

1940

# Utah Liquor Control Commission v. The District Court of the Seventh Judicial District, in and for Carbon County, State of Utah, and George Christensen, one of the Judges thereof

Utah Supreme Court

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Parnell Black; D. Howe Moffat; George H. Lunt; Attorneys for Plaintiff;

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No. 6230

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# In the Supreme Court of the State of Utah

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UTAH LIQUOR CONTROL COMMISSION,

*Plaintiff,*

vs.

THE DISTRICT COURT OF THE  
SEVENTH JUDICIAL DISTRICT, IN  
AND FOR CARBON COUNTY, STATE  
OF UTAH, and GEORGE CHRISTENSEN,  
one of the Judges thereof,

*Defendants.*

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## BRIEF OF PLAINTIFF

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PARNELL BLACK,

D. HOWE MOFFAT,

GEORGE H. LUNT,

*Attorneys for Plaintiff.*

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## INDEX TO CASES CITED

	Page
Atwood vs. Cox, District Judge, 88 Utah 437 @ 445, 55 Pac. (2d) 377 .....	9
Bank of U. S. vs. Dandridge, 6 L. Ed. 552, 554 .....	28
Child, et al., vs. Ogden State Bank, et al., 20 Pac. (2d) 599, 81 Utah 464 .....	7
Colbert, Sheriff of Carbon County, et al., vs. Superior Confection Co., 5 Pac. (2d) 791, (Okla.) .....	25
Collison vs. Kirkpatrick, 292 Pac. 54, (Okla.) .....	26
Construction Securities Co. vs. District Court of Third Judicial District, et al., 39 Pac. (2d) 707, 85 Utah 346 .....	11
Dell Pub. Co. vs. Beggans, Director of Public Safety, et al., 158 Atl. 765 (N. J.) .....	25
Gordon, et al., vs. Smith, Chancellor, 120 S. W. (2d) 325 .....	21, 22, 23
Harmon, et al., vs. Commissioner of Police of Boston, 174 N. E. 198 .....	25
Harvie vs. Heise, Sheriff, et al., 148 S. E. 66 (So. Car.) .....	25
Kelley vs. Kavanaugh, Chief of Police, 3 Fed. Supp. 666 .....	20, 21
Moore, et al., vs. Porterfield, et al., 257 Pac. 307 (Okla.) .....	19, 20
Olsen vs. District Court of Salt Lake County, 93 Utah 145, 71 Pac. (2d) 529 .....	10
Pacific States Box & Basket Co. vs. White, 80 L. Ed. 138 .....	28
R. H. Stearns vs. U. S., 78 L. Ed. 647-653 .....	28
Selecman, et al., vs. Matthews, et al., State Highway Com- mission, 15 S. W. (2d) 788 .....	18
State ex rel. Carson, District Attorney, vs. Kozer, Secretary of State, 270 Pac. 513, 226 Ore. 641 .....	23, 24, 25
Strand Amusement Co., et al., vs. City of Owensboro, et al., 74 S. W. (2d) 710 (Ky.) .....	25
Stork Restaurant Corporation vs. McCampbell, 55 Fed. (2d) 687 (N. Y.) .....	15
Wooras vs. Utah Liquor Control Commission, .... Utah ...., 93 Pac. (2d) 455 .....	17

## TEXT BOOKS

22 C. J. 130-34 .....	28
22 C. J. 136 .....	28

## STATUTES

Session Laws of Utah, 1935, Chapter 43, Sec. 164 .....	12
Session Laws of Utah, 1935, Chapter 43, Sec. 169 .....	27
Session Laws of Utah, 1935, Chapter 43, Sec. 174 .....	14, 15
Session Laws of Utah, 1935, Chapter 43, Sec. 200 .....	17, 18
Session Laws of Utah, 1937, Chapter 49, Sec. 168 .....	14, 26, 27
Utah Constitution, Article V, Section 1 .....	6

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UTAH LIQUOR CONTROL COMMISSION,

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THE DISTRICT COURT OF THE  
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one of the Judges thereof,

*Defendants.*

No. 6230

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## BRIEF OF PLAINTIFF

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This is an original action brought in the Supreme Court of the State of Utah by the Utah Liquor Control Commission, against the Seventh Judicial District Court of the State of Utah in and for Carbon County, and George Christensen, one of its Judges, seeking a Writ of Prohibition and Writ of Mandate in aid thereof. The question involved grows out of the issuance of certain Orders by defendant, the Honorable George Christensen, in the case of *Utah Liquor Control Commission v. Victor Martelle, et al.*, being case No. 5064 in the District Court

of the Seventh Judicial District in and for Carbon County, Utah, wherein the plaintiff sought to confiscate certain whiskey, implements, furniture, fixtures and any other personal property seized in a certain beer parlor, known as the Town Tavern, 222 South Main, Helper, Carbon County, Utah, by Inspectors of the above named plaintiff under authority of Section 164, Chapter 43, Laws of Utah, 1935.

