Appl Aust Inst of Marine & Power Engineers v Sec, Dept of Transport 13 FCR 124

Appl AEC Re: Ex p Kelly (2003) 198 ALR 262

[HIGH COURT OF AUSTRALIA.]

LISTON . . . . . APPLICANT;
RESPONDENT,

AND

DAVIES . . . . . RESPONDENT.
RELATOR,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 24, 25.

Latham C.J., Rich, Dixon, Evatt and McTiernan JJ.

Quo Warranto—Institution of proceedings by private relator—Validity—Rules of the Supreme Court 1916 (*Vict.*), *Order LIII., rr.* 31-39.

Notwithstanding the repeal in Victoria of provisions corresponding to those of 9 Anne c. 25, proceedings by way of information of quo warranto are maintainable in Victoria at the suit of a private person as relator under the provisions of Order LIII., rules 31-39, of the *Rules of the Supreme Court* 1916.

The foundation and history of the jurisdiction to allow proceedings by quo warranto at the relation of a private prosecutor discussed.

Bridge v. *Bowen*, (1916) 21 C.L.R. 582, considered.

Leave to appeal from decisions of the Supreme Court of Victoria (*Gavan Duffy* J., and the Full Court (on appeal from *Lowe* J.): *R.* v. *Liston*; *Ex parte Davies*, (1937) V.L.R. 222) refused.

APPLICATION for special leave to appeal from the Supreme Court of Victoria.

On 6th November 1936 an election to fill an extraordinary vacancy as councillor in the Smith ward of the city of Melbourne was held. Three candidates stood for election, David Taylor Norris Davies, John James Liston and Robert Lyall. The election was held according to the system of preferential voting and the candidate Lyall was first eliminated. His second preference votes were then distributed

between Davies and Liston. As a result of the election Liston was declared elected by a majority of twelve votes over Davies. On 26th November 1936 an order nisi was obtained by Davies for leave to exhibit an information of quo warranto against Liston. From the affidavits it appeared that over fifty votes which were invalid by reason of impersonation, most of which were indentifiable, were cast at the election and were reckoned at the final ascertainment of the poll. On the return of the order nisi *Gavan Duffy* J. held that it was insufficient to allege merely that there were more invalid votes than the successful candidate's majority, and the order nisi was amended by adding an allegation that the impersonated votes were for Liston; the order nisi was then made absolute, but this was done without any further affidavit supporting this statement. Against this decision Liston applied for special leave to appeal to the High Court, which was refused, but without prejudice to his making a later application. An information was then filed by Davies alleging that fifty-six votes were cast in favour of Liston all of which were void for duplication or impersonation. The pleadings continued to defence and reply. Liston then took out a summons under Order XXXIV., rule 2, of the *Rules of the Supreme Court* 1916 (Vict.) for the determination before the hearing of the information of the following questions of law :—(1) Whether or not the court has jurisdiction (*a*) to hear or proceed with the information; (*b*) to order that Liston should be ousted from the office of councillor of the city of Melbourne; (*c*) to declare that Davies should now be admitted on taking the prescribed oath of office to membership of the council of the city of Melbourne as a councillor. (2) Whether or not the officers or officials having the conduct of the election were bound in law to examine the ballot papers purporting to record votes with a view to deciding as to any of such ballot papers whether they were ballot papers of citizens entitled to vote.

The summons was heard by *Lowe* J., who said that the important words to be emphasized in Order XXXIV., rule 2, were that the matter which it was sought to have decided must be a question of law which it would be convenient to have decided before any evidence was given and that in dealing with questions of convenience

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the court should bear in mind that rules of procedure were merely means to enable justice to be done according to the law. His Honour then said :—" Bearing in mind that fact, I turn then to the particular case with which I have to deal. The proceedings are an information at the instance of the relator. There have been a number of proceedings already before the court and each party is very distrustful of the attitude of the other and alleges that the other has an ulterior purpose in the attitude which he takes in these proceedings. On the one side it is said on behalf of the relator that certain ballot papers, which were cast in the election which is challenged, have been sealed pursuant to the provisions of Act 27 Vict. No. 184 and that those sealed ballot papers are directed by the Act to be kept unopened for a period of twelve months after the receipt thereof at the close of the ballot, and at the expiration of that period of twelve months those ballot papers may be destroyed or otherwise disposed of as the council of the city of Melbourne may direct. And it is insisted on before me that the respondent's attitude is one which indicates that he will interpose whatever delays the law provides, for the purpose of ensuring that that period of twelve months will go by and those ballot papers will be destroyed before there is a possibility of investigation. On the other side it is said that the object of the opposition to the present application is to force the opening of those ballot papers so that, whatever may be the merits, by force of public opinion a person who has been declared elected will be compelled to resign his office as councillor. I apprehend that in dealing with the summons that is now before me I ought to see that no relevant evidence, so far as I can prevent it, will be put in jeopardy by any order that I may make. In my opinion I am entitled to have regard to the consequences that may follow from an order directing a prior trial of these issues of law. If I can see that that order may possibly lead to results which may give rise to proceedings which may so extend the time that those ballot papers may be destroyed when it becomes a question of investigation of their contents, then I think I should not order a prior trial of these issues of law. In the circumstances, I think it would not be convenient to have the issues of law determined before the issues of fact are tried." His Honour

accordingly dismissed the summons. Liston then appealed to the Full Court, which dismissed the appeal: *R.* v. *Liston*; *Ex parte Davies* (1).

He applied for special leave to appeal to the High Court from the decision of *Gavan Duffy* J. and from the decision of the Full Court.

Gorman K.C. and *Lewis* (with them *McCay*), for the applicant.

