*, 36 Mo. 711, 286 S.W.2d 721 (1956).

51. *State ex rel. Meriwether v. Campbell*, 120 Mo. 396, 25 S.W. 392 (1894); *State ex rel. Brown v. Town of Westport*, 116 Mo. 582, 22 S.W. 888 (1893); *State ex rel. Ryan v. Huffman*, 248 S.W. 985 (Mo. App. 1923).

52. *State ex rel. Womack v. City of Joplin*, 332 Mo. 1193, 62 S.W.2d 393 (1933); *State ex rel. Mayor, Council, & Citizens of Liberty v. City of Pleasant Valley*, 453 S.W.2d 700 (Mo. App. 1970).

ceeding.⁵³ If an annexation is being challenged, the municipality is a necessary party.⁵⁴ Formerly this prohibited attacking annexation and original incorporation in the same proceeding on the theory that the presence of the municipality as a party in the annexation count admitted its valid existence, which was being attacked in the other count,⁵⁵ but the supreme court has rejected this reasoning.⁵⁶ Since alternative pleadings are allowed by liberalized procedural rules, there is no logic in requiring separate proceedings to challenge incorporation and annexation. This rationale would also apply to suits against private corporations in which the relator wishes to contest both the original incorporation and the exercise of particular powers.

The validity and composition of a school district can be challenged by quo warranto,⁵⁷ and this is the only means for residents and taxpayers of a district to do so, since they are not permitted to attack its existence by a declaratory judgment action.⁵⁸ The same rule applies when the school district is seeking to acquire jurisdiction over additional territory.⁵⁹ In a jurisdictional dispute between two school districts over certain territory, however, either quo warranto⁶⁰ (with one district serving as relator) or a declaratory judgment action⁶¹ is proper

53. *State ex rel. Eagleton v. Champ*, 393 S.W.2d 516 (Mo. 1965).

54. *Id.* at 530.

55. *State ex rel. Crow v. Fleming*, 158 Mo. 558, 595 S.W. 118 (1900).

56. *State ex rel. Eagleton v. Champ*, 393 S.W.2d 516 (Mo. 1965). *State ex rel. Brown v. Town of Westport*, 116 Mo. 582, 22 S.W. 888 (1893), involved a challenge to incorporation and extension in the same proceeding. The court allowed the suit but failed to discuss the problem involved in *Champ*.

57. *E.g.*, *State ex rel. Borgelt v. Pretended Consolidated School Dist.*, 362 Mo. 249, 240 S.W.2d 946 (1951); *State ex rel. Berkley v. McClain*, 187 Mo. 409, 86 S.W. 135 (1905).

58. *State ex rel. Junior College Dist. v. Barker*, 418 S.W.2d 62 (Mo. 1967); *Utt v. Oster*, 362 Mo. 866, 245 S.W.2d 22 (1952); *Spiking School Dist. v. Purported "Enlarged School Dist."*, 362 Mo. 848, 245 S.W.2d 13 (1952). In *Watts v. Gross*, 468 S.W.2d 223 (Mo. 1971), however, landowners were allowed to attack the existence of a county levee district. The articles of association contained a fifty year limitation and the court held that the district ceased to exist by operation of law at the expiration of that period. The court reasoned that, the cessation appearing on the face of the record, the district had no de facto existence and could therefore be attacked by private citizens.

59. *State ex rel. Junior College Dist. v. Barker*, 418 S.W.2d 62 (Mo. 1967); *Utt v. Oster*, 362 Mo. 866, 245 S.W.2d 22 (1952); *Lane v. Finney*, 274 S.W.2d 521 (Mo. App. 1955); *Schmidt v. Goshen School Dist.*, 250 S.W.2d 834 (Mo. App. 1952).

60. *State v. Eckley*, 347 S.W.2d 704 (Mo. 1961); *State ex rel. Dalton v. Reorganized Dist.*, 307 S.W.2d 501 (Mo. 1957); *State ex rel. Oster v. Hill*, 262 S.W.2d 581 (Mo. 1953).

