

1940

Whitney Parry v. J. H. Crosby, George A. Swapp, and David L. Pugh : Abstract of Record

Utah Supreme Court

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Harley W. Gustin; Attorney for Plaintiff and Appellant;

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In the Supreme Court of the State of Utah

WHITNEY PARRY,

Plaintiff and Appellant,

vs.

H. CROSBY, as Justice of the
Peace of Kanab Precinct,
Kane County, State of Utah,
GEORGE A. SWAPP, as
Sheriff of Kane County, State
of Utah, and DAVID L. PUGH,
as County Attorney of Kane
County, State of Utah,

Defendants and Respondents.

APPEAL FROM THE DISTRICT COURT OF THE SIXTH
JUDICIAL DISTRICT, IN AND FOR KANE
COUNTY, STATE OF UTAH

HONORABLE HENRY D. HAYES, *Judge.*

ABSTRACT OF RECORD

HARLEY W. GUSTIN,

*Attorney for Plaintiff
and Appellant.*
FILED

MAR 30 1940

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In the Supreme Court of the State of Utah

WHITNEY PARRY,

Plaintiff and Appellant,

vs.

J. H. CROSBY, as Justice of the
Peace of Kanab Precinct,
Kane County, State of Utah,
GEORGE A. SWAPP, as
Sheriff of Kane County, State
of Utah, and DAVID L. PUGH,
as County Attorney of Kane
County, State of Utah,

Defendants and Respondents.

Case No. 6225

ABSTRACT OF RECORD

TRANS. PAGE

1

COMPLAINT.

Comes now the plaintiff above named and for
cause of action against the defendants and each
of them complains and alleges as follows, to-wit:

1. That the defendants Crosby, Swapp and
Pugh respectively now are and at all times here-

inafter mentioned were the duly elected, qualified and acting justice of the peace, sheriff and county attorney of Kane County, State of Utah.

2. That on a date prior to the 7th day of July, 1939 the defendants and each of them, and without due process of law or any proceeding whatsoever, caused to be taken in their official capacities four (4) devices containing large sums of money in excess of Six Hundred (\$600.00) Dollars and which devices were in the value of in excess of Six Hundred (\$600.00) Dollars.

3. That the defendants and each of them claimed and pretended that the devices so taken were gambling devices and unlawfully and wrongfully in the possession of the plaintiff, all of which plaintiff denies; in this particular, plaintiff alleges that the property so taken is owned by a co-partnership known as the Parry Lodge against which and this plaintiff no due and lawful process
2 has been served, but further alleges that the defendant, J. H. Crosby, and the defendant, George A. Swapp, served upon this plaintiff a citation to show cause on the 7th day of July, 1939, copy of which is hereto attached, marked Exhibit "A".

4. The plaintiff alleges that he is one of the partners and the parties in interest of Parry Lodge from which said property was unlawfully and illegally taken and that by reason of the citation to show cause hereinabove referred to, he has

no adequate or sufficient remedy at law nor do the other individuals interested in the same; that the defendants and each of them have acted in the premises in an arbitrary and unlawful manner and contrary to Title 103, Chapter 25, Section 16 of the Revised Statutes of Utah, 1933, as amended by the Session Laws of the Second Special Session of 1933, Chapter 19, Section 2 and contrary to the constitution of the State of Utah wherein it is provided in effect that property cannot be taken without due process of law.

5. The defendants and each of them as indicated by the foregoing threaten to and will unless restrained by an order of this court destroy the property in which this plaintiff is interested in as a partner and confiscate money of undetermined amount to the detriment and injury of this plaintiff and his co-partners.

WHEREFORE, plaintiff prays that this Honorable Court enjoins the defendants and each of them from proceeding further in said cause and for such other and further relief as may be equitable in the premises.

HARLEY W. GUSTIN,
Attorney for Plaintiff.

(Duly verified).

Filed July 26, 1939.