Lewis. The decision of the Full Court was wrong in refusing to direct the preliminary question of the right of the relator to sue to be determined before the trial. In Victoria a private citizen has no right to act as relator in quo warranto proceedings. Originally the right to institute such proceedings was part of the Royal prerogative. The Act of 9 Anne c. 25 (sometimes called c. 20), which first gave such a right to a private individual, had statutory recognition in New South Wales, having been brought into force by 9 Geo. IV. c. 83, sec. 24, and by 1 Will. IV. c. 21, sec. 3. The Act 1 & 2 Will. IV. c. 58, sec. 8, also recognizes the Act of Anne as being in force. The Act 8 Vict. No. 12 assumes, in sec. 29, that the Act of Anne is in force in New South Wales, because it requires an application to be made within six months. The Act of Anne, thus being in force in Victoria, was repealed by the *Common Law Procedure Statute* 1865 (No. 274), sec. 2 and the First Schedule, the *Common Law Procedure Statute* providing by sec. 253 a similar provision to the statute of Anne. The right of a private individual to act as relator thenceforth depended on that section, and upon its subsequent repeal the right no longer existed. The *Judicature Act* 1875 does not repeal that section. The *Supreme Court Act* 1890, sec. 2 and the First Schedule, repealed all the sections, including sec. 253, of the *Common Law Procedure Statute* 1865 not previously repealed. This repeal preserved expressly the jurisdiction of the court but had the effect of taking away the right of a private individual to take quo warranto proceedings conferred by the repealed Act. The jurisdiction of the court to grant quo warranto is admitted; the point made is that such jurisdiction can only be exercised at the instance of some officer of the Crown. This officer is, in Victoria,

(1) (1937) V.L.R. 222.

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the prothonotary, who has now the same powers as the Queen's Coroner had in England (*Judicature Act* 1875; *Crimes Act* 1928, sec. 389). Order LIII., rule 35, of the *Rules of the Supreme Court* is *ultra vires*, as rules of court cannot deprive His Majesty of his prerogative to prosecute or not to prosecute these proceedings and vest that right in a private individual.

Gorman K.C. (by leave). *Gavan Duffy* J. was wrong in amending the grounds of the order nisi, as there were no facts in the affidavits to warrant the amendment. It is not sufficient for the relator to allege that informal votes were cast, unless it is also shown that the effect of them was to alter the result of the election (*Shortt* on *Informations, Mandamus and Prohibition* (1887), p. 164). The grounds of the information should not have been amended unless the facts relied on to support the amended grounds were put on affidavit (*R.* v. *Jefferson* (1)), that is, unless a prima facie case is made by affidavit that the invalid votes affected the result of the election.

Wilbur Ham K.C. (with him Dr. *Ellis*), for the respondent. The applicant is now, in effect, asking this court to reverse its previous order refusing special leave. The application was made to *Lowe* J. under the *Rules of the Supreme Court*, Order XXXIV., rule 2. *Lowe* J. exercised his discretion correctly in deciding that it was not convenient to have the issue of law tried before the hearing. The exercise of such a jurisdiction is very unusual and may involve divorcing one issue from another. It is true that the Act of Anne gave the private relator a statutory right and that that provision was copied in the *Common Law Procedure Act*. Sec. 2 of the *Supreme Court Act* 1890 preserves the court's common law jurisdiction to give judgment of ouster, and Order LIII., r. 35, which allows proceedings in the nature of quo warranto to be initiated by a private relator is within the rule-making power of the court (*R.* v. *Rogers*; *Ex parte Lewis* (2)). Until 1906 there were no rules corresponding to Order LIII. The court has a common law jurisdiction for informations by private

(1) (1833) 5 B. & Ad. 855; 110 E.R. 1007.

(2) (1878) 4 V.L.R. (L.) 334, at p. 338.

persons preserved in sec. 15 of the *Supreme Court Act* 1928, and these rules are provided to enable that common law jurisdiction to be made effective (*R.* v. *Williams* (1)). Though there was no jurisdiction at common law to give costs, there was jurisdiction to grant ouster (*Shortt* on *Informations, Mandamus and Prohibition* (1887), pp. 112, 204). Formerly, it was necessary to show for whom the false votes were cast, but on the introduction of the secret ballot this became impossible because the votes could not be traced, and an election could, consequently, not be upset. Now that ballot-papers are marked they can be examined at a later stage. The whole purpose of the ballot is that secrecy is inviolable unless the ballot boxes are opened by order of the court. It is not necessary to prove for whom the votes were given at this stage, though it will be necessary to do so at the trial (*Bridge* v. *Bowen* (2)). At this stage it is impossible to prove that the votes were given for the other party (*R.* v. *Harwood* (3)). [He also referred to *Ex parte Bucknell* (4).]

Lewis, in reply. This is a matter of public importance. The remedy given by the statute of Anne was one given to individuals, but even this required the assent of the proper officer on behalf of the Crown. It is admitted that at common law there was jurisdiction to grant quo warranto. The point is whether a private person now (since the repeal of the Act of Anne and of sec. 253 of Act No. 274) has a right to prosecute the information, and that in his own name.

The following judgments were delivered :—

LATHAM C.J. The court has had an opportunity of considering the various points raised upon this application during the adjournments that have taken place since the application was commenced yesterday and is of opinion that special leave to appeal should be refused.

The reasons for the decision of the court will be given by my brother *Dixon*.

(1) (1757) 1 Burr. 402 ; 97 E.R. 371.
(2) (1916) 21 C.L.R. 582.
(3) (1802) 2 East 177 ; 102 E.R. 336.
(4) (1936) 56 C.L.R, 221.

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DIXON J. The application is for special leave to appeal from two orders of the Supreme Court. One is an order absolute made by *Gavan Duffy* J. allowing the filing of an information in the nature of quo warranto. The other is an order of the Full Court affirming an order of *Lowe* J. refusing an application for a special case to raise some questions of law which the defendant says ought to be determined before the trial of the information.