### STATEMENT OF THE CASE.

That on the 25th day of January, 1940, Perry Holt, Inspector of the Utah Liquor Control Commission, appeared before J. W. Hammond, Justice of the Peace in and for Price Precinct, Carbon County, Utah, and there signed an Information, (Exhibit "B") under oath that intoxicating liquors were being sold, bartered and given away in violation of the Utah Liquor Control Act at 222-224 South Main Street, Helper, Carbon County, Utah. That upon the filing of this Information J. W. Hammond issued a Search Warrant (Exhibit "C") commanding Perry Holt to search the premises named in said Information and to seize all liquors and vessels containing the same and all implements, furniture and fixtures used or kept for such illegal selling, and bartering of liquors in violation of the Liquor Laws of the State of Utah. That on January 26, 1940, Perry Holt, together with A. H. Jaynes, and other Inspectors of the Utah Liquor Control Commission, under authority of the Search Warrant searched the premises in said Search Warrant described

and found upon said premises a quantity of whiskey. That at said time the said Inspectors seized the whiskey so found, together with certain tangible personal property then located in and upon said premises and at said time took a complete inventory of said whiskey and said tangible personal property so seized. On January 27, 1940, Perry Holt made a return on said Search Warrant, listing all of the property seized on said premises (Exhibit "D") said Return was filed together with a Warrant with J. W. Hammond, Justice of the Peace. J. W. Hammond later certified all the records and files in said matter to the District Court of the Seventh Judicial District in and for Carbon County, State of Utah. That on said 27th day of January, 1940, the said Perry Holt made a Return (Exhibit "E") to the Seventh Judicial District Court in and for Carbon County, State of Utah, and upon the filing of said Return Judge George Christensen, Judge of said Seventh Judicial District Court in and for Carbon County, State of Utah, did issue a Warrant of Attachment (Exhibit "F"), said Warrant of Attachment listed all of the articles seized by Perry Holt as listed in his Return on said Search Warrant. That on the said 27th day of January, 1940, Victor Martelle, one of the defendants named in said Return of Perry Holt, filed in the said Seventh Judicial District Court, in and for Carbon County, State of Utah, his affidavit (Exhibit "G"), praying that the Court immediately issue an Order to Show Cause (Exhibit "H"), directed to Utah Liquor Control Commission, its agents, servants and employees, and particularly Perry Holt and A. H. Jaynes, requiring

them to appear before the said Court then and there to show cause why they shouldn't be permanently restrained, during the pendency of the action, from removing any of the tangible personal property so seized by Perry Holt from said premises. That upon the filing of this Affidavit, the Court, that is, the Honorable George Christensen, issued an Order to Show Cause, ordering the Utah Liquor Control Commission, its agents, servants and employees, and particularly Perry Holt and A. H. Jaynes, to appear before the said Court at the hour of ten o'clock A. M. on the 5th day of February, 1940, to then and there show cause why they be not restrained from removing said tangible personal property until the determination of said action on its merits. That said Affidavit, and Order to Show Cause, were served upon said Perry Holt and A. H. Jaynes at the premises 222-224 South Main, Helper, Carbon County, State of Utah, while said Perry Holt and A. H. Jaynes were removing the tangible personal property, listed in said Return of Inspector Holt, from the premises. That on the 29th day of January, 1940, George H. Lunt, one of the attorneys for the Utah Liquor Control Commission, served upon the said Victor Martelle and filed with the Court, the said Seventh Judicial District, a Motion to Vacate, Rescind and Set Aside and Hold for Naught the Order to Show Cause (Exhibit "I"). That on the 5th day of February, 1940, the Motion to Vacate and Set Aside, and the Order to Show Cause were heard by the Court and that on the 8th day of February, 1940, the said George Christensen, Judge of the said Court, made and



entered an Order (Exhibit "M") decreeing among other things that the Utah Liquor Control Commission, its servants and employees be restrained from removing anything and everything from said premises at 222-224 South Main, Helper, Carbon County, State of Utah, *except any personal property which could be used only and exclusively for the purpose of violating the Liquor Control Act of the State of Utah*. That on the said 5th day of February, 1940, the Utah Liquor Control Commission filed its Libel of Information (Exhibit "J") asking for the condemnation and forfeiture of the property seized on the premises above named and as listed in the Return of Inspector Perry Holt. Along with said Libel of Information the above Court signed an Order to Show Cause (Exhibit "K") ordering the defendants named in said Libel of Information to show cause, if any they have, on the 19th day of February, 1940, why the said tangible personal property should not be forfeited and it further ordered that Notice of Hearing be given as provided by law (Exhibit "L").

