Mayor et al of Booneville vs. Wertheimer, Morris J; 1858 Cooper 1st Cir. 242/10

85/10

- violation of city ordinance
- Reversed – Mayor has final jurisdiction

Boonville,
June 7th 1858.

Mr Duncomb.

Dear Sir.

Enclosed you have two dollars for which you will send ~~all~~ writs of error to Cooper Court of Common Pleas, in the following cases, "City of Boonville vs. Morris J. Wertheimer," and "James Thomson vs John Roatcap" – for July Term. Sup. Court.

Very Resp.

Stephens & Vest

City of Boonville

v

Wertheimer and

Monroe v Boatcap

Precipes filed June

9th 1858

Wm E Dunscomb

Cooper Com Pleas

1st

Stephens & Wright

# THE STATE OF MISSOURI, ss.

**The State of Missouri,** To the Judge of the Cooper Court of Common Pleas in said State, GREETING:

WHEREAS, In the Record and Proceedings in a certain cause lately pending in the Court of Common Pleas of Cooper County

wherein ~~The City of Boonville~~ Morris J. Wertheimer was plaintiff and the Mayor, Councilmen and citizens of the City of Boonville ~~Morris J. Wertheimer~~ was defendant.

in an action of Prohibition manifest error hath intervened, to the great damage of the said ~~plaintiff~~ defendant as by his complaint, we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the county of Cole, in said State, on the first Monday in July next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.

**Witness,** WILLIAM E. DUNSCOMB, Clerk of our said Supreme Court, at office, in the City of Jefferson, the ninth day of June in the year of our Lord one thousand eight hundred and fifty eight.

Wm E Dunscomb

$1. paid by Stephens & West Atty's

State of Missouri (ss
County of Cooper) The execution of this writ will appear by the
schedule "A" hereto annexed.

In witness whereof I Benj Tompkins Judge & ex officio
Clerk of our Cooper Court of Common Pleas for
said County hereto set my hand and affix the seal of said
Court at office this June 10th 1858.

Benj Tompkins Judge & clerk
By Logan Tompkins D.C

City of Bonville
v
M. J. Wertheimer
Writ of Error

State of Missouri } ss
County of Cooper } Be it remembered that on the 22d day of May A.D. 1857 Morris J. Westheimer filed in the office of the Clerk of the Cooper Court of Common Pleas, the following petition, to wit;

In the Cooper Court of Common Pleas
May Term 1857.

Plaintiff's Petition

Morris J. Westheimer Plaintiff
vs
The Mayor, Councilmen, and citizens of the City of Boonville } Defendant

Plaintiff states that on the 14th day of May 1857, he was arrested by the constable of the City of Boonville on a warrant issued by Henry E. W. McDearmon, Mayor of the City of Boonville, charging plaintiff with the violation of the ordinance of said City, entitled "An ordinance regulating the Markets in the City of Boonville," in this, that the plaintiff "did, on the 14th day of May 1857, during market hours, at a place in the City of Boonville, other than at the Market House, purchase fresh fish contrary to the ordinance in such case made and provided, and which said ordinance is hereunto filed and made a part of this petition. Plaintiff further states that afterwards, to wit, on the said 14th day of May 1857 he was brought by said Constable before the said Henry E. W. McDearmon, Mayor as aforesaid, who then and there imposed a fine of five Dollars and costs upon plaintiff for said supposed violation of the said ordinance, which

