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The History and Development of Qui Tam

NOTES

THE HISTORY AND DEVELOPMENT OF QUI TAM

I. INTRODUCTION

Within the past two years, there has been an attempt to revive the ancient, almost forgotten procedure known as *qui tam*.[1] This attempt was inspired by a House Committee of Government Operations report[2] which stated that *qui tam* suits could be brought to enforce the Refuse Act of 1899.[3] In the report, the committee claimed the Refuse Act provided for *qui tam* suits to encourage enforcement of the act.[4]

Encouraged by the report and unaware of its flaws,[5] environmental protection groups and other private parties filed several *qui tam* suits.[6]

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1. English authorities considered *qui tam* primarily an action, 1 M. BACON, A NEW ABRIDGEMENT OF THE LAW 87-102 (with Bowier's notes 1856) [hereinafter cited as BACON], or an information, 2 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 368-91 (8th ed. 1824) [hereinafter cited as HAWKINS]. In this note, *qui tam* will be referred to as a suit or procedure with the more restrictive denominations employed when appropriate. Furthermore, all *qui tam* suits will be dealt with together except when separate treatment is warranted.

2. STAFF OF CONSERVATION & NATURAL RESOURCES SUBCOMM. OF THE HOUSE COMM. ON GOV'T OPERATIONS, 91st CONG., 2D SESS., QUI TAM ACTIONS AND THE 1899 REFUSE ACT: CITIZEN LAWSUITS AGAINST POLLUTION OF THE NATION'S WATERWAYS (Comm. Print 1970) [hereinafter cited as STAFF REPORT].

3. Federal Refuse Act, 33 U.S.C. §§ 407-13 (1970).

4. STAFF REPORT 17.

5. The committee cited Supreme Court discussions of similar statutes, but these statements were either dicta or inapplicable. Authority to sue *qui tam* was provided by a clear implication in three of the cases: Marvin v. Trout, 199 U.S. 212 (1905); Francis v. United States, 72 U.S. 388 (1866); Adams, *qui tam*, v. Woods, 6 U.S. (2 Cranch) 336 (1805). In United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943), the Court stated:

> Statutes providing for a reward to informers which do not specifically either authorize or forbid the informer [*qui tam*] actions are construed to authorize him to sue.

Id. at 541 n.4. This footnote in Justice Black's opinion relied on Adams, *qui tam*, v. Woods, 6 U.S. (2 Cranch) 336 (1805) and as such is an overstatement of the test for when *qui tam* is provided. *See* notes 107-112 *infra* and accompanying text. *See also* United States, *qui tam*, Matthews v. Florida Vanderbilt Development Corp., 326 F. Supp. 289, 290 n.1 (S.D. Fla. 1971). The court there erroneously attributed the footnote to Justice Clark.

6. At this time twelve *qui tam* suits have been filed in federal courts to enforce the Refuse Act: E.B. Mitchell v. Tennero Chemicals, Inc., 331 F. Supp. 1031 (D.S.C.

The plaintiffs contended that when a statute gives a share of a penalty to an informer the informer may sue *qui tam* unless the act specifically precludes such a suit. Thus, they argued, permission to sue *qui tam* was provided for in the penalty provision of the Refuse Act:

> Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provision of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment, (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, *one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.*[7] [emphasis added.]

In all of these cases, the defendants' motions for dismissal were granted for lack of standing, lack of jurisdiction and failure to state a claim.[8] Although each court supported its decisions with varying rationales, a common theme emerges from the decisions—the courts that dismissed these actions did not clearly understand *qui tam*. As a result, although these decisions may preclude the use of *qui tam* to enforce the Refuse Act, they do not answer the questions of when and how *qui tam* may be used. This note examines these questions.

The note traces the origin and English development of *qui tam* together with the adoption, development and subsequent demise of *qui tam* in America. It then considers the current Refuse Act cases. Unfortunately these cases only discuss what *qui tam* does not include and therefore serve as a negative example. From these cases, how-

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1971); Lavagnino v. Porto Mix Concrete, Inc., 330 F. Supp. 323 (D. Colo. 1971); Gerbing v. I.T.T. Rayonier, Inc., 332 F. Supp. 309 (M.D. Fla. 1971); Connecticut Action Now, Inc. v. Roberts Plating Co., 330 F. Supp. 695 (D. Conn.), *aff'd*, — F.2d — (2d Cir. 1971). Bass Angler's Sportsman's Soc'y v. Scholze Tannery, Inc., 329 F. Supp. 339 (E.D. Tenn. 1971); Enquist v. Quaker Oats Co., 327 F. Supp. 347 (D. Neb. 1971); United States *ex rel.* Mattson v. Northwest Paper Co., 327 F. Supp. 87 (D. Minn. 1971); United States, *qui tam,* Matthews v. Florida-Vanderbilt Development Corp., 326 F. Supp. 289 (S.D. Fla. 1971); Reuss v. Moss-American, Inc., 323 F. Supp. 848 (E.D. Wis. 1971); Bass Anglers Sportsman's Soc'y v. U.S. Plywood-Champion Papers, Inc., 324 F. Supp. 302 (S.D. Texas 1971); Bass Anglers Sportsman's Soc'y v. U.S. Steel Corp., 324 F. Supp. 412 (N.D. Ala.), *aff'd,* 447 F.2d 1304 (5th Cir. 1971); Durning v. I.T.T Rayonier, Inc, 325 F. Supp. 447 (N.D. Wash. 1971). For a thorough discussion of the courts' treatment of *qui tam* in these cases *see* notes 134-60, *infra* and accompanying text.

7. 33 U.S.C. § 411 (1969).

8. *See* notes 134-60 *infra* and accompanying text.

ever, and from the history of *qui tam* the note delineates the current status of *qui tam* and provides a guide for its future use.

II. HISTORICAL DEVELOPMENT

Qui tam is the accepted abbreviation for the phrase *"qui tam pro domino rege quam pro seipso."*[9] The literal translation of this expression is, "he who as much for the king as for himself." The meaning of the expression is that the party bringing the action or information does so as much for the king's as for his own private interest.[10] A *qui tam* suit, then, involves a combination of two distinct interests; one of which is public, the other private. This manner of combining interests is unique to *qui tam.*[11]

Qui tam has roots in the formative stages of English law. Since the thirteenth century *qui tam* suits have consolidated royal and private interests. Although unified in a single suit, the interests remained distinct.

Traditionally in English law, the king's interests were a separate and special class of private interests. As sovereignty developed national status, this notion of the king's interests underwent alteration.[12] Although some of the king's interests remained immediate and personal to him,[13] others, directed towards the general well being of the

9. 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160 (1st ed. 1768) [hereinafter cited as BLACKSTONE].

10. 1 BACON 87. It was acknowledged that the king's interest was generally a public interest. 3 HAWKINS 369. Some statutes provided that the poor fund or some public use should receive a share of the penalty. Pie v. Deane, 80 Eng. Rep. 396, Hobart 250 (K.B. 1617); 3 BLACKSTONE 160.

11. Although the legal term "joinder" was not utilized in the early English law, it is evident that *qui tam* was, in part, a kind of joinder. In this paper *qui tam* will be referred to as a joinder device even though that description was not employed in the early courts.

12. For a discussion of the legal status of English kings, see 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 458-69 (1923) [hereinafter cited as HOLDSWORTH]; F. POLLOCH & F. MAITLAND, THE HISTORY OF ENGLISH LAW 511-26 (2d ed. 1923).

13. Examples include: the king's interest in lands held under royal tenure, Prior of Lewes v. Master Roger de Holt [1300], Select Cases In the Exchequer of Pleas, 48 Selden Society 198 (1931); an interest in the safety and well-being of his men, Rex et John Gobbard v. Hanville, Select Cases In the Exchequer of Pleas, 48 Selden Society 215 (1931); and the dignity of the crown, Baldwin Tyrel's Case (1214), Select Pleas of the Crown, 1200-1225, 1 Selden Society 67 (1888). For a partial listing of the king's personal interests, see 2 HAWKINS 369.

kingdom, became public.[14] These public interests were frequently expressed in statutes.[15]

The interests of private parties in a *qui tam* proceeding were also of two types.[16] The first type included the interests of persons who had allegedly suffered a wrong.[17] These aggrieved parties sued for a redress of their grievances. The second type comprised the interests of common informers.[18] These parties sued to recover a part of a

14. Such a royal interest often involved wrongful use of authority. In Reyne v. Heale, 86 Eng. Rep. 84, 1 Ventris 122 (K.B. 1671), a justice of the peace was sued *qui tam* for refusing to enforce the law and "put down a conventricle." A sheriff in Barret v. Winchcomb, 79 Eng. Rep. 309, Cro. Jac. 360 (K.B. 1614), was sued *qui tam* for allowing a prisoner to escape. In this case the crown did not recover a monetary penalty. Parkhurst v. Powell, 79 Eng. Rep. 456, Cro. Jac. 532 (K.B. 1619) is a similar case in which a sheriff was sued *qui tam* for issuing a deceitful return. Not dissimilar were the statutes delineating the jurisdiction of Admiralty courts, 13 Rich. 2, c.5 (1382); 15 Rich., c.3 (1194). The penalty for incorrectly bringing a suit in the courts of Admiralty was a recovery of double damages by the party aggrieved and a ten pound fine for the king. 2 Hen. 4, c.11 (1400). For an interesting case discussing this statute, see Sands v. Child, 87 Eng. Rep. 332, 4 Mod. 174 (K.B. 1693). That case does not indicate that the prosecution of the wrongdoer was accomplished by a *qui tam* suit, yet it is evident that suit was brought to recover damages and to extract a fine. In such a case it would have been proper to style the complaint *qui tam*. 2 HAWKINS 369.

15. *E.g.*, statutes encouraging commerce, 27 Edw. 3, c.20 (1353), 2 Rich. 2, c.1 (1380), 2 Car. 2, c.32 (1625); statutes regulating jurisdiction, 13 Rich. 2, c.5 (1389), 15 Rich. 2, c.3 (1391); statutes regulating apprenticeship, 28 Hen. 8, c.5 (1536).

16. For a comparison of the informer's imperfect interest in the penalty for which he was suing with the interest of the aggrieved party in his remedy, see Philipps v. Smith, 93 Eng. Rep. 433, Strange 135 (K.B. 1719) and 2 BLACKSTONE 437.

17. Sometimes this recovery was sought in a common law action. 2 HAWKINS 369. Additionally, an aggrieved party could sue as a common informer, but some statutes included an express provision permitting suits only by aggrieved parties. These were also considered penal statutes, but were regarded differently from informer provisions. 3 J. STEPHEN, COMMENTARIES ON THE LAWS OF ENGLAND 585 (1868).

18. It was clear that a common informer's suit belonged to the informer. It was not the king's suit. Kirkham v. Wheeley, 91 Eng. Rep. 31, Salkeld 29 (K.B. 1965). The informer's rights to the penalty did not attach until the suit was instituted, whereupon his rights attached absolutely and to the exclusion of all other potential informers. 3 BLACKSTONE 160. However, if the crown brought suit before an informer, the king stood to recover the entire penalty. Rex v. Hymen, 101 Eng. Rep. 1118, 7 T.R. 535 (K.B. 1798). In either case, the crown could pardon only its potential share of the penalty that was being sued for. Dr. Foster's Case, 77 Eng. Rep. 1222, 11 Co. Rep. 56a (K.B. 1614); Stretton, *qui tam*, v. Tayler, 78 Eng. Rep. 395, Cro. Eliz. 138 (Q.B. 1589).

