IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * *

ZANE M. FLOYD,

Defendant.

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MICHAEL P. VILLANI, DISTRICT JUDGE,

STATE OF NEVADA

Plaintiff/Real Party in Interest.

ZANE M. FLOYD,

Petitioner.

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MICHAEL P. VILLANI, DISTRICT JUDGE,

WILLIAM GITTERE, Warden, Ely State Prison; AARON FORD; Attorney General, State of Nevada

Respondent/Real Parties in Interest

Supreme Court Case No. 83108

District Court Case Nos. 99C159897
Habeas Court Case No. A-21-832952-W

PETITIONER'S REPLY APPENDIX

Volume 1 of 1

RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
DAVID ANTHONY
Assistant Federal Public Defender
Nevada State Bar No. 7978
BRAD D. LEVENSON
Assistant Federal Public Defender
Nevada State Bar No. 13804C
RANDOLPH M. FIEDLER
Assistant Federal Public Defender
Nevada State Bar No. 12577

411 E. Bonneville Ave., Suite 250
Las Vegas, NV 89101
702-388-6577 telephone
702-388-6419 fax
David_Anthony@fd.org
Brad_Levenson@fd.org
Randolph_Fiedler@fd.org

DOCUMENT	DATE	VOLUME	PAGE(S)
Floyd R. Mechem, ***A Treatise on the Law of Public Offices and Officers*** (1890), excerpts: - Book I, Chap. I, §§ 1-16, Public Office and Officer defined. - Book II, Chap. IV, §§ 419-430, By Acceptance of Another Office - Book II, Chap. IX, §§ 476-499, Of the Remedy by *Quo Warranto*	00/00/1890	1	006-048
Michael Lyle, ***ACLU, NV Press Association sue to assure NDOC transparency at execution***, The Nev. Current (July 26, 2021)	07/26/2021	1	064-065
Dayvid Figler, ***Let the people kill!***, The Nev. Independent (July 30, 2021)	07/30/2021	1	066-069
Curtis Hillyer, ***Nevada Compiled Laws 1929***, Volume IV, Ch. 71, § 9203 (1930)	00/00/1930	1	049-052
Simon Greenleaf, ***Reports of Cases Argued and Determined in the Supreme Judicial Court of the State of Maine***, Vol. III, excerpts, pp. 484-487 (1826)	00/00/1826	1	001-005

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Rory Appleton, ***Sisolak: Death penalty repeal won't come up until 2023***, Las Vegas Rev. J. (July 7, 2021)	07/07/2021	1	058-060
State v. Floyd, Case No. 99C159897, Clark County District Court**, State's Response to Defendant's Motion to Stay Proceedings**, filed July 2, 2021	07/02/2021	1	053-057
Martha E. Menendez, ***Working hard for the right to kill***, The Nev. Independent (July 7, 2021).	07/07/2021	1	062-063

Respectfully submitted,

/s/ *Brad D. Levenson*
BRAD D. LEVENSON
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on August 17, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Nevada Attorney General

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District of Nevada

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

BY SIMON GREENLEAF,
COUNSELLOR AT LAW.

VOLUME III.

Containing the Cases from May term 1824 in Cumberland, inclusive, to the end of the year 1825.

Portland:
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....1826....

No. III.

To the Honorable the Senate of Maine :

In compliance with the request expressed in your order of the 11th instant, we, the undersigned, Justices of the Supreme Judicial Court, have considered the three several questions proposed to us, viz.

"1st. Can any person, according to the third article of the "constitution, of right hold and exercise, at the same time, the "several offices of deputy sheriff and justice of the peace ?"

"2nd. Can any person of right exercise, at the same time, the "several offices of sheriff and justice of the peace ?"

"3d. Can any person of right exercise, at the same time, the "several offices of coroner and justice of the peace ?"—and now in answer, respectfully submit our opinion.

The first section of the third article of the constitution declares "that the powers of this government shall be divided into three "distinct departments."

The second section of the same article declares "that no per-"son or persons, belonging to one of those departments, shall "exercise any of the powers properly belonging to either of the "others, except in cases herein expressly directed or permitted." We have found in the constitution only the two following provisions expressly limiting the generality of the foregoing inhibition; viz. article 4, part 3, section 11, which allows justices of the peace, notaries public, coroners, and officers of the militia to hold seats in either branch of the legislature ; and article 5, part 2, section 4, which allows justices of the peace and notaries public to be counsellors. But neither of these two last named provisions particularly relate to the questions under consideration.

We are thus carried back to the third article ; and our opinion must be founded upon the construction of both sections of that article, viewed in connection with several other sections of the constitution.

Article 4, is entitled "Legislative power."

Article 5, is entitled "Executive power."

Article 6, is entitled "Judiciary power."

Article 4th, is divided into three parts.

Article 5th, is divided into four parts.

These divisions were probably made for the sake of method and arrangement, and for the purpose of distinctly marking out the qualifications, mode of election or appointment, powers, duties, and tenure of office of the persons or officers named in such respective subdivisions. But there is nothing in article 5th, declaring or shewing that the governor, council, secretary and treasurer, exclusively compose and exercise all the powers belonging to the executive department; or that such divisions of article 5th were ever intended or understood to mark distinctly the utmost boundaries of that department. On the contrary, section 8, part 1, of said article authorizes the governor, with advice of council, to appoint, among other officers, sheriffs and coroners; and each part of that article contains provisions having little or no connection with powers and duties merely of an executive character. It seems that a justice of the peace belongs to the judicial department. Article 6, section 1, declares that "the judicial "power of this State shall be vested in a Supreme Judicial "Court, and such other Courts as the legislature shall from time "to time establish." And by law a part of the other courts named in the above section are justices' courts. Besides, the 4th section of article 6, provides that "all judicial officers except "justices of the peace, shall hold their offices during good beha- "vior, but not beyond the age of seventy years." Here the exception proves the judicial character of the justice. Sheriffs, deputy sheriffs and coroners, cannot be considered as belonging to the legislative or judicial department; they possess no powers and perform no duties belonging to either of those departments. The question is whether they belong to the executive department. Article 5th, part 1, section 1, declares "that the supreme "executive power of this State shall be vested in a governor." Section 12 declares that "he shall take care that the laws be "faithfully executed." The faithful administration of them devolves on another department. Article 9th, section 2, places the office of sheriff and deputy sheriff on the same ground in respect to incompatibility with certain other offices therein enumerated.

The council aid the governor with their advice. The secretary aids them both by recording their proceedings and keeping their records, and those of the legislature. The treasurer aids in

causing all the State taxes to be collected and paid into the treasury for the public use. In doing this important service, the power of sheriffs and coroners must be resorted to, when legal coercion is necessary ; in which case they are expressly aiding the governor in the execution of the laws, and acting under his commission. In fact, in all cases, their power, when lawfully exercised, is in aid of the governor, and to enable him to do his duty in causing the laws to be executed faithfully. These duties he cannot perform. These powers he cannot exercise in person. Such a performance, such an exercise was never contemplated. There can be no question that sheriffs, deputy sheriffs and coroners are executive officers ; and for the reasons we have assigned, we think they must also be considered, though not named under a distinct head, as belonging to the executive department ; the limits of which are no where in the constitution expressly defined. In addition we would remark, that the advantages intended to be secured by the third article cannot be realized and fairly enjoyed, nor the inconveniences and dangers intended to be avoided by it effectually guarded against, but by giving to it the construction above stated. If the offices are not incompatible, a person holding both, might, as a justice of the peace, issue a process, serve it as a sheriff, deputy sheriff or coroner, decide the cause in his judicial capacity, and then, in his other capacity, execute his own judgment ;—a course of proceeding which we apprehend is not in unison with the true spirit and intent of the inhibition.

We are therefore of opinion that the cases stated in the proposed questions, fall under the general principle contained in the second section of the third article ; and that the office of justice of the peace is incompatible with that of sheriff, deputy sheriff or coroner.

We accordingly answer to the first question, that no person can, according to the third article of the constitution, of right hold and exercise, at the same time, the several offices of deputy sheriff and justice of the peace.

We answer the second question, that no person can of right exercise, at the same time, the several offices of sheriff and justice of the peace.

We answer the third question, that no person can of right exercise, at the same time, the several offices of coroner and justice of the peace.

Judge Weston has been furnished with a copy of the questions proposed, and his opinion requested. His reply has been received, but having had no means for a personal interview and consultation with him, and perceiving that his impressions and conclusions do not at present correspond with ours, we are not authorized to state the foregoing, except as our opinion.

PRENTISS MELLEN,
FEBRUARY 18, 1825. WILLIAM PITT PREBLE.

No. IV.

The Hon. the Senate of the State of Maine, having by their order of the 26th of *February*, 1825, requested that the opinion of the Justices of the Supreme Judicial Court should be given on the following question, viz:—

"*Are the first section of the Act, chapter one hundred and twenty-seventh, and the eighth section of the Act, chapter one hundred and twenty-fourth, or either of them, so far as they provide that certain expenses therein mentioned shall be at the charge of the State, changed, annulled or repealed by the eighteenth section of the Act, chapter one hundred and twenty-second*;"—and that such opinion might be communicated to the Secretary of State for publication.

The undersigned, Chief Justice of said Court, in the absence of Mr. Justice *Preble*, who is now on a voyage to the West Indies, has by letter consulted Mr. Justice *Weston*, on the question proposed; by whom he is authorized to state the following, as the opinion of a majority of the Court.

The Act chapter 127, was passed *March* 10, 1821. The 1st section authorizes selectmen to make provision for sick persons arriving from infected places, and to remove them to safe places; and that the necessary expenses thus incurred shall be paid by the "parties themselves, their parent or master, (if able) or

THE LAW

OF

PUBLIC OFFICES AND OFFICERS.

BOOK I.

OF THE OFFICE AND THE OFFICER; HOW OFFICER CHOSEN AND QUALIFIED.

CHAPTER I.

DEFINITIONS AND DIVISIONS.

§ 1. Public Office and Officer defined.
2. How Office differs from Employment.
3. Office differs from a Contract.
4. Office involves Delegation of sovereign Functions.
5. Office is created by Law and not by Contract.
6. Oath a usual but not a necessary Criterion.
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8. Duration or Continuance as Criterion.
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10. Designation of Place as "Office" as a Criterion.
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18. Executive Officers.
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21. Ministerial Officers.
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§ 1. **Public Office and Officer defined.**—A public office is 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 invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.[1] The individual so invested is a public officer.[2]

1 An office, says BLACKSTONE, is "a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging." 2 Com. 36.

"An office is a special trust or charge created by competent authority. If not merely honorary, certain duties will be connected with it, the performance of which will be the consideration for its being conferred upon a particular individual, who for the time will be the officer." COOLEY, J. in Throop v. Langdon, 40 Mich. 673.

"Lexicographers generally define office to mean public employment, and I apprehend its legal meaning to be an employment on behalf of the government in any station or public trust, not merely transient, occasional or incidental. In common parlance, the term 'office' has a more general signification. Thus we say the office of executor or guardian; or the office of a friend." PLATT, J. in Matter of Oaths, 20 Johns. (N. Y.) 492.

"Whether we look into the dictionary of our language, the terms of politics, or the diction of common life, we find that whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold, or to be in, office." DANFORTH, J. in Rowland v. Mayor, 83 N. Y. 376.

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties." SWAYNE, J. in United States v. Hartwell, 6 Wall. (U. S.) 385, 393.

For other definitions and illustrations see: Hamlin v. Kassafer, 15 Ore. 456, 3 Am. St. Rep. 176; State v. Stanley, 66 N. C. 59, 8 Am. Rep. 488; where PEARSON, C. J., says "A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer. This we consider to be the true definition of a public officer in its original broad sense. The essence of it is, the duty of performing an agency, that is, of doing some act or acts, or series of acts for the State;" Shelby v. Alcorn, 36 Miss. 273, 72 Am. Dec. 169; Matter of Dorsey, 7 Port. (Ala.) 293; Miller v. Supervisors, 25 Cal. 98; Wood's Case, 2 Cow. (N. Y.) 29, note; People v. Hayes, 7 How. (N. Y.) Pr. 248; People v. Stratton, 28 Cal. 388; State v. Valle, 41 Mo. 31; Eliason v. Coleman, 86 N. C. 235; Opinion of Judges, 3 Greenl. (Me.) 481; Hill v. Boyland, 40 Miss. 618; Hall v. State, 39 Wis. 85; People v. Nichols, 52 N. Y. 478, 11 Am. Rep. 734; Henly v. Mayor, 5 Bing. 91; Foltz v. Kerlin, 105 Ind. 221, 55 Am. Rep. 197; Smith v. Moore, 90 Ind. 294; People v. Common Council, 77 N. Y. 503, 33 Am. Rep. 659; Commonwealth v. Gamble, 62 Penn. St. 343, 1 Am. Rep. 422.

2 "The term 'office,'" says ALLEN, J. in Matter of Hathaway, 71 N. Y. 238, 243, "has a very general signification, and is defined to be that function by virtue whereof a person has some employment in the affairs of

As here used, the word office is to be distinguished from its application to such positions as are at most *quasi* public only, as the charge or office of an executor, administrator or guardian, and from the offices of private corporations.

§ 2. **How Office differs from Employment.**—A public office differs in material particulars from a public employment, for, as was said by Chief Justice MARSHALL, "although an office is an employment, it does not follow that every employment is an

another; and it may be public, or private, or *quasi* public, as exercised under public authority, but yet affecting only the affairs of particular individuals. The presidency of a bank is spoken of as an office, and a trustee of a private trust is, in ordinary parlance, said to hold the office of trustee; and the term office is applied to an executor or guardian, etc. A referee, for the trial and decision of actions, is an officer exercising judicial powers under public authority. So receivers appointed by the courts, and commissioners for the appraisal of damages for lands taken for public use, are officers; and strictly and technically exercise the functions of an office. But they are not 'public officers' within the inhibition of the Constitution (which prohibited judges from exercising "any power of appointment to public office)." * * * While the duties of the class of officers last named, referees, etc., were of a public nature, and in a sense concerned the public and the administration of justice, and were exercised under authority derived from the State directly, and not from individuals, still they related especially to particular individuals and a specific litigation; and their authority is restricted to specific matters, and no general powers are conferred upon them authorizing to act in respect to all like cases, or in any case or matter other than specified and named in their appointment. They owed no duty to the public, and could perform no service for the public. The trust they exercise and the duties they perform are 'transient and occasional.' They are not called upon to take the constitutional oath of office, and are not entitled to the emoluments of the office, except such as grow out of and pertain to the duties actually performed. Judge PLATT defines the legal meaning of the term 'office' to be 'an employment on behalf of the government in any station or public trust, not merely transient, occasional or incidental.' (*In re* Attorneys, etc., 20 Johns. (N. Y.) 492). When 'public' is the prefix of 'officer,' the definition is very apt, and clearly and with precision marks the limit of the constitutional prohibition. * * * 'Public office,' as used in the constitution, has respect to a permanent trust to be exercised in behalf of the government, or of all citizens who may need the intervention of a public functionary or officer, and in all matters within the range of the duties pertaining to the character of the trust. It means a right to exercise generally, and in all proper cases, the functions of a public trust or employment, and to receive the fees and emoluments belonging to it, and to hold the place and perform the duty for the term and by the tenure prescribed by law."

office. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer." [1]

"We apprehend that the term 'office,'" said the judges of the supreme court of Maine, "implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office; and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments and sometimes to another; still it is a legal power which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state. An employment merely has none of these distinguishing features. A public agent acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the acts performed the authority and power of a public act or law. And if the act be such as not to require such subsequent sanction, still it is only a species of service performed under the public authority and for the public good, but not in the exercise of any standing laws which are considered as rules of action and guardians of rights." [2]

"The officer is distinguished from the employee," says Judge COOLEY, "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; in the liability to be called to account as a public offender for misfeasance or non-feasance in office, and usually, though not necessarily, in the tenure of his position. In particular cases, other distinctions will appear which are not general." [3]

§ 3. **Office differs from a Contract.**—An office also differs

[1] United States *v.* Maurice, 2 Brock. (U. S. C. C.) 96.

[2] Opinion of Judges, 3 Greenl. (Me.) 481.

[3] Throop *v.* Langdon, 40 Mich. 673, 682.

"An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power or for a fixed term with a successor elected or appointed. An employment is an agency for a temporary purpose, which ceases when that purpose is accomplished." Cons. Ill., 1870, Art. 5, § 24.

from a contract, for, as has been said, "the latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other."[1]

§ 4. **Office involves Delegation of Sovereign Functions.**—The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public;—that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches, for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer.[2]

§ 5. **Office is created by Law and not by Contract.**—In distinguishing between an office and an employment, the fact that the powers in question are created and conferred by law, is an important criterion. For though an employment may be created by law, it is not necessarily so, but is often, if not usually, the creature of contract. A public office, on the other hand, is never conferred by contract, but finds its source and limitations in some act or expression of the governmental power. Where, therefore, the authority in question was conferred by a contract, it must be regarded as an employment and not as a public office.[3]

[1] United States *v.* Hartwell, 6 Wall. (U. S.) 385, 393; United States *v.* Maurice, 2 Brock. 103; Matter of Oaths, 20 Johns. (N. Y.) 493; Vaughn *v.* English, 8 Cal. 39; Sanford *v.* Boyd, 2 Cranch. (U. S. C. C.) 78.

[2] Bunn *v.* People, 45 Ill. 397; Eliason *v.* Coleman, 86 N. C. 235; United States *v.* Lockwood, 1 Pin. (Wis.) 359; Commonwealth *v.* Swasey, 133 Mass. 538; Doyle *v.* Aldermen, 89 N. C. 133, 45 Am. Rep. 677; Opinion of Judges, 3 Greenl. (Me.) 403; Miller *v.* Supervisors, 25 Cal. 98; State *v.* Kirk, 44 Ind. 401; 15 Am. Rep. 239; Hill *v.* Boyland, 40 Miss. 618; Walker *v.* Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; People *v.* Nichols, 52 N. Y. 478, 11 Am. Rep. 734; United States *v.* Germaine, 99 U. S. 508; United States *v.* Smith, 124 U. S. 525; United States *v.* Mouat, 124 U. S. 303.

[3] Hall *v.* Wisconsin, 103 U. S. 5; United States *v.* Maurice, 2 Brock. (U. S. C. C.) 102; United States *v.* Hartwell, 6 Wall. (U. S.) 385; Brown *v.* Turner, 70 N. C. 93; Shelby *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169; Opinion of Judges, 3 Greenl. (Me.)

