

Quo Warranto Proceedings, Nature Of. Special Proceedings, Quo Warranto. Common Law, Quo Warranto. Statutory Construction. Constitutionality, of Statute.

The Quo Warranto proceedings as contained in the statute will not lie except there is a legally existing office. Such proceedings only apply where there are two or more claimants to the same office or position.

Where a new county is created out of an old county an officer of the old county may maintain Quo Warranto proceedings against a corresponding officer of the new county, and thus test the constitutionality of the Act creating the new county.

Common Law Quo Warranto still exists in this state.

Chapter 112, Session Laws of 1911, held to be constitutional.

April 9, 1912.

Hon. Edwin L. Norris,
Governor,
Helena, Montana.

Dear Sir:

I am in receipt of your letter of the 4th inst., relating to certain communications addressed to you by Mr. James A. Walsh and Stranahan & Stranahan representing certain citizens of Hill and Blaine counties, and relating to the constitutionality of Chapter 112, Session Laws of 1911, under which law said counties were established and requesting that you,

“Direct the attorney general to inquire into the organization of these counties and institute the proper proceedings to determine whether or not they are organized as provided by the Constitution of the State of Montana.”

Two propositions of law are submitted by you in your letter, to-wit:

1. Is said Chapter 112, Session Laws of 1911, constitutional?
2. Is there any way by which the constitutionality of said law can be raised other than by Quo Warranto proceedings directed by the governor to be instituted by the attorney general?

1. I am not convinced that said Chapter 112 of the Session Laws of 1911 is violative of Section 26, Art. V, or of Sections 1 or 2 of Art. XVI, of the State Constitution of Montana, or of any other provisions of said Constitution. I must, therefore, hold that the act in question is not violative of any constitutional provision, and I believe that the constitutionality of the act will be sustained by the supreme court. Even if we were to concede that the legislature has the authority to create a county by special act, it would not necessarily follow that the same could not be accomplished by a general law. The general discussion by the court of the powers and authority of the state legislature under the provisions of the State Constitution relating to the establishment of county seats, as contained in *State ex rel Geiger vs. Long*, 43 Mont. 415, may have some bearing upon this question.

2. The proceedings which you are requested to direct this department to institute are for the purpose of testing the constitutionality of this law, and not for the purpose of determining the specific right of any individual to exercise the powers or functions of any office in either of the new counties as against any other claimant thereto. The statute relating to this subject is found in Chapter 5 commencing with Sec. 6943, Revised Codes. That part of the Chapter which has specific

reference to this action is contained in Subdivision 1, Sec. 6943, which reads:

"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 office in a corporation created by the authority of this state."

This statute seems to have specific reference only to cases where the office legally exists and there are conflicting claimants thereto. In all such cases the pleading must distinctly and affirmatively aver the legal existence of the office for

"The information in the nature of Quo Warranto will not lie to try the title of the relator to an alleged office which in fact and in law has no legal existence."

Hedrick v. People, 221 Ill. 374-376; 77 N. E. 441.

23 Am. & Eng. Enc. of Law, 2nd Ed. 632;

17 Enc. Pl. & Pr. 403;

People ex rel Bolt v. Riordan, 73 Mich. 508;

41 N. W. 482.

State ex rel Douglas v. Scott, 17 Mo. 521.

State ex rel Birkhauser, v. Moores, 52 Nebr. 634;

72 N. W. 1056;

32 CYC. 1422.

Such actions may be commenced by the complaining party or by "an attorney and counsellor of law" of his choice. (Sec. 6947, Revised Codes.) or by the attorney general "when directed by the governor."

Sec. 6945 Revised Codes.

State ex rel Brooks vs. Fransham, 19 Mont. 273.

But there are no conflicting claimants to any of the offices in the new counties and the action which it is sought to have instituted is one directed against the office rather than against the officer. The legal existence of the office is the very thing in dispute. The proceeding in the nature of a Quo Warranto authorized by the statute is also in the nature of a contest for the office and not against the office. The allegations in the pleading that the office has not any legal existence would be fatal to the ordinary statutory action. However, taking a broader view of the real meaning and purpose of the statute rather than confining ourselves to the positive expressions therein we are led to believe that the statutory action may be maintained by the officer of the old county against the corresponding officer of either of the new counties on the ground that the officer of the new county is exercising the functions of the office within the old county, which would be the case if the creation of the new county is void.

State ex rel Douglas v. Scott, 17 Mo. 521, is directly in point as to this latter proposition. By act of the legislature a new county was established within the limits of an old county. The sheriff of the old county instituted Quo Warranto proceedings against the sheriff of the new county charging him with unlawfully exercising the powers and performing the duties of the office of sheriff within the limits of the old county. The supreme court held that this action was properly commenced and that by it the constitutionality of the act estab-

lishing the new county was properly presented to the court and in that case the act providing for the creation of the new county was held void.

If the action is instituted by an officer of the old county, it may be commenced and prosecuted under the authority of Sec. 6947, Revised Codes, that is "by himself or by an attorney and counsellor at law" or by the attorney general when directed by the governor so to do.

Section 6945, Revised Codes.

I do not believe that this question can be raised by Quo Warranto proceedings in any other way except by ignoring the statute and commencing action of Quo Warranto at common law for the purpose of making inquiry into the authority by which any officer of the new county supports his claim to exercise the power and authority of the office. I also believe that the common law action has not been abolished by our statute, that it may still be resorted to where necessity demands.

32 CYC. 1417.

But inasmuch as the constitutionality of the act is disputed, it seems reasonable to me that the question may properly be raised in any action or proceeding necessarily based on the act, or which necessarily requires the exercise of power and authority given only by the Act, for if the Act is void it is not a proper basis for anything whatsoever.

Respectfully submitted,

ALBERT J. GALEN,

Attorney General.