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Quo Warranto and the Borough Office Holder, 1700–1792

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In 1713, members of the Whig faction in the Wiltshire borough of Calne, who had been denied a seat by reason of the presence of fifteen ineligible burgesses on the electoral roll, considered their next move. They decided against using the conventional process of a petition to the partisan House of Commons Committee on Privileges and Elections, 'despairing of relief from that Parliament'.[1] Instead, they decided on the more novel course of taking their case to the Court of Queen's Bench by way of a prosecution for quo warranto under the recently enacted Municipal Corporations Act 1711[2] – where they ultimately managed to disqualify the illegally appointed burgesses.

Prosecutions by way of quo warranto under the Municipal Corporations Act 1711[3] became a regular feature of the eighteenth-century English parliamentary electoral cycle. The common resort to the 1711 Act was related to three features of the unreformed electoral system. First, eligibility to vote in the parliamentary boroughs was often confined to a small group of office holders: aldermen, common councillors, capital burgesses, or common freemen. In small boroughs with very few voters and very small majorities, the elimination of even a small number of office holders could affect the outcome of a parliamentary election. Second, litigation was encouraged by the lack of a centralised legal framework regulating eligibility to office (and the derivative title to vote in parliamentary elections). The law regulating election to borough offices was usually local and customary and, as a result, often uncertain.

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[1] S. Handley, 'Calne 1690–1715' in D. Hayton and E. Cruickshanks (eds.), *History of Parliament: The House of Commons, 1690–1715, Vol. II* (Cambridge, 2002), 651, n. 9.

[2] 9 Anne c. 20.

[3] Ibid.

The quo warranto information provided a means of determining these controversies over the exact content of these customs. Third, the pre-existing means of challenging the title to vote was by means of a post-election petition to the House of Commons Committee of Privileges and Elections. However, the Committee was notoriously partisan.[4] Petitioners who were affiliated with the majority party in Parliament would likely prevail; petitioners attached to the opposition were likely to lose.[5] The quo warranto information provided those who, like the candidates from Calne, '[despaired] of relief' from Parliament with a means of independent judicial review of eligibility overseen by the Court of King's Bench.

The Criminal Information and Admission to Borough Office, 1690–1711

Between 1690 and 1711, two types of criminal prosecution, initiated by an information in the Court of King's Bench, had been deployed against disqualified officers, and against those who had admitted them to office: (i) an ordinary criminal information and (ii) an information by way of quo warranto. Ordinary prosecution by way of criminal information lay, according to the rather open-ended test, 'wherever a matter concern[ed] the public government'.[6] In 1697, a criminal prosecution was taken against a member of the Council of Six of Nottingham for presiding without having taken the oath prescribed by the Corporation Act 1661.[7] In 1699, burgesses from Maldon and Malmsbury were prosecuted for failing to take the oaths of office and for participation in an illegal assembly at which alderman and burgesses were elected.[8] In Hilary term 1703, Edward Northey initiated criminal prosecutions against Richard Vavasor for taking office in Totness[9] without observing the Toleration

[4] W. A. Speck, '"The Most Corrupt Council in Christendom": Decisions in Controverted Elections 1702–1742' in C. Jones (ed.), *Party and Management in Parliament* (Leicester, 1984), 107, 108.
[5] Ibid.
[6] *Mr Prynn's Case* (1690) 5 Mod. 459.
[7] *R v. Cooke* (1699) (PRO, KB 11/18); 13 Car. II, c. 1.
[8] *R v. Bartlett* (1699) and *R v. Abraham Huggins* (1699) (PRO, KB 11/18 (Box 1 (Trin 1699)).
[9] (1703) (PRO, KB 28/4, no. 16); Privy Council Register, 11 May 1704 (PRO, PC 2/80, f. 112).

Act 1688,[10] and against Edward Seabrooke for, as mayor, illegally creating freemen in the town of St Albans.[11]

The criminal information by way of quo warranto had developed in the early sixteenth century[12] as a mechanism for dealing with the abuse of franchises by the grantees of franchises devolved to local entities by the crown. There was a legal condition that 'annexed to, and grew upon all franchises, that they be not abused'.[13] Exercising 'liberties privileges and franchises' beyond that granted by the charter was one form of abuse and a criminal offence. The penalties included exclusion from the franchise.[14] The sanction of permanent removal from the franchise could be more effective than the simple fine which might be imposed following an ordinary criminal information.[15] In 1546, a quo warranto information was taken against the borough of Reading for admitting ineligible persons as burgesses.[16] In 1699, a quo warranto information was taken against the mayor of Holt in Denbigh for illegally admitting non-resident freemen.[17] The previous year, the borough of Hertford had illegally created honorary freemen to vote in the interest of the Tory faction and to outvote the non-conformist Whig resident freemen. The Attorney General, Sir Edward Northey, explained that a prosecution by way of information in the nature of quo warranto could be used to restrict the corporation from continuing the practice:

> if an information be exhibited against the corporation in the nature of a quo warranto for claiming a right to make persons not inhabiting within the borough free of that corporation, the corporation must either disclaim such right or set out a title to it on which a judgment will be given, to allow the claim, or to oust them from such right, if the matter shown in the plea shall be adjudged sufficient.[18]

[10] (1688) 1 Wil. & Mar., c. 18.
[11] (1703) (PRO, KB 28/4, no. 18).
[12] H. Garrett-Goodyear, 'The Tudor Revival of *Quo Warranto* and Local Contributions to State Building' in *On the Laws and Customs of England; Essays in Honour of Samuel E. Thorne* (Chapel Hill, NC, 2011), 231, 232; C. Patterson, 'Quo Warranto and Borough Corporations in Early Stuart England' *English Historical Review*, 120 (2005), 879.
[13] *R v. City of London* (1682) 8 Howell State Trials 1039, 1087.
[14] See the text at n. 23 below.
[15] See the text at nn. 6–11 above.
[16] (1546) (PRO, KB 29/178, 34d); Garrett-Goodyear, 'The Tudor Revival', 294.
[17] (1699) (PRO, KB 11/19 (Box 1/Trin 1699). In 1705, a quo warranto information issued against the parish of Chard for purporting to act as a corporation: *R v. Donne* (1705) (PRO, KB 28/14, no. 7).
[18] Opinion of Edward Northey, 29 December 1698 (Hertford Record Office, Hertford Borough Records, Vol. 25, f. 26).

A second strain of quo warranto information, of which there were instances in the late seventeenth century,[19] was revived in a series of prosecutions initiated by Edward Northey in the middle of the first decade of the eighteenth century. A wider understanding of the idea of a franchise underlay this form of quo warranto prosecution. On a narrower view, a franchise was understood as a right that might be directly conferred on the borough by the Crown by a grant: for instance, the right of a borough to elect a mayor or the right to admit burgesses. On a wider view, the notion of a franchise also included the electoral offices derived from the greater franchise: the franchise of being a mayor or being a burgess. This theory of a derivative franchise enabled the institution of the second variety of quo warranto information: for exercising the 'liberty, privilege and franchise' of being a borough officer without having been lawfully appointed. In Easter 1705, Northey laid an information charging Daniel Whidby with exercising the 'liberty privilege and franchises' of acting as mayor of Orford without lawful authority.[20] In 1706, quo warranto informations were initiated against Henry Cocksedge for exercising, without being lawfully elected, the franchise of capital burgess of Thetford,[21] and against Peter Clarke for assuming the office of capital burgess of Devizes.[22] Being a lawfully entitled capital burgess was, according to the charge in these cases, a 'liberty franchise and privilege'. It followed that exercising that borough officer franchise without 'any warrant or royal grant' was amenable to criminal prosecution. As the range of defendants amenable to the quo warranto information was extended – from the immediate franchisee to those who purported to be appointed by that franchisee – so too was the remedy. Corporate officers who asserted the liberty privilege and

[19] In proceedings lasting between 1680 and 1683, the defendants were prosecuted for illegally exercising the office of alderman in Winchester. *R v. Higgins* (1682) 1 Vent. 366. The link between the Winchester case and the early eighteenth-century prosecutions was identified by Paul Halliday in *Dismembering the Body Politic* (Cambridge, 1998), 201–204.