said fine and costs amount to the sum of $8.60, as will appear by the entry made by said Mayor upon his docket, which is herewith filed and made a part of this petition. Plaintiff further states that fresh fish is "wild game" and not required by the ordinance before mentioned, nor by any other ordinance of said City to be sold or purchased at the Market house in said City, but on the contrary thereof may be sold and purchased at any other place in said City, during Market hours, without violating any ordinance thereof. Plaintiff suggests that the said Henry C. McDearmon in issuing said warrant for the apprehension of the plaintiff and causing him to be arrested thereunder, and in imposing upon plaintiff the said fine & costs, acted beyond his authority and Jurisdiction, fresh fish being "wild game" and the purchase thereof at any place other than the Market House, during market hours, not being any offence under the ordinance of said City, or under any other known law. Plaintiff further states that on the 20th day of May 1857, he tendered his affidavit and bond for an appeal to the Circuit Court of Cooper County to the said Henry C. McDearmon, Mayor as aforesaid, from said Judgment rendered by him, as aforesaid, as required by the statute in such case made & provided, but the said Mayor refused to receive the said bond and affidavit and refused to allow the said appeal, and now persists unlawfully and against right in proceeding in said matter, and threatens to issue an execution against the plaintiff to be levied on his goods and chattels for the collection of said fine and costs, unlawfully imposed

upon plaintiff as aforesaid. Wherefore the said plaintiff, the aid of this Court respectfully requesting that injury may not be done him or his property, prays remedy by writ of prohibition to be issued out of this Court to Henry Ell. McDearmon Mayor and to the Councilmen and citizens of the said City of Boonville to prohibit and restrain him, said Mayor, Councilmen, and the said constable, and other citizens of the City of Boonville from proceeding thereon, and for other relief &c &c.

Douglass & Hayden Atty for plaintiff

Plaintiff makes oath and says he believes the above petition & the matters therein as stated are true

M. J. Wertheimer plaintiff

Sworn to and subscribed before me this May 22nd 1857.

Benj Tompkins clerk.

Which said ordinance reads in words & figures as follows, viz:

inance An Ordinance regulating the markets in the City of Boonville.

Section 11. Any person who shall purchase, during market hours, at any other place in the city than at the Market House, any article required to be sold at the Market place shall upon conviction forfeit and pay a fine of five dollars

Section 21. Nothing in this ordinance shall be so construed as to prevent any farmer or raiser, or any person or firm who packs beef or pork, from selling his meat by the quarter, or from selling his bacon, hams, shoulders and sides, or from selling spare ribs or sausage meat in the winter time; nor so construed as to prohibit the selling of venison or wild game.

And which said Mayor's docket reads in words and figures as follows to wit;

Mayor's Docket

State of Missouri,

Mayor, Councilmen and Citizens of the City of Boonville

vs

Morris J. Westheimer

This is a proceeding had against Morris J. Westheimer, upon complaint made and filed by the city attorney for the breach of Section 11, of an ordinance entitled "An ordinance regulating markets in the City of Boonville", said complaint alleges that said Morris J. Westheimer, did on the 14th day of May 1857, purchase during market hours, at a place in the City of Boonville other than at the market house, fresh fish, contrary to the ordinance in such case made and provided.

Complaint made and filed May 14th 1857, and a warrant issued on May 14th 1857, and made returnable forthwith, Warrant returned served May 14th 1857, and the defendant Morris J. Westheimer appeared in Court, and acknowledged that he purchased fresh fish as alleged in said complaint, whereupon the Court adjudged the fine at five dollars and costs

| | |
|---|---|
| Fine | $ 5.00 |
| Mayor's fees, issuing Summons | 25c |
| Rendering judgment | 35 |
| Constable's fee | 50 |
| Attorneys fee | 2.50 |

Henry St. McDearmon, Mayor

And afterwards towit on the 3d day of June 1857 and which said Court was in session the following entry was made of record in said cause towit:

M. J. Westheimer plaintiff

vs

Mayor, Councilmen & citizens of the city of Boonville - defendant.

The demurrer in this cause coming on to be heard it is considered by the court that the same be overruled, and thereupon it is ordered that a writ go in favor of said plaintiff prohibiting them said defendants from collecting the fine complained of by said plaintiff until the further order of this court returnable to the next term of this court until which time this cause is continued.

And which said writ of prohibition reads in words and figures as follows, towit:

Writ of Prohibition

The State of Missouri,

To the Mayor, Councilmen & citizens of the City of Boonville.