§ 6. **Oath a usual but not a necessary Criterion.** — Public officers are usually required by law to take the oath of office, and this fact goes far in determining the character of the duty.[1] But the taking of the oath is not an indispensable criterion and the office may exist without it, for, as has been said, the oath is a mere incident and constitutes no part of the office.[2]

§ 7. **Salary or Fees not a necessary Criterion.** — Like the requirement of an oath, the fact of the payment of a salary or fees may aid in determining the nature of the position, but it is not conclusive, for while a salary or fees are usually annexed to the office, it is not necessarily so.[3] As in the case of the oath, the salary or fees are mere incidents and form no part of the office.[4] Where a salary or fees are annexed, the office is often said to be "coupled with an interest"; where neither is provided for it is a naked or honorary office, and is supposed to be accepted merely for the public good.[5]

§ 8. **Duration or Continuance as Criterion.**—The term office, it is said,[6] embraces the idea of tenure and duration, and certainly a position which is merely temporary and local cannot ordinarily be considered an office.[7] "But," says Chief Justice Marshall,

481; Bunn *v.* People, 45 Ill. 406; People *v.* Nostrand, 46 N. Y. 381.

"Certainly where an individual has been appointed or elected in a manner prescribed by law, has a designation or title given him by law, and exercises functions concerning the public assigned to him by law, he must be regarded as a public officer." JENKINS, J. in Bradford *v.* Justices, 33 Ga. 336.

[1] State *v.* Wilson, 29 Ohio St. 347; Kavanaugh *v.* State, 41 Ala. 399; Lindsey *v.* Attorney General, 33 Miss. 508; Sweeny *v.* Mayor, 5 Daly (N. Y.) 274.

[2] State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488; Howerton *v.* Tate, 68 N. C. 547.

[3] As has been seen in the note to § 1, "the right to take the fees and emoluments thereof" constitutes a portion of several of the definitions of an office, but it is not a *sine qua non*.

[4] State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488; Howerton *v.* Tate, 68 N. C. 547; State *v.* Kennon, 7 Ohio St. 546; United States *v.* Hartwell, 6 Wall. (U. S.) 385

[5] State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488; Throop *v.* Langdon, 40 Mich. 673, 682.

[6] SWAYNE J. in United States *v.* Hartwell, 6 Wall. (U. S.) 385, 393.

[7] United States *v.* Hartwell, 6 Wall. (U. S.) 385; United States *v.* Maurice, 2 Brock. (U. S. C. C.) 103; Bunn *v.* People, 45 Ill. 397; State *v.* Wilson, 29 Ohio St. 347; Hill *v.* Boyland, 40 Miss. 618; United States *v.* Hatch, 1 Pinn. (Wis.) 182; Commonwealth *v.*

"if a duty be a continuing one, which is defined by rules prescribed by the government and not by contract, which an individual is appointed by government to perform, who enters on the duties pertaining to his station without any contract defining them, if those duties continue though the person be changed,—it seems very difficult to distinguish such a charge or employment from an office or the person who performs the duties from an officer." [1]

At the same time, however, this element of continuance can not be considered as indispensable, for, if the other elements are present "it can make no difference," says PEARSON, C. J., "whether there be but one act or a series of acts to be done,—whether the office expires as soon as the one act is done, or is to be held for years or during good behavior." [2]

§ 9. **Scope of Duties as a Criterion.**—"Any man is a public officer who hath any duty concerning the public, and he is not the less a public officer where his authority is confined to narrow limits; for it is the duty of his office and the nature of that duty which make him an officer, and not the extent of his authority." [3]

Sutherland, 3 Serg. & R. (Penn.) 149; Sheboygan County *v.* Parker, 3 Wall. (U. S.) 93; People *v.* Nichols, 52 N. Y. 478, 11 Am. Rep. 734; Throop *v.* Langdon, 40 Mich. 673.

So it is said that the term office means "an employment on behalf of the government in any station or public trust, *not merely transient, occasional or incidental.*" *In re* Attorneys, 20 Johns. (N. Y.) 492.

Commissioners appointed for an indefinite time are not public officers. McArthur *v.* Nelson, 81 Ky. 67.

A person employed for a special and single object, in whose employment there is no enduring element, nor designed to be, and whose duties when completed, although years may be required for their performance, *ipso facto* terminate the employment, is not an officer in the sense in which that term is used in the constitution of Illinois. Bunn *v.* People, 45 Ill. 397.

"In every definition given of the word 'office,' the features recognized as characteristic, and distinguishing it from a mere employment, are the manner of appointment, and the nature of the duties to be performed; whether the duties are such as pertain to the particular official designation, and are continuing and permanent, and not occasional or temporary." State *v.* Board of Public Wks., — N. J. —, 17 Atl. Rep. 112.

[1] In United States *v.* Maurice, 2 Brock. (U. S. C. C.) 103, quoted with approval in Bunn *v.* People, 45 Ill. 397.

[2] In State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488. See also Commonwealth *v.* Evans, 74 Penn. St. 124; Vaughn *v.* English, 8 Cal. 39.

[3] Carth. 479; 7 Bac. Abr. 280; State

§ 10. **Designation of Place as "Office" as a Criterion.**—The fact that the place is designated, in the law providing for its creation, as an *office*, affords some reason for determining it to be such.[1]

§ 11. **Authority to appoint to Office constitutes a public Officer.**—The authority and duty of appointing others to office, of themselves constitute the person vested with that authority and duty a public officer, and it is immaterial that such person is not designated as an officer and takes no oath and receives no fees.[2]

§ 12. **Authentication by chief Executive not necessary.**—Where an individual has been appointed or elected, in a manner prescribed by law, has a designation or title given him by law, and exercises functions concerning the public assigned to him by law, he must be regarded as a public officer, and it can make no difference whether he be commissioned by the chief executive officer with the authentication of the seal of state or not. Where that is given it is but evidence of his title to the office, and this evidence may in some cases be of greater and in others of less solemnity.[3]

§ 13. **Lucrative Office, or Office of Profit.**—An office to which salary, compensation or fees are attached is a lucrative office, or, as it is frequently called, an office of profit.[4] The amount of the salary or compensation attached is not material. The amount attached is supposed to be an adequate compensation and fixes the character of the office as a lucrative one, or an office of profit.[5]

v. Valle, 41 Mo. 31; Shelby *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169; Vaughn *v.* English, 8 Cal. 39.

[1] Bradford *v.* Justices, 33 Ga. 332; State *v.* Wilson, 29 Ohio St. 347; United States *v.* Tinklepaugh, 3 Blatchf. (U. S. C. C.) 430.

[2] State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488; Hoke *v.* Henderson, 4 Dev. (N. C.) L. 1, 25 Am. Dec. 677; Howerton *v.* Tate, 68 N. C. 547; State *v.* Kennon, 7 Ohio St. 546.

[3] Bradford *v.* Justices, 33 Ga. 332.

[4] Dailey *v.* State, 8 Blackf. (Ind.) 329; State *v.* Kirk, 44 Ind. 401, 15 Am. Rep. 239; State *v.* Vallé, 41 Mo. 29; People *v.* Whitman, 10 Cal. 38; Crawford *v.* Dunbar, 52 Cal. 36; Kerr *v.* Jones, 19 Ind. 351; State *v.* De-Gress, 53 Tex. 387; *In re* Corliss, 11 R. I. 638, 23 Am. Rep 538; Foltz *v.* Kerlin, 105 Ind. 221, 55 Am. Rep. 197.

[5] Dailey *v.* State, 8 Blackf. (Ind.) 329. In this case it is said: "Pay, supposed to be an adequate compensation, is attached to the performance of their duties. We know of no other

§ 14. **Office coupled with an Interest.**—An office to which a salary or fees are attached is often said to be an office "coupled with an interest." [1]

§ 15. **Honorary Office.**—So an office to which no compensation attaches is frequently called a naked or honorary office, and is supposed to be accepted merely for the public good.[2]

§ 16. **Office of Trust.**—An office whose duties and functions require the exercise of discretion, judgment, experience and skill is an office of trust, and it is not necessary that the officer should have the handling of public money or property, or the care and oversight of some pecuniary interest of the government.[3]

§ 17. **Place of Trust or Profit.**—The term place of trust or profit is frequently used to designate positions which approximate to, but are not strictly offices, and yet occupy the same general level in dignity and importance.[4]

§ 18. **Executive Officers.**—"Executive officers are those whose duties are mainly to cause the laws to be executed." [5]

§ 19. **Legislative Officers.**—"Legislative officers are those whose duties relate mainly to the enactment of laws, such as members of Congress and of the several state Legislatures." [6]

§ 20. **Judicial Officers.**—"Judicial officers are those whose duties are to decide controversies between individuals and accusations made in the name of the public against persons charged with a violation of the law." [7]

test for determining a 'lucrative office' within the memory of the constitution. The lucrativeness of an office—its net profits—does not depend upon the amount of compensation affixed to it. The expenses incident to an office with a high salary may render it less lucrative, in this latter sense, than other offices having a much lower rate of compensation."

[1] State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488.

[2] State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488.

[3] *In re* Corliss, 11 R. I. 638, 23 Am. Rep. 538. See Doyle *v.* Raleigh, 89 N. C. 133, 45 Am. Rep. 677.

[4] See Doyle *v.* Aldermen of Raleigh, 89 N. C. 133, 45 Am. Rep. 677.

[5] Bouvier's Law Dictionary, title "Officer."

[6] Bouvier's Law Dictionary, title "Officer."

[7] Bouvier's Law Dictionary, title "Officer."

§ 21. **Ministerial Officers.**—"Ministerial officers are those whose duty it is to execute the mandates, lawfully issued, of their superiors." [1]

§ 22. **Military Officers.**—"Military officers are those who have command in the army." [2]

§ 23. **Naval Officers.**—"Naval officers are those who are in command in the navy." [3]

§ 24. **Civil Officers.**—"Any officer who holds his appointment under the government, whether his duties are executive or judicial, in the highest or the lowest departments of the government, with the exception of officers of the army and navy, is a civil officer." [4]

§ 25. **Officer de Jure.**—An officer *de jure* is one who is, in all respects, legally appointed and qualified to exercise the office.[5] The distinction between an officer *de jure*, an officer *de facto*, and a mere intruder, is one of great importance and will be fully considered hereafter. [6]

§ 26. **Officer de Facto.**—"An officer *de facto*," in the comprehensive language of Chief Justice BUTLER of Connecticut, "is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised:—

First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be;

Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some

[1] Bouvier's Law Dictionary, title "Officer."

[2] Bouvier's Law Dictionary, title "Officer."

[3] Bouvier's Law Dictionary, title "Officer."

[4] Rawle Const. 213; Story Const. § 790.

[5] Plymouth *v.* Painter, 17 Conn. 585, 44 Am. Dec. 574.

[6] See *post*, § 317.

precedent requirement or condition, as to take an oath, give a bond, or the like;

Third, under color of a known election or appointment, void, because the officer was not eligible or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public;

Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."[1]

The full discussion of this question is reserved for a subsequent section.[2]

[1] In State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409.

[2] See *post*, § 317.

CHAPTER IV.

BY ACCEPTANCE OF ANOTHER OFFICE.

§ 419. In general.

I. BY ACCEPTANCE OF INCOMPATIBLE OFFICE

420. Acceptance of second Office incompatible with first vacates first.
421. Same Subject—Exception.
422. What constitutes Incompatibility.
423. Illustrations of incompatible Offices.
424. Illustrations of Offices not incompatible.
425. No Proceeding necessary to enforce Vacation.
426. Acceptance of second Office is conclusive of Officer's Election to hold that one.

II. BY THE ACCEPTANCE OF A FORBIDDEN OFFICE.

427. In general.
428. Distinction between Eligibility to Election and Power to hold.
429. Acceptance of forbidden Office vacates first.
430. Same Subject—Not when first Office held under different Government.
431. Same Subject—Illustrations of the Rule.

§ 419. **In general.**—It is contrary to the policy of the law that the same individual should undertake to perform inconsistent and incompatible duties. So also, as has been seen, it is frequently provided by constitutions and statutes that officers holding offices of one class or under one authority, shall not also hold an office of a different class or created by a different authority. Prohibitions of the first kind arise under the common law; those of the second are the creature of express constitutional or statutory enactment.

The subject will, therefore, be considered under two heads:

I. By the acceptance of an incompatible office.

II. By the acceptance of a forbidden office.

I.

BY ACCEPTANCE OF INCOMPATIBLE OFFICE.

§ 420. **Acceptance of second Office incompatible with first, vacates first Office.**—It is a well settled rule of the common law

that he who, while occupying one office, accepts another incompatible with the first, *ipso facto* absolutely vacates the first office and his title is thereby terminated without any other act or proceeding.[1] That the second office is inferior to the first does not affect the rule.[2] And even though the title to the second office fail, as where the election was void, the rule is still the same, nor can the officer then regain possession of his former office to which another person has been appointed or elected.[3]

§ 421. **Same Subject—Exception.**—But an exception is made to the general rule in those cases in which the officer can not vacate the first office by his own act, upon the principle that he will not be permitted to thus do indirectly what he could not do directly. Such an acceptance, it is said, though it may be ground for amotion, does not operate as an *absolute avoidance* in those cases where a person cannot divest himself of an office by his own mere act, but requires the concurrence of another authority to his resignation or amotion, unless that authority is privy and consenting to the second appointment.

"Upon principle, not conflicting with any of the authorities," says PARKE J., in stating this exception, "it seems that an officer cannot avoid his office by accepting another, unless his office be such as he could determine by his own act simply, or unless that authority concurs in the new appointment which could accept the surrender of or amove from the old one."[4]

Such a concurrence, however, is implied where the power authorized to accept his surrender of the first office appoints him to the second.[5]

§ 422. **What constitutes Incompatibility.**—This incompati-

[1] Milward *v.* Thatcher, 2 T. R. 81; Rex *v.* Patteson, 4 B. & Ad. 9; Rex *v.* Hughes, 5 B. & C. 886; Rex & Tizzard, 9 B. & C. 418; State *v.* Brinkerhoff, 66 Tex. 45; Pooler *v.* Reed, 73 Me. 129; State *v.* Dellwood, 33 La. Ann. 1229; State *v.* West, 33 La. Ann. 1261; Stubbs *v.* Lee, 64 Me. 195, 18 Am. Rep. 251; State *v.* Goff, 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. Rep. 226; State *v.* Buttz, 9 S. C. 156; People *v.* Carrique, 2 Hill (N. Y.) 93; People *v.* Hanifan, 96 Ill. 420; Cotton *v.* Phillips, 56 N. H. 220; Kenney *v.* Goergen, 36 Minn. 190; Magie *v.* Stoddard, 25 Conn. 565, 68 Am. Dec. 375; People *v.* Nostrand, 46 N. Y. 375; State *v.* Brinkerhoff, 66 Tex. 45; Biencourt *v.* Parker, 27 Tex. 562; *Ex parte*, Call, 2 Tex. App. 407.

[2] Milward *v.* Thatcher, 2 T. R. 81.

[3] Rex *v.* Hughes, 5 B. & C. 886.

[4] Rex *v.* Patteson, 4 B. & Ad. 9.

[5] State *v.* Brinkerhoff, 66 Tex. 45.

bility which shall operate to vacate the first office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both.[1]

It seems to be well settled that the mere physical impossibility of one person's performing the duties of the two offices as from the lack of time or the inability to be in two places at the same moment, is not the incompatibility here referred to.[2] It must be an inconsistency in the functions of the two offices, as judge and clerk of the same court, claimant and auditor, and the like.[3] "Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not," says FOLGER J., "that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, *per se*,

[1] Bryan *v.* Cattell, 15 Iowa 538; People *v.* Green, 58 N. Y. 295; Stubbs *v.* Lee, 64 Me. 195, 18 Am. Rep. 251; State *v.* Buttz, 9 S. C. 156; People *v.* Green, 5 Daly (N. Y.) 254; State *v.* Goff, 15 R. I. 505, 9 Atl. Rep. 226, 2 Am. St. Rep. 921; State *v.* Brown, 5 R. I. 1, 11; State *v.* Feibleman, 28 Ark. 424.

[2] The definition given in Bacon's Abridgement, Vol. 8, tit. Offices. K. "Offices are said to be incompatible and inconsistent so as to be executed by the same person, when from the multiplicity of business in them they can not be executed with care and ability; or when, their being subordinate and interfering with each other, it induces a presumption they can not be executed with impartiality and honesty," and that by BAGLEY, J., in Rex *v.* Tizzard, 9 B. & C. 418, 421, that "two offices are incompatible where the holder can not in every instance discharge the duties of each," seem in some degree contrary to the text; but the rule in the text is supported by the best considered authorities. See cases cited in preceding note.

[3] See cases cited in note 1 of this section.

have the right to interfere, one with the other, before they are incompatible at common law."[1]

§ 423. **Illustrations of incompatible Offices.**—In accordance with the rule of the last section it is held that the following offices are incompatible and that the acceptance of the second vacates the first: that of town clerk and that of alderman;[2] that of trial justice and that of deputy sheriff;[3] that of justice of the peace and that of constable,[4] sheriff, deputy sheriff or coroner;[5] that of deputy sheriff and that of justice af the peace;[6] that of a prudential committee and that of auditor of a school district;[7] that of state solicitor and that of member of congress;[8] that of councilman and that of city marshal;[9] that of justice of the district court and that of deputy sheriff;[10] that of postmaster and that of judge of the county court.[11]

§ 424. **Illustrations of Offices not incompatible.**—On the other hand the following offices have been held to be not incompatible: that of school director and that of judge of elections;[12] that of clerk of a school district and that of collector of the district;[13] that of member of the assembly and that of clerk of the court of special sessions;[14] that of supervisor of a county and that of deputy clerk of the circuit court of the county;[15] that of clerk of the district court and that of court commissioner;[16] that of crier and that of messenger of a court.[17]

§ 425. **No proceeding necessary to enforce Vacation.**—As stated in the general rule, the acceptance of the second office

[1] In People v. Green, 58 N. Y. 295.
[2] Rex v. Tizzard, 9 B. & C. 418.
[3] Stubbs v. Lee, 64 Me. 195, 18 Am. Rep. 251.
[4] Magic v. Stoddard, 25 Conn. 565, 68 Am. Dec. 375; Pooler v. Reed, 73 Me. 129.
[5] Opinion of Judges, 3 Maine, 486.
[6] Wilson v. King, 3 Littell (Ky.) 457, 14 Am. Dec. 84.
[7] Cotton v. Phillips, 56 N. H. 220.
[8] State v. Buttz, 9 S. C. 156.
[9] State v. Hoyt, 2 Oregon, 246.
[10] State v. Goff, 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. Rep. 226.
[11] Hoglan v. Carpenter, 4 Bush (Ky.) 89.
[12] *In re* District Attorney, 11 Phila. 645.
[13] Howland v. Luce, 16 Johns. (N. Y.) 135.
[14] People v. Green, 58 N. Y. 295, affirming 5 Daly 254.
[15] State v. Feibleman, 23 Ark. 424.
[16] Kenney v. Goergen, 36 Minn. 190, 31 N. W. Rep. 210.
[17] Preston v. United States, 37 Fed. Rep. 417.

ipso facto vacates the first. No proceeding, therefore, by *quo warranto* or otherwise, is necessary in order to declare or complete the vacation of the first office, but it may be at once filled again either by appointment or election as the law provides.[1]

§ 426. **Acceptance of second Office is conclusive of Officer's Election to hold that one.**—Upon his election or appointment to the second office, the officer has a right to elect which of the two he will have and retain, but his election must be deemed to be made when he accepts and qualifies for the second.[2]

As is said by APPLETON, C. J., "Where one has two incompatible offices, both can not be retained. The public has a right to know which is held and which is surrendered. It should not be left to chance, or to the uncertain and fluctuating whim of the office holder to determine. The general rule, therefore, that the acceptance of and qualification for, an office incompatible with one then held is a resignation of the former, is one certain and reliable, as well as one indispensable for the protection of the public."[3]

II.

