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QUO WARRANTO DECISION OF JUDGE BACKUS.

Territory of Arizona, Ex. Rel of the Attorney General, vs. Granville H. Oury, District Attorney of the county of Pima.

Territory of Arizona, in the District Court for the First Judicial District, on motion to quash and dismiss a complaint in the nature of a Quo Warranto. Opinion of the Court.

This is a proceeding under the Code in the nature of a *Quo Warranto*. By the Code it is a proceeding required to be instituted by the Attorney General, in his official capacity as such, or by some other person specially authorized by the court.

The complaint or information filed in this case in compliance with the requirements of the law, commences "James E. McCaffry, Attorney General of the Territory of Arizona, in behalf of the said Territory complains, etc.' of 'G H. Oury, Acting District Attorney for the county of Pima, etc,'

The complaint or information is signed by the said James E. McCaffry, as Attorney General and sworn to by him.

This is all that is shown by the complaint or information as to his official standing as Attorney General, and is sufficient in practice until in some way controverted or questioned. This information or complaint the respondent moves to quash and set aside all proceedings under it.

For reasons in support of his motion he alleges that James E. McCaffry, who assumes to act as Attorney General in the case, is not such officer either *de facto* or *de jure* and that therefore the same is irregularly filed and without authority and should be stricken from the files of the court, and all proceedings under it quashed and set aside.

If James E. McCaffry is not Attorney General, as assumed in the motion, either *defacto* or *de jure*, then the commencing of this proceeding by him as such officer is clearly irregular and unwarranted and should not be permitted.

No form of answer or other competent plea to the information or complaint could raise the issue of Attorney General or not to be tried in the case thus commenced, unless therefore, this question can in some other way be raised, presented and acted upon by the court, the inevitable consequence follows that whoever pleases may assume to be Attorney General whether with or without any right to such office, either in fact or in law, and may commence and prosecute suits in this court without any power in the court or parties to such suits to resist or prevent such palpable irregularity and usurpation. The law is guilty of no such absurdity.

For where in the commencement or prosecution of legal proceedings, questions of either substance or form arise that cannot be reached by plea they are always available on motion if not waived by some step inconsistent with such motion.

A complaint, information, declaration or plea, filed or signed by a person not an attorney of the court, may on motion be stricken from the files, and all proceedings under it quashed.

Also an indictment not properly endorsed or signed, by a person not authorized so to do, may before plea on motion, be quashed. A return of a sheriff or other officer may for irregularity, or other defect be set aside and all proceedings under it quashed, so the return of a person pretending to be an officer and not such in fact may be set aside and quashed on motion. These are a few instances of the many similar proceedings known to the law as matters of every day practice in courts of justice, Chitty's Gen. pr. 50—Arch Cr. Pr.

The law on principals of public policy recognizes officers *de facto* and officers *de jure* holding proof of the former as sufficient in all cases when official existences is collatterally brought in question, and proof only of the latter is requisite in a direct issue upon a *Quo Warranto*, to try the legal right and title to the office in question, or where the party by his pleading make a strict legal title to the office the issue to be tried. Moses, rs. Thornton, 8 T. R. 303—Connel, rs. Curtis, 2 Bing. 228—Bumbary, rs. Mathews 1 car Kir. 380—People, rs. Hopon, 1 Denis. 574. An officer *de facto* is one who is in the actual exercise and enjoyment of the functions of an office and in the perception of its emoluments, and is publicly recognized as such, an officer *de jure* is one having the legal title to an office and may or not be in the possession and exercise of the functions of such office. 1 Bouv. Law Dicy Titles *de facto* and *de jure* 1 Green, Er. 83—U. S. rs. Reyburn 6 Pet., 352—Br. U. S. rs. Dandridge 12, Wheat 70—Regina rs. Vickery 12, Ad. and El. 478.

The respondent in support of his motion shows himself to be in the public and actual possession and use of the functions of the office of Attorney General, and to have so been in the actual possession and use and also in the perception of the emoluments of the office for a year or more last past and publicly recognized as such officer.

Some of these facts are judicially known to this court from its own records, which show the respondent to have been in the actual possession and exercise of the office of Attorney General by the institution and prosecution of the proceedings in this court as such officer, and that continued up to the last sitting of the Court.

The official character of the respondent as Attorney General at least *de facto* if not *de jure* is shown to have been recognized by the body assuming to act as the Legislature of 1868, in the repeal of section 18 of an act of 1866 which purported to devolve the duties of the office in question on the respondent as District Attorney of the county of Pima, so does the present information or complaint which states him to be *de facto* District Attorney of the county of Pima and recognizing him as in the full possession of that office as created by the said act of 1866.