Whereas it has been shown to the Cooper Court of Common Pleas in & for the County of Cooper & State of Missouri, held at the City of Boonville in said County at the Court House on the third day of June 1857 on the part of M. J. Westheimer that whereas said Westheimer was on the 14th of May 1857, arrested by the constable of said City of Boonville and warrant issued by W. E. W. McDearmon Mayor of said City of Boonville charging said Westheimer with violating an ordinance

regulating the markets in the City of Boonville by buying fresh fish contrary to said ordinance, & on the same day was brought before the said Mayor & fined five dollars and costs for supposed violation of said ordinance and whereas it is suggested to our said Crooke Court of Common Pleas that said Mayor in issuing said warrant & causing said Wertheimer to be arrested thereunder and in imposing said fine and costs acted beyond his authority and jurisdiction. And the said Court being willing to maintain the rights of the state & the Laws & customs thereof & being unwilling that any of the citizens of the state should be unjustly or illegally oppressed aggrieved or unduly intermeddled with by the pretended cognizance of said Mayor, do therefore prohibit you the said Mayor, Councilmen & citizens of the City of Boonville, and each of you firmly enjoining that you do not further proceed in the premises against the said Wertheimer nor any further plea hold before you in any way touching the premises nor that you or any of you attempt any thing that may tend to the damage of the said Wertheimer or to the prejudice of the state or in derogation or contempt of the laws & statutes & customs thereof under the danger of incurring the penalty of violators of the laws of the said state & if you have pronounced Judgment against said Wertheimer by reason of the premises to release him therefrom on the peril incumbent until said Crooke Court of Common Pleas shall be further & more fully advised of & concerning the premi-

ises, when you may by the Judgment of said Court be relieved from the command of this writ, or said command be made absolute.

Witness Benj Tompkins Judge of our Cooper County Court of Common Pleas with the seal thereof hereto affixed at office this June 25th 1857.

L. S.

Benj Tompkins

And on which said writ the Sheriff of Cooper County made the following return to wit

Sheriffs Return

I certify that I served the within writ on H. E. H. McDearmond by delivering to him a seperate copy of the same in Cooper County Missouri, on the 30th day of June 1857.

B. Emmons Perry
Sheriff.

And afterwards to wit on the 23d day of November 1857 and whilst said Court was in session the following entry was made of record in said cause to wit:

Record

M. J. Wentheimer
vs
City of Boonville &c

The defendant by the mayor file their answer.

And which said answer reads in words & figures as follows to wit:

Defendants Answer

In the Cooper Court of Common Pleas
Nov. Term 1857.

The Mayor Councilmen and citizens of the city of Boonville, Defendants
vs
Morris J. Wentheimer Plaintiff

Defendant by her attorney, for answer to plaintiffs petition and for cause why said writ of prohibition should not be made perpetual against defendant, admits that plaintiff was arrested by the constable of said city on a warrant issued by said Mayor, for the cause, in the manner and at the time specified in plaintiffs petition. Defendant also admits that a fine of five dollars & costs amounting to $8.60 was imposed on plaintiff by said Mayor but charges & states that said fine & costs were imposed on plaintiff for the violation of the ordinances of said City referred to in plaintiffs petition. Defendant denies that fresh fish is wild game, and not required by said ordinance, nor by any other ordinance of said City to be sold and purchased at the market house in said city as stated in said petition; and defendant denies that fresh fish may be sold and purchased at any other place in said city, than at the market house during Market hours, without violating any ordinance of said City, as charged by plaintiff. Defendant denies that said Mayor in issuing said warrant for the apprehension of plaintiff and in causing him to be arrested thereon, and in imposing upon ~~the~~ plaintiff said fine, acted beyond his authority and jurisdiction. And defendant charges and states that even if it be true as charged by plaintiff, that fresh fish is wild game within the meaning of said ordinance, yet defendant states that said Mayor had and has exclusive original jurisdiction over all cases arising under the act of incorporation and under the ordinances of said City and the plaintiffs case

being one over which the Mayor had jurisdiction, the. the error, if there was any, was an error of Judgment, and the same cannot be corrected by this action or by this proceeding. Defendant further states that even if the facts be true as stated in the first second and third allegations or charges in plaintiffs petition, yet plaintiff is not entitled to the relief demanded nor any other relief in this proceeding

Stephens, Vest & Hutchison for defts

Henry C. W. McDearmon Mayor of said City and agent for defendant makes oath and says he believes the above answer and the matters therein as stated to be true.