BY THE ACCEPTANCE OF A FORBIDDEN OFFICE.

§ 427. **In general.**—From motives of public policy, it is frequently provided in the state constitutions and statutes that a person shall not at the same time hold an office of trust or profit both under the State and under the Federal government; that persons holding judicial offices shall not at the same time hold other offices of trust or profit; that a person shall not at the same time hold two offices of trust or profit, and the like.

These provisions often cover substantially the same ground as the common law prohibition against holding incompatible offices;

[1] Rex v. Trelawney, 3 Burr 1615; Milward v. Thatcher, 2 T. R. 81 Rex v. Tizzard, 9 B. & C. 418; People v. Hanifan, 96 Ill. 420; State v. Dellwood, 33 La. Ann. 1229; People v. Carrique, 2 Hill (N. Y.) 93; State v. Buttz, 9 S. C. 156; Shell. v. Cousins, 77 Va. 328; State v. Brinkerhoff, 66 Tex. 45; Stubbs v. Lee, 64 Me. 195, 18 Am. Rep. 251; Cotton v. Phillips, 56 N. H. 220; Pooler v. Reed, 73 Me. 129.

[2] State v. Brinkerhoff, 66 Tex. 45.

[3] Stubbs v. Lee, 64 Me. 195, 18 Am. Rep. 251.

but they also, in many cases, go further than that and arbitrarily prohibit the holding of two offices which the common law might not declare incompatible.

§ 428. **Distinction between Eligibility and Power to hold.**—As has been seen in an earlier portion of the work, it is frequently declared that persons holding one office shall be ineligible to election to another, either generally or of a certain kind. These provisions being held to incapacitate the incumbent of the first office to *election* to the second, it follows that any attempted election to the second is void and that if, by color of it, he attempts to hold the second office he will be removed from it.[1] It is thus the second office which is vacated instead of the first.

In California, however, under a constitutional provision that "no person holding any lucrative office under the United States or any other power, shall be eligible to any civil office of profit under this State," it is held that this means eligibility to *hold* office as well as to be elected to it, and hence disqualifies a person holding a civil office of profit under the state, *e. g.* that of county supervisor, from continuing to hold this office after he had received and entered upon a lucrative office under the United States, as that of postmaster.[2]

§ 429. **Acceptance of forbidden Office vacates first.**—Where, however, it is the *holding* of two offices at the same time which is forbidden by the constitution or the statutes, a statutory incompatibility is created, similar in its effect to that of the common law, and, as in the case of the latter, it is well settled that the acceptance of a second office of the kind prohibited, operates *ipso facto* to absolutely vacate the first.[3]

No judicial determination is therefore necessary to declare the

[1] Crawford *v.* Dunbar, 52 Cal. 36; Vogel *v.* State, 107 Ind. 374; *In re* Corliss, 11 R. I. 638, 23 Am. Rep. 538.

[2] People *v.* Leonard, 73 Cal. 230, 14 Pac. Rep. 853.

[3] People *v.* Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659; Shell *v.* Cousins, 77 Va. 328; State *v.* Newhouse, 29 La. Ann. 824; State *v.* Arata, 32 La. Ann. 193; State *v.* Dellwood, 33 La. Ann. 1229; State *v.* West, 33 La. Ann. 1261; State *v.* Draper, 45 Mo. 355; Dickson *v.* People, 17 Ill. 191; Foltz *v.* Kerlin, 105 Ind. 221, 55 Am. Rep. 197; Dailey *v.* State, 8 Blackf. (Ind.) 329; Creighton *v.* Piper, 14 Ind. 182; State *v.* Kirk, 44 Ind. 401, 15 Am. Rep. 239; Lucas *v.* Shepherd, 16 Ind. 368; Howard *v.* Shoemaker, 35 Ind. 111.

vacancy of the first, but the moment he accepts the new office the old one becomes vacant. As is said in one case, "His acceptance of the one was an absolute determination of his right to the other, and left him 'no shadow of title, so that neither *quo warranto* nor amotion was necessary.'" [1]

§ 430. **Same Subject—Not when first Office held under different Government.**—But an exception is made to this rule where the first office is held under a different government from that which conferred the second.

Thus in Indiana, under a constitutional declaration that no person shall "hold more that one lucrative office at the same time," it was held that where one who at the time of his election to one lucrative office, that of township trustee, holds another lucrative office, that of United States postmaster, he will be compelled to vacate the second office which he held under the State.[2]

"It is doubtless the general rule," said the court by ELLIOTT, J., "that where a man accepts an office held under the State, he vacates another held under the same sovereignty.[3]

But the reason of the rule fails when applied to offices held under different sovereignties, and where the reason of the rule fails, so also does the rule. There is reason for the rule where the offices emanate from the same government, but none where the offices are created by different governments. The National law neither creates nor governs a State office; neither inducts the officer into office nor expels him from it; neither fixes his qualifications nor prescribes his disabilities. On the other hand, the State law exerts no dominion over the Federal officer as an officer, neither prescribes his qualifications nor declares his disabilities, and it is therefore logically inconceivable that the acceptance of an office existing under a State law vacates an office

[1] People *v.* Brooklyn, 77 N. Y, 503, 33 Am. Rep. 659; Whiting *v.* Carrique, 2 Hill (N. Y.) 93; People *v.* Nostrand, 46 N. Y. 381; People *v.* Green, 58 N. Y. 304.

[2] Foltz *v.* Kerlin, 105 Ind. 221, 55 Am. Rep. 197.

[3] Citing Dailey *v.* State, 8 Blackf. (Ind.)329; Lucas *v.* Shepherd,16 Ind. 368; Creighton *v.* Piper, 14 Ind. 182; Howard *v.* Shoemaker, 35 Ind. 111; Cotton *v.* Phillips, 56 N. H. 220; Milward *v.* Thatcher, 2 T.R. 81; People *v.* Hanifan, 96 Ill. 420; Stubbs *v.* Lee, 64 Me. 195, 18 Am. Rep. 251; Shell *v.* Cousins, 77 Va. 328.

existing under a National law. Where, as here, a man elected to a State office persists in retaining a Federal office, actually remains in it, enjoying its emoluments and discharging its duties, he does not, in legal contemplation and certainly not in fact, vacate it by entering into an office existing under the laws of the State, and for this plain reason the laws of the State do not operate upon Federal offices. Our laws do not extend to offices created by the general government, and no act, that an officer acting under our laws can do, can vacate an office upon which our laws do not operate. Nothing done under our laws can operate where our laws are without effect. We must therefore hold that a man can be expelled from a State office who persists in holding one given him by the Federal government, or we must concede that the courts of Indiana cannot control a citizen who assumes to hold office in direct violation of the Constitution. This concession will not be made."

But this exception made by the court must, it is believed, be limited to the exact state of facts before the court, *i. e.* where the Federal office is accepted last, for if the order of events had been reversed and the Federal office had been accepted second, the court would have had no difficulty in declaring the first vacated under the general rule without making the exception in its application where the offices are held under different sovereignties. And the cases are numerous in which under express provisions the State office has been held vacated by the subsequent acceptance of the Federal office.[1]

§ 431. **Same Subject—Illustrations of the Rule.**—The general rule may be illustrated by the following application of it: Where the constitution provides that no person holding any lucrative office under the State, shall be a member of the general assembly, one who accepts an election to the assembly while holding the office of circuit judge vacates the latter office;[2] where the constitution provides that no person holding an office of honor or profit under the United States shall hold any office of honor or profit under the State, a person who is a director of

[1] See Dickson *v.* People, 17 Ill. 191; People *v.* Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659; State *v.* De Gress, 53 Tex. 387; State *v.* Buttz, 9 S. C. 156.

[2] State *v.* Draper, 45 Mo. 355.

a State deaf and dumb asylum, vacates this office when he accepts that of United States marshal;[1] where the constitution prohibits one person from holding two lucrative offices at the same time, one who holds the office of county recorder vacates it if he accepts that of county commissioner,[2] or, if holding that of county commissioner, vacates it upon accepting that of deputy treasurer,[3] or, if holding that of prison director, he vacates it upon accepting that of mayor;[4] under a constitutional provision that no person shall hold more than one office of trust or profit at the same time, the office of jury commissioner is vacated by accepting that of police commissioner,[5] member of school board or tax assessor,[6] and that of member of the board of health is vacated by accepting that of jury commissioner;[7] where the constitution provides that "sheriffs shall hold no other office," the acceptance of any second office vacates the first;[8] *a fortiori*, where the charter of a city prohibits an alderman from holding any other office, and provides that by his election to and acceptance of another, his office as alderman shall immediately become vacant, an alderman who is elected to Congress and accepts the office *ipso facto* vacates his office of alderman.[9]

[1] Dickson *v.* People, 17 Ill. 191.
[2] Dailey *v.* State, 8 Blackf. (Ind.) 329.
[3] Lucas *v.* Shepherd, 16 Ind. 368.
[4] Howard *v.* Shoemaker, 35 Ind. 111.
[5] State *v.* Newhouse, 29 La. Ann. 824.
[6] State *v.* Dellwood, 33 La. Ann. 1229; State *v.* West, 33 La. Ann. 1201.
[7] State *v.* Arata, 32 La. Ann. 193.
[8] Shell *v.* Cousins, 77 Va. 328.
[9] People *v.* Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659.

CHAPTER IX.

OF THE REMEDY BY QUO WARRANTO.

§ 476. In general.
477. Nature of the Remedy.
478. In what Cases applied.
479. Will not lie where Position is not a public Office.
480. Same Subject—What are Offices within this Rule.
481. Same Subject—What are not Offices.
482. Possession and User of the Office must be shown.
483. Is a civil Proceeding.
484. Is a discretionary Remedy.
485. Effect of Acquiescence.
486. Will not lie where there is other plain and adequate Remedy.
§ 487. Is superseded by special statutory Remedy.
488. Proceedings usually conducted in Name of the Public.
489. Practice in instituting the Proceedings.
490. Interest of Relator.
491. The Requisites of the Information.
492. The Defendant's Pleadings.
493. The Replication.
494. The Burden of Proof.
495. Trial by Jury.
496. The Judgment.
497. Effect of the Judgment.
498. Damages for Usurpation.
499. Costs.

§ 476. **In general.**—As has been frequently seen in earlier portions of this work, the remedy usually adopted for the purpose of trying the title to public office is that ordinarily spoken of as *quo warranto*. In some of the States special remedies have been provided for the purpose, but in the majority of them the proceeding by *quo warranto* is still retained, and seems to deserve separate consideration.

§ 477. **Nature of the Remedy.**—The ancient writ of *quo warranto* was a high prerogative writ, in the nature of a writ of right for the king, against one who usurped or claimed any office, franchise or liberty of the crown, to inquire by what authority he supported his claim, in order to determine the right.[1]

In modern times in England, and in the United States, the ancient writ has fallen entirely into disuse, and is superseded by

[1] High Ex. Leg. Rem. § 592.

the information in the nature of a *quo warranto*, which is a proceeding by information in the proper court to determine by what authority, *quo warranto*, he assumes to hold and exercise the office in question. The use of this remedy, and the practice and procedure in seeking and applying it, have been regulated by statute in many of the States and in some superseded altogether, but where still in use, its main features are still the same.[1]

§ 478. **In what Cases applied.**—The proceeding by *quo warranto* is the proper and appropriate remedy for trying and determining the title to a public office, and of ascertaining who is entitled to hold it; of obtaining the possession of an office to which one has been legally elected and has become duly qualified to hold, and also of removing an incumbent who has usurped it, or who claims it by an invalid election, or who illegally continues to hold it after the expiration of his term.[2] Both of these remedies may be sought by the same information.[3]

Quo warranto is also an appropriate remedy for testing the validity of a statute under which the respondent's office was created.[4]

For the purpose of ousting an actual incumbent and of

[1] Superseded by other remedies in New York. Form but not the substance changed in Dakota. Territory *v.* Hauxhurst, 3 Dak. 205; Lies in Kansas, notwithstanding statute. Tarbox *v.* Sughrue, 36 Kans. 225.

[2] Griebel *v.* State, 111 Ind. 369, 12 N. East. Rep. 700; Williams *v.* State, 69 Tex. 368, 6 S. W. Rep. 845; State *v.* Owens, 63 Tex. 261; Owens *v.* State, 64 Tex. 500; State *v.* Meehan, 45 N. J. L. 189; Territory *v.* Ashenfelter, — N. M. —, 12 Pac. Rep. 879; Davidson *v.* State, 20 Fla. 784; Osgood *v.* Jones, 60 N. H. 543; French *v.* Cowan, 79 Me. 426; Tarbox *v.* Sughrue, 36 Kans. 225; Neeland *v.* State, 39 Kans. 154; State *v.* Commissioners, 39 Kans. 85, 19 Pac. Rep. 2; Collins *v.* Huff, 63 Ga. 207; Hardin *v.* Colquitt, 63 Ga. 589; People *v.* Waite, 70 Ill. 25; People *v.* Moore, 73 Ill. 132; People *v.* Callaghan, 83 Ill. 128; Stone *v.* Wetmore, 44 Ga. 495; People *v.* Sweeting, 2 Johns. (N. Y.) 184; State *v.* Schnierle, 5 Rich. (S. C.) 299; State *v.* Brown, 5 R. I. 1; Territory *v.* Hauxhurst, 3 Dak. 205; Hammer *v.* State, 44 N. J. L. 667; State *v* Stein, 13 Neb. 529; Gass *v.* State, 34 Ind. 425; Farrington *v.* Turner, 53 Mich. 72, 51 Am. Rep. 88.

[3] Griebel *v.* State, 111 Ind. 369, 12 N. East. Rep. 700.

[4] People *v.* Riordan, — Mich. —, 41 N. W. Rep. 482; People *v.* Maynard, 15 Mich. 463; Attorney-General *v.* Holihan, 29 Mich. 116; Attorney-General *v.* Amos, 60 Mich. 372.

admitting another to the office, *quo warranto* is, as has been seen,[1] the remedy and not mandamus.[2]

[1] *Ante*, §§ 216-218.

[2] Frey v. Michie, 68 Mich. 323, 36 N. W. Rep. —, 12 West. Rep. 586.

French v. Cowan, 79 Me. 426. In this case FOSTER, J., says:

"The office to which the petitioner seeks to be restored is actually filled by another, claiming under a legal appointment, admitted and sworn and exercising the functions of the office under color of right. In such case, the appropriate remedy of the petitioner in the first instance, if entitled to any, is by *quo warranto*, and not by *mandamus* alone. In this case, the petitioner is virtually attempting to oust an actual incumbent, and to place himself in an office, the title to which is in controversy, and which cannot be tried in a proceeding of this kind. The general and well nigh universal rule is that *mandamus* is not an appropriate remedy to try the title to an office as against one actually in possession under color of law. The decided weight of authority, both in the English and American courts, is in support of this doctrine.

In Dane's Abridgement the rule is thus stated: 'But if the office be already full by the possession of an officer *de facto*, no writ will be granted to proceed to a new election, until the person in possession has been ousted on proceedings in *quo warranto*.'

Judge Dillon, in his work on municipal corporations, after stating the English rule as above given, and that the same is generally recognized to be the law in this country, says: 'We have before seen that it is the doctrine of the English law, quite generally adopted in this country, that where a person is in the actual possession of an office under an election or a commission, and is thus exercising its duties under color of right, that the validity of his election or commission cannot, in general, be tried or tested on a *mandamus* to admit another, but only by an information in the nature of *quo warranto*.' § § 674, 678, 679, 680, 716.

The same doctrine is more emphatically laid down in High on Ex. Leg. Rem. § 49, and he asserts that the rule is established by an overwhelming current of authority that *mandamus* will not lie to compel the admission of another claimant nor to determine the disputed question of title to an office, where it is already filled by an actual incumbent who is exercising the functions of the office *de facto* and under color of right. In such cases, the party complaining and desirous of an adjudication upon his alleged title and right of possession, must assert his rights by the only proper, efficacious and speedy remedy, and that is an information in the nature of a *quo warranto*.

A careful examination of the decisions both of the English and American courts will not fail to convince the most doubting mind that the general current of authority runs in the same direction, and that the exceptions to the rule are rare and not well founded. A few of the very many authorities bearing directly upon this rule are given,—enough when examined to authenticate the assertion that the rule is too well settled to be denied. King v. The Mayor of Winchester, 7 A. & E. (34 E. C. L. 81); The Queen v. The Mayor of Derby, 7 A. & E. (34 E. C. L. 135);

So a bill in equity will not lie at the suit of a private individual to restrain the exercise of official functions, but resort must be had to the remedy by *quo warranto*.[1]

King *v.* The Mayor of Oxford, 6 A. & E. 348 (33 E. C. L. 89); Frost *v.* The Mayor of Chester, 5 E. & B. 538 (85 E. C. L. 536). COLERIDGE, J.: 'A mandamus goes only on the supposition that there is no one in office, for the purpose of restoring a party to office or to cause an election to be held.' The King *v.* The Mayor of Colchester, 2 T. R. 259; The Queen *v.* Phippen, 7 A. & E. 966 (34 E. C. L. 263); People *v.* New York, 3 Johns. Cases 79; in this case the court held: 'Where the office is already filled by a person who has been admitted and sworn, and is in by color of right, a mandamus is never issued to admit another person, and it is there laid down that the proper remedy, in the first instance, is by information in the nature of a *quo warranto* by which the rights of the parties may be tried. People *v.* Stevens, 5 Hill (N. Y.) 629; People *v.* Lane, 55 N. Y. 219; *In re* Gardner, 68 N. Y. 467; Dunne *v.* McDonald, 41 Conn. 517; Wood *v.* Fitzgerald, 3 Oregon 568; Underwood *v.* Wylie, 5 Ark. 248; Bonner *v.* The State, 7 Ga. 473; People *v.* Detroit, 18 Mich. 338; Brown *v.* Turner, 70 N. C. 93; Denver *v.* Hobart, 10 Nev. 28; Meredith *v.* Supervisors, 50 Cal. 433. 'Mandamus will not be issued to admit a person to an office while another is in under color of right,' State *v.* Auditors, 36 Mo. 70; 'Mandamus will not lie to turn out one officer and to admit another in his place;' People *v.* Matteson, 17 Ill. 167; People *v.* Head, 25 Ill. 325; Hill *v.* Goodwin, 50 N. H. 441; *Ex parte* Harris (Alabama) 14 Am. Law Reg. (N. S.) 646; McGee *v.* State, 1 West. Reporter, 407 (Indiana); Ellison *v.* Raleigh, 80 N. C. 125. 'By *quo warranto* the intruder is ejected. By mandamus the legal officer is put in his place.' Prince *v.* Skillin, 71 Maine, 366.