61. *Reorganized School Dist. R-1 v. Reorganized School Dist. R-111*, 360 S.W.2d

to determine the boundaries of the two districts. The purpose for disallowing private individuals to question the validity of a school district by a declaratory judgment action is to avoid harassment and promote stability.⁶² The threat of harassment is not present when two districts are involved and, since both have sufficient interest in the outcome, the declaratory judgment action is appropriate.⁶³

In challenging the legal existence of a municipal corporation or special district it is important to note that quo warranto is not a substitute for an appeal.⁶⁴ The actions of a county court incorporating a municipality are judicial in nature, and errors of such a body as to fact or law are not fatal to the finality of its order of incorporation. Such an order is a final judgment of a court of record; legal and factual errors are matters to be determined on appeal and are not reviewable in a quo warranto proceeding.⁶⁵ Thus, if incorporation decrees of a county court are challenged by quo warranto, fraud or non-compliance with the statutes governing the issuances of such decree must be alleged.⁶⁶

When quo warranto is used to challenge the original incorporation of either a public or private corporation, the suit must be directed against the individuals who have allegedly usurped corporate privileges.⁶⁷ If abuse of corporate charter is alleged, the corporation itself is the proper party.⁶⁸

Though a single unlawful act by a corporation may result in for-

376 (Mo. App. 1962). See also *State ex rel. Burns v. Johnston*, 249 S.W.2d 357 (Mo. 1952).

62. *Walker Reorganized School Dist. v. Flint*, 303 S.W.2d 200 (Mo. App. 1957).

63. *Id.* at 206.

64. *State ex rel. Cook v. Dougan*, 305 Mo. 383, 264 S.W. 997 (1924); *State ex rel. Cole v. Norborne Land Drainage Dist. Co.*, 290 Mo. 91, 234 S.W. 344 (1921); *State ex rel. Crow v. Fleming*, 158 Mo. 558, 59 S.W. 118 (1900).

65. See cases cited note 64 *supra*.

66. *State ex rel. Eagleton v. Champ*, 393 S.W.2d 516 (Mo. 1963); *State ex rel. Cook v. Dougan*, 305 Mo. 383, 264 S.W. 997 (1924); *State ex rel. Cole v. Norborne Land Drainage Dist. Co.*, 290 Mo. 91, 234 S.W. 344 (1921); *State ex rel. Crow v. Fleming*, 158 Mo. 558, 59 S.W. 118 (1900). For a case in which an incorporation decree was set aside on the basis of fraud, see *State ex rel. Major v. Wood*, 233 Mo. 357, 135 S.W. 932 (1911).

67. *State ex rel. Gentry v. Monarch Transfer & Storage Co.*, 20 S.W.2d 601 (Mo. 1926); *State ex rel. Berkley v. McClain*, 187 Mo. 409, 86 S.W. 135 (1905); *State ex rel. Crow v. Fleming*, 147 Mo. 1, 44 S.W. 758 (1898); *State ex rel. Meriwether v. Campbell*, 120 Mo. 396, 25 S.W. 392 (1894).

68. *State ex rel. Wear v. Business Men's Athletic Club*, 178 Mo. App. 548, 163 S.W. 901 (1914).

feiture,⁶⁹ not every abuse will produce this result. The abuse of charter must affect the public interest to constitute grounds for forfeiture.⁷⁰ There are no precise standards by which to judge whether the public interest is sufficiently affected to justify forfeiture. The courts have articulated only general guidelines, *e.g.*, to produce forfeiture an act must concern "matters which are of the essence of the contract between the state and the corporation."⁷¹ Consequently, the issue has been resolved on a case by case basis.⁷² Since quo warranto actions against municipal and public service corporations have centered on the validity of original incorporation or expiration of franchise, not abuse of powers,⁷³ the question of which acts result in forfeiture has only arisen in suits against private corporations.

Courts have often applied the doctrines of laches and estoppel in suits against municipal corporations.⁷⁴ Generally, Missouri cases express a reluctance to grant ouster if it will adversely affect the public peace, security of property, or payment of the city's debts.⁷⁵ It is

69. *State ex rel. McKittrick v. American Ins. Co.*, 346 Mo. 269, 140 S.W.2d 36 (1940).

70. *State ex rel. Gentry v. American Can Co.*, 319 Mo. 456, 4 S.W.2d 448 (1928); *State ex rel. Hadley v. Delmar Jockey Club*, 200 Mo. 34, 98 S.W. 542 (1905).

71. *State ex rel. Hadley v. Delmar Jockey Club*, 200 Mo. 34, 68, 98 S.W. 542, 555 (1905).