#### QUESTION TO BE DECIDED.

The sole question for determination is whether the Honorable George Christensen, as judge of the Seventh Judicial Court, exceeded the jurisdiction of that court when he issued the Order of January 27, 1940, requiring the plaintiff herein to show cause why it should not be restrained from removing the personal property, listed in the Inspector's Return, from the Town Tavern. Also



whether the Court exceeds its jurisdiction when it issued its Order of February 8, 1940, wherein plaintiff was restrained from removing the personal property from the Town Tavern.

### PLAINTIFF'S CONTENTION.

Plaintiff contends that the orders above referred to were in excess of the jurisdiction of the court because

A. That said Orders interfered with, hindered and made impossible the enforcement of the Utah Liquor Control Act, the enforcement of which were, and are, the plain duty of plaintiff.

B. That the Liquor Control Act and particularly Sections 168 and 169 provide an adequate legal proceedings to protect the interests of Victor Martelle and the orders complained of are not provided for and are contrary to the procedure outlined in said sections.

### ARGUMENT.

Article V, Section 1, of the Constitution of the State of Utah, provide for the Distribution of Powers into three departments of government, as follows:

“The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions apper-

taining to either of the others, except in the cases herein expressly directed or permitted.”

The plaintiff is a commission organized by the laws of this State and is a branch of the Executive department of the State Government.

In proceedings of this sort this Court has power and authority to grant the type of relief, which in its judgment protects all parties regardless of whether it is Mandamus or Prohibition, that is, they have the authority to issue both Writs of Mandamus and Prohibition, if both are necessary to adequately protect the rights of the parties.

In the case of

*Child, et al., vs. Ogden State Bank, et al.,*  
20 Pac. (2d) 599, p. 603, 81 Utah 464,

the court has the following to say with respect to this matter:

“An examination of the statement of positions of the parties reveals a situation that calls for a type of relief more nearly analogous to the purpose of a Writ of Mandamus than to a Writ of Prohibition, and at the same time standing alone neither would bring about the desired result. That this Court has the authority to issue both Writs of Mandamus and Prohibition in such a case is manifest. Constitution of Utah, Article 7, Section 4; Compiled Laws of Utah, 1917, Section 1643. It is not the title but the subject matter of the petition or complaint and answer that reveals the question submitted and determines the relief called

for, and whether by Prohibition, by Mandamus, or by combination of both. The questions presented are so related and interdependant that adequate relief may be had only by granting of both forms of relief. We see no reason why this Court should not proceed to grant such relief as will adequately protect all parties and hasten the determination of the proceeding and bring about promptness and expedition in the liquidation of the bank. Compiled Laws of Utah, 1917, Section 7407. 'The Writ of Prohibition is the counterpart of the Writ of Mandate, it arrests the proceedings of any tribunal, corporation, board or person, whether exercising functions judicial or ministerial when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.' "

The law of this state seems well settled in proceedings wherein Mandamus or Prohibition is sought against a judicial tribunal, that the question is one of jurisdiction and not error. In other words, the Court in such proceedings does not determine how an inferior tribunal shall act but determines whether or not the Court has authority to act with reference to the particular matter involved. The power to do a judicial act must always underlie the doing of it. The provinces of the Writ of Prohibition or Writ of Mandamus is designed to keep inferior judicial and executive bodies within the limits of their jurisdiction. This question resolves into this, did the Seventh Judicial District Court have power to issue its Orders of January 27, 1940 and February 8, 1940, above referred to. We recognize that it is not a question of whether the court acted correctly or incorrectly, but

whether the judicial act was, itself, warranted by law. A leading case on this subject is

*Atwood vs. Cox, District Judge,*  
88 Utah 437 at 445, 55 Pac. (2d) 377.

The matter is gone into quite extensively in this case and numerous authorities are cited. The following is taken from this case in discussing the question of jurisdiction:

“They all mean fundamentally, the power or capacity given by law to a court, tribunal, board, body or officer to entertain, hear and determine certain controversies. The word is derived from *juris dicto*, ‘I speak by the law’. It does not mean that the court must speak correctly by the law. What it says may be incorrect. But it means that its judicial action in respect to the matter in regard to which the action pertains must itself be warranted by law. It does not mean that it must act or operate upon a controversy correctly, *but it means that the law must permit it to act upon the controversy . . . Jurisdiction can never depend upon the merits of the case brought before the Court, ‘but only upon its right to hear and decide at all.’ . . .* 17 Standard Encyc. of Proc. pages 658, 659, it is stated, ‘The test of the jurisdiction of the Court to grant relief is not whether good cause for granting the relief exists, *but whether the tribunal assuming to act had power to enter upon the enquiry in the particular case, or grant the relief for any cause, and this must be sought for in the general nature of the powers of the court or the general laws defining this jurisdiction. . . .* State vs. Stobie, 194 Mo. 14, 92 S. W. 191, 197, ‘*Jurisdiction is authority to hear and determine a cause. Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of*

*the exercise of that power or upon the rightfulness of decisions made.' ''.*

It is the contention of the plaintiff in this case that the Orders signed by the Court on January 27, 1940 and February 8, 1940 were beyond its power and authority. The distinction between what amounts to jurisdiction and error discussed in the case of

*Olsen vs. District Court of Salt Lake County, et al.*, 93 Utah 145, 71 Pac. (2d) 529.