That there have been exceptions to the rule is true. But upon what principle the exceptions have been founded, where there has been an actual incumbent, exercising the functions of the office, and being in under color of right, the decisions themselves fail to afford any satisfactory answer. In Maryland and Virginia, the courts have held that in such cases mandamus would lie. Thus in Dew *v.* The Judges of the Sweet Springs Dist. Court, 3 Hen. & Munf. 1, it was held that mandamus was the best remedy. So in Harwood *v.* Marshall, 9 Md. 83, the court of appeals of Maryland, came to the conclusion that resort to *quo warranto* as preliminary to mandamus was not necessary on the grounds of delay growing out of the use of the process, citing in support of its decision the case of Strong, Pet. 20 Pick. 484, a case more generally referred to as an exception to the rule than any other authority. But an examination of that case shows the fact that it was mandamus to the board of examiners to issue a certificate of apparent election to the petitioner, although, as the court there say, he might then be

[1] Osgood *v.* Jones, 60 N. H. 513, Equity not the proper form to try title to office: Hinckley *v.* Breen, 55 Conn. 119.

Quo warranto will also lie for the purpose of ousting an incumbent whose title to the office has been forfeited by misconduct or other cause.[1] And in such a case it is not necessary that the question of forfeiture should ever before have been presented to any court for judicial determination, but the court, having jurisdiction of the *quo warranto* proceeding, may determine the question of forfeiture for itself.[2] The question must, however, be judicially determined before he can be ousted. "And if the alleged ground for ousting the officer," says VALENTINE, J., "is that he has forfeited his office by reason of certain

obliged to resort to *quo warranto* to test the title to the office. A distinction is there made between the cases where applications had been made to be admitted to an office by proceedings on mandamus, and the case there decided, where the petitioner only sought for a *certificate* of his election, like the case of Marbury *v.* Madison, 1 Cranch 168-9, and The King *v.* The Mayor of Oxford, 6 A. & E. 349 (33 E. C. L. 89), where it was said that the certificate was only one step toward the completion of the title. The court also in Strong's Case admitted that the two processes might be necessary to enable the petitioner to get possession of the office,—the one establish the legality of his election, the other to set aside that of the incumbent, and that although they were independent of each other, they might have been applied for at the same time and proceeded *pari passu*. The court *arguendo* claimed that there are authorities in support of the doctrine that mandamus is the appropriate remedy where there is an actual incumbent acting *de facto*, but the decision of the court is not based upon that ground, and is not authority to the extent claimed in Conklin *v.* Aldrich, 98 Mass. 558, where it is referred to. The general tenor of the decisions from Massachusetts recognize and adopt the rule rather than the exception to it. Attorney-General *v.* Simonds, 111 Mass. 256. It is a fundamental principle that mandamus can be used only to compel the respondent to perform some duty which he owes to the petitioner, and can be maintained only on the ground that the petitioner has a present, clear, legal right to the thing claimed, and that there is a corresponding duty on the part of the respondent to render it to him. If therefore, as in the case at bar, the two persons are claiming the title to office adversely to each other, the respondent being in possession and exercising the duties pertaining to that office *de facto* under color of right, mandamus will not lie to compel the admission of the petitioner, or to determine the disputed question of title."

[1] Commonwealth *v.* Walter, 83 Penn. St. 105, 24 Am. Rep. 154; State *v.* Collier, 72 Mo. 13, 37 Am. Rep. 417; State *v.* Wilson, 30 Kans. 661; Dullam *v.* Willson, 53 Mich. 392, 51 Am. Rep. 128.

[2] Commonwealth *v.* Walter, 83 Penn. St. 105, 24 Am. Rep. 154; State *v.* Wilson, 30 Kans 661; State *v.* Allen, 5 Kans. 213; State *v.* Graham, 13 Kans. 136.

acts or omissions on his part, it must then be judicially determined, before the officer is ousted, that these acts or omissions of themselves work a forfeiture of the office. Mere misconduct, if it does not of itself work a forfeiture, is not sufficient.[1] The court has no power to create a forfeiture, and no power to declare a forfeiture where none already exists. The forfeiture must exist in fact before the action of *quo warranto* is commenced."[2]

§ 479. **Will not lie where Position is not a public Office.**— The State does not inquire by *quo warranto* into the title to a position which is not a legally authorized public office.[3] The right to a mere employment must be tested by other means.[4] What are public offices, and how they are distinguished from mere employments has been already considered in an earlier portion of this work,[5] and further illustrations will be given in the following section.

Courts are also averse to granting leave to file an information in *quo warranto*, where the office in dispute is a petty and insignificant one.[6] So "although the statute says the information may be filed against '*any* person' usurping office in '*any* corporation' created by authority of this state, yet there must be very many cases in which the court would be at liberty to refuse to listen to the controversy. When the proprietors of a country store, or the members of a village library association, or the participants in a district school debating society, or an association of musical amateurs, may incorporate themselves under our general laws, and establish various grades of offices for the purposes of their organization, it can scarcely be seriously urged," says COOLEY, J., "that the supreme court can be required to settle all their contested elections and appointments in this proceeding. There are grades of positions denominated offices which do not

[1] Citing Cleaver *v.* Commonwealth, 34 Penn. St. 283; Brady *v.* Howe, 50 Miss. 624, 625; Lord Bruce's Case, 2 Strange, 819; King *v.* Ponsonby, 1 Ves. Jr. 1, 7; People *v.* Whitcomb, 55 Ill. 172, 176; High on Extraordinary Legal Remedies, § 618.

[2] Citing above authorities and State *v.* Hixon, 27 Ark. 398, 402.

[3] State *v.* North, 42 Conn. 79; State *v.* Dearborn, 15 Mass. 125.

[4] People *v.* DeMill, 15 Mich. 164; Eliason *v.* Coleman, 86 N. C. 235; People *v.* Hills, 1 Lans. (N. Y.) 202; Burr *v.* McDonald, 3 Gratt. (Va.) 215; Dean *v.* Healy, 66 Ga. 503.

[5] See *ante*, § 2

[6] Anonymous, 1 Barn. K. B. 279.

rise to the dignity of being entitled to the notice of the attorney-general by information."[1] And in a later case[2] the same judge says that "it is at least doubtful whether the proceeding by information is applicable to the case of any office not created by the State itself."

§ 480. **Same Subject—What are Offices within the Rule.**—Illustrations of what are, and what are not offices, have been already given, but a brief statement will here be made of some of the positions which have been deemed public offices for the purposes of *quo warranto* proceedings.

Thus the following officers have been subjected to inquiry:—governor,[3] lieutenant-governor,[4] except where the jurisdiction is solely in the general assembly,[5] sheriff,[6] deputy sheriff,[7] county clerk,[8] county treasurer,[9] judge of probate,[10] circuit judge,[11] presiding officers of legislature,[12] directors of asylums,[13] an officer in a railroad company who is appointed by the State,[14] tax collector,[15] commissioner of highways,[16] commissioners to locate a county seat, lay out state roads and the like,[17] assessors,[18] school district clerk,[19] mayor of city,[20] school director,[21] city marshal.[22]

So the title of military officers is also open to inquiry upon this proceeding.[23]

[1] People *v.* DeMill, 15 Mich. 164.

[2] Throop *v.* Langdon, 40 Mich. 673.

[3] Attorney-General *v.* Barstow, 4 Wis. 567.

[4] State *v.* Gleason, 12 Fla. 265.

[5] Robertson *v.* State, 109 Ind. 79.

[6] People *v.* Mayworm, 5 Mich. 146; Commonwealth *v.* Walter, 83 Penn. St. 105, 24 Am. Rep. 154; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

[7] State *v.* Goff, 15 R. I. 505, 2 Am. St. Rep. 921.

[8] People *v.* Miles, 2 Mich. 348.

[9] Clark *v.* People, 15 Ill. 217.

[10] People *v.* Heaton, 77 N. C. 18.

[11] Commonwealth *v.* Gamble, 62 Penn. St. 343, 1 Am. Rep. 422.

[12] Clark *v.* Stanley, 66 N. C. 59; Howerton *v.* Tate, 68 N. C. 547.

[13] Nichols *v.* McKee, 68 N. C. 429; Welker *v.* Bledsoe, 68 N. C. 457; State *v.* Harrison, 118 Ind. 434, 3 Am. St. Rep. 663.

[14] Howerton *v.* Tate, 68 N. C. 547.

[15] Patterson *v.* Hubbs, 65 N. C. 119; Hyde *v.* State, 52 Miss. 665; People *v.* Callaghan, 83 Ill. 128.

[16] People *v.* Hurlbut, 24 Mich. 59, 9 Am. Rep. 103.

[17] People *v.* Hurlbut, *supra.*

[18] State *v.* Hammer, 42 N. J. L. 435.

[19] State *v.* Jenkins, 46 Wis. 616.

[20] People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; Commonwealth *v.* Jones, 12 Penn. St. 365.

[21] State *v.* Boal, 46 Mo. 528.

[22] State *v.* Lupton, 64 Mo. 415, 27 Am. Rep. 253.

[23] State *v.* Brown, 5 R. I. 1; Commonwealth *v.* Small, 26 Penn. St. 31.

§ 481. **Same Subject—What are not Offices.**—But the following are not public officers within this rule:—chief engineer of a railroad,[1] or other officers of a corporation elected by the directors,[2] a clerk in a municipal office,[3] a college professor,[4] a pilot,[5] special commissioners, appraisers, referees and the like,[6] and many others mentioned in a preceding chapter.[7]

§ 482. **Possession and User of the Office must be shown.**—It is indispensable to the jurisdiction in *quo warranto* that the respondent should be shown to have been in the actual possession and user of the office. It is not enough that he should claim the office, but an actual user must be shown.[8]

"But that which constitutes a sufficient user," says Mr. STEPHEN, "depends upon the nature of the office or franchise claimed; thus, where it appeared in the case of a freeman or free burgess of a corporation, that he had been sworn in, though no act or claim be stated to have been done or made by the defendant, the information was granted; and though a mere claim to be sworn in is no usurpation, yet a swearing in, though defective in law, may be; and where a defendant has taken the oath in such a way as he thought to be sufficient at the time to make him a free burgess, it was considered to be an user."[9]

Hence it is held that the taking of the oath within the time prescribed by law is a sufficient user, though the respondent has not actually performed the duties of the office.[10]

So where a person, who has been duly elected to an office and has qualified and taken possession of it, commits such acts while in the office as to work a forfeiture of it, he may be proceeded against by *quo warranto*, even though at the time he has practically abandoned the office but without resigning his claim to it.[11]

§ 483. **Is a civil Proceeding.**—Though originally regarded as

[1] Eliason *v.* Coleman, 86 N. C. 235.
[2] People *v.* Hills, 1 Lans. (N. Y.) 202; Burr *v.* McDonald, 3 Gratt. (Va.) 215.
[3] Throop *v.* Langdon, 40 Mich. 673.
[4] Butler *v.* Board of Regents, 32 Wis. 124.
[5] Dean *v.* Healy, 66 Ga. 503.
[6] Matter of Hathaway, 71 N. Y. 238, 244.
[7] See *ante*, Book I. chap. II.
[8] King *v.* Whitwell, 5 T. R. 85.
[9] 3 Stephen's Nisi Prius, 2441.
[10] People *v.* Callaghan, 83 Ill. 128; King *v.* Tate, 4 East. 337; King *v.* Harwood, 2 East. 177.
[11] State *v.* Graham, 13 Kans. 136.

a criminal proceeding, the remedy by information has now come to be considered as a purely civil one, which, while partaking in some of its forms and incidents of the nature of criminal process, is yet a strictly civil proceeding, resorted to for the purpose of testing a civil right by trying the title to an office or franchise and ousting the wrongful possessor.[1]

§ 484. **Is a discretionary Remedy.**—The pursuit of the remedy by information in *quo warranto* is not ordinarily a matter of right but one resting in the sound discretion of the court, and in England since the statute of Anne[2] and in many of the United States[3] it can only be filed, on the relation of a private individual, by leave of the court first had and obtained. In some of the States, however, such leave is not required.[4] It may be

[1] High. Ex. Leg. Rem. § 603, citing State *v.* Hardie, 1 Ired. (N. C.) 42; State Bank *v.* State, 1 Blackf. (Ind.) 267; State *v.* Ashley, 1 Ark. 279; Lindsey *v.* Attorney-General, 33 Miss. 508; State *v.* Lingo, 26 Mo. 496; State *v.* Stewart, 32 Mo. 379; State *v.* Lawrence, 38 Mo. 535; State *v.* Kupferle, 44 Mo. 154, 100 Am. Dec. 265; Commonwealth *v.* Birchett, 2 Va. Cas. 51; Attorney-General *v.* Barstow, 4 Wis. 567; Commonwealth *v.* Commissioners, 1 S. & R. (Penn.) 382; Commonwealth *v.* McCloskey, 2 Rawle (Penn.) 381, opinion of GIBSON, C. J.; State *v.* Price, 50 Ala. 568; State *v.* DeGress, 53 Tex. 387. *Contra*, in Illinois; Donnelly *v.* People, 11 Ill. 552, 52 Am. Dec. 459; People *v.* Railroad Co. 13 Ill. 66; Wight *v.* People, 15 Ill. 417; Hay *v.* People, 59 Ill. 94.

See also Osgood *v.* Jones, 60 N. H. 543; Ames *v.* Kansas, 111 U. S. 449; Foster *v.* Kansas, 112 U. S. 201.

[2] Rex *v.* Dawes, 4 Burr. 2120; Rex *v.* Martin, 4 Burr. 2122; King *v.* Hythe, 5 A. & E. 832; King *v.* Peacock, 4 T. R. 684; King *v.* Stacy, 1 T. R. 1; Rex *v.* Sargent, 5 T. R. 467; Rex *v.* Parry, 6 Ad. & E. 810.

[3] People *v.* Waite, 70 Ill. 25; People *v.* Moore, 73 Ill. 132; People *v.* Callaghan, 83 Ill. 128; People *v.* Railroad Co. 88 Ill. 537; Commonwealth *v.* Cluley, 56 Penn. St. 270, 94 Am. Dec. 75; Commonwealth *v.* Jones, 12 Penn. St. 365; State *v.* Tolan, 38 N. J. L. 195; Commonwealth *v.* Reigart, 14 Serg. & R. (Penn.) 216; Commonwealth *v.* Arrison, 15 Serg. & R. 133; People *v.* Sweeting, 2 Johns. (N. Y.) 183; State *v.* Schnierle, 5 Rich. (S. C.) 299; State *v.* Fisher, 28 Vt. 714; State *v.* Smith, 48 Vt. 266; People *v.* Keeling, 4 Col. 129; State *v.* Bridge Co. 18 Ala. 678; State *v.* Mead, 56 Vt. 353.

[4] Informations in Michigan may be filed in the Supreme Court by the Attorney-General to test the title to public office, either upon his own relation or upon the relation of any private party, without applying for leave. How. Stat. § 8635. See People *v.* Knight, 13 Mich. 230.

Informations may be filed in the circuit courts by the prosecuting attorney on his own relation or that of any citizen of the county, without leave, or by any citizen of the county alone on obtaining special leave. How. Stats. § 8662, subsection 2. See

filed by the State, in its sovereign capacity, by its attorney-general, without leave.[1]

The remedy being thus usually a discretionary one, it is well settled that the court, upon application to it, will consider all of the circumstances of the case,[2] and leave to file the information will not be granted, although the defect in the defendant's title may be manifest, where it is evident that it will be of no avail, as where it is clear that the respondent will remain in office whatever may be the decision;[3] or where the proceeding could be of little practical benefit, as when the term of the disputed office will expire before the trial can be had,[4] or when the court is satisfied that, if re-instated, relator might legally and would be dismissed again immediately,[5] or when a new election is about to

Vrooman *v.* Michie, — Mich. —, 36 N. W. Rep. 749, 13 West. Rep. 159.

[1] Commonwealth *v.* Walter, 83 Penn. St. 105, 24 Am. Rep. 154; State *v.* Vail, 53 Mo. 97.

[2] State *v.* Tolan, 33 N. J. L. 195, where DEPUE, J. says: "In Rex *v.* Dawes and Rex *v.* Martin, 4 Burr. 2122, which are known as the Winchelsea Cases, Mr. Justice YATES says: 'In all questions of this kind, one great distinction is always to be attended to, that these are applications by common relators who have no inherent rights of prosecution, but by the statute of Queen Anne, are left to the discretion of the court, whether they shall be permitted to prosecute or not. In the exercise of this discretion the court is not merely to consider the validity or defect of the defendant's title, but the expediency of allowing or stopping the prosecution under all its circumstances.' In that case, Lord Mansfield, in the exercise of that discretionary power, viewed the facts of the case—*first*, in the light in which the relators, informing the court of the defect of title, appear, from their behavior and conduct, in relation to the subject-matter of their information previous to their making the application; *secondly*, in the light in which the application itself manifestly shows their motives, and the purpose which it is calculated to suit; and, *thirdly*, the consequences of granting the information; and the application for leave was denied, although it appeared clear that the title of both the defendants was invalid. King *v.* Parry, 6 A. & E. 810; Cole on Criminal Informations, 165; Grant on Corporations, 253; Willcock on Corporations, 476; State *v.* Utter, 2 Green, 84."

[3] State *v.* McCullough, — Nev. —, 18 Pac. Rep. 756.

[4] People *v.* Sweeting, 2 Johns. (N. Y.) 184; Commonwealth *v.* Reigart, 14 Serg. & R. (Penn.) 216; Proceedings may be dismissed where title has expired at time of trial. State *v.* Porter, 58 Iowa 19; State *v.* Jacobs, 17 Ohio 143; State *v.* Tudor, 5 Day (Conn.) 329, or nearly expired; State *v.* Ward, 17 Ohio St. 543.

[5] *Ex parte* Richards, 3 Q. B. Div. 368, 28 Eng. Rep. 322.

occur which will afford the parties full redress;[1] or where the results of granting the leave would be much more disastrous than if it were denied, as when the successful prosecution of the remedy would cause the suspension of all municipal government in a city for more than a year.[2] It must also appear that there is a reasonable probability of being able to sustain the proceedings.[3]

Where the court has granted a rule to show cause why the information should not be filed, its discretion is not exhausted, but upon the return to the rule the leave to file the information may be denied if it appears that the rule was improvidently granted.[4]

But where the court has once granted the leave to file the information, it is held that its discretion or power is at an end, and that the issues raised must then be tried and determined according to the strict rules of law and right as in other cases.[5]

The discretion to be exercised by the court is not, however, a purely arbitrary one, and while leave to file the information is not granted as a matter of course, it will not be arbitrarily refused, but the court will exercise a sound discretion, according to law.[6]

§ 485. **Effect of Acquiescence.**—Where the information is filed on the relation of a private individual, to oust the incumbent and install the relator, the court will take into consideration the conduct of the latter, and where he has himself concurred in the respondent's holding,[7] or where he has acquiesced in the very irregularities of which he complains,[8] or where he has delayed for an unreasonable time in presenting his claims,[9] the relief will not be granted him.