An application was made to this court for special leave to appeal from the first order shortly after it was pronounced, when the proceedings had reached the stage at which the information had been exhibited but had not yet been pleaded to. The court, by a majority, refused the application for special leave, but did so, as I understand it, not because it was of the opinion that any of the questions of law it was sought to argue should be decided against the defendant, but because in all the circumstances it considered that the time was inopportune for raising them and obtaining a decision of the court upon them, if indeed they could be said to have arisen. The proceedings have now got to the stage when pleadings are closed, the matter is ready for trial and is in a list for trial almost immediately.

The first contention upon which the application of the defendant is based is that the proceedings do not lie at all at the instance of the relator. Notwithstanding the refusal of special leave on the previous application, if it appeared probable that on an appeal by the defendant this court would arrive at a decision to the effect that the relator had no *locus standi*, and that the proceedings, therefore, ought not to have been taken and do not lie, we should at this stage have been disposed to intervene and grant special leave in order that that question should be raised. But we are not of that opinion.

The defendant also seeks to raise another question or questions, which go to the correctness in substance of the order allowing the filing of the information of quo warranto. Those questions stand on a somewhat different footing. When an order absolute has been made and an information exhibited, the proceedings upon the information result in a trial at which the defendant is free to put his whole case. Indeed it is the informant or relator upon whom is

cast the burden of establishing the case against the defendant. If those questions stood alone, speaking for myself, I should have found the previous refusal of special leave an almost insuperable obstacle to granting leave at this stage of the proceedings. But the court is of opinion that for reasons which go rather to the merits of the question, reasons which I shall afterwards state, that question also should not be entertained.

The reasons advanced on behalf of the defendant for saying that the proceedings do not lie at the instance of the relator depend upon the somewhat curious course which has been taken in the statute law of Victoria. Owing to the repeal by the legislature of that State of the statute, 9 Anne c. 25, called c. 20 in *Ruffhead's* edition of the statutes, it is said that in Victoria there can be no application of what is commonly supposed to be the general law enabling a private person who is interested to apply to a superior court possessing the jurisdiction of the courts at Westminster for an information in the nature of quo warranto inquiring into the title to a public office asserted by the person in fact occupying it.

We think that the argument places too much reliance upon the statute 9 Anne c. 25 as the source of the jurisdiction of the courts to entertain such a proceeding, and that notwithstanding its repeal in Victoria the jurisdiction to allow an information of quo warranto on the relation of a private prosecutor without the intervention of the Attorney-General exists.

In dealing with the argument, it is, I think, convenient first to state the manner in which the common law affecting the remedy developed, and then the position which had been reached when the statutory provisions were transcribed in Victorian legislation and afterwards repealed.

It is a fact that informations in the nature of quo warranto were originally criminal. In their beginnings they were not to be differentiated from other forms of criminal proceedings by information. The origin of criminal informations and their growth are discussed in vol. I. of Sir *James FitzJames Stephen's History of the Criminal Law* (1883), pp. 294-297, where two different accounts of their history are given. The learned author goes on to say (at p. 296) :— "Whatever may have been its origin, the power to file criminal

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informations in the Court of King's Bench was used, not merely by the Attorney and Solicitor General in cases of public importance, but also by the Master of the Crown Office, who appears to have lent his name to any one who wished to use it. Thus all private persons were able to prosecute criminally any person who had offended them by any act which could be treated as a misdemeanour, without the sanction of a grand jury. This led to abuses in the way of frivolous malicious prosecutions, in which the defendants recovered no costs. This abuse was effectually remedied by 4 Will. & Mary c. 18 (A.D.1692), which enacts that the Master of the Crown Office shall file no criminal information 'without express order to be given by the said court in open court' and upon certain conditions as to costs."

In the seventeenth century at any rate, it is clear that not only could the Attorney-General for any misdemeanour file an ex officio information in the King's Bench, but a private informer or prosecutor might in what might be described as the lesser misdemeanours obtain an information without any application to the court.

Blackstone's Commentaries, 5th ed. (1773), vol. 4, c. 23, sec. 3, p. 308, contain an account of the two classes of information:—"The informations, that are exhibited in the name of the King alone, are also of two kinds: first, those which are truly and properly the King's own suits, and filed ex officio by his own immediate officer the Attorney-General; secondly, those in which the King is the nominal prosecutor, yet it is at the relation of some private person or common informer, and they are filed by the King's coroner and attorney in the Court of King's Bench, usually called the Master of the Crown Office, who is for this purpose the standing officer of the public. The objects of the King's own prosecution, filed ex officio by his own Attorney-General, are properly such enormous misdemeanours as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the Crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal, which power thus necessary not only to the ease and safety, but

even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations filed by the Master of the Crown Office, upon the complaint or relation of a private subject, are, any gross and notorious misdemeanours, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the Attorney-General), but which, on account of their magnitude or pernicious example, deserve the most public animadversion."

There was at common law an original writ issuing out of Chancery for the Crown called a writ of quo warranto. It lay against anyone claiming or usurping any office, franchise or liberty, and its purpose was to inquire into the authority upon which the claim rested and to determine the right to the office, franchise or liberty. An information was devised to take its place and the writ of quo warranto fell into disuse. The information was " properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seize it for the Crown : but hath long been applied to the mere purposes of trying the civil right seizing the franchise, or ousting the wrongful possessor ; the fine being nominal only " (*Blackstone, Commentaries*, 5th ed. (1773), vol. 3, c. 17, sec. 5, p. 263).