H. C. W. McDearmon
Mayor

Sworn to & subscribed before me
this 23d day of Nov 1857.

Benj Tompkins Clerk
By L. Tompkins D.C.

And afterwards towit on the 6th day of February 1858 and while said Court was in session the following entry was made of record in said cause, towit;

Record

Morris J. Wertheimer
vs
Mayor Councilmen & citizens of the city of Boonville.

Now at this day this cause comes on to be heard the plaintiff and defendants appearing by their counsel, the cause was submitted to the Court for trial upon the petition and answer, and the Court finds that the Mayor of Boonville acted beyond his jurisdiction in imposing

a fine on said plaintiff for the cause set forth in plaintiffs petition. It is therefore considered by the court that said defendants be prohibited from proceeding further upon the judgment of said Mayor against said plaintiff, and that a final writ of prohibition go from this court to the defendants, prohibiting them from further proceedings on the judgment of said Mayor against said plaintiff, and that said plaintiff recover of said defendants his costs and charges in this behalf laid out and expended and that he have execution therefor.

And which said final writ reads in words and figures as follows to wit;

Final Writ of Prohibition

The State of Missouri, To the Mayor, councilmen & citizens of the City of Boonville: Greeting; Whereas it has been shown to the proper court of Common Pleas in & for the County of Cooper & State of Missouri held at the Court House in the City of Boonville in said County, on the 6th of February 1858 on the part of Morris J. Wertheimer that whereas said Wertheimer was on the 14th of May 1857 arrested by the constable of said City of Boonville on a warrant issued by St. C. W. McCleanon Mayor of said City charging said Wertheimer with violating an ordinance regulating the markets in the city of Boonville by buying fresh fish contrary to said ordinance and on the same day was brought before said Mayor & fined five dollars & costs for supposed

violation of said ordinance & whereas it is suggested to our said brother Court of Common Pleas that said Mayor in issuing said warrant & causing said Wertheimer to be arrested thereunder & in imposing said fine & costs acted beyond his authority & jurisdiction and the Court being willing to maintain the rights of the State & the laws & customs thereof & being unwilling that any of the citizens of this State should be unjustly intermeddled with by the pretended recognizance of said Mayor Councilmen & citizens of the city of Boonville do therefore pray you the said Mayor Councilmen & citizens of the City of Boonville and each of you firmly enjoining that you do not further proceed in the premises against the said Wertheimer nor any further plea hold before you in any way touching the premises nor that you or any of you attempt any thing that may tend to the damage of said Wertheimer or to the prejudice of the State or in derogation or contempt of the laws statutes & customs thereof under the danger of incurring the penalty of violators of the laws of the said State, and if you have pronounced judgment against said Wertheimer to release him therefrom and absolutely absolve him of the same on the bail incumbent.

Witness Benj Tompkins Judge & clerk of
L. S. said Court with the Seal thereof hereto affixed
at office April 26th 1858.

Benj Tompkins Judge & clerk
By L. Tompkins D.C.

And on which writ the Sheriff of Cooper County made the following return to wit:

Sheriff's Return

I certify that I served the within writ on H. E. W. McDearmon by delivering to him a seperate copy of the same in Cooper County Missouri, on the 27th day of April 1858.