[1] State v. Schnierle, 5 Rich. (S. C.) 299; Commonwealth v. Athearn, 3 Mass. 285; People v. Harshaw, 60 Mich. 200.

[2] State v. Tolan, 33 N. J. L. 195.

[3] People v. Callaghan, 83 Ill. 128.

[4] Commonwealth v. Cluley, 56 Penn. St. 270, 94 Am. Dec. 75; Gilroy v. Commonwealth, 105 Penn. St. 484.

[5] State v. Brown, 5 R. I. 1. But see Vrooman v. Michie, 69 Mich. 42, 36 N. W. Rep. 749, 13 West. Rep. 159, where it is said "the court has discretion to proceed to judgment or not, according as the public interests do or do not require it, and will not do so where no good end will be subserved by it."

[6] People v. Waite, 70 Ill. 25.

[7] Queen v. Greene, 2 A. & E. (N. S.) 460.

[8] Queen v. Lockhouse, 14 L. T. R. (N. S.) 359; Dorsey v. Ansley, 72 Ga. 460; State v. Tipton, 109 Ind. 73.

[9] Queen v. Anderson, 2 A. & E. (N. S.) 740.

But where the proceeding is on behalf of the State, the lapse of time will not bar the action,[1] nor will it be defeated by the acquiescence of the relator.[2]

§ 486. **Will not lie where there is other plain and adequate Remedy.**—As a general rule, a court having the power to exercise jurisdiction in *quo warranto* proceedings will not exercise its jurisdiction where some other plain and adequate remedy exists.[3]

§ 487. **Is superseded by special statutory Remedy.**—So, as has been seen in an earlier section, where a special proceeding has been provided by law for the trial of contested claims to public office, such proceeding is usually held to supersede the remedy by *quo warranto*.[4]

§ 488. **Proceedings usually conducted in Name of the Public.**—While the proceedings in *quo warranto* are civil in their nature, they are so far criminal in their form that they are usually conducted in the name of the sovereign power, and, except where by statute private individuals are authorized to institute them, they are begun, carried on and controlled only by the public legal officer, as the attorney-general or prosecuting attorney.[5]

[1] Commonwealth *v.* Allen, 128 Mass. 308.

[2] State *v.* Sharp, 27 Minn. 38.

[3] State *v.* Wilson, 30 Kans. 661; State *v.* Marlow, 15 Ohio St. 114; State *v.* Taylor, 15 Ohio St. 137; State *v.* Hixon, 27 Ark. 398; Commonwealth *v.* Leech, 44 Penn. St. 332; People *v.* Turnpike Co. 2 Johns. (N. Y.) 190; Neely *v.* Wadkins, 1 Rich. (S. C.) L. 42; Lord Bruce's Case, 2 Strange 819; King *v.* Ponsonby, 1 Ves. Jr. 1, 7, 8; King *v.* Heaven, 2 Durn. & E. 772.

[4] See *ante*, § 215.

[5] Must be in name of Attorney-General in New Hampshire, Osgood *v.* Jones, 60 N. H. 543, and in Illinois, People *v.* Railroad Co. 88 Ill. 537; attorney-general or prosecuting-attorney may bring in Ohio, Res. Stats. § 6763; State *v.* Anderson, 45 Ohio St. 196, 12 N. E. Rep. 656; must be by attorney-general, in supreme court, in Michigan, Babcock *v.* Hanselman, 56 Mich. 27; Vrooman *v.* Michie, 69 Mich. 42, 36 N. W. Rep. 749, 13 West. Rep. 159. See also State *v.* Schnierle, 5 Rich. (S. C.) 299; Lindsey *v.* Attorney-general, 33 Miss. 508; State *v.* Stein, 13 Neb. 529; Robinson *v.* Jones, 14 Fla. 256; State *v.* Gleason, 12 Fla. 190; Barnum *v.* Gilman, 27 Minn. 466; Saunders *v.* Gatling, 81 N. C. 298; Bartlett *v.* State, 13 Kans. 99; Harrison *v.* Greaves, 59 Miss. 453.

"In this country the proceeding is conducted in the name of the State or of the people, according to the local form of indictments, and a departure from this form is a substantial and fatal defect." SWAYNE, J. in Territory *v.* Lockwood, 3 Wall. (U. S.) 236, citing Wright *v.* Allen, 2 Tex.

In certain cases the name of the attorney-general is used in proceedings virtually controlled by private parties, and by statute in some States the proceedings may be prosecuted entirely without his intervention.[1]

Where the office is one held under the government of the United States, proceedings in *quo warranto* must be prosecuted in the name of the United States and not in that of the State[2] or Territory[3] in which he exercises his functions.

§ 489. **Practice in instituting the Proceedings.**—The practice usually pursued in instituting proceedings in *quo warranto* is for the attorney-general to present to the court a petition or motion, based upon affidavits, for leave to file the information. A rule *nisi* is then made requiring the defendant to show cause why the information should not be filed against him. The defendant shows cause by affidavits, when, if sufficient, the proceedings will be discontinued, but if not, the rule for the information is made absolute.[4]

Upon leave being granted, the information is filed, and a summons issues to the defendant requiring him to appear and answer to the information; the order to show cause, or the defendant's appearance for that purpose, not being sufficient to give the court jurisdiction for the trial of the information[5] unless the formal process be waived.[6]

The practice of proceeding by the rule *nisi* is by no means uniform; and in some States the practice is to ask for leave in

158; Wight *v.* People, 15 Ill. 417; Donnelly *v.* People, 11 Ill. 552, 52 Am. Dec. 459; Eaton *v.* State, 7 Blackf. (Ind.) 65; Commonwealth *v.* Lex. & H. T. Co. 6 B. Mon. (Ky.) 398.

See also Wallace *v.* Anderson, 5 Wheat. (U. S.) 291.

[1] See State *v.* Thompson, 34 Ohio St. 365.

[2] State *v.* Bowen, 8 S. C. 400, a presidential elector.

[3] Territory *v.* Lockwood, 3 Wall. (U. S.) 236, a territorial judge.

[4] People *v.* Waite, 70 Ill. 25; Commonwealth *v.* Jones, 12 Penn. St. 356; United States *v.* Lockwood, 1 Pinn. (Wis.) 359; People *v.* Tibbitts, 4 Cow. (N. Y.) 383; People *v.* Richardson, 4 Cow. 103 and notes.

[5] People *v.* Richardson, 4 Cow. (N. Y.) 103; Commonwealth *v.* Sprenger, 5 Binn. (Penn.) 353; Rex *v.* Trinity House, Sid. 86; Attorney-General *v.* Railroad Co. 38 N. J. L. 282.

[6] *In re* County Judge, 33 Gratt. (Va.) 443; Hambleton *v.* People, 44 Ill. 458.

the first instance without the rule,[1] and, of course, where no leave is required, the information is filed at once.[2]

§ 490. **Interest of Relator.**—The State has always a sufficient interest to entitle it to call upon any one assuming to exercise the functions of a public office to show his title thereto,[3] and when the information is filed in its name by the attorney-general it will be presumed that he does so in his official capacity[4] and for the purpose of vindicating the rights of the State.[5]

But when the proceedings are instituted at the instance of a private individual, it must appear that he has some interest in the question,[6] for, as has been said, it would be a grievous rule which should compel a public officer to be called upon at any time to defend his title at the suit of every officious intermeddler.[7]

The interest of a citizen as a tax payer is sufficient to authorize him to institute an inquiry into the title of one who assumes to exercise the functions of a municipal officer.[8] All that the court requires in such cases, it is said, is to be satisfied that the relator is of sufficient responsibility, is acting in good faith and not vexatiously, and has not become disqualified by his own conduct with respect to the election or appointment he seeks to impeach.[9]

But where the proceeding is instituted by a private relator not only for the purpose of ousting the incumbent but also for

[1] Rule *nisi* is no longer required in Pennsylvania, where proceedings are by Attorney-General, Gilroy *v.* Commonwealth, 105 Penn. St. 484, nor in New Jersey, Attorney-General *v.* Railroad Co. 38 N. J. L. 282.

[2] As in Michigan, see *ante*, § 484, note 4. See also Taggart *v.* James, — Mich. —, 41 N. W. Rep. 262.

[3] State *v.* Dahl, 65 Wis. 510, 27 N. W. Rep. 343.

[4] Commonwealth *v.* Fowler, 10 Mass. 290.

[5] Commonwealth *v.* Walter, 83 Penn. St. 105, 24 Am. Rep. 154.

[6] State *v.* Vail, 53 Mo. 97, 109.

[7] Commonwealth *v.* Meeser, 44 Penn. St. 341.

[8] State *v.* Hammer, 42 N. J. L. 435; State *v.* Martin, 46 Conn. 479; Commonwealth *v.* Commissioners, 1 S. & R. (Penn.) 380. But *contra*, see Miller *v.* Palermo, 12 Kans. 14.

In Churchill *v.* Walker, 68 Ga. 681, it is held that every citizen of a town has such an interest in its municipal offices as will enable him to support a *quo warranto* proceeding to test the right of incumbents thereto. JACKSON, C. J., concurred *dubitante*.

In Commonwealth *v.* Meeser, 44 Penn. St. 341, it is held, though with much doubt, that the proceeding could be instituted by a private citizen who appeared to be acting in good faith and to represent a large and responsible number of other citizens.

[9] In State *v.* Hammer, *supra*.

the purpose of installing himself in the office, he must show not only the defects in the defendant's title but also that he was himself eligible,[1] that he has the legal title to the office[2] and that he has done nothing to acquiesce in the condition of which he complains.[3] Where both he and the respondent claim title through the same election, the relator cannot defeat the respondent's title by showing the invalidity of the election, because he thereby shows the frailty of his own title as well.[4]

§ 491. **The Requisites of the Information.**—Something of diversity of opinion exists as to the requisites of the information in *quo warranto* cases. While the proceedings are civil in their nature, they are usually criminal in their form, and the information in ordinary cases conforms more largely to the forms used in criminal proceedings, though the modern tendency is to assimilate it to the forms of civil proceedings.[5]

Originally and primarily a proceeding upon the part of the sovereign to oust and punish usurpers and not to induct the legally entitled officer, the remedy has been gradually extended by statutes until it has become, in many of the States at least, practically a statutory remedy by which one person claiming to be entitled to a public office seeks to oust the possessor and to install himself.[6] This fact explains much of the diversity in the rulings in the different States and between the earlier and the later cases.

Where the proceeding is instituted by and on behalf of the State in its sovereign capacity to test the title of an alleged usurper, much more of generality of allegation is tolerated than in cases where a private individual is the prosecuting party. The title to all offices being derived from the State, and it having an inherent right at any time to call upon one who assumes

[1] State *v.* Long, 91 Ind. 351; State *v.* Bieler, 87 Ind. 320.

[2] State *v.* Stein, 13 Neb. 529; State *v.* Boal, 46 Mo. 528; Miller *v.* Palermo, 12 Kans. 14; People *v.* Ryder, 12 N.Y. 433, State *v.* Tipton, 109 Ind. 73; Collins *v.* Huff, 63 Ga. 207; Hardin *v.* Colquitt, 63 Ga. 587.

[3] State *v.* Tipton, 109 Ind. 73.

[4] Collins *v.* Huff, 63 Ga. 207; Hardin *v.* Colquitt, 63 Ga. 589.

[5] People *v.* Clark, 4 Cow. (N. Y.) 95; State *v.* Commercial Bank, 10 Ohio 535; State *v.* Kupferle, 44 Mo. 154, 100 Am. Dec. 265.

[6] It is impracticable to set out here the statutes of the several states upon this subject. The practitioner in each state will of course consult his own.

to exercise the functions of a public office, to show his right to do so,[1] it is evident that no specific allegations of right or title on the part of the State can be necessary. It is often said, therefore, in such cases, that the State is under no obligation to show any thing on its part,[2] and that a charge in general language that the respondent has intruded into, usurped and unlawfully exercised the functions of a certain office is all that is required to put him to his answer.[3] The existence of the office and its description must be made to appear with reasonable certainty.[4] The State is not bound to allege or show that it has made a demand for the office.[5] In all these cases, the State seeks to recover, not so much upon the strength of its own title as upon the weakness or defects in the respondent's title, which it calls upon him to establish. Defective allegations in the information should be taken advantage of by special demurrer.[6] The information may be amended and merely formal defects will be ignored.[7]

But where, on the other hand, the proceedings are instituted by or on behalf of a private relator, and are designed not only to oust the respondent but also to install the relator as the person legally entitled to the office, different considerations obviously apply. In these cases, which are largely the creatures of statute, it is usually held that the information must state clearly and

[1] "The State has always a right to demand of any one assuming a public office or franchise to show his authority." COOLEY, J., in People v. DeMill, 15 Mich. 164, 181. See to like effect: People v. Thacher, 55 N. Y. 525, 14 Am Rep. 312; State v. Gleason, 12 Fla. 265.

[2] "The people are not required to show anything." BREESE, J., in People v. Ridgley, 21 Ill. 67. "The state is bound to make no showing." CAMPBELL, J., in People v. Mayworm, 5 Mich. 146, 148.

[3] State v. Dahl, 65 Wis. 510, 518, citing State v. Messmore, 14 Wis 115, 116; People v. Pease, 30 Barb. (N. Y.) 588; State v. Goetze, 22 Wis. 303; State v. Tierney, 23 Wis 430; State v. Hoelflinger, 35 Wis. 393; State v. Pierce, 33 Wis. 93; State v. Purdy, 36 Wis. 213;

See also People v. Woodbury, 14 Cal. 43; People v. Abbott, 16 Cal. 358; People v. Miles, 2 Mich. 348; People v. Ridgley, 21 Ill. 67; Clark v. People, 15 Ill. 217.

[4] People v. DeMill, 15 Mich. 164; People v. Ridgley, 21 Ill. 67.

[5] State v. McDiarmid, 27 Ark. 176.

[6] State v. Boal, 46 Mo. 528; Territory v. Lockwood, 3 Wall. (U. S.) 236; Regina v. Smith, 2 M. & Rob. 109; Regina v. Law, 2 M & Rob. 197; People v. Palmer, 14 Cal. 43; Commonwealth v. Commercial Bank, 28 Penn. Stat. 383.

[7] Commonwealth v. Commercial Bank, 28 Penn. St. 383; People v. Richardson, 4 Cow. (N. Y.) 109 note.

specifically the facts which show that the relator is entitled to the office; it must, therefore, show that he was eligible,[1] that he possessed all the qualifications required by law,[2] and that he was duly elected to the office.[3] Defects in this respect render the information obnoxious to a demurrer.[4]

The essentials of an information, in these cases now under consideration, are said to be "that it contain such a plain statement of the facts which constitute the grounds of the relator's claim as makes it affirmatively appear that he has title to the office in controversy, so as to 'show his interest in the matter.'"[5]

§ 492. **The Defendant's Pleadings.**—The defendant, by his plea, must either deny that he has or claims any title to the office in question, or he must show that his title to it is perfect. In other words he must either disclaim or justify. He cannot plead either not guilty or *non usurpavit*.[6]

If he seeks to justify, he must do so fully and specifically. It is not enough for him to allege generally that he was duly elected or appointed, but he must show, upon the face of his plea, such facts as, if true, will vest in him the legal title to the office.[7]

[1] State *v.* Stein, 13 Neb. 529; State *v.* Boal, 46 Mo. 528; Miller *v.* Palermo, 12 Kans. 14; People *v.* Ryder, 12 N. Y. 433.

[2] State *v.* Long, 91 Ind. 351; State *v.* Bieler, 87 Ind. 320; Reynolds *v.* State, 61 Ind. 392.

[3] State *v.* Boal, 46 Mo. 528.

[4] State *v.* Boal, 46 Mo. 528.

[5] Jones *v.* State, 112 Ind. 194, 11 West. Rep. 243.

[6] State *v.* Utter, 14 N. J. L. 84; State *v.* Barron, 57 N. H. 498; Illinois, &c., Ry. Co. *v.* People, 84 Ill. 426; Clark *v.* People, 15 Ill. 217; State *v.* Gleason, 12 Fla. 236; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; State *v.* Ashley, 1 Ark. 513; State *v.* Harris, 3 Ark. 570, 36 Am. Dec. 467; People *v.* Utica Ins. Co. 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

[7] State *v.* Harris, 3 Ark. 570, 36 Am. Dec. 467; Clark *v.* People, 15 Ill. 217; State *v.* Jones, 16 Fla. 306; People *v.* Richardson, 3 Cow. (N.Y.) 113, note.

In pleading an election to the office of director, by the stockholders of a corporation, defendant must show that the election was held agreeebly to law, and in conformity with and in pursuance of the ordinances and regulations of the governing board of the corporation, and that at such election he received a majority of the legal votes; if his claim is by virtue of an election by the board of directors, to supply a vacancy therein, he must show the existence of a board competent to elect, and that a vacancy existed therein and how such vacancy arose, and his subsequent election to fill it. But his pleadings need only show a *prima facie* legal right to the office; if his

And not only must he show that he possessed the necessary qualifications at the time of his election or appointment, but it is held that he must go further and show the continued existence of every qualification necessary to the enjoyment of the office. The law makes no presumption of their continuance.[1]

It is no defense to him, when questioned by the State, to show that the relator is not entitled to the office. He is called upon to make good his own title, and if he can not do that, it is of no avail to him that the relator's title is equally defective.[2]

Where, however, the proceeding is instituted, under a statute, by a private relator who claims the office, and who, as has been seen,[3] must show his own title thereto, the rule is different. "No private citizen," says CAMPBELL, J., "has any right to compel an officer to show title, until he has shown his own right, in the first place, to attack it. In such a controversy, it is manifest that a plea showing that relator has no rights is as appropriate as one setting up title in the respondent. Either, if established, is a complete defence."[4]

The defendant may interpose as many defences as he has,[5] or he may justify in part and disclaim in part.[6]

The plea need not be verified unless required by statute.[7]

pleadings show an election by electors acting under color of legal right, it is sufficient, and if the electors were not possessed of the proper qualifications, this must be shown by this state; State *v.* Harris, 3 Ark. 570, 36 Am. Dec. 460.

Defendant's pleadings are insufficient if they do not show that he qualified under the appointment by which he claims; State *v.* McCann, 88 Mo. 386.

In showing title to an elective office, a plea is sufficient which shows the authority for holding the election, the fact that it was held, and that the respondent received the largest or the requisite number of votes. It is not necessary to allege that the canvassers strictly performed their duty in all respects. People *v.* VanCleve, 1 Mich. 362. Neither is it necessary that respondent should allege his citizenship or other qualifications for the office. The fact of his election is enough to call upon the prosecution to show its invalidity by facts in reply. Attorney-General *v.* McIvor, 58 Mich. 516.

[1] People *v.* Mayworm, 5 Mich. 146; citing State *v.* Beecher, 15 Ohio 723; People *v.* Phillips, 1 Denio (N. Y.) 388; State *v.* Harris, 3 Ark. 570, 36 Am. Dec. 460; State *v.* Ashley, 1 Ark. 513.