In its development into a remedy for the determination of a civil right, the originally criminal information of quo warranto took with it the characteristic to which I have referred, namely, that not only might it be exhibited ex officio by the Attorney-General, but it might be obtained by a private individual from the Master of the Crown Office and without the authority of any judicial order. The fact that, before the enactment of any provision controlling the grant of information, an information of quo warranto was of this kind is made clear by the decisions given before 9 Anne c. 25. The reported decisions do not go far back before that date. The first is after the passing of 4 & 5 Will. & Mary c. 18. In 1698, in *R.* v. *Mayor and Aldermen of Hertford* (1), an information of quo warranto was granted against the mayor and aldermen to show by what

(1) (1698) 1 Salk. 374 and 376; 1 Ld. Raym. 426 ; 91 E.R. 325, 328, 1183.

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authority they admitted persons to be freemen of the corporation who did not inhabit in the borough. It was granted upon motion made on behalf of the freemen. The statute 4 & 5 Will. & Mary c. 18, as it was interpreted, required that without the leave of the court no information should be exhibited by the clerk of the Crown for trespasses, batteries and other misdemeanours, and that he should take a recognizance from the person procuring the information to be exhibited. The freemen had not given a recognizance and a motion was made to set aside the process. The report says:— "And this being to try a right, the question was, whether it was within the said statute, viz. *trespasses, batteries, and other misdemeanours*, which are frivolous wrangling matters of an inferior nature? But the court said, that this usurpation here pretended was a misdemeanour, and the information might be as vexatious in this case, as in trespass or battery: that this last is a remedial law to prevent vexation, and must be construed accordingly; therefore the process was ordered to be set aside, but the information stood" (1). Although that appears to be the earliest case reported making clear the relation of informations of quo warranto to proceedings by criminal information, several cases of 1698 and 1699 appear among the precedents which are stated in *R.* v. *Breton* (2) to have been turned up in a search made under the direction of the Court of King's Bench.

The object of the statute 4 & 5 Will. & Mary c. 18, was to suppress the abuse of proceedings by information. To this end the leave of the court was required and recognizances were exacted. Two things are shown by the cases to which I have referred. The first is that, although the statute is expressed in general terms referring to misdemeanours, it extends to informations of quo warranto. The second is that under it "the clerk of the Crown can in no case file an information without express leave" (*Tancred, Quo Warranto* (1830), p. 9). There are, so far as I have been able to discover, no further reported decisions before the passing of the statute of 9 Anne c. 25. That statute related to corporations and corporators and their officers. It gave the Courts of Queen's Bench and the Courts of Counties Palatine express

(1) (1698) 1 Salk. 376; 91 E.R. 328. (2) (1768) 4 Burr. 2260; 98 E.R. 179.

power to grant informations of quo warranto and it also made the remedy more speedy where offices of that character were usurped. So far as it relates to quo warranto, its important words are: "It shall and may be lawful to and for the proper officer in each of the said respective courts, with the leave of the said courts respectively, to exhibit one or more information or informations in the nature of a quo warranto, at the relation of any person or persons desiring to prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators against such person or persons, so usurping" etc. "and to proceed therein in such manner as is usual in cases of information in the nature of a quo warranto" (sec. 4).

After this statute a definite practice grew up governing applications to the Court of King's Bench in the case of corporations for leave to exhibit informations of quo warranto. The practice appears, as far as I can ascertain, to have moulded the course of procedure at common law in cases which did not relate to corporations. In the case of *R.* v. *Howell* (1) the distinction between the general application of 4 & 5 Will. & Mary c. 18, and the more limited application of 9 Anne c. 25 is shown, and the same view as had been expressed in the case of *R.* v. *The Mayor and Aldermen of Hertford* (2) as to the criminal origin of quo warranto is repeated. Lord *Hardwicke* as Chief Justice of the King's Bench decided that a relator was liable for the costs provided for by 4 & 5 Will. & Mary c. 18, although the information did not come for trial, so that the costs could not be given under 9 Anne c. 25. He said:—"Now no information at all can be filed by the Clerk of the Crown without leave of the court; but the true meaning of the Act, and warranted by practice, is, that he should file no information without leave, nor issue process thereupon without recognizance. As to these informations not being for misdemeanours, it is now too late to make that objection, since the practice has been always otherwise. The courts, indeed, have themselves made this distinction, to grant informations for public usurpations, but if it is only of a private franchise not concerning public government, as a fair, &c., the court

(1) (1736) Cas. temp. Hardwicke 247; 95 E.R. 159.

(2) (1698) 1 Salk. 374 and 376; 1 Ld. Raym. 426; 91 E.R. 325, 328, 1183.

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has sometimes refused them, and directed an application to the Attorney-General. You cannot in this case have a rule for what costs shall be taxed in general, for you can have no more than the penalty the recognizance extends to; but if the cause had gone to trial, you might have had your whole costs, because upon the statute of 9 Anne judgment would be given for costs" (1). This distinction became firmly established (See *R.* v. *Morgan* (2)).

My brother *Rich* has referred me to the provisions of sec. 6 in 9 Geo. IV. c. 83 and to an early New South Wales decision upon it. Read with sec. 5, sec. 6 authorizes the Attorney-General or such other officer as should be duly appointed for the purpose by the Governor to exhibit informations in the colony of New South Wales or Van Dieman's Land. A remarkable modern illustration of the principle is afforded by the decision upon the provision. Sec. 6 of 9 Geo. IV. c. 83 provides "that it shall and may be lawful for any person or persons, by leave of the Supreme Courts" of those colonies "respectively first had and obtained, to exhibit a criminal information against any other person or persons in the name of the said Attorney-General, or of such other officer as aforesaid, for any crime or misdemeanour not punishable by death, by him or her or them committed, or alleged to have been committed . . . and any information so exhibited as aforesaid by leave of the court shall be heard, tried, and determined in such and the same manner in every respect as any other informations are hereinbefore required to be heard, tried, and determined."