72. *State ex rel. McKittrick v. American Colony Ins. Co.*, 336 Mo. 406, 80 S.W.2d 876 (1935) (increase of rates by fire insurance companies without approval of superintendent of insurance a matter of public interest); *State ex rel. Gentry v. American Can Co.*, 319 Mo. 456, 4 S.W.2d 448 (1928) (manufacturer of cans holding onto corporate name solely to prevent its use by anyone else and not for purpose of operating under it affects the public interest); *State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902 (1909) (public interested in actions which are in restraint of trade); *State ex rel. Barret v. First Nat'l Bank*, 297 Mo. 397, 249 S.W. 619 (1923), *aff'd sub nom. First Nat'l Bank v. Missouri*, 263 U.S. 640 (attempt by a national bank to establish a branch bank in violation of a state law a matter of public interest); *State ex rel. Hadley v. Delmar Jockey Club*, 200 Mo. 34, 98 S.W. 542 (1905) (failure to give exhibitions of agricultural products and contests of speed in races between horses according to charter affects public interest); *State ex rel. Crow v. Atchison, T. & S. R.R.*, 176 Mo. 687, 75 S.W. 776 (1903) (imposition of reconsignment charge by a railroad for transportation of cars of grain from place of original delivery to another location within a city a matter of purely private concern).

73. See cases cited notes 74-82 *infra* and accompanying text.

74. *E.g.*, *State ex rel. Eagleton v. Champ*, 393 S.W.2d 516 (Mo. 1965); *State ex rel. Crain v. Baker*, 104 S.W.2d 726 (Mo. 1937). See also *State ex rel. Harrington v. School Dist.*, 314 Mo. 315, 284 S.W. 135 (1926); *State ex rel. Clare v. Consolidated School Dist.*, 277 Mo. 458, 209 S.W. 938 (1919), for cases applying laches in suits against school districts.

75. *State ex rel. Deal & Co. v. Stanwood*, 208 S.W.2d 291 (Mo. App. 1948); *Central Missouri Oil Co. v. City of St. James*, 232 Mo. App. 142, 111 S.W.2d 215

feared that otherwise a city will be unable to obtain credit, *i.e.* investors will not buy municipal securities for fear of the city's dissolution. Laches has been used to deny ouster when the attack was made eight,⁷⁶ ten,⁷⁷ and twelve⁷⁸ years after incorporation. On the other hand, mere passage of time will not necessarily result in denial of ouster. Applying the same general considerations, ouster has been granted when the citizens have never unanimously accepted the validity of the corporation, some have never paid taxes, and no obligations have been assumed by the village.⁷⁹ Thus, neither private rights nor the public interest was adversely affected by ouster.

Laches has also been applied in suits to expel electric companies from municipalities on grounds that their franchises have expired.⁸⁰ If the equities are in favor of the power company, its private rights override the public rights of the municipality. A passage of nine years after expiration of an electric company's franchise, during which time electric service was furnished without objection from the city, is sufficient reason to deny ouster.⁸¹ Payment of property, sales, and license taxes are factors in the company's favor, but the license tax may be the crucial factor since imposition of other taxes is not considered an admission that the company is lawfully constituted.⁸² It is significant, though, that this distinction was made in a case in which there was strong opposition to the company in the city council throughout the period following expiration of its franchise. It is thus open to question whether the distinction between general and license taxes would be controlling if such continuing opposition is not present.

Title to Office

Title to public offices⁸³ and offices in private corporations⁸⁴ are tri-

(1938); *State ex rel. Jackson v. Town of Mansfield*, 99 Mo. App. 146, 72 S.W. 471 (1903).

76. *State ex rel. Jackson v. Town of Mansfield*, 99 Mo. App. 146, 72 S.W. 471 (1903).

77. *State ex rel. Deal & Co. v. Stanwood*, 208 S.W.2d 291 (Mo. App. 1948).

78. *State ex rel. Brown v. Town of Westport*, 116 Mo. 582, 22 S.W. 888 (1893).

79. *State ex rel. Bales v. Hyde*, 2 S.W.2d 212 (Mo. App. 1928).

80. *State ex rel. Sikeston v. Missouri Util. Co.*, 331 Mo. 337, 53 S.W.2d 394 (1932).

81. *Id.*

82. *State ex rel. California v. Missouri Util. Co.*, 339 Mo. 385, 96 S.W.2d 607 (1936).