[2] Clark *v.* People, 15 Ill. 217.

[3] See *ante*, § 490.

[4] Vrooman *v.* Michie, 69 Mich. 42, 36 N. W. Rep. 749, 13 West. Rep. 159.

[5] People *v.* Stratton, 25 Cal. 242.

[6] People *v.* Richardson, 4 Cow. (N. Y.) 113 note.

[7] Attorney-General *v.* McIvor, 58 Mich. 516.

§ 493. **The Replication.**—The plea of the respondent having been put in, the State may then reply. This replication sets forth the particular acts, omissions or defects upon which the State relies to controvert or defeat the claims of title made by the respondent.[1]

§ 494. **The Burden of Proof.**—1. When the respondent is called upon at the suit of the State to show by what warrant he assumes to exercise the functions of a public office, the burden of proving his title rests upon the respondent. As has been seen,[2] the State on its part is not required in the first instance to show anything, and the respondent must either disclaim or justify. The burden of proof is, therefore, upon him.[3]

When, however, the respondent has made out a *prima facie* right to the office, as by showing that he was declared duly elected by the proper officers or has received a certificate of election or holds the commission of appointment by the executive to the office in question, the burden of proof shifts. The certificate or returns of the election officers, as has been seen,[4] are *prima facie* evidence of the title, but they are not conclusive, and while they may not be impeached in a collateral inquiry, yet in a direct proceeding, like *quo warranto*, to determine the title, it is entirely competent to go behind the returns and ascertain the true condition of affairs.[5] The burden of impeaching the returns must rest upon the State.[6] But when this has been done and the returns are rejected, then the respondent is bound to establish his title by other proof, and if he fails to do so, the State is entitled to a judgment against him.[7]

[1] Commonwealth *v.* Commercial Bank, 28 Penn. St. 383; State *v.* Commercial Bank, 10 Ohio 535; Attorney-General *v.* Petersburg R. R. Co. 6 Ired. (N. C.) 456.

[2] See *ante*, § 491.

[3] People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; People *v.* Utica Ins. Co. 15 Johns. (N. Y.) 353, 8 Am. Dec. 243; People *v.* Thompson, 21 Wend. (N. Y.) 252; People *v.* Pease, 27 N. Y. 63, 84 Am. Dec. 242; State *v.* McCann, 88 Mo. 386.

[4] See *ante*, § 212.

[5] People *v.* Pease, 27 N. Y. 63, 84 Am. Dec. 242; People *v.* Seaman, 5 Denio (N. Y.) 409; People *v.* Ferguson, 8 Cow. (N. Y.) 102; People *v.* Van Slyck, 4 Cow. (N. Y.) 297; People *v.* Vail, 20 Wend. (N. Y.) 12; Attorney-General *v.* Megin, 63 N. H. 379.

[6] People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

[7] People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

2. When the proceeding is instituted in behalf of a private individual, and has for its object not only to oust the respondent but to install the relator, the burden of proving the relator's title rests upon himself. Even though the respondent's title may be impeached, this does not establish the relator's right,[1] but before there can be a judgment in his favor he must show that he is legally entitled to receive the office upon the respondent's ouster.[2]

§ 495. **Trial by Jury.**—Trial by jury is not a matter of right in *quo warranto* cases,[3] but is provided for by the statutes of many of the States.[4]

§ 496. **The Judgment.**—Where the defendant disclaims, the State is entitled to an immediate judgment of ouster. If the issues were found in favor of the respondent, the judgment, at common law, was that he be allowed his office.[5]

Where, however, the defendant made default[6] or the issues were decided against him, the judgment, at common law, was that the defendant be fined for his usurpation and be ousted from his office.[7]

Under the modern statutes where the proceedings are instituted by the State, or by a private individual, not only to oust the respondent but also to install the relator, the judgment is ordinarily more comprehensive. In such a case the respondent may be ousted without the relator's being installed,[8] but ordina-

[1] People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

[2] People *v.* Lacoste, 87 N. Y. 192; Miller *v.* English, 21 N. J. L. 317; State *v.* Norton, 46 Wis. 332; State *v.* Hunton, 28 Vt. 594.

[3] See State *v.* Johnson, 26 Ark, 281; State *v.* Lupton, 64 Mo. 415, 27 Am. Rep. 253; State *v.* Vail, 53 Mo. 97; State *v.* Johnson, 26 Ark. 281.

But see White *v.* Doesburg, 16 Mich. 133; State *v.* Allen, 5 Kans. 213; State *v.* Burnett, 2 Ala. 140.

[4] In New York, see People *v.* Albany, &c. R. R. Co. 57 N. Y. 161. In Minnesota, see State *v.* Minnesota Thresher Mfg. Co. — Minn. —, 41 N. W. Rep. 1020.

[5] High, Ex. Rem. 745.

[6] In Michigan it was held that on the default of the respondent the court could give judgment of ouster, but could not determine the right of the relator to the office. People *v.* Connor, 13 Mich. 238. But see Attorney-General *v.* Barstow, 4 Wis. 567.

[7] High, Ex. Rem. §§ 745, 747.

[8] The judgment of ouster against the respondent does not of itself establish relators' right, but he must prove his title. People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

rily the judgment determines the rights both of the respondent and the relator, finding one to be and the other not to be entitled to the office according to the facts.[1]

Where, under the statutes, the relator is entitled to costs upon a judgment of ouster, the fact that the term of office of the usurper has expired since the beginning of the proceeding[2] or that he has vacated[3] or resigned[4] the office, does not ordinarily operate to prevent the rendition of the judgment, but the court will proceed to settle the rights of the parties and to award judgment.

The imposition of a fine is usually a matter resting in the sound discretion of the court, and where no improper motives are shown it will usually be merely nominal.[5]

§ 497. **Effect of the Judgment.**—"It is foreign to the objects and functions of the writ of *quo warranto*," says SMITH, J., in a leading case in Wisconsin, "to direct any officer what to do. It

If relator's right is in doubt, judgment may be given against the respondent, leaving relator's title to be settled in another proceeding. People *v.* Phillips, 1 Denio (N. Y.) 388.

"The title of a relator can only be adjudicated when, upon the facts lawfully established in the cause, his right necessarily appears from the finding. It is no part of the principal issue in the cause, and disproving respondent's right does not establish his. People *v.* Connor, 13 Mich. 238; People *v.* Miles, 2 Mich. 348; People *v.* Knight, 13 Mich. 230." People *v.* Molitor, 23 Mich. 341.

[1] In Michigan, the statute (H. S. § 8638) provides: "In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party so entitled; or only upon the right of the defendant, as justice shall require."

[2] People *v.* Hartwell, 12 Mich. 508, 86 Am. Dec. 70; People *v.* Loomis, 8 Wend. (N. Y.) 396, 24 Am. Dec. 33. In the latter case NELSON, J., said: "The remedy must be entirely fruitless in this case, as the term of office of the defendants has long ago expired. If application had been made for the *quo warranto*, we should have denied it, as was done in the People *v.* Sweeting, 2 Johns. 184. Although judgment of ouster will be unavailing, and the damages, if a suggestion be made, must be very trifling, still I am of opinion we can not suspend the judgment, as the revised statutes are imperative, and give to the prevailing parties costs."

To like effect: Hammer *v.* State, 44 N. J. L. 667; State *v.* Pierce, 35 Wis. 93.

But *contra*, see State *v.* Porter, 58 Iowa 19, and see State *v.* Jacobs, 17 Ohio 143, and State *v.* Ward, 17 Ohio St. 543.

[3] King *v.* Williams, 1 Black W. 93. See also State *v.* Taylor, 12 Ohio St. 130.

[4] King *v.* Warlow, 2 M. & S. 75.

[5] State *v.* Brown, 5 R. I. 1.

is never directed to an *officer* as such, but always to the *person*—not to dictate to him what he shall do in his office, but to ascertain whether he is constitutionally and legally authorized to perform any act in or exercise any functions of the office to which he lays claim."[1]

It is, therefore, held in that case "that a judgment of ouster against the incumbent of an office in no way affects the office. Its duties are the same, whether the original incumbent remains in it, or whether another is substituted in his place. If a removal from an office by a judgment of ouster against the incumbent would affect the office itself, so also would a removal by the death of the incumbent or his resignation. In all these cases we think the office is in no way affected. It remains as it was before the removal."[2]

But while the office thus remains the same, the legal effect of the judgment of ouster upon the pretended officer is to completely remove him from the office, to render null and void all his pretended official acts after the rendition of the judgment, to deprive him of all further official authority,[3] and to conclude him from again asserting title to the same office by virtue of any prior election or appointment.[4] But a judgment of ouster does not affect one who was not in any way a party to the action.[5] Hence while subordinates or assistants appointed by or holding under the deposed officer, and whose title is dependent upon his, lose their offices when his ceases,[6] yet where an assistant does not derive his office from, or in any manner hold under the deposed officer, the judgment against the latter in no way concludes the former.[7]

§ 498. **Damages for Usurpation.**—The awarding of damages to the relator against the respondent for the unlawful usurpation and detention of the office was no part of the functions of the

[1] Attorney-General *v.* Barstow, 4 Wis. 567, at p. 773.

[2] Attorney-General *v.* Barstow, 4 Wis. 567, at p 659.

[3] State *v.* Johnson 40 Ga. 164; King *v.* Serle, 8 Mod. 332.

[4] King *v.* Clarke, 2 East 75.

[5] People *v.* Murray, 73 N. Y. 535; State *v.* Camden, 47 N. J. L. 454; Campbell *v.* Hall, 16 N. Y. 575.

[6] King *v.* Lisle, Andrews 163; King *v.* Hebden, Andrews 389; King *v.* Grimes, 5 Burr. 2599; King *v.* Mayor, 5 D. & E. 66; People *v.* Anthony, 6 Hun (N. Y.) 142; People *v.* Murray, 73 N. Y. 535.

[7] People *v.* Murray, 73 N. Y. 535.

common law proceeding, but the modern statutes have in some cases so enlarged its scope as to permit the relator to claim and recover such damages.[1]

When so awarded, they are determined by substantially the same rules which prevail in other cases. The relator's right to damages covers the whole period of his exclusion, and the extent of the recovery is to be measured by what he has lost.[2] Where a salary is attached to the office, it would ordinarily furnish the measure,[3] but where there is no salary the revenue of the office would be ascertainable by other means.[4]

The fact that the respondent acted in good faith would not prevent the relator from recovering the actual damages sustained,[5] nor would he be compelled to allow the respondent to set off the value of the latter's services in performing the duties during the time he held the office.[6]

§ 499. **Costs.**—The same statutes usually provide for the recovery of costs by the successful party.[7]

[1] Thus in Michigan, by H. S., § 8641–3, the relator may at any time within a year from the judgment in his favor, file a suggestion as to damages, which shall be tried, and the relator "shall be entitled to recover the damages which he may have sustained by reason of the usurpation." People *v.* Miles, 2 Mich. 350; People *v.* Hartwell, 12 Mich. 522, 86 Am. Dec. 70; People *v.* Cicott, 15 Mich. 327; People *v.* Miller, 24 Mich. 458, 9 Am. Rep. 131; Comstock *v.* Grand Rapids, 40 Mich. 397; People *v.* Sackett, 15 Mich. 315.

[2] People *v.* Miller, 24 Mich. 458, 9 Am. Rep. 131.

[3] See People *v.* Miller, 24 Mich. 458, 9 Am. Rep. 131; Auditors *v.* Benoit, 20 Mich. 176, 4 Am. Rep. 382, Dolan *v.* Mayor, 68 N. Y. 274, 23 Am. Rep. 168; Matthews *v.* Supervisors, 53 Miss. 715, 24 Am. Rep. 715; McCue *v.* Wapello County, 56 Iowa 698, 41 Am. Rep. 134; Commissioners *v.* Anderson, 20 Kans. 298, 27 Am. Rep. 171; McVeany *v.* Mayor, 80 N. Y. 185, 36 Am. Rep. 609.

[4] See Stuhr *v.* Curran, 15 Vroom (N. J.) 181, 43 Am. Rep. 353.

[5] People *v.* Miller, 24 Mich. 458, 9 Am. Rep. 131.

[6] People *v.* Miller, 24 Mich. 458, 9 Am. Rep. 131.

[7] Peter *v.* Blue; 40 Kans. —, 20 Pac. Rep. 852; Moss *v.* Patterson, 40 Kans. 720, 20 Pac. Rep. 457.

NEVADA COMPILED LAWS 1929

CONTAINING ALL STATUTES OF A GENERAL NATURE ENACTED BY THE LEGISLATURE OF THE STATE OF NEVADA FROM 1861 TO 1929, INCLUSIVE, TOGETHER WITH ANNOTATIONS FROM THE DECISIONS OF THE SUPREME COURT OF NEVADA CONTAINED IN VOLUMES 1 TO 51, INCLUSIVE, OF THE NEVADA REPORTS AND FROM ALL DECISIONS OF THE COURTS OF THE UNITED STATES CONSTRUING NEVADA STATUTES.

ALSO A DIGEST OF NEVADA REPORTS, VOLUMES 33-51

IN SIX VOLUMES

VOLUME IV

(SECTIONS 8370 TO 9930)

COMPILED AND ANNOTATED
BY
CURTIS HILLYER

SAN FRANCISCO
BENDER-MOSS COMPANY
LAW PUBLISHERS AND BOOKSELLERS
1930

CHAPTER 71.

QUO WARRANTO.

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§ 9228. Procedure in supreme court same as in district court.—Jury.
§ 9229. Appeal does not stay judgment of ouster.

§ 9203. ACTION IN THE NAME OF STATE, AGAINST WHOM. § 714. A civil action may be brought in the name of the state:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, or a franchise, within this state, or an officer in a corporation created by the authority of this state.

2. Against a public officer, civil or military, who does or suffers an act which, by the provisions of law, works a forfeiture of his office.

3. Against an association of persons who act as a corporation within this state without being legally incorporated.

California Code of Civil Procedure, § 803.

Mandamus to compel admission to office, § 9340, post.

Statement in quo warranto held sufficient.—Greeley v. Holland, 14 Nev. 320, 323.

The affirmative of the issue and the burden of proof is on the state.—State v. Haskell, 14 Nev. 209, 210.

The question of the constitutionality of the statute increasing the number of district judges to four and the right of respondent to hold the office of district judge under that statute, can only be raised by a direct proceeding of quo warranto and is not properly before the court by a proceeding for a writ of prohibition.—Walcott v. Wells, 21 Nev. 47, 37 Am. St. Rep. 478, 9 L. R. A. 59, 24 Pac. 367.

Collateral questions will not be inquired into on quo warranto.—State v. Horton, 19 Nev. 199, 8 Pac. 171.

An information in the nature of quo warranto, filed against the incumbent of an office for the sole purpose of having a judicial determination as to who possesses the power of appointment to such office, it being

apparent that defendant will remain in office whatever will be the decision, will be dismissed.—State v. McCullough, 20 Nev. 154, 18 Pac. 756.

Stats. 1865, p. 164, section 14, as to propriety of allowing relator to prosecute the action in his own name, cited in State v. Torreyson, 21 Nev. 517, 34 Pac. 870.

Under the common law any information in the nature of quo warranto will lie only for usurping a public office, and is never exercised in the case of a mere agency or employment determinable at the will of the employer.—State v. Cronan, 23 Nev. 437, 446, 49 Pac. 41.

The provisions of section 1, Stats. 1865, p. 164, while it extends the remedy to any office in a corporation created under the laws of this state, the question of what constitutes an office within the settled rule is not affected by the statute.—State v. Cronan, 23 Nev. 437, 49 Pac. 41.

Under the provisions of section 1, Stats. 1865, p. 164, it was *held:* A private individual may file an information against any "person unlawfully holding or exercising any public office or franchise or when any persons act as a corporation without being authorized by law, or when they exercise powers not conferred by law," and such proceeding is the proper remedy to determine questions involving the corporate existence or the constitutionality of an act incorporating a city, or the right to exercise in any manner the functions of a city council.—State v. Osburn, 24 Nev. 187, 191, 51 Pac. 837.

When the attorney-general refuses to bring an action, a person claiming election to a state office may, by leave of court, bring quo warranto on his own relation, where he has no other remedy.—State v. Sadler, 25 Nev. 131, 165, 83 Am. St. Rep. 573, 58 Pac. 284; State v. Baker (Josephs), 35 Nev. 1, 126 Pac. 345.

Quo warranto is the only remedy a person, who may be duly elected to a state office, has to oust one unlawfully holding the same and have himself instituted.—State v. Sadler, 25 Nev. 131, 83 Am. St. Rep. 573, 58 Pac. 284; State v. Baker (Josephs), 35 Nev. 1, 126 Pac. 345.

Quo warranto proceeding by the state, on the relation of a city against a foreign corporation, for failure to comply with its franchise, instituted by the attorney-general under this section and §§ 9204, 9205, 9206, 9210, post, as to quo warranto, *held* to be an action by the state, and not the city, preventing removal for diversity of citizenship; the state not being a citizen.—State v. Reno Traction Co., 41 Nev. 405, 408, L. R. A. 1918D, 847, 171 Pac. 375.

See, also, citations under Constitution, § 112, ante.

§ 9204. ACTION IN THE NAME OF STATE, AGAINST A CORPORATION. § 715. A like action may be brought against a corporation:

1. When it has offended against a provision of an act by or under which it was created, altered, or renewed, or any act altering or amending such acts.

2. When it has forfeited its privileges and franchises by a nonuser.

3. When it has committed or omitted an act which amounts to a surrender or a forfeiture of its corporate rights, privileges, and franchises.

4. When it has misused a franchise or privilege conferred upon it by law, or exercised a franchise or privilege not so conferred.

Against telegraph company, § 7672, ante.

See State v. Reno Traction Co., 41 Nev. 405, L. R. A. 1918D, 847, 171 Pac. 375, under § 9203, ante.

§ 9205. ATTORNEY-GENERAL TO BEGIN ACTION, WHEN. § 716. The attorney-general, when directed by the governor, shall commence any such action; and when, upon complaint or otherwise, he has good reason to believe that any case specified in the preceding section can be established by proof, he shall commence an action.

See State v. Reno Traction Co., 41 Nev. 405, L. R. A. 1918D, 847, 171 Pac. 375, under § 9203, ante.

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RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ZANE MICHAEL FLOYD,
#1619135

Defendant.

CASE NO: 99C159897

DEPT NO: XVII

STATE'S RESPONSE TO DEFENDANT'S MOTION TO STAY PROCEEDINGS

DATE OF HEARING: JULY 9, 2021
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Motion to Stay Proceedings.

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE RELEVANT TO THIS MOTION

On April 14, 2021, Defendant Zane Floyd filed a Motion to Transfer Case Under EDCR 1.60(H) and a Motion to Disqualify the Clark County District Attorney's Office. The following day, on April 15, 2021, the State filed a Motion for the Court to Issue Second Supplemental Order of Execution and Second Supplemental Warrant of Execution.