[20] (1705) (PRO, KB 28/13, no. 25).

[21] (1706) (PRO, KB 28/19, no. 29). The process was also used against individuals illegally claiming to be members of craft guilds. In *R v. Critchlow* a quo warranto was issued against a defendant claiming to be member of the Coventry Drapers' Company (1706) (KB 21/27, f. 70).

[22] (1706) PRO KB 28/20, no. 18; *R v. Clarke* (1706) Wiltshire Records Office (G 20/1/90 (7)). In *R v. Foley* the defendant was prosecuted for claiming the right to vote for the bailiff in Bewdley (1706) (PRO, KB 28/18). See Halliday, *Dismembering the Body Politic*, ch. 9.

franchise of being a corporate officer without lawful authority now became liable to the traditional quo warranto penalty of exclusion from office.[23] Henry Cocksedge, a Thetford burgess, was fined 40 shillings and was, in addition, ousted from the office of burgess of Thetford.[24] The effect of the notion of the secondary franchise was that constituency managers could now use the criminal information, and its sanction of exclusion, as a voter suppression strategy in parliamentary elections.

In 1711, the new process was given a legislative basis: the Municipal Offices Act 1711.[25] In *R v. Taylor*,[26] more than twenty years later, the origins of the 1711 Act were explained as related to doubts about the capacity at common law of the Court of Queen's Bench, when processing a quo warranto information, to issue a judgment of ouster. The process by information was criminal. The defendant might be fined; but, it was said, a criminal court, trying an information, had no power to impose the civil sanction of excluding a defendant from office. According to Barnardiston's report, the barrister John Willes recollected that '[b]efore the Statute of 9 Ann[e] ... it was far from being a clear point, that judgments of ouster could ever be entered up in informations in the nature of a quo warranto. Lord Chief Justice Holt declared his doubts of it often'.[27] The suggestion that Holt CJ should have 'declared his doubts ... often' about the jurisdiction to order ouster is difficult to reconcile with contemporary legal practice or with Holt CJ's own rulings. Since the early seventeenth century, judgments of ouster or ('excludatur') had been inserted when individuals or corporations were prosecuted by way of quo warranto for illegally asserting privileges and franchises.[28] In 1709, Holt CJ ordered that a burgess from Thetford 'should be ousted of his office'.[29] A decade earlier, Holt CJ actually declared that a judgment in an information in the nature of quo warranto would be positively irregular without 'an ouster of the particular franchise'[30] – an

[23] *R v. Helden* (1610) Edward Coke, *Book of Entries* (London 1614), 527; *R v. Fitzwater* (1676) John Tremayne, *Pleas of the Crown* (London, 1773), 446.
[24] (1706) (PRO, KB 28/19, no. 29); *R v. Turner* (PRO, KB 28/21, no. 11); *R v. Sharpe* (PRO, KB 28/23, no. 45).
[25] 9 Anne c. 20.
[26] (1733) 2 Barn. KB 280.
[27] Ibid. 281.
[28] See *R v. Helden*; Coke, *Book of Entries*; *R v. Fitzwater*; Tremayne, *Pleas of the Crown*.
[29] *R v. Tyrrill and Barber* (1709) 11 Mod. 235 referred to in *R v. Bennett* (1717) 1 Strange 101.
[30] *Banbury's Case* (1695) 3 Salk. 213.

assertion which was virtually the opposite of Holt CJ doubting the jurisdiction to order ouster.

Parliament's claim of exclusive jurisdiction in electoral matters may have provided a more urgent need to underpin the process with a legislative foundation. In *Goodwin v. Fortescue*,[31] in 1604, the Court of Chancery had annulled the election of Sir Francis Goodwin (on the ground of his being an outlaw). The House of Commons protested against the interference of the Court of Chancery, arguing that Parliament had 'ever used to appoint special committees . . . for examining controversies concerning elections'.[32] Parliament's objection was conceded by James I. The problem was that the quo warranto information against voters appeared to offend this injunction: the information was being used to determine the right of electors other than in the Commons. The principle in *Goodwin's* case was then underscored by Parliament's response to the decision of the Court of Queen's Bench in *Ashby v. White*.[33] In *Ashby*, the Court of Queen's Bench had resolved that a returning officer who illegally denied the right to vote to an eligible voter could be sued by the elector in a civil action. The House of Commons, in turn, denounced the decision of the Court of Queen's Bench as an infringement of its privileges to determine electoral disputes, and condemned prosecutions which brought the 'right of electors to the determination of any other jurisdiction'.[34] The language used by the Commons in January 1704 could be seen as a direct repudiation of the quo warranto information, about the admission of non-resident freemen, which was being prosecuted in the Court of Queen's Bench against the corporation of Hertford;[35] by that information, the Court of Queen's Bench was 'determining' the right of a group of 'electors' (non-resident freemen). The Commons statement went on to threaten consequences for lawyers who, by prosecuting an information, infringed the resolution. Lawyers, it declared, who 'shall commence or prosecute any information, which shall bring the right of electors to the determination of any other jurisdiction' were to be regarded as 'guilty of a high breach of the privilege of this House'.[36]

[31] (1604) 2 St Tr. 91.
[32] Ibid. 104.
[33] (1703) 2 Ld Raym. 938.
[34] 26 January 1704, 14 *Commons Journals* 308 (26 January 1704).
[35] (1703) 12 Mod. 224. See Opinion of Edward Northey, above.
[36] 26 January 1704, 14 *Commons Journals* 308 (26 January 1704).

The 1704 resolutions contained a proviso: electoral disputes could be determined elsewhere 'in cases especially provided for by act of parliament'. The House of Commons could agree to cede by legislation part of its own exclusive right to determine 'the qualification of any elector'. This was precisely what Parliament did when in 1711 it enacted the Municipal Offices Act.[37] In 1711 leave was given to Sir Gilbert Dolben, Serjeant Webb, and Sir Robert Eyre, the Solicitor General, to prepare a bill for 'the more easy trying and determining the rights of officers in corporations'.[38] The 1711 Act provided parliamentary authority for the common law process and removed the conflict with Parliament. Section 4 provided that after the first day of Trinity term 1711, 'in case any person or persons shall usurp, intrude into, or unlawfully hold and execute any of offices or franchises' within boroughs or towns corporate 'it shall and may be lawful' for the court to 'proceed therein in such manner as is usual in cases of information in the nature of a quo warranto'.