To this state of facts the relator makes no counter showing, much less affirmatively shows that he is Attorney General either *de facto* or *de jure*.

The former of which every officer is presumed at all times to be ready to shew and is bound so to do when his official character is legally brought into question by plea, motion or otherwise. Failing to do this when so required on this motion, the relator cannot be held or treated by this Court as Attorney General even *de facto*, first—because when properly called upon in this motion he has failed to make the proper showing, that is to show any use of the functions of the office so as to make him *de facto* such officer, and second—because the respondent has affirmatively shown himself in the actual possession and exercise of the functions of the office in question. It is therefore, legally impossible for the same office to be held by the relator so as to constitute him *de facto* such officer.

Here the inquiry of the Court as to official character in this collateral proceeding would stop, although the respondent has, in support of his motion, gone on to show that the relator is not *de jure* Attorney General, had not the relator himself rested his right and used the showing of the respondent as the ground of claim by him, the relator to the office in question.

This Court, for obvious legal reasons, would not have permitted this motion to involve any inquiry into the right *de jure* to the office in question, but when the legal right is urged by the relator as the ground of his claims to the office it is the duty of this court to consider it upon the same principle, that when the plaintiff in a suit avers a strict legal right to official character, he will be bound to prove it as alleged, although neither such averment of character nor proof was primarily necessary.

But so presented and relied upon by the relator as the showing of the respondent is, it is the duty of the Court to consider it. The showing of the respondent so relied upon by the relator and urged as his title to the office in question, is in substance as follows, viz:

That the relator holds and claims the office in question by virtue of an appointment to the same by the Governor of the Territory, which appointment purports to have been confirmed by a body purporting to act as the council of a Legislative Assembly of the Territory for the year 1868, on the 15th of December, 1868.

That this appointment and confirmation was founded on what purports to be the acts of the bodies claiming to be the same Legislative assembly of the Territory for the year 1868, the one of the ——— of ——— 1868, and the other of the date of the 15th day of December of the same year, the former purporting to repeal the 18th section of an act of 1866, vesting all the powers of Attorney General in the District Attorney of the county of Pima, the latter to create the office of Attorney General and authorize the appointment of such officer by the Governor by and with the consent of the Legislative Council.

The same showing of the respondent uncontradicted by the relator and a part of the same showing which the relator urges upon this Court as his ground and claim of right to the office in question, show that the legislative assembly composed of a Council and House of Representatives for the year 1868, and which purported to enact the laws aforesaid and to have advised and consented to the appointment aforesaid was apportioned by the Governor of the Territory and its apportionment not prescribed by law as required by the Organic Act for every legislative assembly after the first, (this being the fifth in order of time.)

That its members were elected on the first Wednesday in June instead of the first Wednesday in September as prescribed by law.

That the Council of said legislative Assembly lost its organization and legal existence by meeting and adjourning without a quorum on the 11th day of December, 1868, from 11 o'clock of that day until 2 o'clock of the afternoon of the same day, and again without a quorum by meeting at 2 o'clock of that day purporting to transact business in electing a President *pro tem.*, and excusing the non-attendence of a member in the former part of that day, and then without a quorum adjourning until 10 o'clock next day, the 12th day of December, 1868, by again, on the 12th day of December aforesaid, meeting without a quorum and transacting business in the reading, correcting and approval of its journal, and then without a quorum pretending to adjourn until 10 o'clock the next day the 13th day of December 1868.

That the Council of the said legislative assembly destroyed its legislative capacity by receiving into it and as one of its members on the 16th day of November, 1868, one O. D. Gass as a member thereof, and who continued to act as such member during the continuance of said Council and was necessary in point of numbers to form a quorum for said Council.

That said Gass was an inhabitant of and resident of the State of Nevada, and not of any District of the Territory of Arizona.

The two former questions, *viz:* the apportionment of the legislative assembly by the Governor and the election of its members on the first Wednesday of June instead of the first Wednesday of September have already been fully considered by this Court in the case of the Territory ex Rel of G. H. Oury, District Attorney of the county of Pima, and *ex-officio* Attorney General, vs. Oscar Buckalew, and decided to be objections fatal to to the existence of any legislative authority or power in an assembly so apportioned or elected at that time.

This Court from a careful reconsideration of these questions in the case can see no ground for any change of opinion.