On May 14, 2021, the district court entertained oral arguments on both motions. The court orally indicated that it was going to deny both of Defendant's motions. An Order was filed on May 18, 2021 denying the Motion to Disqualify the Clark County District Attorney's Office. On May 19, 2021, Defendant filed a Motion to Reconsider regarding the disqualification of the Clark County District Attorney's Office. On June 17, 2021, the court entered an order denying the Motion to Reconsider.

An Order was filed on June 4, 2021 denying the Motion to Transfer Case Under EDCR 1.60(H). Then on June 9, 2021, Defendant filed an Objection to Order denying the transfer. For the purposes of the Objection to Order, the chief criminal judge heard arguments and again denied Defendant's motion to have the case transferred.

In addition to the above two motions, Defendant also filed a motion seeking to strike the State's request to seek an order of execution and a warrant of execution. Argument took place on June 4, 2021. On June 7, 2021, the district court issued a Decision and Order against Defendant's Motion to Strike. As a result of the decision, the State submitted a Second Supplemental Order of Execution for the court's signature, which the court signed and filed on June 9, 2021. Pursuant to the Order, the execution was set to commence the week of July 26, 2021.

On June 24, 2021, Defendant filed a Petition for Writ of Mandamus and Prohibition with the Nevada Supreme Court. The only issue raised in the Petition for Writ of Mandamus and Prohibition is challenging the Clark County District Attorney's Office's ability to remain on this case.

On the same day as the filed Petition, Defendant also filed a Motion to Stay pending the resolution of the Nevada Supreme Court proceedings. The State now objects to a stay of these proceedings.

ARGUMENT

In deciding whether to issue a stay, this court generally considers the following factors:
(1) Whether the object of the petition will be defeated if the stay is denied;
(2) Whether petitioner will suffer irreparable or serious injury if the stay is denied;
(3) Whether respondent will suffer irreparable or serious injury if the stay is granted; and
(4) Whether petitioner is likely to prevail on the merits in the appeal or writ petition.
See NRAP 8(c); Kress v. Corey, 65 Nev. 1 (1948).

Defendant is without basis calling for the Clark County District Attorney's Office to be removed from proceeding with this case. Defendant is making this argument even though his lawful conviction was obtained in 2000, where none of the individuals complained of now were even part of the Office.

A stay is not warranted here because Defendant's only goal is to have the Clark County District Attorney's removed. Statutorily however, NRS 176.505 mandates that an Order of Execution to be issued by a judge when there are no legal reasons prohibiting it. NRS 176.495 calls for a warrant of execution to be ordered. These are statutorily mandated provisions that are required by statute. Thus, no matter who is handling the case, the statutes explain the actions that must take place. Therefore there is no reason to stay this matter pending Defendant's Petition for Writ of Mandamus and Prohibition.

Defendant should also not be able to continually petition to the appellate court as a tactic to delay his execution. The Legislature has specifically provided for statutory guidelines on whether to stay a case involving the death penalty. NRS 176.486 allows for a court of proper jurisdiction to stay a sentence of death when certain postconviction petitions are filed. NRS 176.487 mandates that a proper postconviction petition or appeal shall be a reason for a stay. NRS 176.489 states that the stay should be lifted if the court denies the petition. Basically, these are the legislative reasons to enter a stay in a case of this nature.

Instead, Defendant wishes to have this matter delayed by finding obscure issues to litigate. There is an Order of Execution in place, and this Court still has up for consideration on whether to sign the Warrant of Execution.

Finally, and most importantly, the chances of success are unlikely. NRS 176.495 calls for the Attorney General or the district attorney of the county in which the conviction was had to cause the warrant to be drawn. This is the plain language of the statute. The statute does not take into consideration any of the manufactured reasons that Defendant advances. This Court has already ruled against Defendant's multiple claims, including disqualification of the Clark County District Attorney's Office, thus clearly this Court does not believe that he would prevail on his underlying claim.

Throughout time there have assuredly been individuals who oppose the death penalty. However, the death penalty in Nevada exists as a possible and lawful punishment. The fact that this District Attorney's Office is carrying out this function, although people such as the Defendant wish to abolish the death penalty, is not a sufficient reason to stay these proceedings.

CONCLUSION

The State requests that this Court deny Defendant's request to stay his proceedings.

DATED this 2nd day of July, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #10539

CERTIFICATE OF ELECTRONIC TRANSMISSION

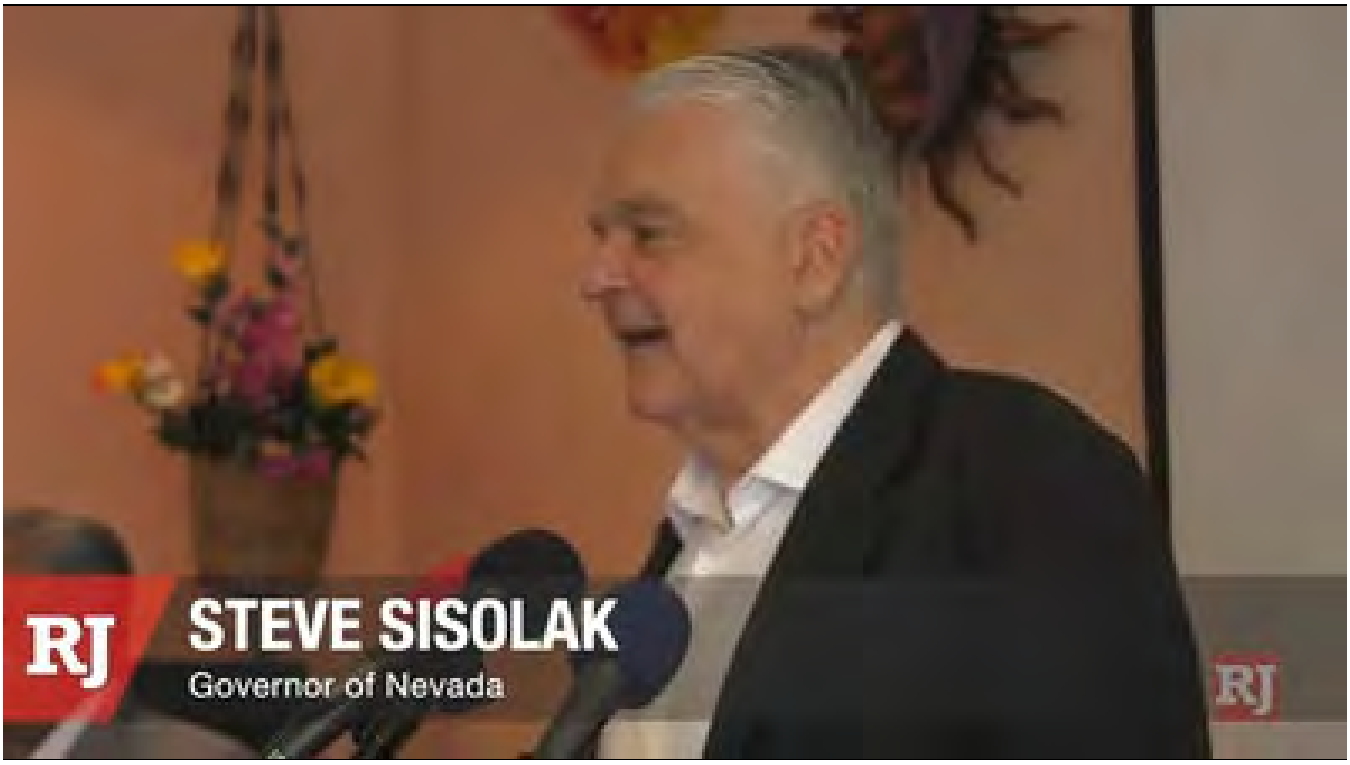
I hereby certify that service of the above and foregoing State's Response to Defendant's Motion to Stay Proceedings, was made this 2nd day of July, 2021, by electronic transmission to:

BRAD LEVENSON
Email: brad_levenson@fd.org
DAVID ANTHONY
Email: david_anthony@fd.org;
Ecf_nvchu@fd.org

BY *J. Garcia*
Employee, District Attorney's Office

AC//jg

Sisolak: Death penalty repeal won't come up until 2023



Nevada governor, Clark County DA discuss death penalty. (Elliot Bauman/Las Vegas Review-Journal)

By Rory Appleton Las Vegas Review-Journal

July 7, 2021 - 11:51 am

Gov. Steve Sisolak waded further into the debate over the future of the death penalty in Nevada during an exchange Wednesday with Clark County District Attorney Steve Wolfson at the Hispanics in Politics breakfast in downtown Las Vegas.

During a question-and-answer session following his speech, Sisolak was asked whether a bill to abolish the death penalty that failed during the 2021 could be revisited during a special session or the 2023 regular session.

"We're not going to have it in a special session," Sisolak responded. "Next session? The death penalty is a very emotional issue on both sides of that issue."

The governor and Democratic legislative leaders decided to kill the bill ahead of the legislative deadline, much to the consternation of the state's progressive advocacy groups and some fellow Democrats.

The repeal of the death penalty was approved on a party-line vote in the Assembly in April, but died in the Senate Judiciary Committee after failing to meet a legislative deadline.

Sisolak said Wednesday the pandemic-constrained structure of the last session did not allow for enough debate on such a complex issue, adding that he wants to hear from the families of crime victims and from incarcerated individuals as part of a more robust public testimony.

The governor reiterated his belief that the death penalty should be used less often and only in particularly heinous cases, such as crimes against children at a school.

Wolfson then interjected from the middle of the crowded room, telling the governor "you and I are more in agreement than disagreement on this issue."

The matter was made more controversial by the fact that state Senate Majority Leader Nicole Cannizzaro and Senate Judiciary Chair Melanie Scheible, both D-Las Vegas, work full-time for Wolfson as prosecutors. At least two lawsuits challenging their dual service are pending before the Nevada Supreme Court.

Wolfson, who testified against the death penalty repeal during the session, then took the public input question further: Why not a referendum on the death penalty?

"Let's bring this issue before the voters," Wolfson said. "Because we all hear that more Nevadans still favor the death penalty, but that number is growing smaller and smaller... rather than have just a few hours of testimony over a couple of days, let's bring it to the voters."

Replied Sisolak: "That's one way to look at it, and I don't necessarily disagree." He agreed that public sentiment on the issue is changing.

"However we get more input, whether that's through a referendum or that's through working groups as we move forward, we need more input from the citizenry in order to make a firm, positive decision," the governor said.

During his speech prior to taking questions, Sisolak echoed familiar themes from other Clark County appearances over the past month: The importance of getting vaccinated, and a rundown of major bills signed into law that included the state public health care option, a mining tax for K-12 education and voting rights protections.

He also touted a section of Assembly Bill 376 that will give UNLV's Immigration Clinic $500,000, which director Michael Kagan told the room would be used to expand to an off-campus office and further support efforts to provide free legal advice to immigrants facing deportation or other proceedings.

Kagan said Nevada is only the seventh state, and first political swing state, to allocate money for this purpose.

Contact Rory Appleton at rappleton@reviewjournal.com or 702-383-0276. Follow @RoryDoesPhonics on Twitter.

Working hard for the right to kill

Martha E. Menendez July 7th, 2021 at 2:00 AM Opinion

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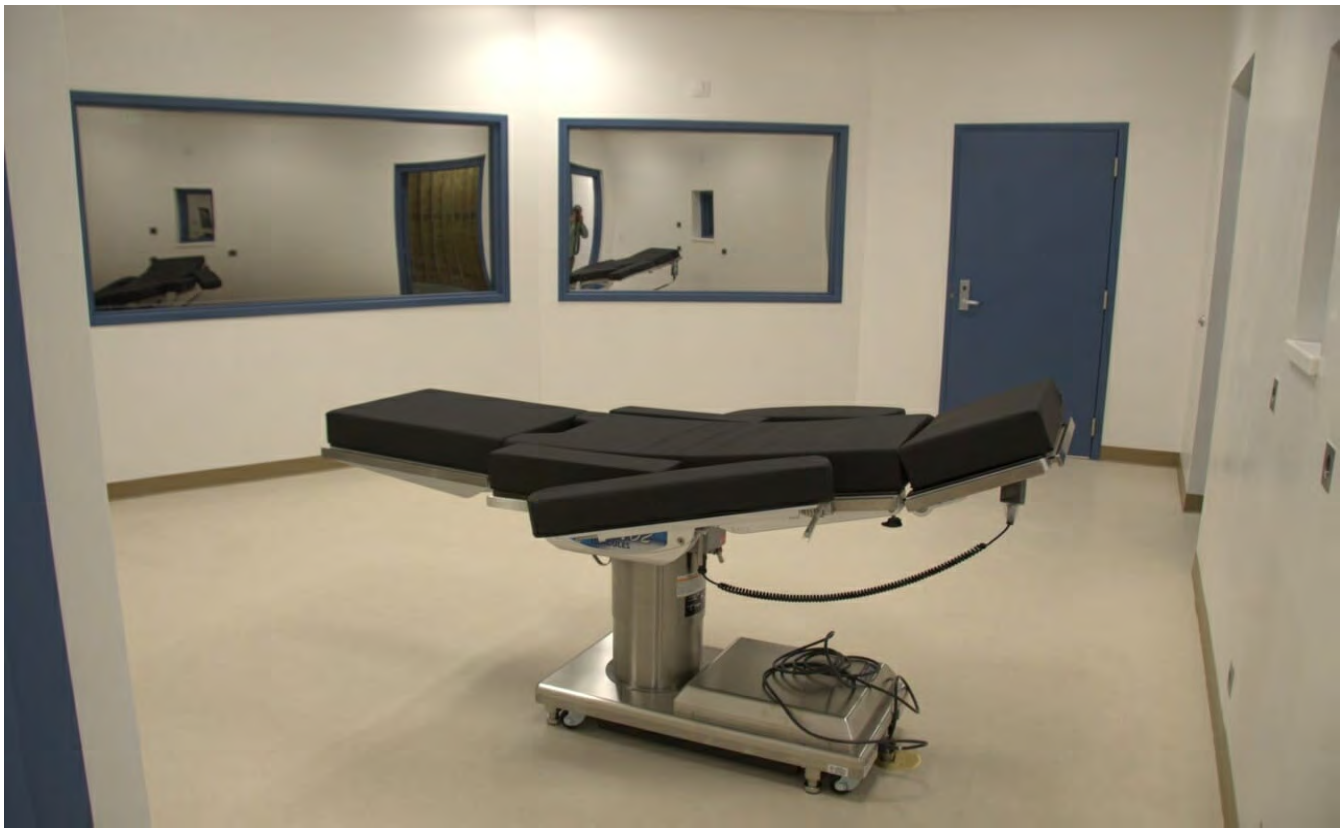

Nevada's execution chamber at Ely State Prison. Courtesy: Nevada Department of Corrections

Imagine it's your job to kill people. Now imagine that you love that job so much that you will go out of your way, in every respect, to be able to do it. Imagine further that this is a sweet government gig, with all the perks and bennies that some people only dream about. What would you call that person, that job? There's "executioner," of course, which conjures up terrifying images of hooded, axe-wielding strongmen, and typically refers to the person whose job it is to carry out a death sentence. But that only speaks to the end of a years and years-long process to get the condemned on that electric chair or, in the case of Nevada, strapped onto a gurney to be lethally injected with whatever poison has been deemed not cruel and unusual. You know, just murderous.

Before we get there, though, it truly takes a village—of people so invested in the power (or the power trip) of taking someone's life that they will block any efforts to stop them from doing so, but also of people along the chain of command who probably don't think much about it at all, who are content to just follow orders, to just do their jobs. As Nevada gears up to execute Zane Michael Floyd, the first such execution in the state in 15 years, let's name some of the people who got us here, shall we?

Executions used to be messy affairs: beheadings, firing squads, etc. We then (most of us) moved on to equally awful but less bloody methods like gas chambers and electric chairs. Still, no need to upset those witnessing the taking of a human life, so someone came up with a special little lethal cocktail of drugs that makes it all look so peaceful, so mechanical, so removed from the actual atrocity that it is. States will vary in how and who administers the deadly injections, but this final act is typically the duty of one or more prison officials. I imagine these are corrections officers who don't get paid very well, who, whether they know it or not, are exploited and likely manipulated into thinking away the moral implications of what their job is asking them to

do. While I do hope that these folks find their conscience and make the choice to maybe not kill people in the future, my beef is not with them. In many ways they are victims of our barbaric system, too.

No, the true and only culprits, as is often the case, are the professionals, the ones with the fancy degrees and the much higher pay grade, who make phone calls and sign documents and then hand the dirty work off to others. I'm talking about the medical professionals, the politicians, the lawyers who ensure that there's always a new body and always the right tools to suck the life out of it.

Let's start with the medical professionals. There's a reason you typically won't see a doctor administering lethal injections or even observing an execution in any professional capacity. The **American Medical Association** has for years condemned its members (who remember, took an oath to care for all people and to do us no harm) from in any way participating in capital punishment. Though someone should probably tell that to the state's chief medical officer, Ihsan Azzam, who despite the fact that he adamantly rejects the notion that he might have any influence over the execution process, still managed to advise the prison director on it — and through his attorneys filed **his own opposition** to staying Mr. Floyd's death. To me that screams participation, but what do I know?

Now pharmacists, it turns out, are not bound by that pesky Hippocratic oath, and while the American Pharmacists Association also holds that participating in an execution in any way is **unethical**, someone's gotta step up and order those murder drugs. Lucky for us, we got one of those someones in Linda Fox, the Nevada Department of Corrections' pharmacy director. Ms. Fox was in the **news last week** when it came to light that the manufacturer of one of the drugs that she ordered and purchased for Mr. Floyd's execution demanded that the state return them, as it is their company policy not to participate in murder. What cold day in hell is it when a global pharmaceutical company displays more of a soul than medical professionals whose job it is to heal rather than destroy?

But wait, the very important work of these death-penalty-advising MDs and PharmDs could not be achieved without the extraordinary efforts of a bunch of JDs. Of course, I am speaking of the lawyers, particularly all those hard-working prosecutors who either really believe murder prevents murder (spoiler alert: **it does not**) or, more likely, are concerned with losing the shiniest of all their bargaining chips. You see, in order for them to get an accused (and likely incarcerated) individual to take a plea and forego their day in court, they have to come in big, put the accused's physical life on the line, because crushing their emotional, mental, and spiritual life with the promise of permanent incarceration just doesn't cut it, you know. Whatever the reason, Clark County, under the leadership of District Attorney Steve Wolfson, is currently **fifth highest in the nation** for how often prosecutors seek the death penalty. Clearly, they're quite attached to it.

So attached, in fact, that two very special prosecutors (who also happen to be state senators) successfully blocked a bill this legislative session that would have abolished capital punishment in Nevada. I'm of course referring to Senate Majority Leader Nicole Cannizzaro and Senate Judiciary Chair Melanie Scheible. Did they vote against the measure? Did they come out against it in protracted and intelligent debate before their colleagues? No, of course not. That would require decency, and we're talking about the right to kill people; decency has no business here. Instead, almost as soon as the bill made it out of Assembly and was headed their way to the Senate, they started **punting**, unable to commit to giving the bill a hearing.