B. Emmons Ferry

Sheriff

State of Missouri } ss
County of Cooper } I Benj Tompkins Judge & clerk of the Cooper Court of Common Pleas for said County do hereby certify that the foregoing twelve pages is a full and perfect transcript of the record and proceedings had in the above entitled cause.

Given under my hand and seal of said Court at office this June 9th 1858.

Benj Tompkins Judge & clerk
By Logan Tompkins D.C.

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Clerks fees

To copying 3113 words & figures at 15 cts per 100 $4.70

2 Certificates & Seals

paid by deft $[illegible]

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Morris J. Wertheimer

vs

Mayor, Councilmen &
citizens of the City of
Boonville pe
R.
March 10th 162

(Record)

filed June 16th 1858
Wm E Dunscomb
Clerk

Cooper Com. Pleas
1st

In the Supreme Court
July Term, 1858.

The Mayor, Councilmen and
Citizens of the City of Boonville, Plff In Error
vs
Morris J. Wertheimer Dft. In Error

Now at this day comes the plaintiff in error, and says, that in the record and proceedings of the court below, and in the judgment rendered by said court there is manifest error, in this to wit:

That the said court granted a final writ of prohibition in favor of Morris J. Wertheimer and against plaintiff in error, commanding them to abstain from the further prosecution of a certain judgment rendered by the Mayor of the City of Boonville against said Wertheimer, for the sum of five dollars and costs, - When in fact the said Wertheimer was not entitled to any such writ or judgment. - and plaintiffs in error say that the judgment of said Court in ~~[illegible]~~ said writ of prohibition was erroneous and illegal, and all proceedings had by said Court in advance thereto, Wherefore plaintiffs in error pray, that on account of the errors aforesaid, and other appearing in the said record and pro-

cedings, ~~the said plaintiffs pray that~~ the said judgment granting the said writ of prohibition may be reversed and an-nulled, and that they may be restored to all things which they have lost by reason thereof, and that this court proceed to the examination of said record and proceedings, and of the matter above assigned for error, and that the said defendant pay to the said error.

Stephens & Vest
for Plffs In Error.

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Mayor, Councilmen
and Citizens of
City of Boonville
v
Morris J. Wertheimer

Assignment of
Error.

filed July 5th 1858
Wm E Dunscomb
Clerk

In the Supreme Court
July Term 1858

M. J. Westheimer defendant in error

vs.

Mayor Councilmen and Citizens of the City of Boonville } plaintiff in error

The said M. J. Westheimer the defendant in error, comes and joins in error and says that in the record, proceedings and judgment of the Court of Common Pleas there is no error, but that the judgment is in accordance with the law of the land, and in all things ought to be affirmed

M. J. Westheimer
by Douglas & Hayden
his attorneys

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M. J. Wertheimer
vs
Mayor &c. of
Boonville

Joinder in error

filed July 6th 1858
Wm E Duncomb
Clerk

In the Supreme Court
July Term 1858

Morris J. Wertheimer defendant in error

vs.

The Mayor Councilmen and Citizens of the City of Boonville } Plaintiff in error

The said Morris J. Wertheimer, defendant in error, comes and moves the Court to dismiss the writ of error, because the same was sued out, and is now prosecuted without, and contrary to the authority of the said City of Boonville, as will appear by the resolution of the Board of Councilmen of said City hereto annexed marked (A) and made a part of this motion.

Morris J. Wertheimer
by Douglas & Hayden
his attorneys.

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M. J. Wertheimer
vs.
City of Boonville

motion to dismiss the
writ of error

filed July 6th 1858
Wm E Duncomb
Clerk

In the Supreme Court
of Missouri.
July Term, 1858.

The Mayor, Councilmen and
Citizens of the City of Boonville, Plff. In Error
vs
Morris J. Wertheimer, Deft. In Error.

Stephens & Vest for Plff. In error, file the following brief.—

Statement of the Case.

Upon the 14th day of May 1857, the defendant in error, Morris J. Wertheimer was arrested and tried before the Mayor of the City of Boonville, for an alleged violation of Section 11, of a certain ordinance of said city entitled "An Ordinance regulating Markets In the City of Boonville" and which section is as follows.

