

The following notes about quo warranto proceedings were taken from a stack of cases and sample forms about quo warranto from multiple jurisdictions. Further work is needed, but this is a start. They discuss how to become a private attorney general:

Wilson v. Blake, 260 P.2d 592. Restricted to special interest, you must allege that DA refused to act in your complaint.

Weisbrod v. Lockard, 143 P. 273. There must be a public interest.

Darrow v. People, 8 P. 661. Exhaust other remedies first, investigate statutory.

Kepley v. People, 230 P.804. Quo warranto is only remedy for trying title to public office.

McCament v. City and County of Denver 501 P.2d 142. The exclusive means of determining whether a person unlawfully holds office is quo warranto.

Lockhard v. People, 178 P. 565 Q. Seeking redress of individual wrong, involves a matter of public interest.

Union Pac. R. Co. v. Colorado Eastern R. Co., 46 P. 219. Can't be used for private purpose/defend rights.

Londoner v. People, 26 P. 135, Byers v. Grand river Bridge Co., 21 P. 898, Darrow v. People, 8 P. 661, Status of plaintiff; must be a tax payer, resident, etc.

Union Pacific R.R. v. Colorado E. R.R. Co. 46 P. 219, 220. Must show harm is likely to come to the public.

Norton v. Rudbeck, 81 P.2d 393. The owner and manager of gas station subject to licensing and police regulation had sufficient interest.

Byers v. Grand River Bridge Co., 21 P.898, You must have more of an interest than just being a citizen.

People v. Lindsey, 253 P. 465, People v. Owens, 69 P. 515, Respondent has burden of proving his right to office.

State v. Murphy, 148 SW.2d 527 and Burkett v. Ulmer, 15 A.2d 858 were cited in People v. Kniss, 357 P.2d 352, 354.

People v. Painless Parker Dentist, 275 P. 928, cert. denied DA must determine whether the public interest is involved.

You can use quo warranto to try the office of constable, State v. Johnson, 52 SW.2d 110, district and prosecuting attorney, People v. Hallett, 1 Colo.352, Howard v. Burns, 85 NW 920, judge, Hill v. State, 128 So.878, 157 Miss. 648, tax collector, Commonwealth v. Blume, 161 A. 551, 307 Pa. 406, policeman, Win. Eckelmann, Inc. v. Jones, 59 A.2d 246, 137 NJ Law 210, Shible v. Township Committee of Wall Tp., Monmouth County, 56 A.2d 734, 136 NJ Law 506, affirmed 61 A.2d 242, 137 NJ Law 692, City of Tulsa v. District Court of Tulsa County, 51 P.2d 511, 174 Okla. 470.

People ex rel Riordan v. Hersey, 196 P.180 (Colo. 1921). State officers are those whose duties concern the state at large, or the general public although they may be exercised within defined limits.

Bowman v. Eldher, 369 P.2d 977 (Colo. 1962). Cities' charters determine whether police are officers for purposes of quo warranto.

Corfman v. McDevitt, 142 P.2d 383 (Colo. 1943). "There is a distinction between an officer and an employee. The term 'office' implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office. The term 'employment' does not comprehend a delegation of any part of the sovereign authority, or authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature." "An ordinance of the City and County of Denver expressly made the holder of the position in question an officer and not an employee."

City and County of Denver v. McNichols, 268 P.2d 1026 (Colo. 1954). "...our Court has recognized that the terms "officer" and "employee" are not interchangeable, and the two are to be distinguished."

City Counsel of Cripple Creek v. People ex rel. Ferguson, 75 P. 603 (Colo.App. 1904). "If Matthews was in actual possession of the office of alderman under an election or commission, and exercising its duties under color of right, his title to the office cannot be tried or tested on mandamus....although not legally appointed or elected thereto, or qualified to hold the same..."

Hudson v. Anear, 75 P.2d 587 (Colo. 1938) United States v. Maurice, 2 Brock. 96. "The officer is distinguished from the employee in the greater importance, dignity, and independence of his position in being required to take an official oath, and perhaps to give an official bond; \* \* and usually, though not necessarily, in the tenure of his position. People ex rel. v. Langdon, 40 Mich. 673 "A position, the duties of which are undefined, and which can be changed at the will of the superior; \* \* \* is not an office but a mere employment, and the incumbent is not an officer but a mere employee."

State ex rel. Burns v. Linn, 153 P. 826 (Okla. 1915). "The general rule, in the absence of special constitutional provision, is that all officers whose duties pertain to the exercise of the police power of the state are in that sense state officers, and under the control of the Legislature, even though they may be officers of a municipality and charged with the enforcement of the local police regulations of such municipality....It is within the power of the state to enact laws for the police protection of its citizens, which shall be effective throughout the state and all of its subdivisions....and make suitable provisions for the enforcement thereof, and provide for the removal of officers charged with the duty of enforcing such regulations who should fail in the discharge of that duty..."

State v. Murphy, 148 S.W.2d 527 (MO. 1941). A writ of quo warranto is in the nature of a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine his right."

"It is also true that it will lie against a county officer who has been legally elected but has forfeited his office by misconduct."

"The officer who violates his oath of office by corruption, willful misconduct or neglect of official duty automatically loses the right to office and becomes a mere interloper."