It was decided in the case of *R.* v. *North* (3) that this provision governed proceedings in the nature of quo warranto. An application for quo warranto had been granted questioning the title of the defendant to the office of alderman, and when he was ousted it was contended that no costs were recoverable. *Wise* J. said:—"The question for my decision was, whether any costs were recoverable in this colony upon a judgment of quo warranto. The question turns, in my opinion, entirely on whether the 9th Anne c. 20, sec. 5, is or is not applicable to a proceeding of this kind. I am of opinion that it is not. The present proceeding is, in point of law, an information in

(1) (1736) Cas. temp. Hardwicke, at pp. 248, 249; 95 E.R., at p. 159.
(2) (1736) 2 Stra. 1042; 93 E.R. 1020.
(3) (1865) 4 S.C.R. (N.S.W.) (L.) 182.

the name of the Attorney-General, under the provisions of 9 George IV. c. 83, sections 5 and 6, and rule 19 of the 29th April, 1856, which sections apply alike to all crimes, whether felonies or misdemeanours. No distinction is made between one kind of felony or misdemeanour and another; and it seems to me, therefore, that the rule as to costs must be alike in all—that is to say, the defendant pays no costs in any case. It has long been well settled that no costs can be obtained in a quo warranto, except by force of 9 Anne c. 20, or some other statute; and that statute does not apply, in my opinion, to any case in which the Attorney-General is the officer in whose name and by whose authority the information is presented" (1).

Sec. 6 of 9 Geo. IV. c. 83 has gone in Victoria. It is really replaced by sec. 389 of the *Crimes Act* 1928 (Vict.), but the case shows the persistence of the view that quo warranto proceedings were criminal in their nature as well as in their origin. That view led to the passing in England of sec. 15 of the *Judicature Act* 1884 making quo warranto a civil proceeding, a provision which is to be found here in sec. 31 of the *Supreme Court Act* 1928 (Vict.).

In the case of *R.* v. *Williams* (2) which was cited this morning, the view that an information of quo warranto may be obtained independently of 9 Anne c. 25 was expressed in a form which appears to make the point particularly clear. A proceeding was taken which actually fell outside the statute. After judgment had been given upon the information against the defendant awarding costs to the relator as under the statute, error was brought. Although the information had been obtained and exhibited on the footing of the statute and costs awarded accordingly, the court of error nevertheless treated the case as one in which the information and judgment, except as to costs, could be supported at common law. The mention of the relator was treated as surplusage and the judgment as to costs only reversed.

But unfortunately in 1765 Lord *Mansfield* made the error of supposing that the *locus standi* of a private individual applying for quo warranto was dependent on the statute of 9 Anne c. 25, and he

(1) (1865) 4 S.C.R. (N.S.W.) (L.), at p. 183.

(2) (1757) 1 Burr. 402; 97 E.R. 371.

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expressed that view on more than one occasion at about that time. In *R.* v. *Trelawney* (1), although his opinion does not appear in the report, it is said (*Selwyn, Nisi Prius*, 5th ed. (1820), p. 1102; 12th ed. (1859), p. 1171) that he so stated and this view is expressed by *Wilmot* J. in the report. In *R.* v. *Marsden* (2) Lord *Mansfield* is reported to have said :—" But no case or even dictum appears, or any instance, where the coroner and attorney did file these informations before the Act of 4, 5 W. & M. : nor by the records of the office, is there any sort of proof of it, therefore I should desire the records to be searched, if it were necessary to form an opinion on that point. But that is not, at present, necessary." *Wilmot* J. expressed a like opinion (3). But after a discussion " the judges all declared expressly, that they were far from giving any opinion one way or another upon the first point; but meant to let it remain open to any future light that might be procured upon the subject, by cases or precedents or otherwise, and particularly by searches after what the Master of the Crown Office had done in these cases, before the two Acts of Parliament of 4, 5 W. & M. and 9 Anne " (4).

In the case to which I have already referred of *R.* v. *Breton* (5) the records were searched, and, although what is stated in the report (6) as to their effect does not expressly refer to the fact that there was a relator, that seems clearly to have been so.

In *R.* v. *Highmore* (7) Lord *Tenterden* referred to the numerous precedents before the statute of 9 Anne. Nevertheless, Lord *Mansfield's* mistake led to a general opinion being formed or repeated to the effect that the origin of the relator's *locus standi* was in the statute. In a book, published in 1830, by *H. W. Tancred* entitled *A Treatise on Informations in the nature of Quo Warranto*, there is, at pp. 14, 15 and 16, a discussion in which the true position is stated. Further, as Mr. *Tancred* says, it appears from the decision in *R.* v. *Gregory* (8) that Lord *Mansfield* himself departed from his opinion and took the true view. Mr. *Tancred* adds, at p. 15 :—

(1) (1765) 3 Burr. 1615; 97 E.R. 1010.
(2) (1765) 3 Burr. 1812, at p. 1816; 97 E.R. 1113, at p. 1115.
(3) (1765) 3 Burr., at p. 1817; 97 E.R. 1116.
(4) (1765) 3 Burr., at p. 1821; 97 E.R., at p. 1118.
(5) (1768) 4 Burr. 2260; 98 E.R. 179.
(6) (1768) 4 Burr., at pp. 2260, 2261; 98 E.R., at p. 179.
(7) (1822) 5 B. & Ald. 771, at pp. 772, 773; 106 E.R. 1373, at p. 1374.
(8) (1772) 4 T.R. 240n.; 100 E.R. 995.