Section 11. Any person who shall purchase during Market hours, at any other place in the City than at the Market House, any article required to be sold at the Market Place, shall upon Conviction, forfeit and pay a fine of five dollars.

This section is limited in its operation by section 21. of the same ordinance which is as follows:

Sec. 21. Nothing in this ordinance shall be so construed as to prevent any farmer or raiser, or any person or firm who packs beef or pork, from selling his meat by the quarter, — or from selling his bacon, hams, shoulders and sides, or from selling spareribs and sausage meat in the Winter time; nor so construed as to prohibit the selling of

venison or wild game.

The complaint filed before the Mayor alleges "that the said Morris J. Wertheimer did on the 4th day of May, 1857, purchase during market hours at a place in the City of Boonville other than at the Market House, fresh fish, contrary to the form of the ordinance in such case made and provided." - Wertheimer appeared before the Mayor and acknowledged that he had purchased fresh fish as charged, whereupon he was fined five dollars. On the 22nd day of May, 1857, Morris J. Wertheimer filed his petition in the Cooper Court of Common Pleas, setting up the foregoing facts, and suggesting that no offence had been committed by said Wertheimer in buying fresh fish as aforesaid, and that the Mayor of Boonville had acted beyond his jurisdiction in the premises, wherefore the petitioner prayed that a writ of prohibition might issue from said Court prohibiting the Mayor, Councilmen and Citizens of the City of Boonville from collecting said fine of five dollars, or any part thereof.

The defendant appeared by the Mayor and demurred to said petition because the same was illegal, insufficient &c and did not state facts sufficient to constitute a cause of action, which demurrer was by the Court overruled. A writ nisi was then issued by the Court prohibiting defendant from the collection of said fine, the said writ being returnable to the next term of the Court. At the next term of the Court defendant (plff in Error) filed an answer denying that fresh fish is wild game within the meaning of the ordinance, and alleging that the Mayor had exclusive and original jurisdiction of all

cases arising under the act of incorporation and the ordinances of the City of Boonville, and that even if the facts be as stated by the plaintiff, yet that no writ of prohibition should issue.

A trial was then had and a final writ of prohibition issued by the Court, prohibiting defendant from the collection of the fine imposed, or any part thereof, to reverse which Judgment this writ of error is prosecuted.

Points and Authorities.

1st. Section 21. of the ordinance which provides that the selling of venison or wild game shall not be considered a violation of Section 11. does not contemplate the selling of fresh fish as an exemption.

Fresh fish are not wild game, nor were they so regarded by the framers of the ordinance.

Webster's Dictionary, unabridged.

2nd. This is not such a case as will warrant the issuing a writ of prohibition.

We have no statute in this state regulating the remedy by prohibition, and it therefore exists subject to Common Law provisions. - Under the Common Law a writ of prohibition would issue out of the Kings Bench, and sometimes out of the Court of Chancery in vacation, directed to the Judge and parties in a suit in any inferior Court commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein does not belong to that jurisdiction, but to the

cognizance of some other Court. "When a person is wrongfully sued in some inferior Court, he must tender his plea to the Jurisdiction, "in propria persona sedente curia", and make oath of the truth thereof; and if the inferior Court will not accept the plea, he may have a prohibition from one of the Common Law Courts at Westminster, or in vacation from the Court of Chancery". Chitty's Pleading. Vol. 1. page 444. It is well settled however that a writ of prohibition does not lie to prevent a Court from deciding erroneously, or from enforcing an erroneous judgment in a case in which it has a right to adjudicate; but can be sustained only for preventing usurpation of Judicial power, by a Court which has no authority to decide the cause in which it assumes the right to act judicially, See Blackstone's Commentaries, Book 3rd page 112. Chitty's Edition. — Comyn's Dig: Title, Prohibition Bacon's Abridgment. Vol. 5, Prohibition, — 2nd Saunders Prohibition, — 3rd Henry Blackstone page 533. — 3rd Bouvier's Institutes, page 93.