The House of Commons and the Quo Warranto Information, 1708–1735

After 1711, the two processes of the petition to the House of Commons Committee of Privileges and Elections[39] and the quo warranto information operated concurrently. Occasionally, the two processes came into conflict. A direct conflict could arise where the Committee's determination on voter eligibility contradicted an earlier quo warranto judgment. In the first of these conflicts, the Commons chose to ignore a prior King's Bench judgment. The borough of Bewdley had split; it was reported that the factions attached to two rival bailiffs were acting 'like rival popes'.[40] The question as to which of the mayors had a legal title to act depended, in turn, on the question of which of two charters (one of 1605 or a later charter) governed the borough; that question had been determined in quo warranto proceedings in 1708 in Smith's Case[41] in favour of the

[37] 9 Anne c. 20.

[38] 16 *Commons Journals* 450 (9 January 1710/11). Serjeant Webb was the MP and Recorder for Devizes and had been implicated in quo warranto proceedings in 1706 (*R v. Clarke* (1706) Wiltshire Records Office (G 20/1/90 (7)). In *R v. Williams* (1757) 1 Wm Bl. 93. Foster noted that the Act had been drafted by Justice Powell.

[39] Speck, 'The Most Corrupt Council in Christendom', 107, 108.

[40] J. Burton, *A History of Bewdley* (London, 1883), 45.

[41] (1708) (PRO, KB 28/26, no. 1).

older 1605 charter.[42] The Committee on Privileges, however, refused to abide by the judgment in the quo warranto case, finding that the bailiff elected under the subsequent charter was lawfully elected.[43]

Parliament again pushed its superior claim to determine the legality of elections in 1729 in a case from Queenborough.[44] The validity of the election of the (Tory) MP, Richard Evans, depended on the votes of newly admitted burgesses. Those burgesses had been admitted at a meeting of the mayor, jurats and bailiffs, but without the concurrence of the existing free burgesses. On an information in the nature of quo warranto in 1728,[45] it had been held that the election was invalid because it did not have the concurrence of the free burgesses. Counsel for the petitioner opened the judgments entered up in the King's Bench in 1728. As it had done twenty-one years earlier, the Commons refused to be bound by the King's Bench and, notwithstanding the verdict on the quo warranto, ruled the election valid.

Eventually, in the Marlborough election dispute of 1735, the House of Commons conceded the superior validity of the quo warranto judgment. By 1735, Sir Robert Walpole's majority had been cut by thirty-four seats. The government was anxious to reverse its defeat at Marlborough. It could do this if it could disqualify ten of the burgesses who had voted for the Tories. The validity of the admission of those ten burgesses depended, in turn, on the validity of the election of a capital burgess named Bell.[46] The problem for the government was that the matter had already been tried by quo warranto and a jury had found that Bell had been properly admitted. Although the jury in quo warranto proceedings had found that Bell had been properly elected, the committee, urged on by Sir Robert Walpole, ruled that it could admit evidence in contradiction of the verdict.[47] The 1708 Bewdley precedent and the 1729 Queenborough petition were produced. The diarist William Hay MP set out the Committee's reasoning:

> The sole right of judging and determining their own elections is one of their most essential privileges and it would be highly imprudent to suffer themselves to be precluded from determining the merits of the election by

[42] 'Anthony Lechmere and Salvey Winnington . . . The Case' (London, 1710), 1.
[43] 8 February 1709, Orders Determinations and Resolutions of the House of Commons (London, 1741), 11.
[44] 21 *Commons Journals* 325, 326, 327 16 & 17 April 1729.
[45] (1728) PRO, KB 21/33, ff. 61, 85.
[46] Edward Harley's Journal, 28 March 1735, in *Tory and Whig: The Parliamentary Papers of Edward Harley* (Martlesham, 1998), 7.
[47] 22 *Commons Journals* 435, 28 March 1735.

> verdicts and judgments in inferior courts which are in the last resort to be decided by the House of Lords.[48]

Walpole's behaviour appalled a number of the more senior lawyers in the Commons. The Solicitor General, Dudley Ryder, deliberately withdrew from the House rather than be seen to be associated with Walpole.[49] A last moment intervention by the elderly Master of the Rolls, Sir Joseph Jekyll, against his own government, persuaded the House of Commons to dis-continue its conflict with the Court of King's Bench. Edward Harley reported that the seventy-three-year-old Jekyll 'spoke so very strong of the consequences of hearing evidence at the bar contrary to a verdict on quo warranto'.[50] The effect was decisive. In deference to the verdict in the quo warranto, the Commons voted, in line with the verdict at Wiltshire Assizes, to sustain the qualification of the Tory burgesses at Marlborough. Jeckyll's intervention in favour of the superiority of the Court of King's Bench upset both the Prime Minister and Queen Caroline.[51] Edward Harley recorded that 'this was a great blow upon the court'.[52] Following the 1735 ruling, decisions in quo warranto proceedings began to be admitted as evidence in committee petition hearings. In January 1769, counsel in a petition against William Strode (the MP for Yarmouth Isle of Wight) produced records of the Court of King's Bench on quo warranto prosecutions tried at the previous Lent Assizes in Winchester. These judgments established that twenty of the burgesses who had voted for Strode had been illegally admitted.[53] The evidence was admitted and Strode was unseated.[54]

The 1711 Act and Its Prosecutors

Prior to 1711 the decision to allow an information to be exhibited was entirely at the discretion of the Crown. In 1703, the Queen's Bench advised a petitioner that 'your way will be to petition the Queen, and she perhaps will order the Attorney General to bring a quo warranto

[48] C. Jones, 'Lord Bruce and the Marlborough Election Petition of 1735', *Parliamentary History* 38 (2019), 362; Speck, 'The Most Corrupt Council in Christendom', 107–21.
[49] Speck, 'The Most Corrupt Council in Christendom', 107, 116.
[50] Edward Harley's Journal, 28 March 1735, 7.
[51] John Lord Hervey, *Some Materials towards the Reign of George II, Vol. 1* (London, 1931), 418.
[52] Edward Harley's Journal, 28 March 1735, 7.
[53] 32 *Commons Journals* 122, 19 January 1769.
[54] Ibid.

against them'.[55] One of the objects of the 1711 Act was to avoid the informer's dependence on the government. Section 4 of the Act broke the prerogative by authorising the master of the King's Bench to exhibit a quo warranto information 'at the relation of any person or persons desiring to sue or prosecute'. The phrase 'any person' was, in practice, interpreted as allowing an application to be made by 'any person' acting on behalf of the actual prosecutor. The actual prosecutor, 'on behalf' of whom the application was made, was usually concealed behind the name of an attorney. James Clear of Gray's Inn fronted an Ipswich-related case in 1773,[56] while all of the challenges made against Portsmouth burgesses in the 1770s were submitted by Peter Taylor of Pall Mall.[57] In 1785, Mansfield CJ, noticing how the real prosecutor had concealed himself behind the relator, teased the prosecutor: 'who are you? What concern have you with the corporation?'[58] The usual answer to the question 'who are you?' was, of course, parliamentary candidates and their managers. A series of quo warranto applications in Droitwich in 1747 were reported to have been taken by Thomas Foley MP and his friends on the one side and Lord Sandys and Mr Winnington on the other.[59] In 1758, the Poole MP Sir Richard Lyttleton was alleged to have secretly funded a series of quo warranto prosecutions.[60] 'Partisans' of the unsuccessful parliamentary candidate, Alexander Fordyce, lay behind several quo warranto challenges in Colchester in the late 1760s.[61] Some quo warranto prosecutions were financed by the government. In the 1740s, Sir Robert Walpole's administration financed quo warranto campaigns aimed at eliminating opposition influence in the boroughs of Orford and Romney.[62] An attorney, Leonard Martin, the son-in-law of the Treasury Solicitor, usually acted as relator in these government-backed quo warranto applications.[63] In the early 1770s, it was alleged that Frederick Rogers, the prosecutor in a case involving the borough of Saltash, was acting under 'the direction and at the expense of the Treasury'.[64]