"In either case the judgment in quo warranto does not try the question of forfeiture. It merely recognizes judicially fait accompli and ousts the wrongdoer from enjoying the privileges of a franchise which he has cased to possess."

"...where the officer steps entirely outside the scope of his authority to exercise a function which neither the constitution nor the statute has entrusted to him, the remedy by quo warranto is available."

*State v. Prevatt*, 148 So. 578 (Fla. 1933). The granting of quo warranto against a corporation is equivalent to a judgment of seizure at common law.

*Rowan v. City of Shawneetown*, 38 N.E.2d 2 (Ill. 1941). "Where the Attorney General and Stat's attorney have refused to bring a quo warranto proceeding at the request of an individual, the statute permits the individual to make application on his own relation but he must show he has an interest in the question."

"...one who has no interest except that which is common t every other member of the public is not entitled to use the name of the government in quo warranto proceedings."

*City of Enid v. Davis*, 206 P. 816 (Okla. 1922). "We understand 'public interest' to mean more than a mere curiosity: it means something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as the interests of the particular localities, which may be affected by the matters in question."

*State ex rel. Paugh v. Bradley*, 753 P.2d 857 (Mont. 1988). Public office defined: "The duties attached t the position must concern the public directly, and must be imposed by public authority - not by contract (citing authority). The duties must be public in a sense that they comprehend the exercise of some portion of the sovereign power and authority of the state either in making, administering, or executing the laws. (Citing authority.) They must be public also, in the sense that they imply the element of personal responsibility, as distinguished from the merely clerical act of an agent or servant. (Citing authority.) In other words, a public officer is a part of the personal force by which the state thinks, acts, determines and administers t the end that its Constitution may be effective and its laws operative."

"...we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) it must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or to legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity and not be only temporary or occasional. In addition, in this state, an officer must take and file an official oath, hold a commission or other written authority and give an official bond, if the latter be required by proper authority." Also see *Burkett v. Ulmer*, *infra*.

*Adam v. Mt. Pleasant Bank & Trust Co.*, 355 N.W.2d 868 (Iowa 1984). Quo warranto to challenge the existence of a corporation. "A corporation's existence may be disregarded if: (1) the corporation is undercapitalized, (2) without separate books; (3) its finances are not kept separate from individual

finances, individual obligations are paid by the corporation; (4) the corporation is used to promote fraud or illegality, (5) corporate formalities are not followed or (6) the corporation is merely a sham."

Montgomery City Res. Dev. V. Bd. Of Mental Ret., 680 F. Supp. 1068 (S.D. Ohio 1987). Right of corporation to exist.

State ex rel. Boynton v. Perkins, 28 P.2d 765 (Kan. 1934). Quo Warranto appropriate method to test right to practice law. See also Birmingham Bar Assn. V. Phillips & Marsh, 196 So. 725 (Ala. 1940)(usurping a franchise).

Burkett v. Ulmer, 15 A.2d 858 (Maine 1940). "At common law, private individuals without the intervention of the attorney general could not, either as of right or by leave of court, institute quo warranto proceedings."

McIlhenney v. City of Wilmington, 37 S.E. 187 (Ga. 1900). The board of the City appointed a certain number of policemen who were absolutely incompetent, and without necessary judgment to execute their duties as prescribed by law. The mayor was frequently notified of his incompetency, and continued to keep him upon the force. One of them continuously made arrests without authority of law and when no offense had been committed; he was notorious for his cruelty and want of judgment in making arrests, and on numerous occasions without authority, either of fact or of law, he mad arrests which were unlawful, and for which he was publicly reprimanded by the mayor. This cop is a state officer. This case is not a quo warranto; it's only useful for showing that a cop is an officer.

"The above and many other authorities to the same purport are presented in the excellent brief of Mr. Meares, whose labors have been useful to the court in preparing this opinion."

City of Newport v. Horton, 47 A. 312 (R.I. 1900). Quo warranto used to determine the constitutionality and status of a police officer.

People ex rel Ray v. Lewistown Community High School Dist., 57 N.E.2d 486 (Ill. 1944) (respecting challenging the right of corporation to exist). "The plaintiff in quo warranto is not required to allege any facts in the complaint showing that the challenged acts are unlawful. It is enough to allege the exercise of the right without lawful authority. All that is necessary or material in any count of the complaint is the general charge of usurpation. The defendant must either disclaim or justify. If he justifies he must set out facts which show his lawful authority to exercise the right claimed....The plaintiff is not required to either allege or prove any facts. The right to call upon any person, natural or artificial, by quo warranto, to justify his acts, is an incident of sovereignty. The burden is on the defendant. If he attempts to justify he must allege and prove facts which justify his acts. Such facts when alleged may be rebutted. The defendant, not the plaintiff, must, by his answer, tender the issues on which the rights claimed by him are to be litigated....The office of an information or complaint in the nature of quo warranto is not to tender an issue of fact, but only to all upon the defendants to show by what authority they claim the right to exercise the powers alleged to be usurped....In other litigation the complaint tenders the issues. It is only in rare instances that the issues tendered by the complaint, in so far as the plaintiff's case is concerned, are departed from. This is not true in quo warranto proceedings. In such cases the issues are never tendered by the complaint. They are tendered for the first time by the answer of the defendant."

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