"The records of the Crown Office leave no room to doubt, that informations were filed by the coroner anterior to that statute, even in cases directly within its provisions (Such as mayor, bailiff, capital burgess: the records are of the 5th Anne. 2 Kyd. on Cor. 416. *Ex informatione*, Mr. *Dealtry*), which clearly shows, that this latter statute did not first introduce these informations, but only made some regulations with respect to the prosecution of them."

In 1845 the House of Lords had before them an appeal in a quo warranto which led them to consult the judges (*R.* v. *Darley* (1)). On that occasion the advice of the judges was given to the House of Lords by *Tindal* C.J., who took the opportunity of stating that the jurisdiction on informations of quo warranto was independent of the statute of 9 Anne c. 25, or at any rate was anterior to it. *Tindal* C.J. said:—"It is only in more modern times that informations have been exhibited by the King's coroner and attorney. The first reported case is that of *The King* v. *Mayor of Hertford* (2), in 10 W. III. And it is a mistake to suppose that these informations were founded on the statute of 9 Anne, *The King* v. *Gregory* (3) and *The King* v. *Williams* (4) where the right to file an information at common law, by the coroner and attorney, against a person for holding a criminal court of record, was recognized. After the statute of 4 and 5 W. & M. which restrained the filing of informations by the coroner and attorney, the sanction of the court was required, and after that statute and the 9 Anne, it exercised a discretion to grant or refuse them to private prosecutors, according to the nature of the case" (5).

Finally, in the modern case of *R.* v. *Speyer and Cassel* (6) Lord *Rading* C.J. stated the same or substantially the same conclusion. The question in that case was whether a member of the Privy Council was liable to an information of quo warranto if he lost his qualification for that office; for an office it was held to be. After shortly stating the history of the remedy up to the statute of 9 Anne c. 25, Lord *Reading* C.J. proceeds:—"Since that time there has been a tendency

(1) (1846) 12 Cl. & Fin. 520, at p. 537; 8 E.R. 1513, at p. 1520.
(2) (1698)1 Salk. 374 and 376; 1 Ld. Raym. 426; 91 E.R. 325, 328, 1183.
(3) (1772) 4 T.R. 240 n.; 100 E.R. 995.
(4) (1757) 1 Burr. 402; 97 E.R. 371.
(5) (1846) 12 Cl. & Fin., at pp. 537, 538; 8 E.R., at p. 1520.
(6) (1916) 1 K.B. 595, at p. 608.

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to extend the remedy, subject to the discretion of the court to grant or refuse informations to private prosecutors according to the facts and circumstances of the case, and hence it is that it becomes so difficult to reconcile many of the decisions, as was pointed out by Lord *Brougham* in *Darley* v. *The Queen* (1). In that case the judges were summoned to the House of Lords to give their opinion. The House of Lords adopted the opinion delivered by *Tindal* C.J., and since then this decision has been the starting point when considering the law relating to quo warranto, and the effect of the earlier cases has been much qualified: *Reg.* v. *Hampden* (2). Many of the authorities cited to us in the course of the argument were dealt with in that case and reviewed by *Tindal* C.J. He expressed his conclusion in the oft-quoted words (3):—'After the consideration of all the cases and dicta on this subject, the result appears to be, that this proceeding by information in the nature of quo warranto will lie for usurping any office, whether created by charter alone, or by the Crown, with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others.' The test to be applied is whether there has been usurpation of an office of a public nature and an office substantive in character, that is, an office independent in title. This decision is an authority against the proposition argued by the Attorney-General. It establishes that, whereas formerly a quo warranto was held to lie only where there was an usurpation of a prerogative of the Crown or of a right of franchise, a proceeding by information in the nature of quo warranto has long since been extended beyond that limit and is a remedy available to private persons within the limits stated by *Tindal* C.J. and subject always to the discretion of the court to refuse or grant it" (4).

In Victoria 9 Anne c. 25 was repealed and transcribed in the *Common Law Procedure Statute* 1865, secs. 2, 253, 254. When the *Judicature Act* 1883 was passed it left those provisions of the *Common Law Procedure Statute* in force. The *Rules of Court* 1884 were made in

(1) (1846) 12 Cl. & Fin., at p. 537; 8 E.R., at p. 1519.
(2) (1865) 6 B. & S. 923, at p. 931; 122 E.R. 1434, at p. 1437.
(3) (1846) 12 Cl. & Fin., at p. 541; 8 E.R., at p. 1521.
(4) (1916) 1 K.B., at p. 609.

the year following the passing of the *Judicature Act*. They referred to quo warranto in rule 2 of Order LXVIII., and made applicable certain provisions of the Judicature rules, but no Crown Office rules were made.

In the consolidation of statutes of 1890, made under the supervision of Mr. Justice *Higinbotham*, the provisions of 9 Anne c. 25, sec. 4, were treated as no longer of importance. They were repealed by the *Supreme Court Act* 1890, sec. 2. That section included a proviso that nothing therein should be construed to take away, lessen or impair any statutory or other jurisdiction, power or authority of the court or the judges thereof. Sec. 18 repeated the provision that comes from 9 Geo. IV. c. 83, sec. 3, conferring upon the Supreme Court the jurisdiction of the common-law courts at Westminster.

It is said on behalf of the defendant that the result of the repeal of 9 Anne c. 25 and the corresponding provisions of the *Common Law Procedure Statute* was to make it no longer possible for the Supreme Court of Victoria to give leave to a relator to exhibit an information in the nature of quo warranto, or, alternatively, no longer possible in the case of corporations which were covered by 9 Anne c. 25, sec. 4.