In that case the complaint was filed and the defendant interposed a demurrer. Affidavit and notice was served on attorney for plaintiff by defendant to take plaintiff's deposition. The plaintiff failed to appear and the court overruled the demurrer of defendant, at which time the defendant called attention to the court that it had served a notice on the plaintiff's attorney of the taking of plaintiff's deposition and that he had failed to appear so the court without anything further overruled the demurrer and made an Order that the defendant would have ten days from the time the plaintiff appeared to have his deposition taken in which to file his answer. The plaintiff took the matter up to this court on certiorari. The court has the following to say:

“It appears to us from the foregoing that the Court did not regularly pursue the authority conferred, while the lower court in its order disposed of the demurrer and so far as that matter was

concerned was acting within the authority conferred or by warrant of law, yet it injected into the order making disposition of the demurrer and as a part thereof an Order which there was no warrant in law for it to make and which had no bearing on the matter presented by the demurrer. Its jurisdiction in that regard had not been invoked by anything before the Court and its conclusions in regard thereto were wholly without support in law. Certainly the Court did not regularly pursue the authority conferred and to that extent exceeded its jurisdiction."

This case is authority for the proposition that a court in the commencement of proceedings may have jurisdiction but it does not follow that all orders and acts of the court thereafter made in the proceedings are likewise within its jurisdiction. It then becomes a question of jurisdiction and not one of error.

In the above case the Court had jurisdiction of the subject matter but with reference to the orders heretofore referred to the defendant Court exceeded its jurisdiction.

Writ of Prohibition or Writ of Mandamus will lie when it is shown that an inferior tribunal has exceeded its jurisdiction and that the party seeking the writ has no plain, speedy and adequate relief at law.

*Construction Securities Co. vs. District Court of Third Judicial District, in and for Salt Lake County, et al., 39 Pac. (2d) 707, 85 Utah 346.*



A. THE ORDERS OF THE DEFENDANT COURT HINDERED AND MADE THE ENFORCEMENT OF THE UTAH LIQUOR CONTROL ACT AN IMPOSSIBILITY AND PREVENTED PLAINTIFF FROM DISCHARGING THE DUTIES IMPOSED ON IT BY LAW.

You will observe that from the statement of facts Perry Holt was an Inspector for the Utah Liquor Control Commission, and upon the filing of an affidavit or information with the Justice of the Peace, obtained a Search Warrant to search the premises at 222-224 South Main, Helper, Carbon County, State of Utah, and armed with this search warrant he did search the premises and he found a quantity of whiskey unlawfully kept on said premises. That he arrested the man in charge, seized the whiskey together with certain personal property listed in his Return and made return to the Justice of the Peace. The actions of Perry Holt in securing the search warrant, in searching the premises and seizing the property was pursuant to the authority conferred in Section 164, Chapter 43, Laws of Utah, 1935, which reads as follows:

If any district, county, city or town attorney, or any peace officer, or any other person has probable cause to believe that alcoholic beverages are possessed, manufactured, sold, bartered, given away or otherwise furnished in violation of this act, or are kept for the purpose of selling, bartering or giving away or otherwise furnishing the same in violation of law, it shall be the duty of such attorney, peace officer or person forthwith to make and file with the judge of the district or

city court, or any city, town or precinct justice of the peace, written information supported by his oath or affirmation that he has information and reason to believe that this act is being violated at a certain place, stating the facts within his knowledge; and he shall describe as particularly as may be the place, and the names of the persons, if known, participating in such unlawful act. Such judge or justice of the peace, upon finding probable cause to believe that the facts stated in such information are true, shall issue a search warrant, directed to any peace officer in the county whom the complainant may designate if he shall designate such peace officer, otherwise to any peace officer in the county, describing as particularly as may be the alcoholic beverages and the place described in said information, and the persons named or described therein as the owners or keepers of such alcoholic beverages; commanding the officer to search thoroughly the place, and, on finding alcoholic beverages in unlawful possession or use, to arrest persons found therein and bring them before the court of justice, to seize such alcoholic beverages, with the vessels containing them, and all implements, furniture and fixtures used or kept for such illegal acts, and to keep the same securely until final action is had thereon. Whereupon the officer to whom such warrant shall be delivered shall forthwith obey and execute as effectively as possible the commands of the warrant, and make return promptly of his doing to the court or justice, with an itemized inventory of all alcoholic beverages and property or things seized, and a list of all persons in whose possession the same were found, if any; and, if no person is found in possession of such alcoholic beverages or property, his return shall so state. Such officer shall securely keep all alcoholic beverages and other things so seized by him until final action is had thereon. A copy of the warrant shall be served upon the person or persons

found in possession of any alcoholic beverages, furniture or fixtures so seized, and, if no person is found in possession thereof, a copy of the warrant shall be posted in a conspicuous place on the building or room wherein the same are found.