In most cases the informer would be provided a designated share of the penalty. 3 BLACKSTONE 160. However, there is some evidence that a conspirator could gain a pardon by confessing his crime and turning in his fellow wrongdoer. L. RADZINOWICZ, A HISTORY OF THE ENGLISH CRIMINAL LAW 33-56 (1957).

penalty[19] and were thus a class of bounty hunters.[20] In comparison with the aggrieved party, an informer was motivated by the chance of gain, not by the need for recovery. This distinction, combined with the overzealous pursuit of bounty, eventually lead to a general distrust of the informer. Initially *qui tam* proceedings were not dependent upon statutory authority. An aggrieved party brought a *qui tam* suit to obtain a common law remedy in the royal courts for a private wrong that also affected the king's interests.[21] Only by alleging a royal interest could a private party gain access to the royal courts, since in the thirteenth century these courts generally considered only matters involving the king.[22] At that time local courts had general jurisdiction over private wrongs. The adequacy and fairness of the proceedings conducted in local courts were uneven at best. Plaintiffs sought access to the royal courts, which were successfully expanding their jurisdiction. Various techniques were devised to expand the jurisdiction of royal courts to include the area of private wrongs.[23] *Qui tam* was one of these techniques. This subsequent expansion of jurisdiction culminated in the emergence of royal courts as the principal forum for settling all legal disputes. By the fourteenth century, royal courts heard suits involving private wrongs without requiring the use of techniques such as *qui tam*. Consequently, as the need for the non-statutory *qui tam* proceeding disappeared, the use of it likewise faded.[24] Nevertheless, English authorities as late as the nineteenth century asserted its continuing availability.[25]

But even as non-statutory *qui tam* fell into disuse, statutes began to

19. For a partial list of acts which permitted common informer suits, see 21 Jac., c. 28 (1623) (discussed in 3 COKE, INSTITUTES 191) [hereinafter cited as COKE, INST.]; and Schedule to The Common Informers Act, 14 & 15 Geo. 6, c. 39 (1951).

20. Informers have been referred to as "lewd" and "the worst kind of people". M. DAVIES, THE ENFORCEMENT OF ENGLISH APPRENTICESHIP 63 (1956) [hereinafter cited as DAVIES].

21. *See* cases cited note 13 *supra*. *See also* Milsom, *Trespass From Henry III to Edward III*, 74 LAW Q. REV. 429 n.49, 50 (1958) [hereinafter cited as Milsom].

22. Milsom 585.

23. Private parties who wanted to get their suit before the royal courts adopted various means to plead such an interest. Some of the techniques employed included: a demand for punitive damages, 2 HOLDSWORTH 369, 449; an allegation of "*contra pacem*", Milsom 575; an allegation of aggravating circumstances which constituted a loss to the king, *id.* at 429.

24. Cases were brought in the common law *qui tam* manner in the fourteenth century. The damage to the king was added as an aggravation to the private party's damages. Milsom 429.

25. 2 HAWKINS 369.

appear that permitted private parties to initiate actions to redress public wrongs. In some of these statutes the plaintiff was required to have suffered some particular injury over and above the public wrong; he had to be an aggrieved party. In others, any informer could initiate the action.

In the early stages of English criminal law, enforcement of penal statutes was limited by the lack of an effective public police force.[26] To rectify this inadequacy, the courts permitted private accusers to bring bills to enforce penal laws.[27] In the fourteenth century, Parliament enacted the first statute which permitted a private informer to sue for the violation of a penal law, and gave the private prosecutor a one-fourth share of the penalty imposed upon conviction of the wrongdoer.[28] There was no requirement that the private prosecutor have suffered any individualized injury. Similar provisions appeared in statutes sporadically until the sixteenth century.[29] At that time Parliament began to utilize the *qui tam* provision for the execution of a broad spectrum of penal statutes.[30]

Parliament enacted the first *qui tam* statute for aggrieved parties in 1400.[31] This statute provided penalties for violations of the statute which limited the jurisdiction of Admiralty courts. A party improperly subjected to suit in an Admiralty court could, in turn, sue his prosecutor for double damages and a fine, payable to the king, of ten pounds. Defendants to the improper suits were the persons most interested in the enforcement of the statute, so these defendants were given the power to prosecute violators. Consequently, the aggrieved

26. On the use of informers as a police force and the subsequent abuses see 2 L. RADZINOWICZ, A HISTORY OF THE ENGLISH CRIMINAL LAW 33-167 (1957). On the use of criminal informations to enforce penal laws, see 9 HOLDSWORTH 236-38.

27. For example, the king's council relied upon private informers or accusors as early as the thirteenth century. Select Cases Before the King's Council, 1243-1482, 35 Selden Society xxxv *et seq.* (1918); 2 HOLDSWORTH 197-199.

28. Statute Prohibiting the Sale of Wares After Close of Fair, 5 Edw. 3, c.5, § 6 (1331).

29. For a list of some early English statutes which could be pursued by informers, see 21 Jac., c.28 (1623). This statute repealed many obsolete informer statutes.

30. In the sixteenth century informers were also being employed to enforce commercial regulations, 4 HOLDSWORTH 355, and apprenticeship laws, DAVIES 30. At the same time a system of paid inspectors was being developed. These inspectors were akin to professional informers. 4 HOLDSWORTH 369; DAVIES 32.

31. A Remedy For Him Who Is Wrongfully Pursued In Admiralty Court, 2 Hen. 4, c.11 (1400).

defendant simultaneously recovered for his loss and enforced the statutory proscription.[32] Some subsequent statutes specified a period of time during which only an aggrieved party could bring an action on the statute. If no aggrieved party prosecuted within the designated period, an informer would then be permitted to sue out the penalty and recover a share.[33]

All *qui tam* statutes, then, included two elements: (1) private prosecutors shared in the penalty; (2) private persons could initiate a suit to recover the penalty.[34] If the private prosecutor was successful, he would get a share of the penalty, and the king or some public use would get the remainder.

Qui tam was not a form of action. It was, rather, a means of bringing an action. Consequently the thirteenth century non-statutory *qui tam* plaintiff filed his suit in an ordinary general writ[35] as if he were suing to recover for an ordinary wrong.

At this time there was no paid informer system as such. However, private parties, called accusers, were permitted to file bills in the king's council to prosecute violations of the criminal law.[36] These early informers were not given rewards for bringing these bills. Eventually, however, the bounty-hunting aspect of private prosecution was adopted into English law. Informers were then given a share of whatever penalty they recovered. These informers were permitted to file either an indictment or popular action against a defendant.[37] The suit

32. Bylota v. Pointel, 73 Eng. Rep. 346, 2 Dyer 159b (K.B. 1558).

33. *See, e.g.*, An Act for the Better Preventing Excessive and Deceitful Gaming, 9 Anne, c.14, § 2 (1710).

34. Fleming, *qui tam*, v. Bailey, 102 Eng. Rep. 1090, 5 East 313 (K.B. 1804); Barnard v. Gostling, 102 Eng. Rep. 487, 2 East 569 (K.B. 1802); BACON 88; 2 HAWKINS 368. There were instances where the courts allowed an informer to prosecute a wrongdoer even though the informer did not stand to gain a share of the penalty, but these cases do not fall within the ambits of *qui tam*. Roe v. Roe, 145 Eng. Rep. 443, Handres 185 (K.B. 1661); Malden v. Bartlett, 145 Eng. Rep. 727, Parker 105 (K.B. 1750), noting Cuff v. Vachel, 123 Eng. Rep. 395, And. 138 (C.P. 1505) to the contrary. A private party could not institute a suit to recover a part of a penalty which was to go to the poor fund. Dickinson v. Clarke, 84 Eng. Rep. 518, 2 Keble 820 (K.B. 1671); Pie v. Deane, 80 Eng. Rep. 396, Hobart 250 (K.B. 1617).

35. Milsom 429.

36. Select Cases Before the King's Council, 1243-1482, 35 Selden Society xxxvii (1918).

37. *See* Preamble, 4 Hen. 7, c.20 (1487). "But, more usually, these forfeitures created by statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same; and hence such actions are called

would demand the full penalty, but only part of it would go to the private informer. In 1576, Parliament provided the first statute[38] limiting the means of prosecution at the informers' disposal. The statute was not clear. It was read to limit informers' suits to informations or original actions, and some courts dismissed informer's suits brought in any other manner.[39] The courts were not uniform, however, in their interpretation of this statute and its procedural limitation.[40] Parliament clarified the matter in 1623 by enacting a statute which permitted informers to sue by means of popular action, bill, plaint, or information.[41] This was the last statute which considered the manner in which an informer could bring a suit. Since that time, when informers have been permitted to sue *qui tam,* they have been given the alternative of bringing their suit as a criminal or civil proceeding. The consequences of this choice were the manner in which the courts conducted the suit.

Initially, *qui tam* informers could bring indictments.[42] However, with the increased utilization of the informer's provision, Parliament chose to limit informers' criminal prosecutions to informations.[43] Parliament retained this limit without modification until the informer's suit was abolished in 1951.[44] Proceedings begun by *qui tam* informations, were handled as were other criminal proceedings.[45]

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popular actions, because they are given to the people in general." [Emphasis added] 3 BLACKSTONE 160.

38. 18 Eliz. c.5 (1576).

39. Gadley v. Whitecot, 78 Eng. Rep. 790, Cro. Eliz. 544 (Q.B. 1596).

40. 2 HAWKINS 371-72. There was considerable dispute as to whether the implied restriction applied to aggrieved parties. *Compare* Gabriel Widow v. Clerke, 78 Eng. Rep. 336, Cro. Eliz. 76 (Q.B. 1587) holding that the restriction applied to all penal actions *with* Johnson v. Pays, 78 Eng. Rep. 675, Cro. Eliz. 435 (Q.B. 1595), which held that aggrieved parties were not covered by the restriction.

41. 21 Jac., c.4 (1623).

42. *See* Preamble, 4 Hen. 7, c.20 (1487).

43. An indictment was brought at the oath of twelve men while an information was brought at the suit of the king's attorney or a private informer. 2 HAWKINS 357. For a discussion of the early history and the development of the information, see 9 HOLDSWORTH 236-45.

44. The Common Informers Act, 14 & 15 Geo. 6, c.39 (1951).

45. *E.g.,* Quakers could not testify, Atcheson v. Everitt, 98 Eng. Rep. 1142, Cowp. 382 (K.B. 1775); amendments to pleadings were not permitted, Philips v. Smith, 93 Eng. Rep. 433, Strange 136 (K.B. 1715); a defendant could plead "not guilty", and the Attorney General could reply *non vult prosequi* or pardon the king's share, Hammon v. Gryffith, 78 Eng. Rep. 826, Cro. Eliz. 583 (Q.B. 1597); Dr. Foster's Case, 77 Eng. Rep. 1222, 11 Co. Rep. 56b (K.B. 1614). There seems to be a two-fold reason for this. First, the information filled the void left by the decline of the

As an alternative, an informer could chose to sue *qui tam* in a civil proceeding.[46] Such a proceeding would be subjected to the same limitations as other civil suits. Initially, then, a *qui tam* suit was unique only because it combined the private interest of the prosecutor and the public interest in enforcing the statute.