The matter may be looked at as one of jurisdiction, or it may be looked at as one of right. The jurisdiction of the Court of King's Bench to entertain informations in the name of the King granted at the instance of a private prosecutor by the Master of the Crown Office appears clearly to have existed at common law. The control by the court of the Master of the Crown Office as King's Attorney and Coroner in reference to granting informations at the instance of a private prosecutor may rest on 4 & 5 Will. & Mary c. 18, but that statute is still in force (See Division 4 of Part II. of the *Imperial Acts Application Act* 1922). But the jurisdiction over a proceeding by quo warranto obtained by a private individual subsisted at common law and is preserved. The jurisdiction to give leave to issue the process also remains.

Looked at from the point of view of right, the matter may tend perhaps to get into some confusion. The position of relator or prosecutor in the case of prerogative writs and of informations is anomalous. The relator or prosecutor has a *locus standi* to obtain

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relief, but the relief or remedy runs in the name of the Crown. In form it is a proceeding by the Crown taken in the public interest. The relator or prosecutor cannot be said to have the ordinary private right to a remedy for the enforcement of the duties owing to him or for the vindication of his own personal rights. The remedy goes in the interests of the public and the relator is in the position of a person who informs the court of an occasion why the public remedy should go.

A further argument, or, perhaps another aspect of the same argument, is relied on in support of the defendant's application for special leave to appeal. The contention is that, although as a result of the provisions of sec. 18 of the *Supreme Court Act* 1890, which is now sec. 15 of the *Supreme Court Act* 1928, it may be possible in Victoria for the Supreme Court to entertain an information of quo warranto, nevertheless it is not for the court to make a judicial order at the instance of a relator for its issue. If the private individual obtains the information from the proper officer of the Crown, the prothonotary, as in whose name the duties of the Master of the Crown Office should be done, then the court is to try it. But, since the repeal of 9 Anne c. 25, it is said, there is no right in the relator to obtain an order of the court for leave to exhibit the information; that his right having been destroyed, the remedy ought not to be allowed to him judicially. I do not think that expresses the true position. The true position is that the relator's *locus standi* depends upon procedure, and that when the statute of 9 Anne c. 25 or its transcribed provisions were repealed, the question might be regulated by rules of court. The Supreme Court Rules of 1906, upon which the relator relies, were passed and a procedure was prescribed enabling a private individual who was interested to proceed very much as he formerly might have done. It is unnecessary to consider whether under sec. 389 of the *Crimes Act* 1928 the information should still run in the name of the prothonotary. Order LIII., rule 35, says that it need not, and, as it is now a civil proceeding, it may be a matter falling within the rule-making powers. In any case the duties of the prothonotary would not be exercisable independently of the control of the court.

The statute of 9 Anne c. 25, sec. 4, itself refers to the Master of the Crown Office as the proper officer of the court.

The course of decision in reference to the descriptions of offices for which an information of quo warranto would lie has not been uniform. As the foundation of the remedy is the encroachment upon the Royal prerogative involved in a usurpation of office or franchise, it appears at one time to have been thought that, apart from cases falling within 9 Anne c. 25, sec. 4, an information would not lie to determine the right to occupy a statutory office. For, unless the office emanated from the Crown and was held directly or indirectly in consequence of the exercise of a prerogative power, it might be considered that the occasion of the remedy was lacking. Upon this view, the statute of 9 Anne c. 25 might be regarded as an extension of jurisdiction, because not all the offices which it included were necessarily derived under charter or otherwise from the Crown. But afterwards a different view was taken and it was decided that it was enough that the office emanated from the Crown in its legislative capacity. In *Darley* v. *The Queen* (1) *Tindal* C.J. says:—"But supposing that this proceeding is applicable only where rights of the Crown, as in the instances of offices derived from the Crown, are concerned, it is not confined to such as are created by charter, or which may be presumed to have been originally so created. It has been held to apply to offices constituted by Parliament; nor can any good reason be assigned why it should lie, where the Crown alone creates the office by its prerogative, and not lie where it creates it with the advice and consent of the Lords and Commons. Accordingly an information was held to lie for a corporate office created, not by charter, but by Act of Parliament (*The King* v. *Duke of Bedford* (2)); so for the office of commissioners for paving under a local Act (*The King* v. *Badcock* (3)); and for the office of trustees of a harbour (*The King* v. *Nicholson* (4)), though constituted by a private act, their duties being public; and the court said, that informations have been constantly granted where any new jurisdiction or public trust is exercised without authority,

(1) (1846) 12 Cl. & Fin., at p. 539; 8 E.R., at p. 1521.
(2) (1729) 1 Barn. K.B. 242; 94 E.R. 165.
(3) (1782) 6 East, at p. 359; 102 E.R. at p. 1324.
(4) (1714) 1 Stra. 299; 93 E.R. 533.

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and the argument that these informations were granted only where the Crown alone could have granted the franchise, was expressly overruled." And again: "After consideration of all the cases and dicta on this subject, the result appears to be, that this proceeding by information in the nature of quo warranto will lie for usurping any office, whether created by charter alone, or by the Crown, with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function of employment of a deputy or servant held at the will and pleasure of others; for, with respect to such employment, the court certainly will not interfere, and the information will not properly lie" (1).

From the citations contained in the opinion of the judges in this case, in the arguments of *R.* v. *Ramsden* (2), *R.* v. *Hanley* (3), *R.* v. *Beedle* (4) and *R.* v. *Guardians of St. Martin's* (5), and from the collection of cases in *Halsbury*, 2nd ed., vol. 9, p. 805, note *c*, a great many examples may be obtained of cases falling altogether outside 9 Anne c. 25, sec. 4, where a relator's information has been held to lie. The fact is that there grew up a general jurisdiction to grant relief at the instance of a relator in proceedings framed upon the analogy of the statute, based upon the common law as restricted by 4 & 5 Will. & Mary c. 18.