It will be observed from this section that it was mandatory for Perry Holt, upon finding liquor unlawfully kept on said premises, to take into his possession the whiskey, together with the implements, furniture and fixtures located on said premises, used or kept in connection with the violation and make his return as provided by law.

Section 168, Chapter 49, Laws of Utah, 1937, among other things, provides the procedure after such a seizure, to-wit:

In the event of a seizure as provided for in Section 164, the officer shall forthwith make a return of his acts thereunder, and if the warrant was issued by a city court or justice of the peace and by such return it appears that tangible personal property was seized by said officer, the jurisdiction of the city court or justice of the peace shall thereupon cease except that the city court or justice issuing such warrant shall forthwith certify the record and all files to the district court of the county in which said premises are situated and from the time of filing such records and files with the clerk of the district court it shall have jurisdiction to proceed with the cause and determine the merits thereof as provided by law.

This section was followed by Inspector Perry Holt.

Inspector Holt was a peace officer at the time of the seizure. Section 174, Chapter 43, Laws of Utah, 1935, set forth:

Inspectors appointed under this act, sheriffs, deputy sheriffs, constables, marshals, police officers, members of the state highway patrol, and other officers and employes of the state, and of any subdivision or agency thereof, are vested with the powers of peace officers and powers necessary to enforce the provisions of this act.

From the facts and from the law quoted there is no question but that Perry Holt, as Inspector for the Plaintiff, was discharging a plain mandatory duty imposed upon him by law. The mandate of the statute, upon finding liquor unlawfully kept on the premises, is to seize the implements, furniture and fixtures therein kept in connection with the violation and to take the same into his possession. The power to seize carries with it the power to remove the enumerated personal property to a place of safe keeping is recognized by all the courts. A leading case on this proposition is

*Stork Restaurant Corporation vs. McCampbell*, 55 Fed. (2d) 687 N. Y.

Plaintiff invoked the jurisdiction of the Court on the ground that the proposed action of defendants would violate the constitutional provisions against depriving a person of his property without due process of law. Plaintiff alleged that prohibition agents under defendants direction entered and took possession of plaintiff's premises, made arrests and were preparing to remove furnishings and fixtures. Plaintiff alleged irreparable damage, etc., and asks for restraining order. On the

question of the officers right to remove the property the court said:

“As a general proposition, the right of a public officer to seize personal property carriers with it the right to remove the property from the premises. This is certainly true of a sheriff on attachment, or execution, unless removal would result in destruction of the property. ‘When he seizes, he may remove it for safe keeping, and this is not only to give effect to the seizure, but for his own security’. *Catlin v. Jackson*, 8 Johns. (N. Y.) 520, 548. See also *Mills v. Camp*, 14 Conn. 219, 36 Am. Dec. 488; *Williams v. Powell*, 101 Mass. 467, 3 Am. Rep. 396; *Fullam v. Stearns*, 30 Vt. 443; *Grey v. Sheridan Electric Light Co.*, 19 Abb. N. C. (N. Y.) 152, 155. It must be fully as true in the case of an officer exercising the right of distraint or of seizure forfeiture. The denial of power to remove seized articles to a place of security designated by law or selected by the officer would beyond doubt be an unwarranted restraint upon him and might seriously cripple the enforcement of the law. In fact, it is a trespass for the officers to remain on the premises longer than is necessary to remove the seized property, unless they have the owner’s permission. See *United States v. American Brewing Co.*, (D. C.) 296 F. 772, 777; *Rowley v. Rice*, 11 Metc. (Mass.) 337. It is plain, therefore, that such articles as the defendant had the right to seize on the plaintiff’s premises he has the right to remove from the plaintiff’s premises.”

On the question of the courts jurisdiction to issue the injunction prayed for the court said @ 690:

“Temporary injunction against a public officer can be granted only on a strong showing that his

threatened action is beyond the scope of his lawful authority. . . . *Courts will not issue injunctions against administrative officers on the mere chance that they may not follow the law.*''

At this point it must be borne in mind by this Court that the Orders signed by the defendant Court prevented and made impossible the removing of the implements, furniture and fixtures from said premises by Perry Holt. It, therefore, made impossible the carrying out of the plain, mandatory provisions of the statute and interfered and prevented the enforcement of the Utah Liquor Control Act. This is peculiarly significant in view of the fact that this Court has held in the case of

*Wooras vs. Utah Liquor Control Commission*, ..... Utah ....., 93 Pac. (2d) 455

that in a Libel proceeding the action is against the thing, it being an action in rem. That the thing, itself, is the offender and that seizure of the property, or the res, is equivalent to the arrest of the person in a criminal case. By the acts of the defendant Court, as complained of, plaintiff was unable to make a proper seizure (arrest) and the property was, as a result, allowed to remain in the premises under the same conditions to be used from that time on in connection with the violation of the Utah Liquor Control Act. Section 200, Chapter 43, Laws of Utah, 1935, recognizes no property rights in this type of property, to-wit:

**There shall be no property rights whatsoever in any alcoholic beverages, packages, vessels, ap-**



pliances, fixtures, bars, furniture and implements kept or used for the purpose of violating, or used in violation of, any provision of this act.