In time, the informer provisions became subject to several forms of abuse.[47] The first form included the collusive use of *qui tam* suits to permit a wrongdoer to escape the effect of a penalty. A friend of the wrongdoer would bring suit and either obtain a confessed judgment for a small part of the penalty or permit the wrongdoer to prevail at a feigned trial.[48] The second form of abuse included the vexatious use of *qui tam* suits by overly aggressive informers who prosecuted little known and obsolete violations.[49]

Coke indicates that the public was outraged by these abuses.[50] In response to this outrage, Parliment enacted provisions designed to curb the abuses. These provisions imposed several restrictions on informer suits.

The first attempt to curb the abuses was a wholesale abolition of the informer provisions. This attempt proved unworkable since informers were still needed to enforce the penal laws of England.[51] Subsequent attempted cures either imposed procedural restrictions or penalized the wrongdoing informer. The first procedural restriction eliminated the preclusive effect of collusive suits.[52] By removing the

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criminal appeal. 9 HOLDSWORTH 230. *See also* Select Cases Before the King's Council 1243-1482, 35 Selden Society xxxvi-vii (1918). Secondly, the information was an alternative to the indictment. Thus, conceptually a *qui tam* information was a criminal prosecution. For a more recent discussion of the question of whether *qui tam* was a criminal or civil proceeding see Atchison v. Everitt, 98 Eng. Rep. 1142, Cowp. 382 (K.B. 1775).

46. Either as a suit in debt, Barns v. Hughs, 83 Eng. Rep. 391, Lev. 248 (K.B. 1668), or as an action on the case, Barret v. Winchcomb, 79 Eng. Rep. 309, Cro. Jac. 360 (K.B. 1614). Debt seems to have been preferred. 1 J. CHITTLY, A PRACTICAL TREATISE ON PLEADING 104 (1809).

47. For a thorough discussion of these abuses and the subsequent attempts to curb them, see DAVIES 63-76.

48. For a summary of the possible collusive techniques which could be employed, see Preamble, 4 Hen. 7, c.20 (1488). This act attempted to cure the collusive abuses. It did so, in part, by providing that the first man to inform had a vested right to the suit. This right was not lost unless the first informer misbehaved.

49. 3 COKE, INST. 191-92.

50. *Id.*

51. DAVIES 63.

52. 4 Hen. 7, c.20 (1487).

incentive for collusion, Parliament eliminated this abuse. Several years later, Parliament addressed the problem of informer harassment. In 1576, Parliament passed a statute which provided a two-fold attack on informers. One part of the statute provided for the imposition of penalties on vexatious informers.[53] Another part of the statute permitted defendants to recover their court costs from harassing informers.[54] In 1587 Parliament enacted further legislation. This statute imposed two procedural restrictions, a one year statute of limitations[55] and a strict venue requirement.[56] Finally, in 1623, Parliament enacted sweeping legislation to curb the informer abuses.[57] The statute consisted of three parts. In the first part, obsolete informer provisions were repealed. The second section included a stricter venue requirement than the earlier statute. Finally, the third section affected changes in the details of pleading. These changes ameliorated some of the harsh procedural rules which were imposed on the *qui tam* defendant. This statute along with the cumulative impact of all the earlier legislation accomplished the long sought reform of most of the informer abuses.[58] The restrictive provisions applied only to *qui tam* suits brought by informers. Neither the king nor an aggrieved party was affected by this legislation.[59]

Thus in the seventeenth century the *qui tam* concept had wide acceptance in England. Non-statutory *qui tam* actions may still have been possible, but this was by no means certain. On the other hand, statutory versions of *qui tam* were very much in evidence. The two forms of statutory *qui tam*, one for informers, the other for aggrieved parties, though derived from similar sources, were subject to such different procedural limitations as to make them quite dissimilar. The

53. 18 Eliz., c.5, § 4 (1576).

54. 18 Eliz., c.5, § 3(3) (1576). *See, e.g.*, Wilkinson, *qui tam*, v. Allot, 98 Eng. Rep. 1133, Cowp. 366 (K.B. 1775) (non suited plaintiff had to pay defendants costs). In comparison a successful informer would not be rewarded costs. Frederick v. Lookup, 98 Eng. Rep. 51, 4 Burr. 2018 (K.B. 1767).

55. 31 Eliz., c.5, § 5 (1589).

56. 31 Eliz., c.5, § 2 (1589).

57. 21 Jac., c.4 (1623). For a detailed analysis of this statute see 3 COKE, INST. 191-94.

58. The success of James I in comparison to the Tudor monarchs may have been due to a more aggressive opposition to informers or to the gradual buildup of provisions controlling the abuses. 4 HOLDSWORTH 359.

59. 31 Eliz., c.5 (1589) was applied to informers, Pomfreit v. Brownsal, 78 Eng. Rep. 968, Cro. Eliz. 735 (Q.B. 1600), but not to aggrieved parties, Allen v. Stear, 78 Eng. Rep. 885, Cro. Eliz. 645 (Q.B. 1598).

aggrieved party statutes provided remedies, while the informer statutes provided for a share of the penalty. There was the added confusion as to whether an aggrieved party had to proceed *qui tam* if that avenue was open to him.[60] Finally, *qui tam* suits could be brought in either a civil or criminal proceeding.

This mass of confusion and complexity continued unsorted throughout the seventeenth and eighteenth centuries. It was this confusion that the American colonies inherited when they adopted English law.

III. AMERICAN ADOPTION OF QUI TAM

The extent and method of the reception of English law by the American colonies and states is a problem which does not lend itself to easy resolution. As expressed by Cardozo:

> One of the chief difficulties confronting a student of our legal history is that the whole subject of the reception of English law, both common and statutory, was not thought out in any consistent way but was left unsettled and in the air. The plaint was a common one that no one can tell what is law and what is not in the plantations.[61]

In substantially all of the states, English statutes enacted by a specified date were expressly adopted by legislative acts.[62] Section 35 of the New York Constitution of 1777 is typical of the general enactments of state legislators:

> such parts . . . of the *statute law of England* and Great Britain, and of acts of the legislature of the colony of New York, as together did form the law of said colony on the 19th day of April in the year of our Lord 1775, shall be and continue the law of this state.[63] [Emphasis added.]

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60. There was some question whether an aggrieved party could pursue his common law remedy without joining the king's interest if the *qui tam* remedy were available. *See, e.g.*, Lady Waterhouse v. Bawde, 79 Eng. Rep. 116, Cro. Jac. 133 (K.B. 1606) (judgment for defendant where plaintiff failed to sue *qui tam*); Lord Townsend v. Dr. Hughes, 86 Eng. Rep. 994 (1003), 2 Mod. 150 (K.B. 1676) (dictum).

61. Beers v. Hotchkiss, 256 N.Y. 41, 54, 175 N.E. 506, 511 (1931). *See also* United States v. Worral, 2 U.S. 384 (1798), where the court expressed a similar confusion over the same question.

62. *See, e.g.*, United States v. Park Motors, 107 F. Supp. 168, 176 (E.D. Tenn. 1952), and Menne v. City of Fond du Lac, 273 Wis. 341, 77 N.W.2d 703 (1956).

63. 1 Laws of the State of New York 15 (Kent-Radcliff Rev. 1802). *See also* similar statutes in Pennsylvania, Acts of the Gen. Ass. of Pa., Session of 1776-77, C. DCCXXVI [1 Laws of the Commonwealth of Pennsylvania 1700-1810, 429 (1810)] and in Virginia, Ordinances of Convention, C. 5, S VI [9 Hening, Stat. at Large Va. 127 (1821)].

American courts had the complex task of determining specifically what part of the

These provisions made it clear the state legislatures intended to adopt English statutory law.

Determining what part of the English decisional law, in contrast to the statutory law was received is a more disputed issue. Most courts would agree that the Pre-Revolutionary decisions of the English courts interpreting English statutes were to be given great weight.[64] Commenting on the reception of these decisions, Gray wrote: "The decisions of the English courts after the settlement of the colonies and before the Revolution had as great and direct an influence, as a matter of fact, upon the decisions of this country as if they had been considered binding authorities."[65]

English law was applicable and controlling. The task confused and frustrated some courts to the point where one court declared that it would not listen to citations from "musty, old worm eaten books." It further stated that "not Common Law—not the quirks of Coke and Blackstone but common sense" would control its decisions. C. WARREN, A HISTORY OF THE AMERICAN BAR, 227 (1966).

During the Revolution, many of the colonies rashly rejected nearly everything English, to the point where some colonial legislatures passed acts rejecting English law. But the initial rejection was short lived. *See*, An Act Prohibiting the Reading of Certain Reports in the Commonwealth (approved 1808), reprinted in 3 THE STATUTE LAW OF KENTUCKY 457 (Littel ed. 1811), and R. POUND, THE SPIRIT OF THE COMMON LAW, 116-117 (1921).

After the Revolution the former colonists proceeded to adopt selectively that part of the English law which was applicable to the American venture. In his commentaries, Kent described this process in the following way:

> A great proportion of the rules and maxims which constitute the immense code of the common law grew into use by gradual adoption, and received from time to time, the sanctions of the courts of justice, without any legislative act of interference. . . . [The English Common Law] has been assumed by the courts of justice, or declared by statute, with the like modifications, as the law of the land in every state. It was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charters and colonial statutes.

J. KENT, COMMENTARIES ON AMERICAN LAW 471 (1826). *See also* Pope, *The English Common Law in United States*, 24 HARV. L. REV. 6, 13 (1910) [hereinafter cited as Pope].

Chief Justice Shaw would have agreed with Kent's general evaluation. Speaking specifically on the adoption of English statutes, the Massachusetts Chief Justice said:

> The general rule in regard to English statutes is, that all statutes in amendment of the common law . . . which were made before the emigration of our ancestors, and which were applicable . . . to the laws and institutions founded here, are deemed to be a part of the common law, as adopted by our ancestors and transmitted to us.

Wilbur v. Tobey, 33 Mass. 177, 182 (1833). *See also* United States v. Park Motors, 107 F. Supp. 168 (E.D. Tenn. 1952).

64. *See* United States v. Park Motors, 107 F. Supp. 168 (E.D. Tenn. 1952); Menne v. City of Fond du lac, 273 Wis. 341, 77 N.W.2d 703 (1956).

65. J. GRAY, THE NATURE AND SOURCES OF THE LAW 232 (1892).

Another American authority concluded:

> The truth of the matter is, therefore, that the greater part of the law of the states which is in fact identical with the common law of England does not consist of the common law of England which was adopted and made binding upon our courts, but it consists of rules established by the English courts which have in fact been accepted and followed, without regard to the dates of the English decisions establishing such rules, and without consideration of the question whether such decisions are a part of the adopted common law and binding upon our courts or not.[66]

There are, then, two basic views on the adoption of English law. One view asserts the whole of the common law of England was adopted in this country.[67] The conflicting view asserts the adoption of the common law of England meant not the adoption of the whole common law, but the adoption of the common law as it existed in England prior to some particular period so that only the English cases prior to that time became binding upon the courts in this country.[68] The only conclusion that can be drawn from these conflicting authorities is that the courts of this country are not bound by the decisions of the English courts, but may look to these decisions to ascertain the principles and rules of the common law. The English decisions may be considered as indicative of what the common law was at any time in the past or what it may be in the present.[69]

Applying these general principles to *qui tam*, it is apparent that *qui tam* as it existed in England[70] could have been received in the United States in three ways. First, the common law *qui tam* action

66. Pope 18. Pope concluded that when American courts disapproved of an English decision, "the usual method of avoiding their conclusions was by saying that the English decisions were not the law but only evidence of the law." *Id.* at 16.