83. *See State ex rel. Walker v. Bus*, 135 Mo. 325, 331, 36 S.W. 366, 367 (1896), for the following definition of a public office: "A public office is defined as 'the right, authority, and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is in-

able in a quo warranto proceeding,⁸⁵ the information being directed at the purported office holder and not the office itself.⁸⁶ A party may be ousted as a usurper because of his ineligibility to hold office at the time of his election⁸⁷ or because of his misconduct resulting in forfeiture of office.⁸⁸ Although the doctrine of laches applies in suits attacking the validity of incorporation decrees and in cases involving ouster of public utilities, the supreme court in *State ex rel. Danforth v. Orton*⁸⁹ held that laches will not bar a suit seeking ouster of an official for misconduct in office, since the nature of the proceeding and the public interest preclude its application in such situations. The narrow holding of *Orton* is limited to instances of misconduct in office and would not seem to apply to ouster suits at the relation of a rival claimant alleging ineligibility of the incumbent, since the public interest is arguably not as great in such suits.

Quo warranto filed ex officio by the government attorney determines only the respondent's legal title to office⁹⁰ and has no effect on the claims of others to the same office. Early Missouri cases, however, manifested some confusion concerning the nature and scope of the proceeding if the information was brought at the relation of a private party. There was early authority that a rival claimant serving as relator must show in the information that he possesses all the necessary qualifications for office.⁹¹ This holding was seemingly based on the ra-

vested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' [Citations omitted.] The individual who is invested with authority, and is required to perform the duties, is a public officer."

84. See *State ex rel. Bornefeld v. Kupferle*, 44 Mo. 154 (1869).

85. *E.g.*, *State ex rel. Danforth v. Orton*, 465 S.W.2d 618 (Mo. 1971); *State ex rel. McKittrick v. Murphy*, 347 Mo. 484, 148 S.W.2d 527 (1941); *State ex rel. McKittrick v. Wymore*, 345 Mo. 169, 132 S.W.2d 979 (1939).

86. *State ex rel. McKittrick v. Murphy*, 347 Mo. 484, 148 S.W.2d 527 (1941); *State ex rel. Byrd v. Knott*, 75 S.W.2d 86 (Mo. 1934).

Quo warranto does not lie to prevent the improper exercise of power lawfully possessed but only to prevent the usurpation of power not possessed. See *State ex rel. McKittrick v. Murphy*, 347 Mo. 484, 148 S.W.2d 527 (1941); *State ex rel. Walsh v. Thatcher*, 340 Mo. 865, 102 S.W.2d 937 (1937).

87. *E.g.*, *State ex rel. Crow v. Page*, 140 Mo. 501, 41 S.W. 963 (1897).

88. *E.g.*, *State ex rel. Saunders v. Borgess*, 346 Mo. 548, 264 S.W.2d 339 (1954); *State ex rel. McKittrick v. Wymore*, 345 Mo. 169, 132 S.W.2d 979 (1939).

89. 465 S.W.2d 618 (Mo. 1971), *cert. denied*, 404 U.S. 852 (1972).

90. *State ex rel. McKittrick v. Wiley*, 349 Mo. 239, 160 S.W.2d 677 (1942); *State ex rel. Attorney General v. Vail*, 53 Mo. 97 (1873).

91. *State ex rel. Kempf v. Boal*, 46 Mo. 528 (1870). For another case indicating that quo warranto involved seating the relator, see *State ex rel. McCune v. Ralls County Court*, 45 Mo. 58 (1869).

tionale that quo warranto involved seating the relator as well as ousting the respondent. This view has been rejected and it is now clear that the relator need not be a claimant of the office.⁹² Numerous cases state that in addition to ouster a quo warranto judgment only authorizes costs for the relator and that he may not be seated in office via quo warranto.⁹³

If the relator is not a rival claimant, however, it may be difficult to show the necessary interest to serve as relator. As previously discussed, general taxpayer status is, without more, insufficient to create relator status since the broad policy is to protect public officials from unnecessary harassment. Thus, it is not certain what interest other than that of a rival claimant would suffice in suits to try title to public office. A stockholder, however, may have sufficient interest to attack the validity of a claim to corporate office.⁹⁴

As stated above, recent Missouri cases indicate that the purpose of quo warranto is to determine only the validity of respondent's title and not that of anyone else. If a relator's interest is based upon a rival claim to office, the claim will be examined only to the extent that it bears upon respondent's claim to title.⁹⁵ This is particularly important if the alleged usurper is the incumbent and his eligibility for the office is being challenged. An information brought at the relation of a rival claimant attacking an incumbent's title to office which fails to assert that the relator-claimant, though duly elected, had acquired proper certification has been held to be deficient.⁹⁶ The relator's claim is examined and if he is not qualified, ouster is denied on the theory that the incumbent is entitled to hold office until his successor is elected and qualified.⁹⁷