The law seems to be very definitely fixed that courts cannot, by its orders, processes or actions, interfere with, impede, hinder and prevent public officials, their agents, servants and employees, from enforcing the law and discharging a duty imposed upon them as such by law and when Courts assume to act, and by its orders and processes do act, with reference to matters the effect of which is to hinder, delay, interfere with, impede and prevent such public officials, their agents, servants and employees, from discharging duties imposed upon them by law then such acts on the part of the court are in excess of their jurisdiction and are without authority in law.

That Courts exceed their jurisdiction when they, by their orders and processes, interfere with the ordinary functions of other branches of government, particularly the executive department, is borne out by the following case:

*Selecman, et al., v. Matthews, et al., State Highway Commission*, 15 S. W. (2d) 788.

Where injunction proceedings were commenced against the Highway Commission over changing the location of certain roads. The law of the State confers the powers to locate state highways upon the Highway Commission, etc.,

“But if it be contended that the statute as a whole contains implications which require state high-

ways to be 'located in the interest of economy and directness of routes,' it is sufficient to say that the power to determine the facts in every case is vested exclusively in the state highway commission; if the Legislature had intended that the commission's findings should be subjected to judicial review, it doubtless would have said so.

'An officer to whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is, that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of mandamus.' *Gaines v. Thompson*, 7 Wall. 347, 352, 19 L. Ed. 62, 65, *Kearney v. Laird*, 164 Mo. App. 406, 144 S. W. 904.

To grant an injunction in this case would be to interfere with the ordinary functions of the executive department of the state government; that the courts will not do. *Louisiana v. McAdoo*, 234 U. S. 627, 34 S. Ct. 938, 58 L. Ed. 1506."

In an action brought by certain taxpayers to enjoin Superintendent of Schools from designating certain school district, etc., the court in

*Moore et al. v. Porterfield, et al.*,  
257 Pac. 307 (Okla.)

says:

“The law presumes the validity and regularity of their official duty, and this presumption obtains until overcome by proof, as to the acts involving the performance of ministerial or administrative duties. *Watkins v. Havighorst*, 13 Okl. 128, 74 Pac. 318.

Under section 3, art. 13, of the Constitution of Oklahoma, separate schools for white and colored children, with like accommodations, must be provided by the Legislature, which must be impartially maintained.

We cannot presume that the defendant, as county superintendent of public instruction, will violate the foregoing provisions of our Constitution, but, on the contrary, we must presume that he will do his duty. Under Section 3, Chapter 219, article 15, Session Laws of 1913 (section 10569, C. O. S. 1921), as construed by *Jumper et al. v. Lyles*, 77 Okl. 57, 185 Pac. 1084, the county superintendent of public instruction of a county is authorized to designate what school or schools in each school district shall be the separate school, and which class of children, either white or colored, shall have the privilege of attending such separate school or schools of said school district. This discretionary power of the county superintendent will not be controlled by injunction, unless it appears that such contemplated action is based upon grounds or reasons clearly untenable or unreasonable.”

And in

*Kelley v. Kavanaugh, Chief of Police,*  
3 Fed. Supp. 666.

An action was brought for an injunction restraining the defendant from seizing and destroying certain mint vending machines. There the court said:

“Courts of equity have no power to restrain public officers by injunction from acts which they are required by law to perform. Mere apprehension of unauthorized acts by public officers will not authorize the issuance of an injunction. Proof of threatened breach of authority must be clear and convincing. This rule is specially applicable where the application for a temporary injunction is based upon affidavits. See *Corpus Juris*, pages 240 et seq.; *Triangle Mint Corp v. Mulrooney*, 257 N. Y. 200, 177 N. E. 420.

In view of this denial and upon all of the proofs submitted upon this motion, the application for a temporary injunction should be denied. The presumption may be indulged in that defendant will observe the decision of the Circuit Court of Appeals and refrain from the seizure of plaintiff's nonconvertible mint vending machines pending the trial of the case. Of course, it is possible some method or means may be employed whereby the machines in question are used for gambling purposes. In that event, upon the proof that any particular machine is being used for gambling purpose, defendant, not only has the right, but it is his duty, to seize, such machine and arrest the person in possession thereof.”

Likewise the court will prohibit when an injunction is issued which exceeds the jurisdiction of the Court. In

*Gordon, et al. v. Smith, Chancellor,*  
120 S. W. (2d) 325.