[55] *Vaughan v. Company of Gunmakers* (1703) 6 Mod. 82.
[56] (1773) (PRO, KB 28/286, no. 9).
[57] (1774) (PRO, KB 28/290, nos. 5 to 7).
[58] *R v. Stacey* (1785) 1 Term Reports 1, 3.
[59] Re Borough of Droitwich, William Penrice, 27 January 1749/50 (PRO, KB 1/10/2).
[60] Re Borough of Poole, John Mansfield, 22 November 1758 (PRO, KB 1/13/5).
[61] *Oxford Journal*, 30 July 1768.
[62] *Cobbett's Parliamentary History of England, Vol. 12* (London, 1812), 631, 633.
[63] (1741) (PRO, KB 28/156, rot. 4).
[64] Re Borough of Saltash, Affidavit of John Hill 16 January 1772 (PRO, KB 1/18/4).

The Quo Warranto Process and the Electoral Cycle

From the early 1720s onwards, the eighteenth-century English general election was usually held in the spring. As the date of the election drew nearer, it was essential to the effectiveness of the electoral quo warranto information that it work with dispatch. The mayor, who would serve as the returning officer on election day, had usually been elected the previous autumn, typically on St Michaelmas day.[65] The prosecutor needed to be able to remove the illegally appointed mayor between Michaelmas and the election in the late spring. Under the pre-statutory version of quo warranto, the defendant had been able to retard the process by a delay in entering an appearance. In Hertford-based litigation in 1699, the defendants had avoided entering an appearance for a year; Holt CJ described the common law process as like 'church-work, very slow in its progress'.[66] The 1711 Act was designed to work at a more accelerated pace than the common law remedy: Mansfield CJ described the 1711 Act as the statute 'for quickening the amotion of usurpers'.[67] Under the pre-statutory form of the prosecution, the prosecutor would have to obtain writs of *capias* and of *distringas* to compel the defendant's appearance.[68] The 1711 Act cut out this requirement and substituted a condition that the defendant 'shall appear and plead as of the same term in which the ... information ... shall be filed'. It did not specify what was to happen if the defendant did not plead within the term. The Court of King's Bench remedied that omission by interpreting the 1711 Act as allowing the court to give judgment in default where a defendant failed to appear and plead after four rules.[69] If the prosecutor managed to have the case ready for trial at the spring assizes, the officer, whose title was disputed, might possibly be removed in time for the general election later that spring. In Hilary 1734, an information was laid against an Oxford burgess, Benjamin Beart. Pleadings were exchanged and the case tried at Easter assizes, where the defendant was fined and ousted.[70] Of course, most

[65] Worcestershire: *R v. Higgins* (1681) T. Raym. 484; Carlisle: *Haddock's Case* (1680) T. Raym. 435; Orford: *R v. Goodwyn* (1694) Comb. 269; Guildford: *Mayor of Guildford v. Clarke* (1690) 2 Vent. 247.

[66] *R v. The Town of Hertford* (1704) Carth. 503.

[67] *R v. Dawes* (1767) 1 Wm. Bl. 634, 635.

[68] *R v. Compson* (1707) (PRO, KB 28/21, no. 36); *R v. Cocksedge* (1707) (PRO, KB 28/23).

[69] *R v. Stephens* (1734) (PRO, KB 28/128, no. 26); *R v. Fussell* (1734) (PRO, KB 28/129, no. 7). A 1722 Crown Office note of the practice is set out *R v. Ginever* (1796) Term Rep. 594 (n. 2).

[70] (1734) (PRO, KB 28/128, no. 4).

cases were still determined outside four months; prosecutions were invariably delayed by adjournments, references by the judges of assize to the Court of King's Bench and by writs of error.[71] Borough officers with dubious titles were aware of the danger of being ousted by the accelerated procedure under the 1711 Act and took steps to evade the process. The mayor elected for Scarborough in the autumn of 1738 refused to appear in his robes in public during the Michaelmas term in order 'to prevent informations being brought against [him] in time for trial at lent assize'.[72]

The Grounds of Review by Quo Warranto

While the borough charter established the basic constitutional framework of the borough, key legal issues about the legal conditions of eligibility to borough office (and thereby to vote in parliamentary elections) often remained unaddressed in the charter. The charter of the borough of Southwold was 'silent' as to who was to administer the oath of office to a newly elected burgess.[73] In a 1733 case from Walsall, it was noted that no provision was made by the charter as to what period of notice of the holding of a borough election was necessary.[74] Aston J noted that most charters 'unhelpfully' failed to set out the conditions for election as a burgess or freeman.[75] A dispute in Maidstone over the method of election of the jurats was caused, the Solicitor General explained, by the fact that the 'penning of the charter of Elizabeth leaves it uncertain'.[76] In a case involving the conditions to be elected chamberlain for the borough of Nottingham, Mansfield CJ complained that 'the charters are totally silent'.[77]

To fill the silences in charters, boroughs resorted to custom. In 1742, Lord Romney said that the political community in the boroughs never read the charters but simply relied upon what their predecessors did in similar cases in the past.[78] The grounds of judicial review by way of quo

[71] *R v. Trew* (1734) (KB 28/128, no. 2) (adjournment); *R v. Seward* (1734) (KB 28/128, no. 9) (delay by writ of error).
[72] Benjamin Fowler, 27 October 1739 (PRO, KB 1/6/3).
[73] *R v. Wake* (1728) 1 Barn. KB 80.
[74] *R v. Corporation of Walsol* (1733) Kel. W. 245.
[75] *R v. Carter* (1774) 1 Cowp. 220.
[76] *R v. Corporation of Maidstone* (1739) (Lincoln's Inn, Hill 16, f. 108).
[77] *Derby Mercury*, 7 February 1777.
[78] *The History and Proceedings of the House of Lords, from the Restoration in 1660, to the Present Time, Vol. 8* (London, 1741–43), 502.

warranto information usually involved allegations of infringements of this customary election law. There were three broad categories of infringements: (i) that the officer was not eligible to be nominated; (ii) that the election was not by the proper electoral college; or (iii) that the manner of the holding of the election had infringed customary rules.