67. Chilcott v. Hart, 23 Colo. 40, 45 P. 391 (1896); Williams v. Miles, 68 Neb. 463, 96 N.W. 151 (1903).

68. *See* People v. Williams, 145 Ill. 573, 33 N.E. 849 (1893); Guest v. Reynolds, 68 Ill. 478 (1873); Gerber v. Grabel, 16 Ill. 217 (1854). For an example of the effects of these different theories of adoption on the laws of negotiable instruments, see F. BEUTEL, BEUTEL'S BRANNAN NEGOTIABLE INSTRUMENT LAW 48-51 (7th ed. 1948).

69. Pope 16.

70. Learned Hand, in Sutherland v. International Ins. Co. of New York, 43 F.2d 969 (2nd Cir. 1930), noted, "This was a qui tam action, well known in England, whence we imported it . . . ." *Id.* at 970. The court in State v. Smith, 49 N.H. 155 (1870) similarly compared the usage of *qui tam* in England and this country and noted that several states were employing a type of informer provision to enforce their criminal laws.

by which an aggrieved party sought to redress his injuries may have been adopted generally along with other portions of the common law. Secondly, specific English statutes which could be enforced by a *qui tam* suit may have been adopted by colonial or state legislatures. Thirdly, American legislatures may have used English law as a model for *qui tam* provisions in American statutes.

No evidence has been found of a common law *qui tam* suit in our early history. It seems unlikely that American colonial lawyers were familiar with the early use of *qui tam* as a common law device to bring a suit in a royal as opposed to local court. Despite the acknowledgement of the common law *qui tam's* existence by some eighteenth century English authorities,[71] its usage in English courts was minimal or nonexistent during that period. This sparse usage may also explain its absence in American courts. Although theoretically a non-statutory *qui tam* may have been adopted together with the rest of the English common law, no actual cases to support the theory have been found.

There are, however, numerous examples of statutory *qui tam* in early American history. Many colonies expressly adopted in toto certain English statutes which could be enforced by *qui tam* procedures.[72] In addition, other statutes were adopted with minor modifications.[73] Moreover, American legislatures did use *qui tam* provisions similar to those found in English statutes. An example of this form of reception was the use of informers to enforce penal laws.[74] This technique was employed in two ways. First, some statutes permitted informers or aggrieved parties to sue *qui tam.*[75] Secondly, other statutes pro-

71. *See* note 25 *supra* and accompanying text.

72. *E.g.*, The Miller's Toll in Colonial Connecticut. This provision was originally enacted in 1672 and was still being enforced in 1828. State v. Bishop, 7 Conn. 181 (1828).

73. The penalty provisions of the early New Jersey Gaming Law, Act of Feb. 8, 1797 §§ IV, V [1800] N.J. Laws 224-25 (repealed 1847) were very similar to the English Gaming Law, 9 Anne, c.14, § 2 (1710). The court noted in Marvin v. Trout, 199 U.S. 212, 225 (1905) that informer statutes had been employed in America "since the foundation of our Government."

74. For a partial list of *qui tam* statutes, see STAFF REPORT *supra* note 2, at 3-4.

75. Usually informers were private parties with no connection with the state, but in Tarde v. Benseman, 31 Texas 277 (1868) a tax assessor brought an action *qui tam* for the violation of a revenue statute. Coincidentally, this was similar to the use of paid inspectors to enforce commercial law during the reign of Elizabeth. *See* note 30 *supra.*

vided rewards to informers without permitting them to sue.[76]

Statutes providing for *qui tam* suits were common in eighteenth century America, and the notion that *qui tam* was a joinder of public and private interests was generally accepted.[77] Many statutes were interpreted as giving informers the same kind of contingent interest in the penalty as their English counterparts.[78] In some instances, legislatures enacted statutes which acknowledged the primacy of the first informer's suit, thereby adopting the English attitude towards multiple informers.[79]

The courts also were influenced by English law pertaining to *qui tam* suits. In deciding which penal statute permitted an informer to sue *qui tam*, the courts held that permission either must be expressly granted[80] or clearly implied[81] in the penalty provision. In other words,

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76. If a statute created a penalty without providing the means to recover it, a *qui tam* suit was not authorized. State v. Smith, 49 N.H. 155 (1870); Norman v. Dunbar, 53 N.C. 317 (1861). The court in Wheeler v. Goulding, 79 Mass. (13 Gray) 539, 542 (1859) discussed the distinctions between a *qui tam* statute and one which merely provided a reward to anyone who gave information leading to a conviction.

77. "[The private party cannot bring the suit] but by joining the state in the prosecution . . . ." Dickinson v. Potter, 4 Day 340, 342 (Conn. 1810). In some cases the court referred to the state as an indispensable party. Houghton v. Havens, 6 Conn. 305, 307 (1826); Yocum v. Daniel, 24 Ky. 14 (1829). Another court said that the penalty had to be divided between the state and a private party for the suit to be styled *qui tam*. Salonen v. Farley, 82 F. Supp. 25, 28 (E.D. Ky. 1949). Some courts required an informer to declare *qui tam* so that the state's interest and private party's interest both appeared on the record. Vandeventer v. Van Court, 2 N.J.L. 155, 156 (Sup. Ct. 1807); Megargell v. Hazleton Coal Co., 8 W. & S. 342, 345 (Pa. 1845).

78. United States v. Griswold, 24 F. 361, 362 (D.C. Ore. 1885) (U.S. cannot pardon informer's share of penalty provided under FED. REV. ST. §§ 3490-94); State v. Smith, 64 Me. 423 (1875) (dictum); Pike v. Madburg, 12 N.H. 262 (1841); Ritchie v. Shannon, 2 Pawle 196 (Pa. 1828).

79. For examples of state statutes which still enforce this English law [4 Hen. 7, c. 20, §§ 4-6 (1488)], see ALA. CODE tit. 7 § 148 (1958); GA. CODE ANN. § 3-606 (1962).

80. The courts in Bush v. Republic of Texas, 1 Tex. 455 (1846); and Campbell v. Board of Pharmacy of New Jersey, 45 N.J.L. 241 (1883) dealt with statutes which specifically provided for enforcement by *qui tam* suits.

81. The strength of the implication varies with the wording. Because the implication must be clear, a presumption exists against the presence of implied authority. Only when a provision contemplates the rewarding of one who has both discovered and prosecuted a violation can the test of clear implication be satisfied. Thus, the wording of such a provision encompasses only those addressed as active prosecutors. Courts have permitted *qui tam* suits to be brought on the following wordings: "to anyone who would prosecute therefore . . ."; Chicago & Alton R.R. v. Howard, 38 Ill. 414 (1865); Nye v. Lamphere, 68 Mass. 295 (1854); Thompson v. Howe,

the English test[82] of whether or not a penalty could be recovered in a *qui tam* suit was adopted by the American courts.[83]

The reception of English law went beyond the mere recognition that an aggrieved party or informer could sue *qui tam.* The reception extended to an adoption of the English *qui tam* procedures and to a utilization of the informer controls developed by Parliament. Examples of English *qui tam* procedures employed in American courts were numerous. As in England, the same kinds of suits were brought by private parties to recover the penalties,[84] and a defendant in a *qui tam* suit might answer either "not guilty" or *"nil debet,"*[85] just as his English counterpart. Pleadings in civil actions were subject to the adopted Statute of Jeofails.[86] Procedural errors were handled in the same manner as in England.[87] When no common informer appeared, the state could sue for the entire penalty.[88] Finally, a judgment in American

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46 Barb. 287 (N.Y. Sup. Ct. 1866); "one who would sue for the same", Adams v. Commonwealth, 1 Woodward Dec. 417 (Pa. Dist. Ct. 1866); "one half to the informer and prosecutor", Drew v. Hilliker, 56 Vt. 641 (1884); "to the use of [the informer]" Adams, *qui tam,* v. Woods, 6 U.S. (2 Cranch) 336 (1804); Higby v. People, 5 Ill. (4 Scammon) 165 (1844); Chicago & Alton R.R. Co. v. Howard, 38 Ill. 415 (1865); Colburn v. Swett, 42 Mass. (1 Metcalf) 232 (1840) (dictum); Lynch v. the Steamer "Economy," 27 Wis. 69 (1870); *contra,* Omaha & Republican Valley Ry. v. Hale, 45 Neb. 418, 63 N.W. 849 (1895); "one-half for the use of the informer . . .", Payne v. Coursey, 20 Ga. 585 (1856). The court in Smith v. Look, 108 Mass. 139 (1871) did not permit the plaintiff to proceed where the statute was phrased to give one-half to the party making the complaint. Evidently the court interpreted the word "complaint" in a non-legal sense.

82. *See* note 34 *supra.*

83. Some cases cite English opinions as authority: Williams v. Wells Fargo & Express Co., 177 F. 352, 355 (8th Cir. 1910); Colburn v. Swett, 42 Mass. (1 Metcalf) 232, 235 (1840); Drew v. Hilliker, 56 Vt. 641, 646 (1884).

84. In most cases an action in debt or action on the case was filed. However, in Raynham v. Rounseville, 26 Mass. 44 (1829), the court said an indictment would lie. In Adams, *qui tam,* v. Woods, 6 U.S. (2 Cranch) 336 (1805), Chief Justice Marshall noted, regarding a statute prohibiting slave trade, "In this particular case, the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently, either debt or information would lie." *Id.* at 340. This is a recognition that the English statute, 18 Eliz., c.5, § 1 (1576), applied to American law. *See* note 38 *supra* and accompanying text.

85. Burnham v. Webster, 5 Mass. 266 (1809).

86. Martin, *qui tam,* v. M'Night, 1 Tenn. 330 (Dist. Ct. 1808), *on rehearing,* 1 Tenn. 380 (Dist. Ct. 1808).

87. *E.g.,* dismissal of a suit brought by an improper party, Burrell v. Hughes, 116 N.C. 430 (1895).

88. State v. Smith, 64 Me. 423 (1875); Commonwealth v. Howard, 13 Mass. 221 (1816).

courts was given an effect very similar to that which an English judgment would have been given in England.[89]

From the above discussion it seems clear that *qui tam* as it existed in early America was virtually identical to English *qui tam*. The colonies and newly established states adopted not only the letter but the spirit of this unique procedure. Recognition of this wide scale adoption provides a useful basis for determining the current propriety of *qui tam* suits in certain factual settings.

IV. AMERICAN DEVELOPMENT OF QUI TAM

To some extent the American experience with *qui tam* informers paralleled the English. Identical problems with vexatious and collusive informers developed. In response to these problems American legislatures employed the same remedies as Parliament.[90] Informers were required to pay costs if they did not prevail.[91] Only a final judgment was effective as a bar to a subsequent informer's suit.[92] Short statutes of limitations for informers[93] and strict venue statutes,[94] similar to the English provision, helped control abuses. In some cases fines were levied on wrong-doing informers.[95]

In addition to the English remedies, American legislatures developed some of their own to cure the informer abuses. Statutes were passed giving the state the exclusive control of penal actions. By gaining control of penal actions, the state accomplished two ends. First, abuses perpetrated by informers were stymied; secondly, the decision

89. Beadleston v. Sprague, 6 Johns. 101 (N.Y. Sup. Ct. 1810); Middleton v. Wilmington & Weldon R.R., 95 N.C. 167 (1886).

90. *E.g.*, Pennsylvania adopted 4 Hen. 7, c.20 and 22 (1487); 23 Car. 2, c.9, reprinted in S. ROBERTS, DIGEST OF SELECT BRITISH STATUTES 138-39 (1847).