This was a petition for restraining order against the Superintendent of the Arkansas Police, and other officers, to restrain them from arresting, threatening to arrest, etc., plaintiffs, or other citizens for operating automobiles upon the highways. The court issued a temporary restraining order, and the petitioners filed their petition for a Writ of Prohibition, alleging that the chancery court of Union County had no jurisdiction for the reason that the complaint seeks to enjoin the enforcement of a criminal statute, and seeks to enjoin the criminal prosecution of persons who have not complied with the provisions of the law.

“The office of the writ of prohibition is to restrain an inferior tribunal from proceeding in a matter not within its jurisdiction; it is never granted unless the inferior tribunal has clearly exceeded its authority and the party applying for it has no other protection against the wrong that shall be done by such usurpation. We have many times held that when the Court has jurisdiction over the subject matter and the question of its jurisdiction of the person turns upon some fact to be determined by the court, its decision that it has jurisdiction is an error, and prohibition is not the remedy. But in the instant case, the court has no jurisdiction over the subject matter, and the question of the existence or non-existence of jurisdiction does not depend on contested facts which the inferior court is competent to inquire into and determine. *Sparkman Hardwood Lumber Co. v. Bush*, 189 Ark. 391, 72 S. E. (2d) 527.

‘Chancery courts will not interfere by way of injunction to prevent anticipated criminal prosecutions. The city through her citizens has the right to enforce the ordinance, if valid. A court

of chancery will not entertain a contest over the question as to the validity of the ordinance and restrain prosecutions pending the determination of that question, as the whole matter can be settled in a court of law where only the violation of the ordinance, if valid, can be punished.' *Rider v. Leatherman*, 85 Ark. 230, 107 S. W. 996, 997.

The suit in the chancery court was for the purpose of restraining prosecutions under a criminal statute. There are no contested facts which the lower court might examine and determine as to its jurisdiction, but the court had no jurisdiction of the subject matter.

The chancery court had no jurisdiction and the writ of prohibition is therefore granted."

When an executive officer is directed by law to perform a certain duty the courts have no jurisdiction to interfere with the performance of that duty. In

*State ex rel. Carson, Dist. Atty. v. Kozar, Secretary of State*, 270 Pac. 513, 226 Ore. 641.

This suit was instituted by the State Highway Commission of Oregon to obtain an injunction against the defendant, as secretary of State, to enjoin him from certifying and printing on the official ballot for the ensuing election the ballot title and numbers of proposed initiative measure to amend the existing motor vehicle law. It was admitted that the secretary of state had followed the statute with reference to this matter. The court says:

"Where an initiative petition has been filed in the office of the secretary of state, is in proper form, properly verified, contains the requisite number of signatures, and shows upon its face



that all of the statutory directions entitling it to be filed have been complied with, the statute makes it the imperative duty of the secretary of state to file the petition, and, upon its being filed, to certify and print the ballot title and numbers on the official ballot, so that it can be voted upon. The relator contends that, in the performance of this duty by the secretary of state, he was acting in a ministerial capacity, and was not engaged in any legislation, and argues from this that the courts do have power to enjoin the secretary of state if the bill itself, when enacted, would be unconstitutional. Where the law defines and prescribes the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial. 34 C. J. 1179.

It is clear that no executive officer can exercise any legislative power, and that the acts of the secretary of state in accepting and filing an initiative measure, where all statutory requirements have been complied with, and in certifying and printing the ballot title and numbers of the measure on the official ballot, are ministerial in nature, and that he is not exercising any legislative power, but is performing the acts which, under the statute, are essential to the exercise of the legislative power by the people of the state, and, while he is acting purely in a ministerial capacity, and not exercising any discretion, the law itself enjoins upon him the performance of the acts themselves, and it would seem to follow, as a necessary consequence, where a duty is imposed upon a public official to do an official act, upon compliance by others of all the statutory requirements necessary to make it the duty of the official to do the act, that no court would have power to enjoin the officer from the doing of such act. Under the circumstances stated, the directions of the statute upon the secretary of state are plainly

mandatory, and require the performance by him of the very duty which relator seeks to have the court enjoin him from doing. The courts have no power to direct a public official to refuse to perform a duty imposed upon him by the mandatory provisions of the statute.”

There are numerous other cases in many jurisdictions that hold with the above cases, that acts of courts that prevent or hinder public officials from carrying out the duties and doing the things imposed on them by the clear provisions of the law, are in excess of their jurisdiction and therefore without authority of law.

With respect to acts, orders and processes of courts which interfere with and prevent the enforcement of criminal statutes and the arrest of law violators, it seems to be the almost universal rule, that such acts, orders and processes are in excess of the jurisdiction of the court. We call the court's attention, by title and citation only, to a number of cases that adhere to this view:

*Harmon, et al., vs. Commissioner of Police of Boston*, 174 N. E. 198;

*Strand Amusement Co., et al., vs. City of Owensboro, et al.*, 47 S. W. (2d) 710, Ky.;

*Dell Pub. Co. vs. Beggans, Director of Public Safety, et al.*, 158 Atl. 765 N. J.