Mayors could be prosecuted by quo warranto information on the ground that they had not satisfied some condition of eligibility. In 1748, the title of the mayor of Wareham was challenged on the ground that the mayor had not, in accordance with the customary requirement, first been lawfully elected as a capital burgess.[79] Prior service as sheriff was alleged to be a condition of mayoral eligibility in Poole; the title of John Masters was challenged on the ground that he had not served as sheriff.[80] A number of prosecutions were based on an infringement of a requirement that the candidate for mayor had been a burgess.[81] A dispute in Westbury in 1742 arose from an allegation that there had been an infringement of the convention that the nominees for mayor should be two councillors selected by the current mayor.[82]

Most charters would authorise the corporation to elect 'one or more of the discreet men of the borough, to be a burgess or burgesses', but without specifying the conditions for being recognised as a 'discreet man'.[83] Eligibility to be elected to the office of burgess or freeman was usually claimed through two customary routes: servitude (having served for seven years as an apprentice to a freeman) or patrimony (being born the eldest son of a current freeman). Attorneys employed to contest freemen claiming title through servitude would consult the entries of apprenticeship in corporation books or would obtain testimony from neighbours prepared to vouch that the freeman had not served for the full seven years.[84] Church registers and freemen admissions rolls were checked in order to disprove title by patrimony by showing that the defendant's father had been admitted on a date later than, rather than before, the birth of his son.[85] The titles of a series of Portsmouth

[79] Daniel Dugdale, 6 May 1748 (PRO, KB 1/9/5); *R v. Lewis* (1758) 2 Keny. 497 (New Radnor).
[80] Benjamin Skutt, 17 October 1748 (PRO, KB 1/9/6).
[81] *R v. Mayor of Weymouth* (1740) 7 Mod. 373.
[82] *R v. Hillier* (27 November 1742) (PRO, KB 1/7/5).
[83] *R v. Carter* (1774) 1 Cowp. 220, 226.
[84] *R v. Fenn* (1768) (PRO, KB 28/266); *R v. Lilly* (1768) (PRO, KB 28/266); *R v. Rowe* (1769) 4 Burr. 2287.
[85] Re Borough of Colchester, Affidavit of John Casketter (10 May 1768) (PRO, KB 1/17/4).

burgesses were challenged on the ground that they had been children when they were first admitted.[86] The claim of the Corporation of Exeter to elect non-residents as freemen was the subject of a prosecution in 1730[87]; similar challenges were taken against the Corporation of Durham in 1767[88] and the Corporation of Portsmouth in the mid-1770s.[89]

A second category of dispute involved more far-ranging constitutional questions about which borough constituency could exercise electoral rights. Freemen were becoming increasingly assertive in claiming political rights. The legality of a Maidstone by-law which excluded the 900 male inhabitants who made up the 'commonalty', was the basis of a series of quo warranto challenges in the 1760s.[90] A Helston by-law which removed the voting rights of the freemen was the subject of a prosecution in 1772.[91] A dispute in Yarmouth involved the issue of whether the power of election of capital burgesses belonged to the manorial court or to the common burgesses meeting in the guildhall.[92]

A third category involved disputes about the administration of the election meeting. An appointment in Appleby was challenged in 1723 on the ground that the meeting had not been held in the 'Moot-Hall but at a tavern and it was a plain surprise'.[93] Failure to provide proper notice of the election was a common ground of challenge.[94] An election of capital burgesses in Bury St Edmunds was challenged on the ground that the custom that the hall keeper, or the serjeants at mace, gave one or two days' notice of a pending meeting ('in order to prevent surprise') had been infringed.[95] In Wigan, in 1773, it was alleged that the normal custom of ringing the bell loudly for seven minutes before an assembly for the admission of burgesses had been disregarded.[96] In Grampound, in

[86] *R v. Bladen* (1774) (PRO, KB 28/290, no. 6); *R v. Carter* (1774) Lofft. 516 & 1 Cowp. 58.
[87] *R v. Heath* (1730) 1 Barn. KB 416.
[88] *R v. Vane* (1767) (PRO, KB 28/261).
[89] *R v. Monday* (1777) 2 Cowp. 530.
[90] *R v. Spencer* (1766) 3 Burr. 1827; *R v. Cutbush* (1768) 4 Burr. 2204; *A Short Treatise on the Institution of the Corporation . . . of Maidstone from the year I 757 to the Present Time* (Maidstone, 1786), 17–20.
[91] *R v. Head* (1770) 4 Burr. 2515; *Hoblyn v. The King* (1772) 2 Bro. PC 329.
[92] *R v. Leigh* (1767) (PRO, KB 28/260, no. 2).
[93] *Musgrave v. Nevinson* (1723) 1 Str. 584.
[94] *R v. Tucker* (1727) 1 Barn. KB 26 (Lyme Regis).
[95] Re Bury St Edmonds, Affidavit of Orbell Ray and John Challis (25 April 1744) (PRO, KB 1/8/2).
[96] Re Borough of Wigan, Affidavit of John Jackson and others (29 April 1776) (PRO, KB 1/20/4). *R v. May* (1770) 5 Burr. 2681 (Saltash) is another instance.

1741, it was reported that the mayor had sworn freemen 'at a private meeting between him and some of his friends ... with an interest to multiply votes at the [general] election'.[97] The legality of the election of burgesses at Wigan was disputed on the ground that the bailiff was not present at the election meeting.[98] An election by less than the prescribed quorum provided clear grounds for quo warranto. Borough elections at Evesham in 1728, and at Yarmouth in 1760, were challenged on the ground that a majority of the aldermen and capital burgesses were absent.[99] The election of the mayor of Westbury, and the election of burgesses at meetings at which that mayor presided, were disputed by a quo warranto on the grounds of 'the major part of the legal common or capital burgesses not being present at such nomination or election'.[100]

The majority of prosecutions resulted in the targeted officers either disclaiming or being ousted. In the year preceding the 1761 general election, over 95 per cent of those prosecuted either disclaimed or were ousted.[101] In the year preceding the 1768 general election, the figure was over 80 per cent[102]; for the 1774 election, the figure was 60 per cent.[103] A large number of defendants simply disclaimed office rather than fight the quo warranto challenge. All of the twenty-four Ipswich freemen prosecuted in 1773 conceded rather than fight the quo warranto.[104] Defendants were deterred by the expense: the cost of their own legal representation as well as the risk of having to pay the other side's costs (which could vary between £50 and £200).[105] A borough member from

[97] Re Borough of Grampound, Affidavit of William Carkeet (4 November 1741) (PRO, KB 1/7/3).
[98] *R v. Latham* (1764) 3 Burr. 1485.
[99] Re Borough of Evesham, Robert Cook (21 November 1732) (PRO, KB 1/3/4); Francis Halford, 2 January 1733 (PRO, KB 1/3/4); *R v. Grimes* (1770) 5 Burr. 2598.
[100] Re Borough of Westbury, John Withers, 4 February 1749 (PRO, KB 1/10/1).
[101] This figure is based on the quo warranto prosecutions recorded in PRO, KB 28/233 (Easter 1760) to PRO, KB 28/237 (Easter 1761).
[102] The figure is based on the quo warranto prosecutions recorded in PRO, KB 28/261 (Easter 1767) to PRO, KB 28/265 (Easter 1768).
[103] The figure is based on the prosecutions recorded in PRO, KB 28/287 (Michaelmas 1773) to PRO, KB 28/291 (Michaelmas 1774).
[104] *R v. Brown and others* (PRO, KB 28/286 (Trin. 1773) & PRO, KB 28/287 (Mich. 1773)).
[105] Re Borough of Orford, costs £55 (1734) (PRO, KB 28/128); Re Borough of Grampound, costs £180 (1741) (PRO, KB 28/156); Re Borough of Droitwich, costs £50 (1750) (PRO, KB 1/10/2); Re Borough of Taunton, costs £55 (1746) (PRO, KB 28/178, no. 3); *R v. Pickerill*, costs £180 (1792) 4 Term Reports 809.