EXHIBIT "A"

4 IN THE JUSTICE'S COURT IN AND FOR
KANAB PRECINCT, KANE COUNTY,
STATE OF UTAH.

Before J. H. Crosby, *Justice of the Peace.*

The State of Utah, <i>Plaintiff,</i> vs. Whitney Parry, <i>Defendant.</i>	}	CITATION TO SHOW CAUSE.
---	---	----------------------------

*The People of the State of Utah to
Whitney Parry Greeting:*

By order of this court, you are hereby cited and required to appear before the judge of this court, at the court room thereof, at the County Court house, in Kanab, Kane County, State of Utah, on Friday, the 7th day of July, 1939, at five o'clock in the afternoon of that day, then and there to show cause, if any you have, why the Slot Machines, which were taken from you under writ of attachment, issued by this court, should not be destroyed and the money in them forfeited to Kane County.

Witness, the hand of J. H. Crosby, Justice of the Peace of Kanab Precinct, Kane County, State of Utah, this 7th day of July, 1939.

(Signed) J. H. CROSBY.

I, George A. Swapp, sheriff of Kane County, State of Utah, hereby certify that I served a copy of the above citation on Whitney Parry, at Kanab, Kane County, State of Utah, on the 7th day of July, 1939.

(Signed) GEORGE A. SWAPP.

(Title of Court and Cause):

5

RESTRAINING ORDER.

To the Defendants Above Named:

Good cause appearing therefor, you and each of you, your officers, agents and deputies and any other person acting for and on behalf of any of you are hereby restrained from the destruction or confiscation of any so-called slot machine or any other device or property and the forfeiture of any money contained therein as indicated by that certain citation to show cause issued by the defendant, J. H. Crosby, Justice of the Peace of Kanab Precinct, Kane County, State of Utah, on the 7th day of July, 1939 or on any other date and

directed to the plaintiff, Whitney Parry, until further order of this court.

DATED this 25th day of July, 1939.

BY THE COURT:

HENRY D. HAYES (Signed)
District Judge.

Filed August 1st, 1939.

(Title of Court and Cause):

9 ORDER TO SHOW CAUSE.

To J. H. Crosby, as Justice of the Peace of Kanab Precinct, Kane County, State of Utah, George A. Swapp, as Sheriff of Kane County, State of Utah, and David L. Pugh, as County Attorney of Kane County, State of Utah, the Defendants Above Named:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that you are hereby required to appear before the above entitled court at the courtroom of said court in the City of Kanab, County of Kane, State of Utah on Tuesday, the 15th day of August, 1939, at the hour of 2:00 P. M. on said day or as soon thereafter as counsel may be heard to show cause, if any you have, why the injunction or restraining order heretofore issued

herein should not be made permanent and the property taken by you and each of you returned to the alleged owner of the same.

DATED this 7th day of August, 1939.

BY THE COURT:

HENRY D. HAYES,
District Judge.

Filed August 11, 1939.

(Title of Court and Cause):

11

ANSWER.

Come now the defendants in the above entitled action and answering the complaint of plaintiff on file herein, admit, deny and allege as follows, to-wit:

1. The said defendants admit the allegations of Paragraph 1 of plaintiff's said complaint.

2. Answering Paragraphs 2 and 3 of said complaint the said defendants admit that they seized four devices containing money, but allege that said devices were taken by due process of law, and that said devices were gambling devices and were being operated by the said plaintiff and his agents contrary to law.

3. The defendants admit that the plaintiff has an interest in the Parry Lodge.

The defendants deny each and every other material allegation in said complaint contained not heretofore specifically admitted.

Wherefore said defendants pray that said restraining order be set aside and cancelled.

O. R. MICHELSEN,

Attorney for Defendants.

(Duly verified).

Filed August 15, 1939.

(Title of Court and Cause):

15

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cause having come on regularly for hearing on the 15th day of August, 1939 before the Honorable Henry D. Hayes, the judge of the above entitled Court, sitting without a jury, a jury trial having been expressly waived by the respective parties, and Harley W. Gustin appearing for the plaintiff and David L. Pugh and O. R. Michelsen, appearing for the defendants; and the matter having been originally set for hearing upon an order to show cause why a restraining order, heretofore issued out of this Court, should not be made permanent, and an answer having been filed, not only to said restraining order but to the merits of said cause, and witnesses having been sworn and examined and documentary evidence

having been adduced, both as to the merits of said cause and to said restraining order, and the evidence having been closed and the Court having duly considered the same and being fully advised in the premises now makes, adopts and finds the following:

16

FINDINGS OF FACT.