*Harvie vs. Heise, Sheriff, et al.*, 148 S. E. 66 So. Car.;

*Colbert, Sheriff of Carbon County, et al., vs. Superior Confection Co.*, 6 Pac. (2d) 791, Okla.;

*Collison vs. Kirkpatrick,*  
292 Pac. 54, Okla.

B. THAT THE LIQUOR CONTROL ACT AND PARTICULARLY SECTIONS 168 AND 169 PROVIDE AN ADEQUATE LEGAL PROCEEDINGS TO PROTECT THE INTERESTS OF VICTOR MARTELLE AND THE ORDER COMPLAINED OF ARE NOT PROVIDED FOR AND ARE CONTRARY TO THE PROCEDURE OUTLINED IN SAID SECTIONS.

Under Section 168, *supra*, after the Inspector has made his return the Justice certifies all of the records and files to the District Court of the County and the District Court, from then on, has jurisdiction to determine the merits of the case. The court is required to fix time for hearing and cause notice thereon to be served personally and by posting which shall describe the alcoholic beverages and the personal property that has been seized, to specify the time and place for hearing. Should anyone appear and claim any of the property involved shall be made a party to the proceedings. The section then provides as follows:

If the court shall find from the evidence presented that violations of this act did occur upon the premise wherein said alcoholic beverages or other tangible personal property so seized by said arresting officer which was located upon said premises was also used in connection with violation of this act and shall be forfeited as hereafter provided unless any of the claimants prove to the satisfaction of the court that said tangible personal property or some parts thereof were not used for any purpose whatsoever in connection

with the operation of the business conducted on the premises where said personal property was seized.

The Legislature undoubtedly intended Section 168 to be the exclusive method of proceeding after evidence of a violation of the Liquor Act had become available to the Commission. This is made very manifest by Section 169 which reads as follows:

When any alcoholic beverage, packages, property or other things shall have been seized by virtue of any warrant, the same shall not be discharged or returned to any person claiming the same by reason of any alleged insufficiency of description in the warrant, of the alcoholic beverages, property or place, nor by order in claim and delivery, or any other summary process, but the claimant shall only have the right to be heard on the merits of the case; and final judgment of conviction in such proceedings shall in all cases be a bar to all suits for the recovery of any alcoholic beverages or other things seized, or of the value of the same, or for damages alleged to have arisen by reason of the seizing and detention thereof.

The law is quite uniform that a presumption attends the acts of the public officer, to the effect that the facts exist which justifies his action. In other words, there is always a presumption that official acts have been and are properly performed, and in general, it is to be presumed that everything done by an official in connection with the performance of an official act in the line of his duty was legally done, whether prior to the act, such as giving

notice, or determining the existence of conditions prescribed as a prerequisite to legal action, or subsequent to such act,

*22 C. J. Pages 130-34*

unless the presumption of regularity is rebutted, it is conclusive.

*22 C. J. Page 136*

Acts of a public officer "which presuppose the existence of other acts which makes them legally operative are presumptive proof in the matter."

*R. H. Stearns vs. U. S., 78 L. Ed. 647-653*

quoting a principle announced by U. S. Supreme Court in

*Bank of U. S. vs. Dandridge,*  
6 L. Ed. 552, 554

with reference to action by Board of Directors of Bank of U. S.

The case of

*Pacific States Box & Basket Co. v. White,*  
80 L. Ed. 138

involved an order of the Department of Agriculture of Oregon fixing the specification of berry boxes, it was contended that the rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legislature; and that

where the regulation is the act of an administrative body, no such presumption exists so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation.

The Supreme court refuses to accept this and holds the "presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies"—giving full reasoning.

### CONCLUSION.

It is apparent from the foregoing that if the action of the defendant judge, in making the Orders of January 27, 1940 and February 8, 1940, is within his jurisdiction then it lies within the power of the judge to nullify the mandate of the legislature. To leave the intoxicating liquors, implements, furniture and fixtures in the Town Tavern, in the possession of Victor Martelle, during the pendency of the action means two things. In the first place, that during the pendency of the action Victor Martelle may continue to operate in his illegal venture without fear of additional penalty, and in the second place, that upon the determination of the case and the entering of the order of confiscation, all of the property in the premises may have disappeared. In other words, the entry of the Orders herein complained of completely nullify not only the power of plaintiff to perform the duties imposed by law but completely nullify the acts of the Legislature.



It is respectfully submitted that the Alternative Writ herein should be made permanent, that henceforth the seizure and trial of the property charged with violating the provisions of our Liquor Control Act may be carried out by an orderly procedure as provided by law.

Respectfully submitted,

PARNELL BLACK,

D. HOWE MOFFAT,

GEORGE H. LUNT,

*Attorneys for Plaintiff.*