Gov. Sisolak for his part, took that moment as an opportunity to express his desire that the death penalty remain in place, thus setting the stage for the month of inaction that was about to take place. When the deadline finally arrived, the governor was the first to issue a statement informing us that there was **"no path forward"** for the bill. Nevermind that it was his, Ms. Cannizzaro's, and Ms. Scheible's path to forge. All the two senators had to do was give it a hearing, state their position, and then vote accordingly. On the record, of course. Then should it have passed, leave it to the governor to decide whether to sign or to veto.

But then we'd know with certainty where everybody stands on the issue, and you see, these people (these Democrats) all have elections coming up, which means that they can't actually afford to take a position. It's how politics works, I see now. Decisions are often made in backroom conversations. The hearings, debates, and testimonies are just for show. In this case, especially, that was not a show that the two district attorneys/senators could afford. They had to go back to their day jobs, after all, and that would have been awkward, don't you think?

So here's my suggestion to avoid all the ill-will that secrecy creates. If you all really believe in the death penalty this deeply, if you're willing to ignore the democratic process and purchase drugs illegally, and use your medical license to advise on how to most efficiently kill someone, then own it all. Embrace it. Be loud and be proud, babes. After all, you're principled individuals who see capital punishment as a social good, right? Why be ashamed of that?

In fact, all of you, from the pharmacist to the governor, should make it a point to be at the next execution. Take a pic, take a few. Maybe even televise it, let the world see the fruits of your labor, you seeker of justice, you. Then, when it's all said and done, be sure to pose next to the body, the one that you just proudly ushered to its death and put that on your campaign posters. Dare them to ever question you about being tough on crime again. Dare them!

Oh, I'm sorry, does that sound barbaric? Which part? The pictures? The televised broadcast? The calculated murder of another human being? Yeah, I know. Problem is, none of you with any power to stop it seem to ever do so. And heads up: The world's already watching.

Martha E. Menendez lives in Nevada and is the legal manager for Justice in Motion, a NY-based organization.

JUSTICE

UNDERCURRENT

ACLU, NV Press Association sue to assure NDOC transparency at execution

BY: **MICHAEL LYLE** - JULY 26, 2021 4:43 PM

Nevada's execution chamber. (Nevada Department of Corrections photo)

The ACLU of Nevada filed a federal lawsuit on behalf of the Nevada Press Association against the state to assure Zane Floyd's pending execution is conducted in a transparent manner.

The complaint, Nevada Press Association v. Sisolak, scrutinizes limitations on witnesses, specifically members of the press, observing the execution, saying that the state's "procedures violate the plaintiff's First Amendment rights when it gives the Nevada Department of Corrections unfettered authority to deny requests from media representatives for an invitation to Floyd's execution."

The lawsuit also questions the state's execution manual and what witness will be able to hear and see.

"Unfortunately, the state's plan for Zane Floyd's execution is designed to limit what reporters can see and to prevent them from reporting if something goes wrong," said Richard Karpel, the executive director of the Nevada Press Association. "The people of Nevada have a right to know if the state performs its executions humanely, and the press has a First Amendment right and responsibility to report it."

Legal and civil right groups, including the ACLU, have already condemned the Nevada Department of Corrections' plan to use a never-before-tried combination of drugs for the lethal injection

On Monday, the ACLU of Nevada released a statement saying Nevada shouldn't be allowed to move forward with a plan that allows "them to hide the consequences of using experimental drug combinations to kill someone."

"The limited details surrounding the state's proposed execution of Zane Floyd, who was born with brain damage and suffered PTSD after serving in the Marines, further highlights why the death penalty remains an antiquated tool that should be rendered obsolete," said Athar Haseebullah, the executive director of the ACLU of Nevada. "Tax-payer funds are being used to defend this ridiculous protocol. Nevada is better than this."

Floyd, who was convicted for killing four people at a Las Vegas supermarket in 1999 and sentenced to death in 2000, was scheduled to be executed in July, but a federal judge stayed his execution at the end of June.

Clark County District Attorney Steve Wolfson started pushing for Floyd's execution earlier in the spring around the same time lawmakers were discussing Assembly Bill 395, which would have abolished the death penalty.

Wolfson said the timeframe was coincidental.

If the execution goes forward, Floyd would be the first execution in Nevada in 15 years.

In May, Texas carried out an execution without media witnesses, and Texas officials later said they were not sure how that "error" was made.

Let the people kill!

Dayvid Figler July 30th, 2021 at 2:00 AM Opinion

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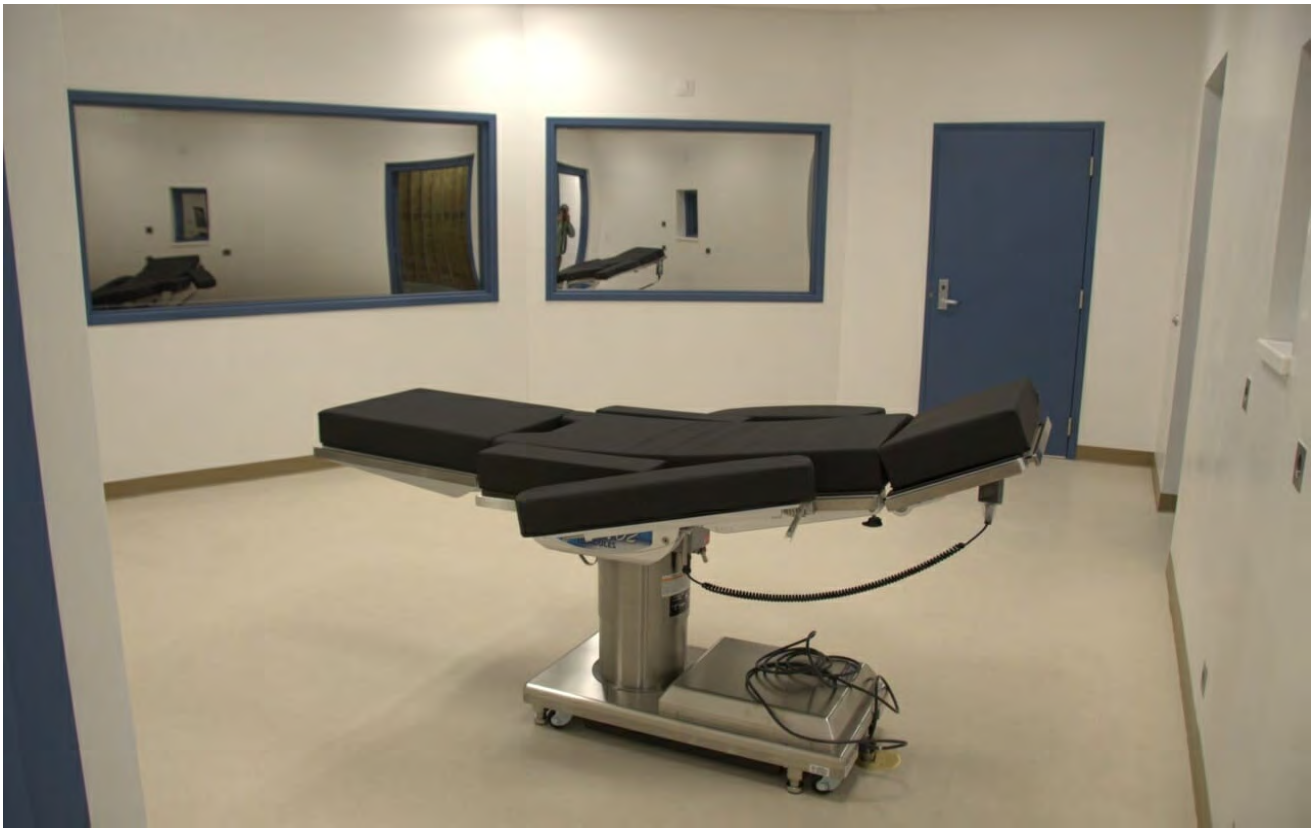

Nevada's execution chamber at Ely State Prison. Courtesy: Nevada Department of Corrections

If there's one thing we can all agree upon at that familiar Nevada intersection of politics, justice and abject insincerity is that 2021 was ***absolutely NOT*** the time for elected officials in the Nevada State Senate to vote on, let alone, discuss, the end to the death penalty in our state.

Why?

"Well first," said all the people from the same party with the same, supposed political leanings who are in charge of creating paths without interference from anyone since they control all levers of government, "there wasn't a path."

"And second," continued those same people despite seeming to acknowledge the death penalty is costly, ineffective, **racist**, exploitive, oppressive and immoral, "you don't need a second reason. Nevadans are supposed to accept that when those of us who control the river and boat and the crew and the weather and time and space (at least this legislative time and space) say that the trip is going in a different direction than logic and compassion dictate, you don't ask why. Even if it's a trip to the execution chamber."

But…

"There just wasn't a path. The time just wasn't right. Maybe after we have more time to do whatever we would need more time to do that we didn't do before even though we have all the time we can talk about it, like maybe in 2023 or 2025, or after we kill everyone on death row, or something, we don't know, there wasn't a path in 2021!"

But… you didn't even discuss it in the Senate?

"Hush," they continue suggesting more people or data needed to be heard from even though ALL the data was received at the Assembly hearings and ALL the people in support, opposition and otherwise were given lengthy opportunities to make the same points they've been making for decades, "we told you there wasn't a path!"

SO WHAT COMES NEXT?

Apparently, there wasn't a path in 2021 for a discussion of the death penalty in the Nevada Senate. Even the governor of Nevada, who has previously indicated that he is against the death penalty and cried at a screening of a movie showing the inequities of the death penalty, said he wouldn't sign any bill since there "wasn't a path."

Sidenote: you ever say a phrase so many times that it loses all meaning?

So, since there wasn't a path, what comes next?

Do advocates somehow compile even more statistics of prosecutorial misconduct, wrongful convictions, inequitable application, lack of oversight and expense?

Unlikely, since they pretty much kitchen-sinked all the indisputable data already and presented it. Nevada (and in particular, Clark County), is undeniably, provably and pathetically horrible on every single measure of an ability to handle or utilize a lawful death penalty. They are, however, extraordinarily good at using it to force plea negotiations in a despotic manner and feeding the bloodlust of vengeance seekers who only care about hurting a person who hurt them with the ultimate power of destruction. So yeah, nothing the opponents are going to do with data or evidence is going to help forge a path.

Is there a concerted effort to defeat these failed "pathmakers?"

Despite the posturing of the democratic socialists, only **maybe** in charge of the Democratic Party in Nevada, it's unlikely that those who blocked the progress of a death penalty repeal will be targeted with more progressive candidates. That's because of the ever-present fear by the party that if they don't stand together they will simply lose their majority; the majority, after all, which allows them to make…paths for legislation! Also, the fear that any efforts might result in back-benching or marginalization of a legislator's efforts to do what's important to that legislator and their constituents. Rarely will Nevada politicians turn on each other unless it's pretty much the tail end of a financial or **sexual behavior scandal** – and even then, mostly just **"troubled," "saddened" and "disappointed**." To take positions against other members for failing to take action on important measures would be unprecedented.

No one responsible (or silent against those responsible despite presenting themselves as great abolition advocates) will lose a primary or be heavily targeted in any significant way over this. No one will involuntarily leave their position. Nothing will alter the trajectory or agenda of those in elected "leadership." There will not be a coup or an official call-out-people-by-name censure on this highly contentious issue since there hasn't yet been any such action or movement.

Is it important to at least find out why any death penalty reform just faded away?

Everybody deeply interested or involved in the death penalty "debate" instinctively knew it was foolhardy to think that the two employees of the Clark County district attorney's office who also happen to be the leader of the Senate and the chair of the Judiciary Committee (Nicole Cannizzaro and Melanie Scheible, aka Path-maker-1 and Path-maker-2, respectively) were ever going to allow the death penalty debate to advance. Or that they will in the future. Not when their boss (and the association of

district attorneys) and most of their colleagues (some of whose bad behavior is one of the core arguments for repeal) all seemingly LOVE the death penalty by way of their testimony. None of them even pretend to utter even the slightest concern or hesitancy in exercising the ability to obliterate a human life - as though they had some sort of **complex** leading them to believe ***their* acts of killing** are immune from the same judgment and scrutiny that they render upon the condemned.

And while a convenient response (read: deflection) when these two (or really anyone else) gets asked "why no debate" is (beyond that whole "path" nonsense) Gov. Steve Sisolak wouldn't sign ANYTHING they could come up with in the 2021 session advanced to him - that's a smokescreen.

The governor didn't say he would veto, he just said enough to apparently end debate. He was intentionally, some might say calculatingly, ambiguous. He said he couldn't support any bill that didn't allow the death penalty...sometimes...for really bad things or people or something. This, of course, is antithetical to an intellectually honest discussion over the reality of the death penalty. The argument over the death penalty isn't about how it's being misused to execute really good people who do really good things. The argument is how even though it's ONLY used against first-degree murderers whose aggravating circumstances outweigh any mitigation -- it still operates in a manner that is irrefutably imprecise, ineffective, racist, wrought with invited error and misconduct and for those who care about budgets and money - ridiculously expensive. If you're against the death penalty (as the governor has said numerous times before in public) and if you acknowledge the flaws of the death penalty in application (as the governor has said through tears in at least one private screening of a death penalty film), there simply isn't a genuine space for an absolute shut-down of debate that the pathmakers claimed ended it.

Figuring out why the governor flatulated this smokescreen that benefitted Path-makers 1 & 2 certainly begs for an exercise in political analysis, but where to start? None of the discussion was public. Any hypothesis about horse-trading, protectionism or even a view at the time about his own vulnerability against a **self-proclaimed** tough-on-crime opponent in the next election cycle could never be verified. What does seem clear is that the fix was in prior to the session even beginning.

There are a host of reasons – obvious and/or speculative – which would be enough for oddsmakers to have called the defeat of the measure a *consensus bet* before the first bill draft was set to ink, let alone way into the session when the governor decided to pipe up. But again, the most direct and simple reason can't ignore that a certain Clark County district attorney who could theoretically fire or demote Path-makers 1 & 2, publicly came out in a very **zealous** manner in favor of allowing the death penalty to continue.

As such, the status quo will forever be that there is not a path. No one is going to take responsibility for the measure dying. No one is going to call out those who killed it. No one is going to call this all a sick game with people's lives and the sanctity of striving for a more moral system in the balance. No one is going to bother with fixing pathmaking for these sort of hot-button issues in the future. It's done.

Which leaves us with...?

Looks like the only path on the table was suggested by death penalty proponent and guy pictured in a**tuxedo** for a panel to **"discuss"** racial justice when his office is **responsible** for so much **racial** injustice, DA Steve Wolfson.

In a **recent talk**, after agreeing with the governor that "it wasn't the right time" (wait, what about paths…?), he suggested bringing the issue to voters. Wolfson said, "What I would like this community to consider, potentially, is a referendum. Let's bring this issue before the voters because we all hear that more Nevadans still favor the death penalty…."

Well far be it for me to think that voters can't handle nuance or separate the emotional release of having the option of killing a "bad guy" from all the overwhelming evidence that the death penalty is a profoundly stupid thing to have in a civilized society for one million reasons. I mean if YOU read this far, you probably figured it out, but really how many people will do a deep dive into the pros and cons of a death penalty YAY OR NAY on a ballot?

Now I'm not saying Americans are inherently violent, hyperbolic and/or vengeful - but whoosh -- have you ever heard of Twitter?

I mean since it has been allowed again since the 1970s, the death penalty is limited to first-degree murder but is there any doubt that in the vaccuum of "gut check" with no data, stats, indicators of disparity based on status (race, ecomonic, national origin), etc., there aren't an overwhelming number of people who would prefer to give the death penalty for ANY crime that touches them. Going back to Twitter, it seems a lot of people sometimes call for the death penalty for even the most minor of offenses and regularly for virtually anything concerning ANY conduct that impacts children, old people, animals, police officers, homeowners in their own home and on and on.

Which is why we typically leave the interpretation of what is working or not working for the dispassionate benefit of the community to the legislature and well…. Yeah. Given the opportunity to hypothetically and without getting their own hands

dirty with the yuck yuck of physically extinguishing a human soul like some….murderer, I'd venture most Americans who haven't given much thought to the priority of the death penalty would continue to not give much thought to the death penalty and excitely vote "**KILL 'EM ALL**"; and if they could, an alternate measure to watch them unbox the lethal cocktail!

See, all other arguments aside, what does the death penalty do other than making someone think they feel good by resorting to the same violence that made them feel bad – just directed at the condemned. And once the condemned is dispatched to another place (hell, apparently, the preferred destination of most death penalty advocates for even more suffering), what happens next? Studies show it doesn't move the needle on **deterrence**, and it certainly doesn't bring the victim back to life. You can say eye-for-an-eye brings some measure of "justice" to the victim, but that balance sheet doesn't work, since the condemned person is friggin' gone. They're released from any further punishment. Hell-talk aside, they never have to think about their conduct or the victim one second more. The death penalty does nothing to benefit the victim; direct vengeance to somehow satiate those who miss the victim reeks more of movie plot than measure of "making thing rights" with anyone.

Indeed, if we're there's a serious suggestion about having a death penalty referendum, let's go all the way. Here's the language:

Nevada must kill, on a one for one basis, the most beloved family member(s) of anyone found guilty of killing another person(s) but the perpetrator lives in prison for life. If this passes and is not found to be constitutional, then no death penalty of anyone can occur. If this does not pass, then there is no reason to have a death penalty and the death penalty must be repealed.

Think about it. This measure would actually make all the dreams and promises of pro-death penalty advocates come to fruition. I mean, seriously, right now it's all just tough talk and no results.

Eye-for-an-eye? Got you. Innocent victim for innocent victim. *Justice* means suffering of the offender to you? Well, if you want the killer to agonize to the fullest degree for the rest of his or her life like the victim did – boom. *Deterrence*? Heck, everyone and their literal brother will be working overtime to make sure no one gets killed again. *Racism, prosecutorial misconduct*? Look, everyone in the system is going to be on their best behavior when triggering a possible mandatory execution of an uninvolved party. And *cost*? They can run, but they can't hide. We can make it a national game where we post the face and give a bounty (a fraction of the cost of housing a death row inmate or law enforcement salaries) to anyone who kills the target! Even better: make it a **game show** and sell **advertising**.

And as a bonus, if it turns out the accused person was actually innocent, they can be exonerated while they're still alive! Currently, all we can do is put an asterisk on a gravestone if we're too late figuring it out.

Mr. Wolfson makes sense when he says this issue should be punted to the people. It truly seems to be the only "path." But let's really see what's on the peoples' minds. You never know -- maybe the real problem with the death penalty is that state-sanctioned killing hasn't truly lived up to its potential; maybe the path was always meant to lead us through the angry mob. Maybe if we are all at risk of execution, we won't ever have to kill another person again. Or we'll kill a lot of people. Either way, at least we won't have to burden our legislators with doing the right thing, or calling out their own colleagues for failing to even let the matter be discussed.