1. That the defendants Crosby, Swapp and Pugh respectively now are and at all times hereinafter mentioned were the duly elected, qualified and acting justice of the peace, sheriff and county attorney of Kane County, State of Utah.

2. That on a date prior to the 7th day of July, 1939 the defendants and each of them caused to be taken in their asserted official capacities four (4) devices, commonly known as "slot machines", from the possession of the plaintiff and which devices contained sums of money in excess of Six Hundred (\$600.00) Dollars and were in value of in excess of Six Hundred (\$600.00) Dollars.

3. That said devices were taken by the said defendants pursuant to proceedings then and there entitled in the Justice's Court in and for Kanab Precinct, Kane County, State of Utah before J. H. Crosby, Justice of the Peace, and

Before J. H. Crosby, *Justice of the Peace.*

The State of Utah,
Plaintiff,
 vs.
 Whitney Parry,
Defendant.

AFFIDAVIT FOR
 ATTACHMENT.

Before me, J. H. Crosby, Justice of the Peace within and for Kanab Precinct, Kane County, State of Utah, personally appeared George A. Swapp, Sheriff of Kane County, who being first duly sworn by me, deposes and says: That he has reason to believe and does believe that the said Whitney Parry has in his place of business certain Slot Machines which are being operated contrary to law.

George A. Swapp.

Subscribed and sworn to before me this 12th
day of June, 1939.

J. H. Crosby,
Justice of the Peace.

Filed on this 12th day of June, 1939.

J. H. Crosby,
Justice of the Peace."

(b) "IN THE JUSTICE'S COURT IN AND
 FOR KANAB PRECINCT, KANE COUNTY,
 STATE OF UTAH.

Before J. H. Crosby, *Justice of the Peace.*

The State of Utah, <i>Plaintiff,</i> vs. Whitney Parry, <i>Defendant.</i>	}	WRIT OF ATTACHMENT.
---	---	------------------------

*The people of the State of Utah, to the sheriff
 or any Constable of Kane County, Greeting:*

You are hereby commanded to attach and
 safely keep any and all Slot Machines belonging
 to the above named defendant which may be found
 in his place of business, known as the Parry Lodge
 in Kanab, Kane County, State of Utah, until dis-
 posed of by order of Court.

Make due return thereof.

Dated June 12, 1939.

J. H. Crosby,
Justice of the Peace.

Office of the Sheriff,
Of the County of Kane, State of Utah, — ss.

By virtue of the annexed writ, I duly attached
four Slot Machines as follows:

One nickel machine No. 409294
One dime machine No. 405327
One twenty-five cent machine No. 1172
One half dollar machine No. 420756.

18 Am holding the same to be disposed of by
order of Court.

George A. Swapp,
*Sheriff of Kane
County, Utah.*

Dated June 12th, 1939.”

(c) “IN THE JUSTICE’S COURT IN AND
FOR KANAB PRECINCT, KANE COUNTY,
STATE OF UTAH.

Before J. H. Crosby, *Justice of the Peace.*

<p>The State of Utah, <i>Plaintiff,</i> vs. Whitney Parry, <i>Defendant.</i></p>	}	<p>CITATION TO SHOW CAUSE.</p>
--	---	------------------------------------

*The people of the State of Utah to Whitney
Parry, Greeting:*

By order of this court, you are hereby cited and required to appear before the judge of this court, at the court room thereof, at the County Court-house, in Kanab, Kane County, State of Utah, on Friday, the 7th day of July, 1939, at five o'clock in the afternoon of that day, then and there to show cause, if any you have, why the Slot Machines, which were taken from you under writ of attachment, issued by this court, should not be destroyed and the money in them forfeited to Kane County.

Witness, the hand of J. H. Crosby, justice of the Peace of Kanab Precinct, Kane County, State of Utah, this 7th day of July, 1939.

J. H. Crosby.

I, George A. Swapp, sheriff of Kane County, State of Utah, hereby certify that I served a copy of the above citation on Whitney Parry, at Kanab, Kane County, State of Utah, on the 7th day of July, 1939.

George A. Swapp."