Yarmouth pleaded with the Court of King's Bench not to allow an information against him on the ground that the cost of defending his office even if it were to succeed 'would greatly tend to the impoverishment of himself and [his] family'.[106] A group of over sixty burgesses from Lyme Regis, who had been targeted by quo warranto, accused the prosecutor, the MP Henry Fane, of using the King's Bench to intimidate them from 'from supporting and defending their rights on account of the great and enormous expense'.[107] In a case from Portsmouth, Mansfield CJ accused the prosecutors of employing a litigation strategy which involved 'loading the parties with expense'.[108] The 1711 Act gave the court discretion to impose a fine in addition to the judgment of ouster and costs. Blackstone wrote that fines in quo warranto informations were 'nominal only',[109] and the Court of King's Bench also described the 'fine to the King in such as case' as 'merely nominal'.[110] In practice, the amount of the fine in the mid-eighteenth century was usually between £80 and £200[111] – a figure which was certainly more than nominal.

Quo Warranto and Historical or Systemic Invalidity

Two types of defect could infect whole swathes of titles. One category involved cases where the illegality had been long-standing and repeated. In 1740, John Olmius, a candidate for the constituency of Weymouth, received a letter from his election agent relating how he had been 'in [his] study reading a book entitled *The Student's Companion or Reason of Laws* by Giles Jacob' when he had hit upon a legal argument which would enable Olmius to accomplish the elimination of hundreds of hostile voters.[112] Since 1616, the mayor and all previous mayors had been,

[106] Re Borough of Yarmouth, Robert White (5 January 1760) (PRO, KB 1/14/3).
[107] Re Corporation of Lyme Regis (Zachariah Drower and others, 1 June 1779) (PRO, KB 1/21/6).
[108] *R v. Monday* (1777) 2 Cowp. 530.
[109] W. Blackstone, *Commentaries on the Laws of England: Book the Third* (Oxford, 1768), 263.
[110] *R v. Pickerill* (1792) 4 Term Rep. 809.
[111] *R v. Seward*, fine £99 (1734) (PRO, KB 28/128, no. 9); *R v. Cribb*, fine £166 (1734) (PRO, KB 28/128, no. 13); *R v. Thomas*, fine £85 (1747) (PRO, KB 28/181, no. 11); *R v. Walker*, fine £144 (1767) (PRO, KB 28/260, no. 4).
[112] J. Joyeaux to J. Olmius, 12 April 1740 (Wiltshire Record Office, Chafyn Grove papers, MS 865/478).

contrary to the terms of the charter, nominated by the aldermen, and not by the common burgesses. The logical effect was that 125 mayors had been illegally appointed and all of the officers (freemen, aldermen and burgesses) sworn in by those mayors had been illegally appointed. The House of Lords upheld the information and ousted the mayor.[113] Earlier, in a 1738 case from Maidstone, it was found that, in continuous breach of the 1619 charter of James I – which required the election of jurats by the mayor, jurats and the inhabitants – voting rights had been limited to the mayor and jurats alone.[114] The invalidity had been practised for over 100 years.

A second form of defect involved a long sequence of titles derived from a superior office holder whose own appointment was invalid. The office of freeman derived from the swearing into office by the current mayor. 'It had always been understood that when a bad mayor presides, all elections under him are bad.'[115] Accordingly, the titles of freemen sworn in by a mayor could be voided if the mayor's own title was defective. The election of the mayor of Westbury in 1743 – and the election of burgesses at meetings at which that mayor presided – was challenged by a quo warranto on the grounds of 'the major part of the legal common or capital burgesses not being present at such nomination or election'.[116] In 1774, over sixty burgesses were ousted from Portsmouth when the title of the mayor, Sir John Carter, was successfully challenged on quo warranto.[117] Such mass impeachments could be contrived. An earlier mayor might collusively agree not to contest a quo warranto challenge to his title, thereby enabling the destruction of the titles of those who derived their title from that collusive mayor. Such collusive strategies were suspected to have been employed by former mayors at Winchelsea in the 1760s[118] and Cambridge in the late 1780s.[119]

A number of doctrinal strategies were attempted in order to limit the destructive impact of an appointment by an officer with a bad title. One was the de facto officer doctrine: the principle that the acts of a

[113] *R v. Mayor of Weymouth* (1740) 7 Mod. 373; *R v. Tucker* (1742) 2 Bro. PC 304.
[114] *R v. Blunt* (1738) Andr. 293; W. R. James, *The Charters and Other Documents Relating to . . . Maidstone* (London, 1825), 171–179.
[115] *R v. Corporation of Bridgewater* (1784) 3 Doug. KB 379.
[116] Re Borough of Westbury, John Withers, 4 February 1749 (PRO, KB 1/10/1).
[117] Robert East, *Extracts from the Records in the Possession of the Municipal Corporation of Portsmouth* (Portsmouth, 1891), 237, 238.
[118] *R v. Dawes* (1769) 4 Burr. 2277.
[119] Re Cambridge, John Mortlock (22 May 1789) (PRO, KB 1/26/2).

defectively appointed officer might be regarded as valid for the purpose of protecting the title of officers who had innocently relied upon their validity. However, the Court of King's Bench was reluctant, for policy reasons, to apply the doctrine.[120] The concern was that a general understanding in the boroughs, that acts carried out by an improperly appointed mayor would be saved, would reduce the incentive to lawfully administer the appointment process: 'the constitutions of corporations would be overturned as officers will be hereby encouraged not to adhere to the terms of the charter'.[121] Another strategy was the void/voidable theory of invalidity. Lord Hardwicke recollected that the void[122]/voidable distinction was deployed in opposition to the argument that the failure of the mayor of Portsmouth[123] to take the oath prescribed by the Corporation Act 1661 invalidated all subsequent appointments of freeman made by the mayor. Since, it was argued, the non-compliance with the 1661 Act merely made the appointment voidable (valid until voided by quo warranto) rather than void (unlawful from the point of the entry into office), the subsequent appointments were valid. Lord Hardwicke noted that, in the end, the point had not been determined.[124]

The regulation by time limit of the period allowed for taking quo warranto informations became the preferred technique for limiting the opportunities for upsetting long-established titles. The Court of King's Bench began to insert time limits early in the history of the process. A quo warranto from Buckingham in 1711 (involving an alderman who had been unlawfully appointed in an alehouse) was barred on the ground that the defendant had 'continued in the office for several years'.[125] In 1722, Harcourt told the House of Commons that, 'after eight or nine years, the Court of King's Bench would never suffer an information [by quo warranto] to be filed'.[126] In the 1720s, the court refused to grant a quo warranto to set aside the appointment of burgesses in Malmsbury

[120] *R v. Lisle* (1738) Andr. 163.
[121] Ibid., 167 (serjeant Eyre).
[122] 13 Car. II, c. 1.
[123] Lord Hardwicke was probably referring to the prosecution which was the subject of *R v. Whitehorn* (1711) 10 Mod. 64. The void/voidable point is not referred to in the law report.
[124] *R v. Miller* (1736) (Middle Temple, Misc. 19, f. 43).
[125] *R v. Borough of Truro* (1727) 1 Barn. KB 19.
[126] 13 December 1722, 20 *Commons Journals* 78.

and Helstone after eight years; and Truro after six years.[127] During this decade, the Court of King's Bench began to develop a distinction between 'minute matters'[128] and 'small slips'[129] (where the prosecution must be initiated within a short period) from 'objections going to the whole of the election'.[130] Defects in the first category were to be prosecuted promptly. However, the public interest in enforcing legality in the boroughs required that claims involving more serious defects should not be impeded by strict time limits. In one case the defendant was prosecuted twenty-six years after his election.[131]