The true and simple test of these questions is this: that any legislative assembly to be possessed of legislative power must be composed, organized and elected in accordance with the Organic Act authorizing such body.

The feature thaa distinguishes the legislative assembly of the Territory of Arizona from every other assembly and gives it legislative power over that Territory is that it be apportioned, elected and organized in the manner prescribed by the Organic Act, if not, however, moral, intelligent, capable and satisfactory it may be to people electing it, it is not the legislative assembly of the Territory and has no legislative or political power whatever.

This view is to my mind decisive of the present motion; the relator showing no recognized use or exercise of the functions of the office sought and claimed by him is not *de facto* such officer and especially so when it is affirmatively shown by the respondent that he is, and for a long time past has been in the recognized use and exercise of the functions of the office and receiving the emoluments thereof rendering it in fact, and in law, impossible for the relator to hold the same office *de facto*, whatever his rights may be; *de jure*.

The respondent must, therefore, by the Court, be held and treated as *de facto* Attorney General.

The relator has in no ways attempted to show himself *de facto* such officer but has rested his case solely on his legal right as derived from the legislative proceedings and appointment shown on this motion by the respondent.

These, if the laws and appointment were valid and effectual, would give the relator a title to the office *de jure* and a right on proper proceedings to be put in possession of the office *de facto*.

But having rested his claim of office on these legislative proceedings and appointments as a question of law, it becomes the duty of the Court to consider the matter so submitted and finding the acts and appointment of no legal force or effect, the right of the relator to the office in question as urged by himself fail not only *de facto* but *de jure*; no user being shown to sustain the one and no law or valid appointment to create or support the other.

The view already taken of this case makes it necessary to consider the other questions above presented as the meetings and adjournments of the Council without a quorum and the reception into the body of a member from without the Territory.

It is an unbending maxim of American law indeed of the common law as applicable to all American institutions civil or political that majorities govern, and that no political or civil body, consisting of more than one member can organize or perpetuate its organization or do any binding act whatever without the presence of a quorum or a majority of its members unless expressly authorized so to do by the sovereign power creating such body.

In accordance with the fundamental and unbending principle the Constitution of the United States, and those of the several States expressly authorize each House of Congress and each House of the Legislatures of the several States to meet and adjourn without a quorum and send for absent members.

Without such provisions there could be no such meetings and an adjournment would work a total dissolution of the bodies.

Neither Congress nor the Legislatures of the several States could give themselves such power; nothing short of the supreme act of the people by their constitution could do it and nothing short of the creative power of Congress that gives life and vitality to the legislative assembly of the Territory of Arizona could give it such a power.

Upon what principle therefore the Council of the legislative assembly of the Territory assumed to meet, act and adjourn without a quorum I am utterly at a loss to understand; or by what right or authority that body took in a member from the State of Nevada and from without the Territory when the Organic Act expressly provides that all "members of the Council and House of Representatives shall reside in and be inhabitants of the District for which they may be elected respectively."—Organic Act, section 5. I can have no doubt as at present advised that such proceedings would utterly invalidate and destroy any legal capacity or power in the Council.

But, it is not now necessary to decide these questions upon the principles heretofore decided in this case; the motion of the respondent must be granted and an order entered striking the complaint or information from the files as irregularly filed and without authority by one not holding the office of Attorney General and all proceedings subsequent thereto set aside and quashed.

It is so ordered.

The Telescope.

The New York *Tribune* gives a readable synopsis of a lecture delivered before the American Institute, by Prof. Alexander, of Princeton College, who, after being introduced to the audience, spoke as follows:

It was a noble figure which Bunyan used in his Holy War, in which he calls the senses the gate of the soul—the inlet of knowledge from without. Among these, noblest of them all, is the eye-gate, the medium through which from afar the glories of light are borne upon the very wings of the morn. Quite as interesting, in some aspects, is the eye through which we are enabled to see. And then, how beautiful and glorious is the light, entering, as it does, through the unbarred gates of the morning, gilding with glory the canopy of the sky, revealing the distant mountain-top, and unveiling the fair face of nature. Even its shreds and patches are beautiful as they sparkle in the diamond or twinkle in the dew-drop, and the light comes back blushing itself because it has kissed the cheek of the blushing rose. Ah! beautiful is light; but most grand and most beautiful, most glorious, when it reveals to us from afar the glories of the great panoply that surrounds us, and the sun who covereth himself with light as with a garment. Most glorious, in the next place, is the adaptation of the eye to light, and of light to the eye. Oh, what a simple telling fact is it that the wonderful emanation is poured upon the most delicate organ of the human body, in its own way, with the velocity which would accomplish a journey by steam of 250 miles in a single second, without injury to that organ. On the contrary, light is a blessed thing for the eyes, and all the senses harmonize in its reception. The lecturer here illustrated by diagrams the effect which prisms and lenses have in diffusing the rays of light. About the earliest mention of the use of instruments for diffusing the rays of light was the use by the monster Nero, who was near-sighted, of a convex mirror, composed of precious stones, in order that he might fully enjoy the contests of the gladiators in the arena. Prof. Alexander, in this connection, exhibited a magnesium light on the platform, showing the effect of the light entering at different points of the mirror. The lecturer next referred to the history of the telescope, and said that he had a book in which there was an article by one Professor Alexander, and as that writer was a personal friend of his, he would quote from it.