91. Reynolds v. Stevens, 2 Root 136 (Conn. 1794); Omaha & Republican Valley Ry. v. Hale, 45 Neb. 418, 63 N.W. 849 (1895). In Pennsylvania, malicious prosecution by informers was punishable by an award of double costs to the aggrieved party. Act of Nov. 27, 1700, ch. 83 [1896] 2 PA. STAT. 100 (repealed by the Queen in Council, 1706).

92. Haskins, *qui tam*, v. Newcomb, 2 Johns. 405 (N.Y. Sup. Ct. 1807); Raynham v. Rounseville, 26 Mass. 44 (1829); Burley v. Burley, 6 N.H. 200 (1833).

93. Commonwealth v. Frost, 5 Mass. 53 (1809); Pike v. Madbury, 12 N.H. 262 (1841). In Delaware, informers and aggrieved parties had the same statute of limitations, tit. 18, ch. 123, § 12, [1852] DEL. REV. STAT. 441.

94. Ch. 123, § 8, [1860] MASS. REV. STAT. 621.

95. Haskins, *qui tam*, v. Newcomb, 2 Johns. 405 (N.Y. Sup. Ct. 1807) (fine for unlawful compounding); *see* statute cited note 91 *supra*.

to prosecute was vested in the government.[96] Thus the government could pardon the entire penalty where as before it could only pardon its share. Various means were utilized to accomplish this centralization of control.

The most direct means to vest control of penal actions in the government were amendments which either specifically repealed the informer provision or which required a penal action to be prosecuted by a state's attorney.[97] In some instances the states opted for partial control of the informers. This partial control was accomplished in one of two ways. Either the use of informers was restricted[98] or the government was provided with authority to intervene in an informer's suit.[99]

Another means of centralizing the control of penal actions was accomplished by revoking the informer's share of a penalty. This was done either expressly or impliedly. When a statutory provision giving an informer a share of the penalty was repealed, the would-be informer's basis for bringing a *qui tam* suit was removed, as was his incentive.[100] Some amendments and acts provided that all proceeds from fines, penalties or forfeitures would accrue to the state or a named public cause. Such provisions were occasionally interpreted as an implied repeal of informer's shares in all statutes.[101]

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96. The 1943 amendment to The False Claims Act, 31 U.S.C. § 232 (1970) prohibits informer suits brought on evidence already in the hands of the federal government. Sheer v. Anaconda Wire & Cable Co., 149 F.2d 680 (2d Cir.), *cert. denied*, 326 U.S. 762 (1945). The obvious purpose of this amendment was to effectuate the government's choice of either prosecuting or ignoring an alleged false claim.

97. In Williams v. Wells Fargo & Express Co., 177 F. 352 (8th Cir. 1910), the court discussed a statute containing an apparent conflict regarding who could prosecute. One section of the act gave a share of the penalty to one who prosecuted for it. This would seem to give an informer the implied right to initiate proceedings under the act. Another section required all prosecutions to be conducted by federal prosecutors. The court held that under these circumstances an informer could not proceed *qui tam*. *See also* Rosenberg v. Union Iron Works, 109 F. 844 (N.D. Cal. 1901); State v. Marietta & North Ga. R.R., 108 N.C. 24, 12 S.E. 1041 (1891).

98. *See* note 93 *supra*.

99. Under The False Claims Act, 31 U.S.C. § 232(C) (1970), the government has sixty days to intervene.

100. *See generally* Hibbard v. Parmenter & Polsey Fertilizer Co., 70 N.H. 156, 46 A. 683 (1900).

101. The court in Dutton v. Fowler, 27 Wis. 427 (1871) held that all the proceeds from a fine accrued to the county in which the conduct being penalized occurred. The court in Southern Express Co. v. Commonwealth, 92 Va. 59, 22 S.E. 809 (1895), avoided the problem by calling the penalty a forfeiture, not a fine for a crime.

Courts also restricted the use of *qui tam*. A judicial means of precluding informer suits was to label them criminal as opposed to civil, and then refuse to permit private parties to bring them.[102] Such a characterization was a break from the English practice.[103]

The frequency of *qui tam* suits also underwent change in the nineteenth century. Initially *qui tam* was very popular. Towards the end of the nineteenth century, however, it was employed less and less. One reason for the reduction in *qui tam* suits stems from legislation which nearly eliminated all *qui tam* statutes. There is no evidence of a concerted effort to abolish *qui tam*; rather, there appears to have been a steady erosion of the informer actions. The Connecticut experience furnishes an example of this erosion. There the number of informer actions was reduced gradually by statutory revisions in the latter quarter of the nineteenth century. Prior to these revisions, informer actions played a significant role in the Connecticut courts.[104]

The federal experience with *qui tam* was quite similar to that of the states'. So long as *qui tam* was necessary to enforce the penal laws,[105]

Cf. State v. Indiana & Ill. S.R.R., 32 N.E. 817 (1892). In State v. Maultsby, 139 N.C. 583, 51 S.E. 956 (1905), the court said that an informer could have a share of a penalty, but not of a fine. A "penalty" was defined as a "sum certain," while a "fine" was described as "discretionary within the limits prescribed and is paid to the state." *Id.* at 585, 51 S.E. at 956.

102. Three principal techniques were employed to determine whether an action was criminal or civil. Some courts look to the procedure employed: Canfield v. Mitchell, 43 Conn. 169 (1875); State v. McConnell, 70 N.H. 158 (1900); Waters v. Day, 10 Vt. 487 (1838). Other courts considered the nature of the penalty. In United States v. Claflin, 97 U.S. 546 (1878), the Court termed a fine of twice the value of goods smuggled "remedial," as opposed to a forfeiture or penalty which was considered "penal." *Id.* at 552-53. *But see* Palmer v. Conly, 4 Denio 374 (N.Y. Sup. Ct. 1847) (comparing remedial penalties to punitive penalties); Cummings v. Board of Educ. of Okla. City, 190 Okla. 533, 125 P.2d 989 (1942). The third technique which the courts have employed to distinguish between penal and civil actions has been to consider the kind of conduct prohibited. An activity, otherwise lawful, which is made unlawful could be prosecuted by means of a civil suit. Ott v. Jordan, 116 Pa. 218, 9 A. 321 (1887).

103. In discussing penal actions, of which *qui tam* was a variety, Blackstone made it clear that an informer was suing to recover a penalty and in so doing was enforcing a criminal statute. 2 BLACKSTONE 437.

104. A comparison of the Revised Code of Connecticut of 1874 with the subsequent revisions of 1888 and 1902 reveals that most of the forty-six *qui tam* statutes permitted under the 1874 Code were eliminated by one or the other of the subsequent revisions.

105. *See* the discussion of the False Claims Act of 1863, 89 CONG. REC. 10696-97 (1943) (remarks of Senator Langer quoting earlier remarks of Senator Van

it was utilized. During the latter part of the nineteenth century the federal informer provisions were gradually reduced. Finally, in 1943, an amendment was proposed to eliminate one of the last remaining informer provisions of any consequence.[106] The amendment was rejected, but only remnants remained of a once important statutory scheme.

American judicial attitudes toward *qui tam* were also mixed, as evidenced by Mr. Justice Black's opinion in *Marcus v. Hess*.[107] In that case the Circuit Court of Appeal's decision had started from the premise "that *qui tam* or informer actions have always been regarded with disfavor" by the courts.[108] In reversing the lower court, Black stated:

> We cannot accept either the interpretive approach or the actual decision of the court below. Qui tam suits have been frequently permitted by legislative action and have not been without defense by the courts.[109]

Black's favorable attitude towards *qui tam* was clear from the following broad language in footnote four of the opinion:

> Statutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue.[110]

Black cited *Adams v. Woods*[111] as authority for this statement. This was too expansive a reading of that case. In *Adams*, Chief Justice Marshall was confronted with a statute which by clear implication gave an informer a right to bring an action.[112] Marshall was not discusing a statute which was vague as to when informers could sue. Despite Black's overreading, it was nonetheless clear from *Marcus* that

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Nuys). Davies indicates that there were other reasons for the employment of *qui tam* informers, but he does not suggest what these reasons were. DAVIES 25 n.2.

106. H.R. 1203, 78th Cong., 1st Sess. 1943.

107. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 (1943).

108. United States *ex rel.* Marcus v. Hess, 177 F.2d 233, 235 (3rd Cir.), *aff'd*, 317 U.S. 537 (1943).

109. United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943).

110. *Id.* at 541 n.4.

111. 6 U.S. (2 Cranch) 336 (1805).

112. The Court considered the Slave Trade Law of 1794, Act of Mar. 22, 1794 ch. 11, § 1, 1 Stat. 346, which stated:

> Violators . . . shall forfeit and pay the sum of $2,000, one moiety to the use of the United States, and the other moeity to the use of *him or her who shall sue for and prosecute the same.* (Emphasis added).

For a similar analysis of this construction, see Note, 17 LOYOLA L. REV. 757, 761 (1971).

qui tam was favorably regarded, if not by all courts, at least by the Supreme Court in 1943.

What emerges from this historical evolution is recognition that in America, as earlier in England, *qui tam* proceedings began as a useful and perhaps necessary supplement to the efforts at law enforcement of inadequate public agencies. As the public agencies became more effective, the need for *qui tam* actions diminished. The legislatures and courts, responding to this reduced need, gradually applied a myriad of procedural and doctrinal[113] restrictions on *qui tam* proceedings. Thus, as in the English experience, American *qui tam* became beclouded with misconceptions and uncertainties.

V. A SUGGESTED ANALYSIS

A. General Analysis

Despite these uncertainties, statutes providing for *qui tam* suits still exist in the United States. In some cases, existence of legislation permitting these suits might be attributed to legislative indifference or oversight, but there are examples of both state and federal statutes which remain in effect and which have not been overlooked.[114]

As was true in the nineteenth century, contemporary statutes providing that informers can share in a penalty, fine or forfeiture are phrased in various ways. Judicial interpretation is frequently necessary to determine when such phrases authorize a *qui tam* proceeding.[115] There are, unfortunately few recent decisions on these questions of statutory construction. This problem of statutory interpretation can be best broken down into two elements. First, the legislature's general attitude towards *qui tam* must be determined. Secondly, assuming a favorable general attitude, the court must determine whether the particular statute before it permits a *qui tam* action.

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113. The propriety of allowing a private individual to enforce a criminal statute by means of a civil action necessarily requires a consideration of the doctrine of "prosecutor's discretion" and the conflicting policy arguments. Such a consideration is entirely separate from divining legislative intent from statutory restrictions. *See generally* Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion*, 18 LAW & CONTEMP. PROB. 64 (1948); Note, 17 LOYOLA L. REV. 749, 759-60 (1971).

114. For a recent decision acknowledging the currency of *qui tam*, see Lanne v. City of Bayonne, 7 N.J. Super. Ct. 169, 72 A.2d 397 (1950).

115. New York permits both informer suits, N.Y. CIV. PRAC. LAW § 7-203 (McKinney 1963), and actions on statutes by aggrieved parties, N.Y. CIV. PRAC. LAW § 7-202 (McKinney 1963).