In Victoria that jurisdiction appears to be properly exercisable in pursuance of Order LIII. of the *Rules of the Supreme Court.*

The question I have discussed is, no doubt, deserving of thorough investigation and the circumstances of this case have made it undesirable that we should take the time necessary for as complete an examination of the authorities as we should like. But the defendant in applying for special leave has complained that he has not been able to secure from the courts any decision on this his most important and fundamental objection to the information, and certainly he has made several attempts to raise it as a preliminary question. In the circumstances we think it right to express our opinion upon it and to do so at once, in view of the fact that the trial of the information is now pending.

(1) (1846) 12 Cl. & Fin., at pp. 541, 542; 8 E.R., at pp. 1521, 1522.
(2) (1835) 3 A. & E. 456; 111 E.R. 487.
(3) (1830) 3 A. & E. 463n; 111 E.R. 489.
(4) (1834) 3 A. & E. 467; 111 E.R. 491.
(5) (1851) 17 Q.B. 149; 117 E.R. 1238.

The other matter upon which the application is grounded is of quite a different nature. The defendant contends that the order nisi should not have been made absolute, because at that time it was neither properly alleged and certainly not proved that any of the votes said to have been cast by persons impersonating electors upon the roll were cast in favour of the defendant. Therefore, it was said, it was not shown that any votes should be deducted from the defendant's total, and, indeed, it was not known from the total of which of the candidates, who were more than two in number, the fictitious votes should be deducted. The argument was primarily based upon the decision of this court in *Bridge* v. *Bowen* (1), a decision upon a New South Wales statute.

The question whether *Gavan Duffy* J. ought or ought not to have taken the course that he did, in acting upon the material before him and allowing an information to be filed, is one which I do not think should be examined at this stage of the proceedings. When the information was filed and pleaded to, an issue arose for trial or inquiry. The issue involves the question whether the defendant received a majority of lawful votes. When this court decided that it ought not to grant special leave to appeal from the order absolute, that appears to me to imply that, until in the proceedings upon the information the Supreme Court had determined the question, this court should not be called upon to intervene. The point which it is sought to make is that, unless and until proof is adduced that the impersonators voted in favour of the defendant in sufficient numbers to account for his majority, he cannot be called upon to support the validity of his election. The point may never arise upon the trial of the information. But the distinction or possible distinction between such a case as this and that of *Bridge* v. *Bowen* (1) appears from a passage in the judgment of *Isaacs* J., as he then was (2). It is as follows :—" In England it is, and always has been, the universal practice in cases of personation to allege and prove that the personator voted for the opposite party, and thereupon the vote is deducted. Before the *Ballot Act* in England, when the voting was open, the proof was easy, because the destination of the vote was always known, and the vote was deducted from the person who got it

(1) (1916) 21 C.L.R. 582. (2) (1916) 21 C.L.R., at pp. 621, 622.

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(*Southampton Case* (1)). The same practice has been followed since the *Ballot Act* 1872 which sanctions it (*Gloucester Case* (2); *Athlone Case* (3)). In Queensland, both in parliamentary and municipal elections, intruded votes are, notwithstanding the ballot law, examined and struck off the total of the person who received them (*Queensland Parliament Papers* 1912, vol. I., pp. 40, 42, and 73; *R.* v. *Martin* (4)). There is nothing, therefore, inherently contrary to the *Ballot Act* in looking to see for whom a personated vote or other intruding vote was given. The secrecy of the ballot is intended to protect those who have a right to vote, not those who illegally invade the polling booth, and tend to destroy the elective privileges of the lawful voters. This principle is stated with great clearness in the *Cyclopedia of Law and Procedure* (American) vol. XV., at pp. 424, 430, 431, with cases cited. Some legislatures have therefore made provision for voting in such a way that until the necessity arises for eliminating invaders' votes, absolute secrecy shall be preserved; but, when such necessity does arise, means are afforded by which those votes can be ejected. So in England and Queensland. Other legislatures appear to consider on the whole that no such means are absolutely necessary, or that their adoption may be left to the local bodies concerned. Secrecy is then inviolable whatever personation takes place."

In the present case, sec. 22 of Act No. 178 provides for the preservation of votes. It appears to contemplate their production for examination judicially. Further, in sec. 152 of the *Local Government Act* 1928, which applies to Melbourne and Geelong, there are allusions to the position of the returning officer, who has the voting papers. It supposes that he is legally bound to answer questions in some inquiry. We think that the application of the views given effect to in *Bridge* v. *Bowen* (5) is at least questionable. The votes are there and the question as to how they are to be dealt with on the trial of the information is a matter which can only properly arise at the trial. We do not think it desirable to give in advance an opinion upon the question, which has not been argued, whether at the trial

(1) C. & K. 102.
(2) (1873) 2 O'M. & H. 59, at p. 64.
(3) (1880) 3 O'M. & H. 57, at p. 59.
(4) (1907) Q.S.R. 166.
(5) (1916) 21 C.L.R. 582.

the matter should be dealt with upon subpœna *duces tecum* or by directing an inquiry or some other investigation.

Lowe J. was invited to order that a special case should be stated raising the question whether the proceeding was maintainable and another question or questions. He exercised his discretion and refused to do so. So far as this is an application for special leave to appeal so as to attack that particular order, it would be difficult to induce this court to undertake the task of reviewing the learned judge's exercise of discretion. The applicant appealed from the order of *Lowe* J. to the Full Court and the Full Court again refused to overrule his discretion. We have been asked as a third court to enter into the question of how a discretion in a procedural matter should be exercised.

The second point which I have dealt with is of an entirely different character from the first; it does not go to the question whether the proceedings lie at all, but to the manner in which they ought to be decided in substance.

Special leave to appeal refused.

Solicitors for the applicant, *Mahoney, O'Brien & Harty.*
Solicitors for the respondent, *Bullen & Burt.*

H. D. W.