Election contest cases must be distinguished from quo warranto proceedings. The former is the only method to oust the respondent and seat the claimant. The sole issue in an election contest is who received

92. *State ex rel. Ponath v. Hamilton*, 240 S.W. 445 (Mo. 1922); *State ex rel. Weed v. Meek*, 129 Mo. 431, 31 S.W. 913 (1895); *State ex rel. Boyd v. Rose*, 84 Mo. 198 (1884); *State ex rel. Ewing v. Townsley*, 56 Mo. 107 (1874); *State ex rel. Attorney General v. Vail*, 53 Mo. 97 (1873).

93. See cases cited note 90 *supra*.

94. See *State ex rel. Attorney General v. Vail*, 53 Mo. 97, 110 (1895).

95. *State ex rel. McKittrick v. Wiley*, 349 Mo. 239, 160 S.W.2d 677 (1942); *State ex rel. Ponath v. Hamilton*, 240 S.W. 445 (Mo. 1922); *State ex rel. Attorney General v. Vail*, 53 Mo. 97 (1873).

96. *State ex rel. Anderson v. Moss*, 187 Mo. App. 151, 172 S.W. 1180 (1915).

97. *Id.* at 155, 172 S.W. at 1181.

the most votes, that is, who was actually elected.⁹⁸ The eligibility of a successful candidate must be determined by quo warranto and is not a proper question in an election contest case.⁹⁹ Furthermore, in contrast to election contests, it is improper in quo warranto proceedings to go beyond the election returns and determine the eligibility of voters.¹⁰⁰ Thus, as quo warranto exists in Missouri, the proceedings conclude upon the determination of respondent's eligibility, and inquiry is only made into a rival claimant's title as it may affect that of respondent.¹⁰¹

Quo warranto lies to oust a city alderman from office despite a provision in a municipal charter stating that the board of aldermen shall be the judge of the qualifications of its members.¹⁰² The reasoning is that such charter provisions do not attempt to vest the board with sole power to judge the qualification of its members. Under this construction the courts have avoided the question whether the people of a city could limit the judicial power to issue quo warranto by adopting a provision vesting exclusive authority in the board.¹⁰³ It has been determined, however, that the legislature can not interfere with the courts' constitutional jurisdiction over quo warranto.¹⁰⁴ In a suit to oust the prosecuting attorney of Cole County for misconduct in office, the court held that its jurisdiction to issue quo warranto was not affected by a statute providing for the removal of county, city, and township officers.¹⁰⁵ This decision changed previous case law which held

98. *Kasten v. Guth*, 395 S.W.2d 433 (Mo. 1965); *Davenport v. Teeters*, 273 S.W.2d 506 (Mo. App. 1954).

99. *Kasten v. Guth*, 395 S.W.2d 433 (Mo. 1965). Quo warranto lies only against a person holding office. Possibly prohibition can be used to challenge, before the election, a candidate's eligibility to run for office by questioning the placement of his name on the ballot. See Note, *The Writ of Prohibition in Missouri*, 1972 WASH. U. L. Q. 511, 530 n.94.

100. *State v. Consolidated School Dist.*, 417 S.W.2d 657 (Mo. 1967).

101. *State ex rel. Ponath v. Hamilton*, 240 S.W. 445 (Mo. 1922).

102. *State ex rel. Walters v. Harris*, 363 S.W.2d 580 (Mo. 1962).

103. *Id.* at 582.

104. *State ex rel. McKittrick v. Wymore*, 345 Mo. 169, 132 S.W.2d 979 (1939); *State ex rel. Walker v. Equitable Loan & Inv. Co.*, 142 Mo. 325, 41 S.W. 916 (1897); *State ex rel. Crow v. Vallins*, 140 Mo. 523, 41 S.W. 887 (1897). *Contra*, *State ex rel. Cole v. Norborne Land Drainage Dist. Co.*, 290 Mo. 91, 234 S.W. 344 (1921), which involved a suit to challenge the extension of boundary lines of a drainage district. The court held that the special statutory provision which limited the scope of review in such cases to the assessment of damages for land appropriated or adversely affected effectively curtailed the court's power to issue quo warranto.