The first element involves the existence of a legislative pronouncement permitting or precluding *qui tam* suits. Recently such pronouncements have been issued from both federal and state legislatures. The best example of congressional attitude is legislation dealing with the Informer Act.[116] In 1943, the U.S. House of Representatives proposed an amendment to abolish this act.[117] The Senate refused to accept this abolition,[118] but agreed to limit the act.[119] Again, in 1960, the act was the subject of congressional concern, but as in 1943 the *qui tam* procedure was retained.[120] Such activity indicates both an awareness and an approval of the *qui tam* provisions in the Informers Act.

The attitude of state legislatures towards *qui tam* is also reflected in recent statutes. A Virginia statute provides that an informer or person prosecuting may have part of a fine.[121] In this context "person prosecuting" does not refer to the state's attorney but rather a private party. In comparison, a Vermont statute requires that all fines "shall belong and be paid to the state."[122] The latter statute precludes the bringing of a *qui tam* suit in Vermont as the private party or informer is provided no interest in the recovery of the penalty. Such suits had previously been permitted in Vermont.[123]

In North Carolina, an amendment to the constitution provided that the net proceeds of all penalties, fines and forfeitures would go to the school fund.[124] There was a lively controversy as to whether this precluded an informer from bringing a *qui tam* suit to recover a part of a penalty given to one who would "sue for the same." The court re-

116. H.R. 1203, 78th Cong., 1st Sess. (1943). During the course of the debate on the amendment, the False Claims Act was referred to as the Informers Act. 89th CONG. REC. 10751, 10845 (1943).

117. *See* note 106 *supra.*

118. The Senate insisted on its amendment to H.R. 1203, 89th CONG. REC. 10845 (1943).

119. 89 CONG. REC. 10752 (1943).

120. The 1960 amendment was minor in scope. It is mentioned at this point only to indicate that congress is currently aware of the False Claims Act.

121. VA. CODE ANN. § 19.1-344 (1950). West Virginia allows the prosecutor to recover a share of the penalty if his name appears on the indictment. W. VA. CODE § 62-4-2 (1966).

122. VT. STAT. ANN. tit. 13 § 7252 (1958). Maryland has a similar statute. MD. ANN. CODE Art. 38 § 3 (1957).

123. Rev. Stat. ch. 105 § 3 [1842] Vt. Comp. Stat. 589.

124. N.C. CONST. art. 9, § 7. This provision was added as an amendment to N.C. CONST. Art. 9, § 5.

solved the issue by retaining the informer's share, and his right to sue for it.[125]

Once it has been determined that a legislature has an announced policy in favor of *qui tam* suits, or at least has not precluded such proceedings, the question then becomes in what instances are such suits authorized. As discussed above, *qui tam* statutes either expressly or impliedly give an informer or aggrieved party the right to institute proceedings.[126] For analytical purposes, penalty provisions can be broken down into three categories: the first category includes express grants to sue *qui tam;* the second gives permission by a clear implication; and the third category includes those statutes which merely give an informer a share of those penalties that he is helpful in obtaining.

The wording of express grants to proceed *qui tam* vary. The federal Informers Act spells out in great detail the procedure by which a person suing "as well for himself as for the United States," may proceed *qui tam.*[127] State statutes authorizing a *qui tam* suit by an express provision within the penalty section generally do not provide for so much detail as the Informers Act. These state statutes provide a wide variety of provisions, and in some instances the private party is given an uncontrolled right to proceed:

> Any person who may be aggrieved or injured by the violation of section 59-201 may prosecute the violator in a criminal action by his own attorney, without the intervention of the county attorney . . .[128]

In other instances the private party's right to proceed *qui tam* is restricted:

> Upon the refusal, failure, or neglect of the proper officers of the States or of any county, township, city, town or school district, to institute or diligently prosecute proper proceedings . . . any resident taxpayer . . . may in the name of the State of Oklahoma as plaintiff, institute and

125. *See* Sutton v. Phillips, 116 N.C. 502, 21 S.E. 968 (1895), in which the North Carolina court said that an amendment to the state constitution which gave the clear proceeds of all penalties to the school fund was not a bar to an informer suit (two judges dissenting); *accord,* Barnett v. Atlantic & Pacific R.R. Co., 68 Mo. 56 (1878); Lynch v. The Steamer "Economy", 27 Wis. 69 (1871).

126. *See* notes 80-81 *supra* and accompanying text.

127. 31 U.S.C. §§ 231-235 (1964). The *qui tam* provision is included in 31 U.S.C. § 232 (1964).

128. NEB. REV. STAT. § 59-204 (1943). One state openly refers to such statutes as *qui tam.* TENN. CODE § 43-2006 (1964).

maintain for the recovery of such property . . .[129]

A clear implication of the right to sue *qui tam* arises when a share of the penalty is given to one who will sue for it. The same can be said of a penalty to be recovered "at the suit of the informer."[130] The manner in which the informer's share of the penalty is provided gives a clear indication that the state's legislature intended to permit an informer to bring a *qui tam* suit.

The third category of penalty provisions has caused some conflict among the courts as to whether such provisions authorize a private party to institute a *qui tam* proceeding. There is considerable doubt as to whether a *qui tam* suit may be brought where the penalty provision only acknowledges the informer's share.[131] Most courts, including federal, have regarded such provisions as an insufficient basis to demonstrate a legislative intent to authorize *qui tam* suits.[132] A few courts have ruled to the contrary.[133] The penal provision in the Refuse Act falls within this last category and provides an example of contemporary judicial interpretation.

B. The Refuse Act Cases

In each of the Refuse Act cases, the courts stated at least three reasons supporting their dismissals. Some of these reasons were repeated in several opinions; others were not. No single reason was accepted by all the courts; however, one approach was widely accepted. Most courts asserted the plaintiffs had no authority to sue. The courts used two lines of reasoning to arrive at this conclusion. The first line asserted that the Justice Department had the exclusive right to prosecute violators of the Refuse Act. The second denied the informer's right to sue. The courts expressed these lines of reasoning in a variety of ways.

The most prevalent rationale was that § 413 precluded *qui tam* suits.[134] This section specifically provides for enforcement by the

129. OKLA. STAT. ANN. tit. 62 § 373 (1963).

130. GA. CODE ANN. § 62-106 (1966).

131. Federal Refuse Act, 33 U.S.C. §§ 407, 411, 413 (1969).

132. *See, e.g.*, Williams v. Wells Fargo & Express Co., 177 F. 352 (8th Cir. 1910); Smith v. Look, 108 Mass. 139 (1871); Almy v. Harris, 5 Johns. 175 (N.Y. Sup. Ct. 1809); Allen v. Craig, 102 Ore. 254, 201 P. 1079 (1921).

133. Chicago and Alton R.R. v. Howard, 38 Ill. 415 (1865).

134. Connecticut Action Now, Inc. v. Roberts Plating Co., 330 F. Supp. 695 (D. Conn.), *aff'd*, — F.2d — (2d Cir. 1971).

Justice Department.[135] Even if the penalty provision authorized an informer to sue *qui tam*, § 413 nullified this grant. Two federal cases support this argument.[136] There is little authority to the contrary.[137]

Six cases asserted a similar rationale.[138] This involved two steps. First, there was a two-fold conclusion that the Refuse Act was a criminal statute and could not be enforced by a civil action. Secondly, only proper authorities, in this case the Justice Department, could enforce criminal statutes. Two courts offered a slight variation on the first step.[139] These courts argued that *qui tam* actions could be brought only for civil penalties and, since § 411 imposed a criminal fine, *qui tam* did not lie. Either line of reasoning relied upon the conclusion that

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135. *E.g.*, Bass Angler Sportsman Soc'y v. U.S. Steel Corp., 324 F. Supp. 412, 415 (M.D. Ala. 1971).

136. Williams v. Wells Fargo & Express Co., 177 F. 352 (8th Cir. 1910); Rosenburg v. Union Iron Works, 109 F. 844 (N.D. Cal. 1910); 33 U.S.C. § 413 (1964).

> [T]he Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of (this act) . . . and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the state . . . .

137. The court in United States v. Griswold, 26 F. Cas. 42 (No. 15,266) (D. Ore. 1877) [in construing the False Claims Act] rejected an argument that *qui tam* enforcement of that act which was expressly provided for under Act of March 2, 1863, ch. 67 § 5, 12 STAT. 696, codified as 31 U.S.C. § 233 (1970), or under a general statute which requires United States District Attorneys to prosecute civil actions in which the United States is a concerned party, Rev. Stat. § 367, revised and codified as 28 U.S.C. § 517 (1970). At least one authority thought this case controlling in the Refuse Act situation. *See* Note, *Qui Tam Actions and the Rivers and Harbors Act,* 23 CASE W. RES. L. REV. 173, 201-05 (1971). One author construed § 413 to cover some, but not all proceedings. Thus he concluded the United States Attorney was not required to bring all suits to enforce the act. Note, *Qui Tam Actions Under the 1899 Refuse Act: Possibility of Individual Legal Action to Prevent Water Pollution,* 36 MO. L. REV. 498, 511 (1971).

138. Gerbing v. ITT Rayonier, Inc., 332 F. Supp. 309 (M.D. Fla. 1971); Lavagnino v. Porto Mix Concrete, Inc., 330 F. Supp. 323 (D. Colo. 1971); Bass Angler Sportsman's Soc'y v. Scholze Tannery, Inc., 329 F. Supp. 339 (E.D. Texas 1971); United States *ex rel.* Mattson v. Northwest Paper Co., 327 F. Supp. 87 (D. Minn. 1971); Bass Angler Sportsman's Soc'y v. U.S. Plywood-Champion Papers, Inc., 324 F. Supp. 302 (S.D. Texas 1971); Bass Angler Sportsman's Soc'y v. U.S. Steel Corp., 324 F. Supp. 412 (N.D. Ala.), *aff'd,* 447 F.2d 1304 (5th Cir. 1971).

139. Connecticut Action Now, Inc. v. Roberts Plating Co., 330 F. Supp. 695 (D. Conn.), *aff'd,* — F.2d — (2d Cir. 1971); Bass Angler Sportsman Soc'y v. U.S. Steel Corp., 324 F. Supp. 412 (N.D. Ala.), *aff'd,* 447 F.2d 1304 (5th Cir. 1971). Two courts referred to the penalty as a criminal penalty and reasoned that *qui tam* lay only to recover a civil penalty, Gerbing v. ITT Rayonier, Inc., 332 F. Supp. 309 (M.D. Fla. 1971); United States, *qui tam,* Matthews v. Florida-Vanderbilt Development Corp., 326 F. Supp. (S.D. Fla. 1971).

the Refuse Act is a criminal statute. The courts arrived at this conclusion by an examination of the wording of § 411.[140]

Some courts approached the question of who had authority to prosecute violators of the Refuse Act from a different standpoint. These courts chose to deny informers the right to proceed *qui tam* on the grounds that Congress had not given informers that right. Five of these courts concluded that the Refuse Act gave neither express nor implied authority to sue *qui tam*.[141] This was an application of the English test.[142] Other courts took a slightly different approach and arrived at the same conclusion. One such approach was advanced in *Bass Angler v. U.S. Plywood*.[143] The court there stated that the informer's right to a share of a penalty depended upon three conditions: criminal prosecution under § 411, a conviction, and a fine imposed upon sentence. The court then concluded, "The informer's rights, therefore, are entirely dependent on, and inseparable from, the criminal proceeding brought by the Justice Department, the party authorized to institute such suit."[144] Once again a court presumed that a criminal proceeding was required to enforce the act. In this instance the presumption was not expressly supported. Similarly, another court noted that a successful prosecution could lead to a sentence of a fine, imprisonment, or both. A private party could not bring a civil suit which could lead to the imposition of a prison term; therefore, the court concluded, an informer could not sue *qui tam* under the Refuse Act.[145] This opinion came the closest to giving a clear explanation for calling the Refuse Act a criminal statute.