4. That no other or further papers, documents or process was served upon Whitney Parry, the defendant named in the paragraph next above, and who is one and the same person as the plaintiff hereinabove named.

19 5. That the defendants and each of them claimed and pretended that the devices so taken were gambling devices and unlawfully and wrongfully in the possession of the plaintiff, named as defendant, however, in paragraph 3 above.

6. That the devices so taken were in the possession of and owned by a partnership known as Parry Lodge consisting of Whitney Parry, the plaintiff above named, and his brother, C. G. Parry, all of which was well-known to the said defendants at and prior to the matters and things hereinabove referred to.

7. That on the 12th day of June, 1939 and for at least two days prior thereto and at the time of the affidavit for attachment and the writ of attachment and the writ thereof mentioned in subdivisions (a) and (b) respectively of paragraph 3 above, the devices herein involved and in said affidavit and writ of attachment and the writ thereof particularly described were not used or in use for any purpose whatsoever.

8. That at no time did the defendants or either of them comply with or attempt to comply with the provisions of Title 64, Revised Statutes of Utah, 1933 nor did they or either of them give any or other notice nor served upon the plaintiff above named any other written document or process other than as above specified.

9. That on the 12th day of June, 1939 and for sometime prior thereto the Parry Lodge was closed to the general public and leased and solely occupied by what is commonly known as Columbia Pictures Corporation and reputedly a California corporation, and that on the day mentioned and for sometime prior thereto a sign was placed in a conspicuous position upon the premises of said Parry Lodge to the effect that the same was closed to the public.

20 From the foregoing Findings of Fact, the Court makes, adopts and finds the following:

CONCLUSIONS OF LAW.

1. That the restraining order heretofore issued herein be and the same is hereby dissolved, vacated and set aside.

2. That the foregoing action should be dismissed at plaintiff's costs.

Judgment is hereby ordered to be entered accordingly.

DATED at Chambers this 13th day of October, 1939.

BY THE COURT:

HENRY D. HAYES,
District Judge.

Filed October 16, 1939.

(Title of Court and Cause):

21

JUDGMENT.

The above entitled cause having come on regularly for hearing on the 15th day of August, 1939 before the Honorable Henry D. Hayes, the judge of the above entitled court, sitting without a jury, a jury trial having been expressly waived by the respective parties, and Harley W. Gustin appearing for the plaintiff and David L. Pugh and O. R. Michelsen appearing for the defendants; and the matter having been originally set for hearing upon an order to show cause why a restraining order, heretofore issued out of this court, should not be made permanent, and an answer having been filed, not only to said restraining order but to the merits of said cause, and witnesses having been sworn and examined and documentary evidence having been adduced, both as to the merits of said cause and to said restraining order, and the evidence having been closed and the court having duly considered the same and the court having duly made and entered herein its Findings of Fact and Conclusions of Law and it appearing therefrom that the defendants and all of them are entitled to have judgment in accordance therewith.

IT IS HEREBY ORDERED, ADJUDGED
AND DECREED as follows:

22 1. That the restraining order heretofore issued herein be and the same is hereby dissolved, vacated and set aside.

2. That the above entitled action be and the same is hereby dismissed with costs to the defendants hereby taxed in the sum of \$.....

DATED at Chambers this 13th day of October, 1939.

BY THE COURT:

HENRY D. HAYES,
District Judge.

Filed October 16, 1939.

(Title of Court and Cause):

23 ORDER EXTENDING TIME FOR BILL
OF EXCEPTIONS.

Good cause being shown for the making of this order and the court being fully advised in the premises and upon motion of Harley W. Gustin, attorney for the plaintiff, IT IS HEREBY ORDERED that the plaintiff may have to and including the 15th day of December, 1939 within which to prepare, serve and file his bill of exceptions in the above entitled cause.

DATED this 10th day of November, 1939, at Chambers.

BY THE COURT:

HENRY D. HAYES,
District Judge.

Filed November 13, 1939.

(Title of Court and Cause):

24 ORDER EXTENDING TIME FOR BILL
 OF EXCEPTIONS.

Good cause being shown for the making of this order and the court being fully advised in the premises and upon motion of Harley W. Gustin, attorney for plaintiff, IT IS HEREBY ORDERED that the plaintiff may have to and including the 15th day of January, 1940 within which to prepare, serve and file his bill of exceptions in the above entitled cause.