"Roger Bacon, in his Opus Majus, makes use of such language with reference to what 'may be performed by refracted vision,' as to render it somewhat probable that he was at least acquainted with the theory of a refracting telescope, though there is no sufficient proof that he constructed one; and Baptista Portia is said by Wolfius to have made a telescope, but the description of the instrument given by the inventor is very defective, and the instrument, whatever it was, does not seem to have been used in any celestial observation. Indeed, we have no distinct evidence that such an instrument was used before the beginning of the 17th century.

Descartes ascribes the invention of the telescope to James Metius (Jacob Adriansy) of Allmear, in Holland; but Huyzans, as well as Borellus, to John Lippenshelm, or Lippersy, (Hans Zanz, or Jansen,) a maker of spectacles, of Middelburg. Prof. Moll, after an examination of official papers preserved in the archives of the Hague, comes to the conclusion, that on the 17th of October, 1608, Jacob Adriansy was in possession of the art of making telescopes, but from some unexplained cause concealed it; and that on the 21st of the same month, Hans Zanz, or Jansen, was actually in possession of the invention; but there is little reason to believe that it was devised by either him or his son Zacharias, though one of them invented a compound microscope about the year 1590. One of the earliest of the telescopes made by the Jansens was presented to the Prince Maurice, to be used in the wars. It was in April or May, 1609, that Galileo first heard of this, and the instrument was then described to him as one which had the property of making distant objects appear as though they were near. Galileo thereupon divined how that might be effected, and the next day, according to Delambre, was in possession of a telescope magnifying three times. Galileo's second telescope magnified about 18, and his third about 33 times."

The next topic was the planet Jupiter and his satellites, of which there are four. These satellites were observed by Galileo, who also observed their eclipse. Jupiter turns round in less than ten hours. The moon, it would be noticed from the diagram, had a very ragged edge, which was accounted for by the fact that the mountains upon its surface were first struck by the rays of the sun, thus causing it to exhibit an uneven appearance to the eye. They have a different atmosphere in the moon from that on earth; things weigh only one-sixth what they do here, and the moon is not made of the same stuff as the earth. The sun, it would be observed, was broken by long, black, hollow spots, which sometimes open and close in the space of three or four days. The spectroscope shows that there is iron there, and magnesium, and sundry other things. Next is the planet Mars, which seemed to be covered with something very like snow. The distance to the moon is a ten months' journey by steam; from here to the sun is more than 3000 years' journey at 30 miles an hour, so that if we had started with Cortez when he conquered Mexico, we should have had a residence there of but 25 years. But what is that compared to the distance of the fixed stars, which were 7,000 times as far off as the most remote planet? The light of some of these stars has been actually measured, and one of them seems to be brighter than a hundred suns.

What shall we say of the Power who gives light to these hundred suns? These suns, which are so remote, were started before the human race began. The consideration of this showed us the power of omniscience and the velocity of light. The lecturer here explained why the stars exhibited a white light, showing also that fixed stars, being in pairs, revolved around another, and thus sometimes presented the appearance of being but one. For the same reason, some appeared to be colored green, others yellow and blue, and and others black. The greatest imagination ever exercised—that of Milton—never conceived anything more sublimely magnificent than is found in these tinted suns, these gems that surround the dark brow of night. For these discoveries, said the speaker, we are largely indebted to an American, Allen Clark, one of the best opticians in the world. Photography has been a valuable assistant in promoting the sciences of astronomy as well as other sciences, showing a beautiful instance of the co-operation of the sciences in these days. Prof. A., in conclusion, exhibited a photograph of a remarkable phenomenon which he said exhibited the appearance of a whirling rocket on its travels through the sky, and closed with an eloquent peroration