In the 1740 case from Weymouth, the challenge was targeted at the mayor who had been elected under a legal understanding of 125 years' standing, that an alderman was eligible for appointment as mayor.[132] Covertly, the Weymouth litigation was being managed on behalf of the Prime Minister, Robert Walpole. Walpole's use of quo warranto to disturb innocent borough officers, who had assumed for years that their titles were lawful, lay behind an opposition demand for legislative intervention. In 1743, a Bill for Quieting Corporations,[133] which proposed a time limit on questioning the acts of an illegally appointed officer by quo warranto, was introduced by the politically independent Lord Romney. The Bill, introduced three months after the conclusion of the Weymouth litigation, proposed that 'reasonable periods of time be limited' after which a quo warranto prosecution could not be initiated.[134] The Bill did not specify a limitation period: this was to be settled by the House of Lords. However, the House of Lords was unable to agree on a time period. It struggled to reconcile the principle that unlawful appointments

[127] *R v. Bowen Hart the Mayor and Burgesses of Malmsbury* (1722) 8 Mod. 55; *R v. Pyke* (1724) 8 Mod. 286 (burgesses holding office for fourteen years; quo warranto refused); *R v. Major de Helstone* (1725) 2 Str. 677 (eight years); *R v. Borough of Truro* (1727) 1 Barn. KB 19.

[128] *R v. Corporation of Truro* (1727) as explained in *R v. Corporation of Maidstone* (1739) (Lincoln's Inn, Hill 16, f. 112).

[129] *R v. Woodman* (1728) 1 Barn. KB 101.

[130] *R v. Corporation of Truro* (1727) as explained in *R v. Corporation of Maidstone* (1739) Lincoln's Inn, Hill 16, f. 112.

[131] *R v. Powell* (1722) 8 Mod. 165; *R v. Woodman* (1728) 1 Barn. KB 101. Twenty-nine years was regarded as excessive: *R v. Stephens* (1757) 1 Burr. 433.

[132] *R v. Mayor of Weymouth* (1740) 7 Mod. 373; *Tucker v. The King* (1742) 2 Br. 309. See n. 113 above.

[133] 'A Bill for Quieting Corporations' (7 March 1743) (Parliamentary Archives, HL/PO/JO/10/6/508).

[134] W. Cobbett, *The Parliamentary History of England Vol. 13* (London, 1812) 98 (17 March 1743).

should be amenable to correction on judicial review (a policy which favoured a longer time limit) with the principle that the settled expectations of officers who assumed that they had been validly elected should not be disturbed (a policy which favoured a shorter time limit). Lord Chesterfield thought that, in the case of an annual officer, the limit should be a couple of weeks. From the other side, Lord Cholmondeley (Walpole's son-in-law and a 'faithful friend to court power')[135] argued that the effect of a rigid prescription period was equivalent to providing that 'stolen goods not reclaimed in a certain time should remain forever the property of the thief'.[136] Lord Chancellor Hardwicke thought that it was impossible to establish a limitation period: a time of 'any long duration' would merely perpetuate the existing time limits set by the Court of King's Bench so that the Bill would 'have no effect', while a very short time would allow improper elections escape correction and encourage 'injustice and violence by a law'.[137] Unable to agree on a time limit, Romney's Bill was heavily defeated.[138]

Parliament and Quo Warranto, 1767–1792

The question of the quo warranto time limit question arose once again in 1767. Sir Fletcher Norton had been retained as counsel for Nathaniel Dawes, a former town clerk of Winchelsea, who had been admitted as a burgess for thirteen years without any objection.[139] When, during argument, the question of the appropriate time limit arose, the Court of King's Bench drew the line at twenty years: an application made after twenty years could never be admitted (though a delayed application within twenty years might be refused in the court's discretion). The twenty-year maximum – more than doubling the eight-year period employed at the beginning of the century – was justified on the ground that it was 'in analogy of the rules on bonds and highways'[140] and

[135] J. Burgh, *Political Disquisitions, Or, An Inquiry into Public Errors, Vol. 1* (London, 1774), 467.

[136] *The History and Proceedings of the House of Lords during the Second Session of the Third Parliament of King George II*, 11 March 1743, 510.

[137] Ibid., 512–513.

[138] Ibid., 17 March 1743, , 538; Edward Harley's Journal, 11 February 1743, 64.

[139] *R v. Dawes* (1767) 4 Burr. 2120.

[140] While there was no fixed limitation period in the case of bonds, the court had a discretion to dismiss on grounds of delay which it would exercise after a 'silence of eighteen years'; *Case of the Borough of St Ives* (1757) 2 Keny. 171.

equivalent to the period prescribed for many personal actions by the Statute of Limitations 1623.[141] The pro-prosecutor twenty-year time limit would not have been enough to protect Dawes (who had been in office for nineteen years) against prosecution.[142] In laying down the twenty-year limit, Mansfield made it clear that he was happy for Parliament to reduce the court's twenty-year limit[143] and while the case was adjourned, the issue was raised in the House of Commons in the spring of 1767. Fletcher Norton, who was acting for the Winchelsea defendants affected by Mansfield's new rule,[144] was one of those MPs who sponsored a 'Bill for Quieting Corporations and for Rendering More Speedy and Effectual Writs of Quo Warranto'.[145] As in 1742, the House could not agree on the length of the limitation period. It was reported that a 'number of hard names' had 'alarmed the gentlemen of the House'[146] against restricting the court's capacity to exercise judicial review by imposing too short a time limit. When, in November, the Winchelsea cases resumed, without any change in the law, Mansfield confirmed the principle that he had earlier suggested: that officers would be secure after the elapse of twenty years.[147] Mansfield CJ's generous time limit preferred the interests of the Crown over the interests of borough officers. Although the twenty-year maximum was said to be 'the ne plus ultra',[148] it was not binding on the Crown and a prosecution could be initiated, even after the twenty years, by 'the King himself . . . [acting] by his Attorney General'.[149]

Political opposition to Mansfield's pro-prosecutor rule was renewed in the House of Commons in 1770.[150] However, Mansfield's successor as Chief Justice, Lloyd Kenyon, continued, at first, to endorse Mansfield CJ's

[141] 21 Jac. 1, c. 16; *Winchelsea Causes* (1766) 4 Burr. 1962; *R v. Stacey* (1785) 1 Term Rep. 1.
[142] On the resumed hearing in the summer of 1767, the Court of King's Bench used its discretion to block the prosecution against Dawes (which had been taken within twenty years): *R v. Dawes* (1767) 4 Burr. 2120.
[143] *R v. Dawes* (1767) 4 Burr. 2022, 2023.
[144] *R v. Wardroper* (1766) 4 Burr. 1963.
[145] 31 *Commons Journals* 359, 14 May 1767.
[146] (1768) 30 *Scots Magazine* 82, 1 February 1768.
[147] *Winchelsea Causes* (1767) 4 Burr. 1962.
[148] *R v. Rogers, Burgess of Helston* (1770) 4 Burr. 2523.
[149] *R v. Dawes* (1767) 4 Burr. 2120, 2121; *R v. Wardroper* (1766) 4 Burr. 1963.
[150] 32 *Commons' Journals* 846, 30 March 1770; 'A Bill [With the Amendments] for the Further Quieting and Establishing Corporations; and for Rendering More Speedy and Effectual Proceedings in Writs of Quo Warranto, and Informations in Nature of a Quo Warranto', *House of Commons Papers*, 22 (1770).