DATED this 14th day of December, 1939, at Chambers.

BY THE COURT:

HENRY D. HAYES,
District Judge.

Filed December 16, 1939.

(Title of Court and Cause):

25 NOTICE OF APPEAL,

*To the Defendants Above Named and to their
Attorney, Joseph Chez, Attorney General
of the State of Utah:*

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that Whitney Parry, the plaintiff above name, hereby appeals to the Supreme Court of the State of Utah from that certain judgment in the above entitled action dated the 13th day of October, 1939 and filed on or about the 16th day of October, 1939 dissolving, vacating and setting aside the restraining order theretofore issued therein, dismissing said action and awarding costs to the defendants and from the whole of said judgment.

DATED this 9th day of January, 1940.

HARLEY W. GUSTIN,
Attorney for Plaintiff.

Filed January 11, 1940.

26

CLERK'S CERTIFICATE.

STATE OF UTAH, }
COUNTY OF KANE. } ss.

I, D. M. TIETJEN, Clerk of the Sixth Judicial District of Kane County, State of Utah, do hereby certify that the above and foregoing and hereunto attached files contain all the original papers designated by the praecipe filed herein by attorney for appellant in the above entitled case, including the original Notice of Appeal and Bill of Exceptions, together with full, true and cor-

rect copies of entered orders made by the Court and designated by the said praecipe. The Whole constituting the Transcript on appeal therein.

I further certify that an Undertaking on Appeal in due form, and has been properly filed in my office, that the same was filed on the 11th day of January, A. D. 1940.

And I further certify that the said Judgment Roll is this date transmitted to the Supreme Court of the State of Utah, pursuant to such appeal. Also that the three Exhibits marked Plaintiff's Exhibit No. A-1, and Defendants' Exhibits marked A and B, dated Aug. 15, 1939 are also attached hereto and made a part hereof and transmitted herewith.

WITNESS my hand and the seal of said Court at Kanab, Kane County, Utah, this 20th day of January, A. D. 1940.

(SEAL)

(Signed) D. M. TIETJEN,

*Clerk of the District Court
of Kane County of Utah.*

(Title of Court and Cause):

BILL OF EXCEPTIONS.

30 BE IT REMEMBERED, that the above entitled cause came on regularly for hearing at

Kanab, Kane County, Utah, at 2:00 P. M. August 15, 1939 before the Honorable Henry D. Hayes, Judge of the above entitled court, sitting without a jury; Harley W. Gustin appearing as counsel for the plaintiff and David L. Pugh appearing as counsel for the defendants.

WHEREUPON, the following proceedings were had:

36 WHITNEY PARRY, the plaintiff, was called as a witness on his own behalf and being first duly sworn testified as follows:

Direct Examination by Mr. Gustin.

My name is C. W. Parry. I am a hotel operator. I reside at Kanab, Kane County, State of Utah and operate the Parry Lodge in Kanab. The Parry Lodge is owned by myself and my brother,
37 C. G. Parry. I know Mr. Pugh, the county attorney, and he knows my brother. I have known the Justice of the Peace as well as Mr. Pugh for about nine years.

The machines involved were picked up on the 12th day of June, 1939 and I was present when they were taken out of the lodge. At that time, no
38 papers were served on me. I know the sheriff who is named as one of the defendants in this action and saw him that night. He did not serve me with any papers. The first paper I saw in connection with the case was the order to show cause,

a copy of which is attached to the complaint, marked Exhibit "A", in the instant case.

39 On the night that I refer to in June, there was certain property taken from the Parry Lodge by the sheriff, the marshall and the deputy sheriff and the property has not been returned. The property is commonly described as "slot machines." At the time the property was taken the Parry Lodge was definitely closed to the public. We had a motion picture company at that time which took all the accommodations we had available and one of the agreements under which we took the motion picture company was that the lodge be closed to the public and that they might use it entirely as they saw fit while there. We had a sign attached on the front of the house all the time they were there to the effect that the place was closed. At this particular time the Parry Lodge was occupied just as a private home would be operated under lease.