105. *State ex rel. McKittrick v. Wymore*, 343 Mo. 98, 119 S.W.2d 941 (1938).

that a state statute calling for forfeiture of office upon conviction of a misdemeanor precluded quo warranto proceedings without a previous conviction.¹⁰⁶ There is currently no requirement that a quo warranto action in which forfeiture of office is alleged be preceded by a criminal conviction, and the broader doctrine that the legislature can not interfere with the courts' constitutional jurisdiction of quo warranto has been reaffirmed.¹⁰⁷ The rationale prohibiting this legislative interference would seem also to prevent a municipal charter from limiting the constitutional power of courts to issue quo warranto.

In contrast to municipal aldermen, quo warranto does not lie to oust a member of the House of Representatives, since a state constitutional provision¹⁰⁸ making the House the sole judge of its members' qualifications precludes the use of the information. In a dispute over the use of quo warranto to oust a state representative for failure to satisfy a residency requirement of the state constitution, the court held that it had jurisdiction, but granted respondent's motion to dismiss because no justiciable issue was presented.¹⁰⁹ The court followed dictum in *Baker v. Carr*¹¹⁰ stating that "a textually demonstrable constitutional commitment of the issue to a coordinate political department" is basis for finding non-justiciability. The rationale of this case has been applied to forfeiture of office subsequent to valid election as well as original ineligibility.¹¹¹ The supreme court noted in its most recent decision that only a constitutional amendment, approved by the people, could vest power in the courts to remove state legislators.¹¹²

III. CONCLUSION

Quo warranto is defined as an "extraordinary writ." By its nature, however, quo warranto is probably more extraordinary than the other extraordinary writs—mandamus, prohibition, certiorari, and habeas corpus. The situations calling for its application are restricted and arise less frequently. The use of the writ is limited by its purpose—pro-

106. *State ex rel. Letcher v. Dearing*, 253 Mo. 604, 162 S.W. 618 (1923).

107. *State ex rel. Danforth v. Orton*, 465 S.W.2d 618 (Mo. 1971); *State ex rel. Dalton v. Mosely*, 365 Mo. 711, 286 S.W.2d 721 (1956); *State ex rel. Taylor v. Cumpston*, 362 Mo. 199, 240 S.W.2d 877 (1951).

108. Mo. CONST. art. III, § 18.

109. *State ex rel. Danforth v. Banks*, 454 S.W.2d 498 (Mo. 1970), *cert. denied*, 400 U.S. 991 (1971).

110. 369 U.S. 186 (1962).

111. *State ex rel. Danforth v. Hickey*, 475 S.W.2d 117 (Mo. 1972).

112. *Id.* at 622.

tection of the public from usurpation of public office or franchise. The limitations of this purpose are emphasized by the restrictions placed upon the use of the writ. For instance, quo warranto is generally brought by the government and may only be brought by a private individual with the approval of the government attorney and with the leave of the court. Issuance of the writ culminating in ouster of the respondent from office or franchise is within the sound discretion of the court and will be ordered only when such action is in the public interest. Even in suits initiated by a rival claimant challenging the right of an official to hold public office, quo warranto lies only to oust the wrongful office holder, not to seat the rival. The rival's interest in attaining office is in part his private affair and must be pursued in another proceeding.

It is possible to relax some of these restrictions and to increase the usefulness of quo warranto. For instance, some states allow a private individual to bring a quo warranto action on his own initiative if the government attorney refuses the individual's request to institute the suit.¹¹³ Such a rule does not alter the public purpose of the writ, since it does not change the situations to which the writ is applicable. Indeed, making the writ more available to private individuals seems consonant with the public interest because it imposes a check upon the government attorney's discretionary authority. Yet Missouri has apparently felt no need to expand the public's access to the writ. The usefulness of quo warranto might also be enhanced if the courts were to exercise more latitude in fashioning judgments. The standard judgment, ouster of the respondent from office or franchise, is a rather harsh measure and for this reason sparingly imposed. Other types of judgments, however, are available, including fines and, more importantly, ouster of the respondent from the exercise of particular powers, not from office or franchise. The latter device could be developed into a means of defining and enforcing limitations of powers held by public and private corporations and officials. Still, there has been little development during recent years in the scope and function of quo warranto in Missouri, and there has been little indication of a willingness to broaden the application of the writ in the foreseeable future.

113. See, e.g., FLA. STAT. ANN. § 80.01 (Supp. 1967); ILL. REV. STAT. ch. 112, § 10 (1966).