twenty-year time limit: five months after he succeeded Mansfield, Kenyon applied the rule in the case of a Cambridge burgess who had been in office for twelve years.[151] However, in 1791, just three years later, Kenyon CJ dramatically changed policy.[152] He now acknowledged that the twenty-year period was oppressive to borough officers, and he prohibited the prosecution of a Newcastle freeman who had been illegally admitted nineteen years earlier.[153] The following day, the court laid down a general rule contracting Mansfield CJ's twenty-year period to six years. Not merely was the time limit stricter; Kenyon's rule in the Newcastle case did not, like Mansfield's rule, create an express exemption so as to enable the Crown to prosecute after six years.[154]

The Informations in the Nature of Quo Warranto Act 1792

Three months after the Newcastle freemen case,[155] Charles James Fox introduced, along with his famous Bill on the law of libel, a Bill on the 'Law of Informations in the Nature of Quo Warranto'.[156] Ultimately, what would become the Informations in the Nature of Quo Warranto Act 1792[157] did little more than place the six-year limit laid down by Kenyon CJ on a statutory basis – but with one important addition: the theoretical immunity of the Crown from the time limit was removed. Overriding the common law immunity of the Crown, the six-year time limit was also to apply when the application was taken 'by his Majesty's Attorney General, or other officer of the Crown, on behalf of his Majesty'. By contrast with the parliamentary concerns of the 1740s and 1760s, Fox's concerns were not especially with the protection of innocent borough officers from being expelled for historical defects. In fact, Fox seems to have considered Kenyon's six-year limit as slightly over-restrictive on prosecutors. Given that parliaments lasted seven years, he proposed that the period of limitations should be extended to seven or

[151] *R v. Bond* (1788) 2 Term Rep. 767.
[152] *R v. Dicken* (1791) 4 TR 282.
[153] Ibid.
[154] Ibid.; R. Gude, *The Practice of the Crown Side of the Court of King's Bench* (London, 1828), 377.
[155] The Newcastle ruling was announced on 10 February 1791, *The Times*, 11 February 1791.
[156] 20 May 1791, 46 *CJ* 624; (1790–92) 79 House of Commons Sessional Papers, Bills 1790–91 & 1792.
[157] 32 Geo. III, c. 58.

eight years (so that members of Parliament, towards the end of the parliamentary cycle could employ quo warranto to remove borough officers elected at the beginning of the cycle).[158] However, an amendment to Fox's Bill moved in the House of Lords by Chief Justice Kenyon himself reduced the period to six years; the result was Kenyon managed to give statutory effect to his own rule.[159]

Fox and his supporters justified the Bill by reference to deeper constitutional concerns. William Pitt the Younger made perhaps the more persuasive of the arguments in the Commons, objecting to the claim of the Court of King's Bench to regulate access to justice by extra-statutory rules of court. It was 'the province of Parliament to fix the time'; it was 'unconstitutional and unsafe' for the Court of King's Bench to legislate by rules of practice.[160] Fox, on the other hand, targeted the exemption of the Crown from the 1791 time limit. Fox's case for reform of quo warranto was probably not as compelling as his case for his more celebrated companion Bill for restoring the role of juries in libel prosecutions (which he was piloting through the Commons at the same time).[161] By Kenyon CJ's rule, Fox argued, the Attorney General, on behalf of the government, might move at any time.[162] The effect was that the government might disfranchise electors who were opponents of the government and who had been elected more than six years ago.[163] Boroughs, Fox argued in a speech which at points seemed overstated, were not 'safe' against the King.[164] He linked this 'danger to the liberty of the people' to the Chief Justice, Lord Kenyon; it was 'by the last rule of the Court of King's Bench [Kenyon's rule]' that the Attorney General 'on the part of the king, might move at any time'. But the exemption of the Crown from time limits – the principle of *nullum tempus occurrit regi*[165] – was a common law rule which, unless it was overridden by statute, was binding on Kenyon. Kenyon was hardly to blame for this orthodox legal

[158] 20 May 1791, *The Speeches of the Right Honourable Charles James Fox, Vol. IV* (London, 1815), 263.
[159] 5 June 1792, 33 *Parliamentary Register or History of the Proceedings and Debates of the House of Commons* (London, 1792), 227.
[160] *Bath Chronicle*, 26 May 1791.
[161] Libel Act 1792 (32 Geo. III, c. 60).
[162] 20 May 1791, W. Cobbett, *The Parliamentary History of England, Vol. 29* (London, 1817), cols. 573–574.
[163] *Derby Chronicle*, 26 May 1791.
[164] Ibid.
[165] *R v. Berkley* (1754) 1 Keny. 80 (the principle exempted the Crown from the time limits regulating certiorari).

principle. Kenyon's version of the rule was also slightly less prerogative-orientated than Mansfield's. Mansfield's rule had expressly exempted the Crown; Kenyon's had not. Fox's concerns about the government's liberty to evade quo warranto time limits were probably more theoretical than practical. There had been a time bar in operation since Mansfield's rule of 1767. Yet Fox did not name an actual instance in which the government had been able to evade the 1767 time limit. A search of the identity of quo warranto informants in the early 1770s shows no cases in which an application was made at the direction of an agent of the Crown.[166] Instead, when the government did use quo warranto, it hid behind private informants (like the attorney, Leonard Martin, who prosecuted on behalf of Walpole in the 1740s).[167] But since those relators concealed the fact that they were acting on behalf of the Crown, they would not have been able to rely on the prerogative exemption, and would have had to prosecute within the six-year limit.

The Quo Warranto Information in 1792

The statutory form of judicial review quo warranto established by the Municipal Corporations Act 1711[168] blended elements of criminal prosecution and civil proceedings.[169] This system of judicial review, in turn, resulted in the displacement of hundreds of borough electors. At the same time, the 1711 Act process was tainted by its association with dishonourable electoral strategy. The process was, as Lord Chalmondley put it in 1743, exploited by 'agents of faction' who acted 'under the pretence of public justice' to advance the 'particular interests of wicked men'.[170] The identity of the actual prosecutor was hidden behind a common informer; borough place holders were intimidated into disclaiming their office by fear of unsupportable costs and fines; litigation was sometimes funded by the government; collusive legal strategies were used to impeach the titles of political rivals; and officers, who for years had assumed in good faith that their title was secure, were ejected for concealed historic defects. Underlying the parliamentary

[166] PRO, KB 28/286 (Trinity 1773) to PRO, KB 28/292 (Hilary 1775).
[167] See the text at n. 62 above.
[168] 9 Anne c. 20.
[169] *Re Maidstone Corporation* (1739) Lincoln's Inn, Hil. 16, ff. 108, 112; *R v. Francis* (1788) 2 Term Reports 484.
[170] *The History and Proceedings of the House of Lords during the second session of the Third Parliament of King George II*, 11 March 1743, 510 (Lord Chalmondley).

efforts in 1743, 1767, 1770, and in the early 1790s, to rebalance the process was a concern to protect borough political life from those 'agents of faction'. Yet, despite its misuse, the 1711 Act did expand the presence of the rule of law in borough politics and provide an independent alternative – the Court of King's Bench – to the partisan House of Commons. The 1711 Act was the beginning of the broader constitutional tendency which gradually saw the investigation of electoral malpractice removed from Parliament to the courts, a process which would be completed when the Committee on Elections was shut down and the Parliamentary Elections Act 1868[171] transferred all election petitions to the Court of Queen's Bench.

[171] 31 & 32 Vict. c. 125.