40 Thereupon plaintiff's Exhibit "A-1", Citation to Show Cause (Tr. p. 29), was offered and received in evidence.

Plaintiff's Exhibit "A-1" is the only paper that was served upon either my brother or myself.

Cross Examination by Mr. Pugh.

41 At the time the so-called slot machines were at the Parry Lodge we were not taking outside

42 guests. We furnished the meals and paid the
 help. The machines that are involved were in the
 west wing of the lodge used for a curio store and
 43 tap room. We had beer on tap. I could not say
 whether or not anyone else came into that room
 on the day the machines were taken except the
 motion picture people who leased the place. I was
 44 in the room that day going and coming. I was
 there the night the devices were taken from the
 lodge by the sheriff. No papers were shown to
 me. He did not show me a writ of attachment nor
 read me one. He said "We have come to get your
 slot machines." I said "By what authority are
 you taking these slot machines?" And he said
 "We have a paper made out by the county attor-
 ney and signed by the Justice of the Peace."

44 Q. Did he say what kind of a paper?

A. No, he merely said you had made out a paper that gave him authority to take the slot machines.

LeGRANDE PENDLETON was called as a witness on behalf of the plaintiff and after being first duly sworn testified as follows:

Direct Examination by Mr. Gustin.

46 My name is LeGrande Pendleton. I have re-
 sided in Kanab for seven years. I am an employee
 of the Parry Lodge. During the month of June

I remember certain machines taken from the lodge. I think it was about 12:00 midnight at the time the officers came in. Mr. Whitney Parry was not present. Mr. Swapp was there. At that
47 time the lodge was occupied by the Columbia Picture Corporation. I painted a sign and posted it myself on the front of the Parry Lodge to the effect that it was closed to the public. The sign was there the day the sheriff walked in and took the machines and had been for at least three weeks
48 prior to that time.

The members of the moving picture company were the exclusive guests of the Parry Lodge. At different times, however, local people went in and out of the lodge. These were people that were employed by the motion picture company and were people residing in Kanab. On one occasion two local people came in that I did not think were connected with the motion picture company. I told them there was nothing that I could serve them and they were not permitted to play the machines. They left without any further trouble. The only time I saw the sheriff was the night the machines were taken.

49 Cross Examination by Mr. Pugh.

Barnard Mulliner and Hazen Harris were the two people that came in and were told that they could not play the machines. Local people were

not permitted to play the machines whether they worked for the picture company or not. I was there to carry out the orders of my employer and most of the time I was in the bar lobby while it
 51 was operated. When the machines were taken from the lodge I did not see any paper in the hands of anyone. I did not know where Mr. Parry was when they came.

Whereupon the plaintiff rested.

30 It was stipulated that a Mr. Luke, "a road patrolman", if called on the part of the defendants would testify that "a day or so before" the machines involved were picked up that he saw the
 35 machines being played "in the ordinary way" in the Parry Lodge but not on the day that the machines were picked up. This stipulation was sub-
 45 ject to the objection that such testimony would be wholly irrelevant and immaterial.

46 THE COURT: "The objection is overruled."

52 GEORGE A. SWAPP, one of the defendants, was called as a witness on his own behalf and on behalf of his co-defendants and after being first duly sworn, testified as follows:

Direct Examination by Mr. Pugh.

My name is George A. Swapp. I reside in Kanab, Kane County, Utah. I am the sheriff of that county. I visited the Parry Lodge on the

12th day of June, 1939. (Defendants' Exhibit "A"
53 was marked as such.) I have seen defendants' Exhibit "A" before. I saw it on the 12th of June, 1939. My signature appears on that paper.

MR. PUGH: We offer in evidence this paper, defendants' Exhibit "A", Affidavit for Attachment. (Tr. p. 27)

MR. GUSTIN: Objected to as incompetent,
54 irrelevant and immaterial, * * *. It does not purport to be an affidavit. * * *, and no foundation laid for its admission in evidence.

THE COURT: Objection overruled, the exhibit is admitted in evidence.

I saw defendants' Exhibit "B" at the Parry Lodge on the evening of June 12, 1939. I took into my possession some machines or devices and
55 have them in my possession at the jail house. My signature appears on defendants' Exhibit "B".