Some courts attempted to divine the congressional intent of the act. Each of these courts reached a separate conclusion. One court stated that informers were disfavored in 1899, the year in which the Refuse

140. *See, e.g.*, Connecticut Action Now, Inc. v. Roberts Plating Co., 330 F. Supp. 695, 697 (D. Conn.), *aff'd*, — F.2d — (2d Cir. 1971).

141. Lavagnino v. Porto Mix Concrete, Inc., 330 F. Supp. 323 (D. Colo. 1971); Enquist v. Quaker Oats Co., 327 F. Supp. 347 (D. Neb. 1971); United States *ex rel.* Mattson v. Northwest Paper Co., 327 F. Supp. 87 (D. Minn. 1971); United States, *qui tam*, Matthews v. Florida-Vanderbilt Development Corp., 326 F. Supp. 289 (S.D. Fla. 1971); Bass Angler Sportsman's Soc'y v. U.S. Steel Corp., 324 F. Supp. 412 (N.D. Ala.), *aff'd*, 447 F.2d 1304 (5th Cir. 1971).

142. *See* note 34 *supra* and accompanying text.

143. Bass Angler Sportsman's Soc'y v. U.S. Plywood-Champion, Inc., 324 F. Supp. 302 (S.D. Texas 1971).

144. *Id.* at 306.

145. Durning v. ITT Rayonier Inc., 325 F. Supp. 446 (N.D. Wash. 1970).

Act was enacted.[146] This conclusion was an accurate appraisal of the legislative attitude towards *qui tam* at the turn of the century. Thus, in a doubtful case, it could be argued that Congress did not intend to provide for informer suits. The second court's conclusion was that Congress intended the informer's share in § 411 as a reward, not as a means to sue.[147] The court did not support this conclusion. It is strange reasoning, for every informer statute includes a reward for the party who prosecutes. It is the providing for a share combined with a grant to sue that permits an informer's suit to be brought *qui tam.* Thus to say that any particular informer's share was nothing more than a reward begged the question. The court should have gone on to say that a grant to sue was not provided in the statute.

Two more reasons were given for these dismissals. One court announced that *qui tam* had not found its way into the common law.[148] This argument limited the availability of *qui tam* suits to those which were specifically provided for by statute. Such an argument was not an accurate statement of English law.[149] Furthermore the status of the common law *qui tam* has never been resolved in American courts. Thus the argument stands as a bare conclusion. Another court speculated that a criminal suit brought by the Justice Department and a *qui tam* action filed by an informer could be brought simultaneously to prosecute the same offense. When this occurred, a court would not know what to do.[150] The court offering this speculation was obviously unaware of the rule in *Rex v. Hymen*[151] which resolved this problem.

The rule of that case is that the government may sue for the informer's share of the penalty if, and only if, no informer has initiated a suit prior to the government's filing. If this condition is met, no informer can sue or recover any part of the penalty.[152] On the other

146. United States *ex rel.* Mattson v. Northwest Paper Co., 327 F. Supp. 87 (D. Minn. 1971).

147. Durning v. ITT Rayonier, Inc., 325 F. Supp. 446 (N.D. Wash. 1970).

148. Bass Angler Sportsman's Soc'y v. U.S. Plywood-Champion Papers, Inc., 324 F. Supp. 302 (S.D. Texas 1971).

149. *See* notes 21-22 *supra* and accompanying text.

150. Durning v. ITT Rayonier Inc., 325 F. Supp. 446, 447 (N.D. Wash. 1970).

151. *See* note 18 *supra.*

152. United States v. Anaconda Wire & Cable Co., 52 F. Supp. 824, 826 (E.D. Pa. 1943); United States *ex rel.* Benjamin v. Hendrick, 52 F. Supp. 60, 61 (S.D. N.Y. 1943).

hand, once an informer has initiated his suit, and assuming arguendo that he can proceed under the act, the right to continue vests absolutely in the informer and can not be interfered with by the government.[153] There is, then, no possibility of two suits being prosecuted at one time.

By the variety of reasons given for these dismissals, it is evident that the courts were unsure of their position. Actually the question of whether *qui tam* is provided for in a statute is rather easily resolved. The English test, which requires that a statute provide an express grant or clear implication for an informer to sue *qui tam*, is widely accepted[154] and relatively easy to apply. The wording of § 411, "one-half of said fine to be paid to the person or persons giving information which shall lead to conviction,"[155] clearly does not give an informer an express grant to sue. It is equally obvious that this language does not clearly imply that an informer can initiate an action to recover the penalty. Rather, it appears the informer must await governmental prosecution. Then, if the government prevails and a fine is imposed, the informer may assert his right to half of the fine.[156]

Even if § 411 authorizes informers to sue, however, § 413 nullifies this grant. The law on this construction is clear and well established,[157]

153. "Even the sovereign has no right to interfere. The first plaintiff has sole control of the action . . . ." United States v. B.F. Goodrich Co., 41 F. Supp. 574, 575 (S.D. N.Y. 1941). *See also* note 78 *supra* and accompanying text.

154. *See* note 132 *supra*. However, there is a contrary view which contends ". . . *qui tam* actions are allowed if part of a pecuniary penalty is specified for an informer, unless the statute expressly prohibits this method of enforcement." Note, *Qui Tam Actions and the Rivers and Harbors Act*, 23 CASE W. RES. L. REV. 173, 212 (1971). The author of this view relies upon Justice Black's dictum in United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943), discussed at notes 107-112 *supra*, and accompanying text, and upon two other federal court opinions, United States v. Stocking, 87 F. 857 (D. Mont. 1898), and United States v. Griswold, 26 F. Cas. 42 (No. 15,266) (D. Ore. 1877). These last two cases noted that the adopted statutory construction rule for determining whether *qui tam* lay was that where a penalty was given in part, "to whoever would sue for the same", that penalty could be sued for in a *qui tam* suit. The words "whoever would sue for the same" constitutes an implied grant of authority to sue. *See* note 81 *supra*. Such language would make no sense if informers were not allowed to sue for the penalty. By using that language, the legislature gives informers the right to proceed. This contrary view, then, is an overreading of the authorities it cites and an ignoring of the accepted position which the Refuse Act cases reflect.

155. 33 U.S.C. § 411 (1964).

156. For a case in which this procedure was successfully followed, see United States v. Transit-Mix Concrete Corp., 2 E.R.C. 1074 (S.D. N.Y. 1970).

157. *See* note 97 *supra* and accompanying text.

and was applied in half of the Refuse Act cases.

A third reason *qui tam* is not available under the Refuse Act is unassailable. As the court noted in *Durning v. ITT Rayonier*,[158] § 411 provides for the possible imposition of a prison term. Under these circumstances, only the state should be permitted to prosecute violations of the act.

These reasons apply to suits by informers, but not necessarily to a suit brought by a plaintiff who has suffered a particular injury over and above that suffered by the general public; he sues for a remedy as well as a share of the penalty. As discussed above, such plaintiffs were often distinguished from informers. On occasions these distinctions provided grounds for different results in identical cause of action. So far, only the plaintiff in *Lavagnino v. Porto Mix Concrete, Inc.*,[159] has attempted to employ an aggrieved party argument as an alternative means to authorize a *qui tam* suit. Faced with this problem, the court merely construed the Refuse Act as applying only to interferences with navigation.[160] Since the plaintiff alleged damage to his real property he could not recover under the Refuse Act.

VI. Possible Future Developments

There is little chance that courts will permit an informer to bring a *qui tam* suit on the Refuse Act. That does not, however, necessarily preclude all private parties from suing under the Refuse Act. Private suits may be attempted by aggrieved parties such as the plaintiff in *Lavagnino*.[161] These plaintiffs may be able to resort to common law *qui tam* suits.

As discussed above, *qui tam* was, in part, a common law remedy.[162] Although aggrieved parties no longer needed the *qui tam* technique after the fourteenth century, there was no outright abolition of it as a

158. 325 F. Supp. 446, 448 (W.D. Wash. 1970).

159. Lavagnino v. Porto Mix Concrete, 330 F. Supp. 323 (D. Colo. 1971).

160. The court did, however, note some conflict. *Id.* at 325-26. For an example of cases holding that obstruction to navigation was not an essential element of the offense see United States v. Maplewood Poultry Co., 327 F. Supp. 686 (N.D. Me. 1971); United States v. U.S. Steel Corp., 328 F. Supp. 354 (N.D. Ind. 1970). *See also* Kalur v. Resor, 3 E.R.C. 1458 (D.D.C. 1972).

161. Lavagnino v. Porto Mix Concrete, 330 F. Supp. 323 (D. Colo. 1971).

162. *See* notes 21-22 *supra* and accompanying text.

non-statutory procedure.[163] Thus it is possible to argue that it still exists and has been adopted in this country along with the rest of the common law of England.[164]

It could be argued that the thirteenth century English suitors reason for bringing a suit *qui tam* finds a suitable analogy in our country today. As shown above, those early English suitors often desired to plead their cases in royal courts.[165] If the plaintiff's grievance also touched a matter of royal concern the plaintiff could join the two grievances and proceed *qui tam* in the royal courts. A twentieth century suitor finds himself in a somewhat analogous situation if he desires to bring his suit in federal court. If the conduct giving rise to his grievance would also affect a national interest—as evidenced by its violation of a federal act—then the suitor would be confronted with the common law *qui tam* situation. How should the federal courts respond to such a problem?

The use of the early *qui tam* procedure would be questionable for several reasons. First, the existence of a common law remedy which lay dormant for five centuries is extremely doubtful. Even if it can be said to exist in the English common law, it may not have been adopted in this country. Secondly, it can be argued that since Parliament provided by statute for suits by aggrieved parties which could be pleaded *qui tam* then no other wrongs than those covered could be redressed in this manner. This argument would consider such enactments as impliedly preempting the common law *qui tam.*

The arguments challenging the current status of common law *qui tam,* are formidable. On a theoretical plane they may be overwhelming, but as a practical matter courts may still decide to permit a common law *qui tam* suit. Such a decision could be based on one of two grounds. First, the courts could decide that *qui tam* as a common law remedy is and always has been allowed in our courts. Alternatively, the courts could formulate a common law *qui tam* remedy.

Any attempt to argue the existence of a common law *qui tam* suit also must recognize that our system of federalism raises the level of complexity of *qui tam* jurisprudence. Even if *qui tam* was adopted as part of American law, a plaintiff faces a formidable problem in

163. *See* note 25 *supra.*
164. *See* notes 70-71 *supra* and accompanying text.
165. *See* note 23 *supra.*

bringing a common law *qui tam* suit in federal court. An argument that *qui tam* is a part of American common law initially must overcome Mr. Justice Brandeis' dictum in *Erie R.R. Co. v. Tompkins*[166] to the effect that there is "no federal common law." This blanket assertion was invalidated by subsequent decisions,[167] but a *qui tam* plaintiff in federal court would still face substantial problems. The *Erie* decision remains good law as to the substantive law applicable in federal court. What procedural law is to be used in federal court presents another problem. Supposedly, the Federal Rules of Civil Procedure are controlling in federal courts, but when the rules do not cover a given procedure, such as *qui tam*, the federal courts might look outside the rules.[168] The question of whether a common law *qui tam* action is a matter of substantive law or merely procedural, together with a resolution of the attendant issues it raises in the federal context is beyond the scope of this note. They are issues that must be recognized, however, should one attempt to rely on a common law *qui tam* remedy.