MR. PUGH: We offer in evidence Exhibit "B" of the defendants' Writ of Attachment (Tr. p. 28)

MR. GUSTIN: Objected to as wholly incompetent, irrelevant and immaterial and the proper foundation not having been laid.

THE COURT: Objection overruled, the exhibit is admitted in evidence.

56 L. U. CHAMBERLAIN was called as a witness on behalf of the defendants and after being first duly sworn, testified as follows:

Direct Examination by Mr. Pugh.

My name is L. U. Chamberlain. I am the City Marshall of Kanab. I had occasion to go to the Parry Lodge on the night of June 12, 1939 with George Swapp and Deputy Sheriff Foote. I was present when certain devices were taken from the lodge. I saw defendants' Exhibit "B" on the
57 night of June 12th prior to going with the sheriff to the Parry Lodge and also while we were at the Parry Lodge.

58 Q. You may state whether or not you saw the sheriff show that paper to Whitney Parry that evening?

A. Yes sir, I saw Mr. George Swapp with this paper and apparently offered to read it or offer it to Mr. Parry for himself to read it.

MR. GUSTIN: I move that the answer "apparently offered it to Mr. Parry or offered it to Mr. Parry to read", be stricken on the ground it is indefinite and vague and conjectural, and otherwise incompetent.

THE COURT: Objection overruled.

HAROLD H. FOOTE was called as a witness on behalf of the defendants and after being first duly sworn, testified as follows:

My name is Harold H. Foote and I reside at Orderville in Kane County. I was at the Parry Lodge on the 12th day of June, 1939 and was present when certain devices were taken. There were four of them. We took them to the county jail and locked them in. I cannot say that I ever saw defendants' Exhibit "B".

Thereupon both parties rested.

That the defendants appeared in this proceeding by Olaf R. Michelsen, now deceased, and have agreed that Joseph Chez, the Attorney General of the State of Utah, may represent them and act in lieu of the original attorney of record, and the said Joseph Chez has made and requested that his appearance be entered in said action.

TENDER OF BILL OF EXCEPTIONS.

On the 8th day of January, 1940 comes Whitney Parry, the plaintiff above named and serves upon Joseph Chez, the attorney for the defendants above named, the foregoing Bill of Exceptions for use on appeal herein, consisting of one volume of 39 pages numbered 1 to 39. The same is hereby tendered to and served upon counsel for the defendants as aforesaid that he may examine the same and propose any amendments thereto which he shall be advised ought to be made in order that the said Bill of Exceptions be settled and allowed as a full, true and correct Bill of Exceptions.

(Signed) HARLEY W. GUSTIN,
Attorney for Plaintiff.

Service of the foregoing proposed Bill of Exceptions acknowledged this 8th day of January, 1940.

(Signed) JOSEPH CHEZ,
Attorney for Defendants
Attorney General.

STIPULATION TO SETTLE BILL OF EXCEPTIONS.

The undersigned, counsel for the defendants, hereby stipulates and agrees that he has examined the foregoing Bill of Exceptions in the above entitled cause of action; that he has no amendments to propose thereto and that the same may now be presented to the Court and signed, settled and allowed by the Judge who tried said cause, without notice and his absence, as the full, true and correct Bill of Exceptions in said cause. Reserving the right to file amendments if deemed necessary.

DATED this 8th day of January, 1940.

(Signed) JOSEPH CHEZ,
Attorney for Defendants
Attorney General.

CERTIFICATE OF JUDGE SETTLING
BILL OF EXCEPTIONS.

I, HENRY D. HAYES, the District Judge who tried the foregoing cause, do hereby certify that the above and foregoing Bill of Exceptions consisting of 39 pages numbered from 1 to 39, inclusive, contains all of the testimony and evidence offered, admitted or adduced upon the trial of said cause together with all objections and exceptions taken and motions made, and all proceedings had on the trial, before and after judgment, in said cause and not otherwise of record; and contains sufficient reference to all exhibits therein referred to identify the same. There being no amendments thereto, said Bill of Exceptions is hereby approved, settled, signed and allowed within time as the full, true and correct Bill of Exceptions in the foregoing cause of Whitney Parry, Plaintiff, vs. J. H. Crosby, as Justice of the Peace, Kanab Precinct, Kane County, State of Utah, George A. Swapp, as sheriff of Kane County, State of Utah, and David L. Pugh, as county attorney of Kane County, State of Utah, and the clerk is hereby ordered to file the same.

Dated this 8th day of January, 1940.

HENRY D. HAYES,

District Judge.

Filed January 10, 1940.

(Title of Court and Cause):

ASSIGNMENTS OF ERROR.

Comes now Whitney Parry, the appellant above named, and assigns the following errors occurring in the trial of this cause before the Honorable Henry D. Hayes, Judge of the District Court of the Sixth Judicial District, in and for Kane County, State of Utah, and upon which he relies for a reversal of the judgment in this case:

1. The court erred in overruling appellant's objection to the testimony of a Mr. Luke who it was stipulated, over appellant's objection, would testify to the effect that "a day or so before" the machines involved were picked up he saw the machines being played "in the ordinary way" in the Parry Lodge. (Tr. pp. 30, 35, 45, 46; Abs. p. 25)
2. The court erred in receiving in evidence over appellant's objection respondent's Exhibit "A". (Tr. pp. 53-54; Abs. p. 26)
3. The court erred in receiving in evidence over appellant's objection respondent's Exhibit "B". (Tr. p. 55; Abs. p. 26)
4. The court erred in denying appellant's motion to strike that portion of the witness Cham-

berlain's testimony—a witness called by respondents—as follows:

“MR. GUSTIN: I move that the answer ‘apparently offered it to Mr. Parry or offered it to Mr. Parry to read’, be stricken on the ground it is indefinite and vague and conjectural, and otherwise incompetent.”

(Tr. p. 58; Abs. p. 27)

5. The court erred in its finding of fact No. 2 and particularly that portion of said finding which reads as follows:

“commonly known as ‘slot machines’ ”
because the same is not supported by, but is contrary to the evidence. (Tr. p. 16; Abs. p. 9)

6. The court erred in its finding of fact No. 4 and particularly that portion of said finding which reads as follows:

“that no other or further papers, documents or process was served upon Whitney Parry”

because the same is not supported by, but is contrary to the evidence. (Tr. p. 18; Abs. p. 13)

7. The court erred in its finding of fact No. 8 and particularly that portion of said finding which reads as follows:

“other than as above specified”

because the same is not supported by, but is contrary to the evidence. (Tr. p. 19; Abs. p. 14)

8. The court erred in its conclusion of law No. 1 wherein it is concluded that the restraining order theretofore issued in said cause should be dissolved, vacated and set aside, because said conclusion is contrary to the facts and to the law. (Tr. p. 20; Abs. p. 15)

9. The court erred in its conclusion of law No. 2 wherein it is concluded that the action should be dismissed at appellant's costs, because said conclusion is contrary to the facts and to the law. (Tr. p. 20; Abs. p. 15)

10. The court erred in making and entering its judgment (Tr. pp. 21-22; Abs. p. 16) because said judgment is contrary to the law and because the evidence is insufficient to sustain or justify the same in the following particulars, to-wit:

(a) The evidence conclusively and without contradiction shows that the machines or devices seized by the respondents on the 12th day of June, 1939 were not gambling devices or used as such.

(b) The evidence conclusively and without contradiction shows that the machines or devices seized by the defendants and taken from the possession of the plaintiff were seized and taken without due process of law.

(c) The evidence conclusively and without contradiction shows that at no time did the respondents or any of them acquire jurisdiction over the person of the appellant on account of his possession or custody of said machines or devices.

(d) The evidence conclusively and without contradiction shows that at no time did the respondents or any of them acquire jurisdiction over the said machines or devices.

(e) The evidence conclusively and without contradiction shows that the possession of the machines and devices by the respondents and each of them and their threatened destruction of the same is unlawful.

WHEREFORE, appellant prays that the foregoing may be considered by this court as his assignments of error and that the judgment appealed from be reversed and the cause remanded or that a judgment be entered in accordance with law and the views of this court.

HARLEY W. GUSTIN,

*Attorney for Plaintiff and
Appellant.*

Duly served March 30, 1940.