Should the plaintiff prevail in this attempt, or if in the state context a common law *qui tam* remedy should be recognized, then private parties would be indirectly able to enforce various statutes. The granting of this authorization would not be so unheard of as the Refuse Act decisions would indicate.

In dismissing the *qui tam* suits under the Refuse Act, the courts have ignored a seemingly obvious analogy to the Security and Exchange Act[169] cases that have given private parties a right of action under a governmentally enforced statute. The analogy is not applicable as to the informer provision in the Refuse Act for there is no such provision in the Exchange Act. But, in the securities cases the Supreme Court has supplied relief to aggrieved parties under a criminal statute which does not expressly provide for such relief. The Court held simply

166. 304 U.S. 64 (1938).

167. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525 (1958); Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945). Perhaps the strongest attack on the *Erie* doctrine is found in Keeffe, Gilhooley, Baily & Day, *Weary Erie,* 34 CORNELL L.Q. 494 (1949).

168. Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949); D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 442 (1942). *See also* Hanna v. Plumer, 380 U.S. 460 (1965); Note, *Erie v. Tompkins and the Federal Rules,* 62 HARV. L. REV. 1030 (1949).

169. 15 U.S.C. § 78 (1971).

that relief should be forthcoming to a private party whose injury resulted from the violation of a federal statute,[170] even if there was no express provision concerning a private remedy. A good argument could be made that if implied private rights of action are allowed under the Exchange Act as a means of effectuating the congressional purpose of protecting investors, a similar action should be allowed under the Refuse Act, if the purpose of the latter statute is to prevent pollution and protect persons damaged thereby.[171]

The Refuse Act courts are probably correct in holding that the informer provision of the act in and of itself does not give a private party a cause of action. But to extend those holdings to say that a private civil action cannot be used to enforce an otherwise governmentally enforced statute is clearly contradictory to the holdings in the Exchange Act cases. A closer look at these cases will show the validity of the analogy.

The Exchange Act does not expressly provide for private actions as a means of enforcing sections 10(b) and 14(a),[172] nevertheless, the Supreme Court approved an implied private right of action under these sections. In the leading case on private rights of action under the Exchange Act, *J.I. Case v. Borak*,[173] the Court directly addressed the issue of whether or not a private right of action should be implied for injury resulting from alleged violations of § 14(a) of the act. The Court could easily have concluded that if Congress had intended to provide for such actions, it would have done so expressly,[174] but it reached the opposite conclusion and allowed the action.

The purpose of section 14(a) is to prevent management or others from obtaining authorization for corporate action by means of de-

170. *See, e.g.*, Mills v. Electric Auto Lite Co., 396 U.S. 375 (1970); J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Karden v. National Gypsum, 69 F. Supp. 512 (E.D. Pa. 1946).

171. *See* note 160 *supra.* One court noted the existence of such relief to aggrieved parties and also noted the similarity to *qui tam.* United States *ex rel.* Mattson v. Northwest Paper Co., 327 F. Supp. 87, 93, n.9 (D. Minn. 1971). *See also* Connecticut Action Now, Inc. v. Roberts Plating Co. Inc., — F.2d — (2d Cir. 1971) (recognizing possibility of this argument if an aggrieved party were involved).

172. 15 U.S.C. §§ 78b, n(a) (1971). Express private rights of action are provided in other sections. 15 U.S.C. § 78i(e), 78p(b), 78r(a), 78cc (1971).

173. 377 U.S. 426 (1964). *See also* Mills v. Electric Auto Lite Co., 396 U.S. 375 (1970), *affirming Borak.*

174. *Compare* 15 U.S.C. §§ 77k, l (1971) *with* note 172 *supra.*

ceptive or inadequate disclosure in proxy solicitation.[175] In reference to the purposes of this section the *Borak* Court stated, "While this language makes no specific reference to a private right of action, among its chief purposes is the 'protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result."[176] With this statement of congressional purpose

175. J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964).

176. *Id.* at 432. Other courts have found implied private rights of action under § 10 of the Exchange Act on a statutory tort theory. *See, e.g.*, Kardon v. National Gypsum, 69 F. Supp. 512 (E.D. Pa. 1946). The statutory tort argument is grounded upon 2 RESTATEMENT OF TORTS § 286 (1938) which states that a civil suit for violation of a legislative enactment is proper, provided that such enactment was intended to prevent the type of injury which occurred and to protect the particular plaintiff alleging the measure's violation. In other words, the violation of a statutory command is wrong in itself and liability follows whenever the prohibited conduct injures a party whom the statute was designed to protect (in this case investors under the Exchange Act). A private right of action on this theory is premised on the lack of an effective common law or statutory remedy. *See* Note, *An Implied Private Right of Action Under Section 16(a) of the Securities and Exchange Act of 1934*, 23 CASE W. RES. L. REV. 155 (1971) suggesting that courts have found implied private rights of actions under the Exchange Act on three theories: (1) statutory tort, (2) congressional purpose (*Borak supra* note 173), (3) jurisdictional grants in a particular act. As to the latter, the author comments that courts have held that the grant of jurisdiction includes the concomitant power to make jurisdiction effective. *Id.* at 159, *citing* Deckert v. Independent Shares Corp., 311 U.S. 282 (1940).

The statutory tort theory, that an injured party must be given a remedy under the Exchange Act, has been somewhat modified under § 16(b) [15 U.S.C. § 78p (1971)] of the act. The purpose of § 16(b) is to prevent corporate insiders from taking advantage of their positions by trading for short term profits in the corporation's stock. Section 16(b) provides that the corporation, or should the corporation fail to bring an action, a stockholder can bring an action against the insider who traded short term. The importance of allowing a stockholder to bring a derivative action against the insider is that the stockholder is only very indirectly injured, and he recovers nothing for bringing the action—the corporation recovers the penalties levied against the wrongdoing insiders. Thus, the purpose of allowing a stockholder, as a private party, to bring an action is not to provide him relief for a tortious injury, but to supply a powerful method by which the section can be enforced.

This purpose distinguishes § 16(b) stockholder actions from § 14(a) actions where the stockholder as an injured party seeks personal relief. Recognizing the purpose of § 16(b)—enforcement of the act—courts have fashioned penalties against violators that are very severe. The penalty is fashioned on a maximum profit theory; *i.e.* the court determines the maximum profit that the violator could have gained and levies that penalty against him, even if the inside trading resulted in a substantial loss to him. This indicates an independent purpose other than merely providing a remedy for a private party plaintiff. *See* Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir. 1943), *cert. denied*, 320 U.S. 751 (1944); Gratz v. Claughton, 187 F.2d 46 (2d Cir.), *cert. denied*, 341 U.S. 920 (1951); 2 L. LOSS, SECURITIES REGULATION, 1037-1132 (2d ed. 1961). Taken collectively, these cases indicate not only a formula-

as its basis, the Supreme Court concluded that "under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."[177] The remedy the Court made available to the aggrieved plaintiff was a private right of action, which the Court implied from the congressional purpose.[178] Underscoring this point, the Court stated, "It is for the federal courts to adjust their remedies so as to grant the necessary relief where federal secured rights are invaded."[179] Prior to the *Borak* decision, the only means for punishing violation of section 14(a) was by governmental action provided for in sections 27 and 32 of the act.[180]

The Court justified its holding that a private action would lie on the grounds that the action would greatly enhance the effectiveness of the Exchange Act, particularly since the Securities and Exchange Commission did not have the resources necessary to regulate effectively the proxies covered by the section.[181]

When a *qui tam* action was brought by an aggrieved person, his primary purpose was to obtain a private remedy; effective enforcement of public policy was a happy by-product. The analogies between the implied private right of action under Exchange Act and an aggrieved party *qui tam* action under the Refuse Act need not be belabored further. Suffice it to say that the Supreme Court has provided for an implied right of action as a remedy under a federal statute which

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tion of a private remedy but also a means of enforcing the federal statute, *i.e.* a merger of private and governmental interests.

177. J.I. Case Co. v. Borak, 377 U.S. 431, 432 (1964).

178. For the remedies available under § 14(a), see Note, *Private Remedies Available Under Section 14(a) of the Securities and Exchange Act 1934*, 55 IOWA L. REV. 657 (1970); "Since no specific remedies are set forth in Section 14(a), the federal courts have wide discretion to formulate remedies for Section 14(a) violations to meet the exigencies of each particular case in accord with basic principles laid down in *Borak*. Within this broad framework of possible remedies courts have developed three general types of relief: injunction, recission of the transaction and restitution of the consideration given by the plaintiff, and money damages." *Id.* at 659.

179. J.I. Case Co. v. Borak, 377 U.S. 431, 433 (1964).

180. 15 U.S.C. §§ 78aa, ff (1971).

181. The Court stated that "The [Securities and Exchange] Commission advises that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited. Time does not permit an independent examination of the facts set out in the proxy material and this results in the Commission's acceptance of the representations contanied therein at their face value, unless contrary to other material on file with it." 377 U.S. at 432. The *Borak* Court found the Commission's lack of resources a good reason for providing for private actions.

did not expressly provide for such relief. The Court thought it its duty to supply such a remedy not only as a means of effectuating a congressional purpose, but also as a means of supplying relief where Congress had failed to do so.[182]

By allowing for a private right of action under the Exchange Act, two interests are merged, one private, one public. The private interest is the redress of a grievance, *i.e.* relief for violation of the federal statute. The public interest served is the increased compliance with federal statutes. Such a merger of interests was the very basis, historically, for the existence of *qui tam*.[183] Perhaps giving an "implied private right of action" is no different from allowing an aggrieved party, such as the plaintiff in *Lavagnino v. Porto Mix Concrete, Inc.*,[184] to bring a suit *qui tam*. Is not the "implied private right of action" of *Borak* merely another name for a common law *qui tam* suit by an aggrieved party? If so, should not such an action be allowed under the Refuse Act, not to recover a fine or penalty, but simply to obtain a remedy for a particular injury?

VII. CONCLUSION

Qui tam is now over seven centuries old. It has gone through periods of tremendous popularity during its long history; it has also been subject to wholesale abuse and rigid control. Recently it has fallen into disuse. There may now be reason for its revival. In deciding whether to permit an aggrieved party to sue *qui tam* under the Refuse Act or other statutes, the courts should not be influenced by the unhappy history of *qui tam* actions by common informers. Rather, they should consider whether or not such suits would contribute to the effective enforcement of the statutory policy. The federal district courts that have been faced with informers as *qui tam* plaintiffs have not undertaken such a consideration. It may be hoped that the foregoing discussion may provide some guidance to parties and courts faced with that question.

182. In Mills v. Electric Auto Lite Co., 396 U.S. 375 (1970) the Supreme Court carried the *Borak* holding even further by allowing a private cause of action under § 14(a) even though it was not clear that the defendant's violations of the proxy rules were the cause of plaintiff's injury.

183. The analogy is not perfect, for the king had something to gain, in addition to the enforcement of the statutes, by the successful prosecution of an aggrieved party *qui tam*. *See* notes 12-21 *supra* and accompanying text.

184. 330 F. Supp. 323 (D. Colo. 1971).