Arnold and Parish v Shields et als. 5th Dana Ky. R. page 20. — and cases there cited, Wachtman v Phillips 2nd Metcalfe, 296. — Ex Parte Brandlecht 2nd Hill 367. — Ex Parte Gordon 2nd Hill 363. — 7th Wendell p578 — The authority of the Cooper Court of Common Pleas to issue the writ of prohibition in the present case, depends altogether there on the assumed fact, that the Mayor of the City of Bonneville had no jurisdiction in the case in which he was attempting to proceed, — The Mayor imposed a fine upon the defendant in error, for the alleged violation of a city ordinance, and we contend

that in so doing he acted within his jurisdiction, although the Mayor's Construction of the ordinance may have been erroneous. By section 3 of an act amendatory of an "act to incorporate the City of Bonville", Laws of Missouri, 1847, pag 183, it is further provided, that "the Mayor shall have exclusive original jurisdiction over all cases arising under the act of incorporation and upon all ordinances of the city". The case at bar "arises upon a city ordinance", and belongs to that class of cases especially within the Mayor's Jurisdiction, In the case of Arnold and Patrick vs. Shields et als. 5th Dana. above referred to, where the full doctrine and practice in regard to writs of prohibition are fully discussed, Chief Justice Robertson uses the following language in speaking of the ~~decision of a~~ Judgment of a Justice of the Peace, "If he had no jurisdiction his judgment was not merely erroneous, it was void, and a Ministerial Officer might have been guilty of trespass in attempting to enforce it". He then cites the case of Tobias Watkins 3rd Peters 206, and says, "In that case it was contended by the Counsel of Watkins, that the indictment under which he had been convicted and imprisoned did not charge any offence of which the Court had cognizance, and that therefore the Judgment was void, and his imprisonment illegal, But the Supreme Court overruled the application for a habeas Corpus, because although, for the reason just suggested, the Judgment was erroneous, nevertheless, as the Court which rendered it had criminal jurisdiction in similar cases, it's judgment was not void, and observed as follows "To determine whether the offence charged be legally punishable or not,

is among the most unquestionable of it's (the District Court's) powers and duties, The decision of this question is the <u>exercise of Jurisdiction</u>, whether the Judgment be for or against the prisoner &c".
"Had any offense against the laws of the United States been in fact committed, the District Court of the District of Columbia could take cognizance of it, The question whether an offense was or not committed; was a question which that Court was competent to decide". 3. Peters. 206.

Applying this principle to the case before us, it is very evident that the Mayor of the City of Boonville had jurisdiction of the class of cases, to which this case belonged, and to decide the question whether any violation of City ordinances had been committed or not. "<u>The decision of this question is the exercise of Jurisdiction</u>".

If this is not the law, then there is no limit to the exercise of the writ of prohibition, Every irregularity of proceeding, every erroneous decision in regard to the law, or the facts of the case, would justify the writ, and the discretion of the inferior tribunal would be destroyed, See also - Ex Parte Morgan Smith 23rd Alabama Rep. 106. - Morris v Lennox & Martin. 8th Mo. R. 252

3rd. The Cooper Court of Common Pleas having no appellate jurisdiction or control over the Mayor's Court of the City of Boonville, and no jurisdiction over the subject matter in controversy, had no right to issue a writ of prohibition to said Mayor.

The 10th section of the act establishing the Cooper Court of Common Pleas, Local Acts, 1855 page 75, provides, that "The said Court of

Common Pleas shall have concurrent original jurisdiction with the Circuit Court of Cooper County in all civil actions, and all actions of partition, and all actions by and against vessels; Concurrent superintending control with said Circuit Court over Justices of the Peace within said County; and appellate jurisdiction from their Judgments; and Concurrent original jurisdiction with Justices of the Peace in all civil actions, &c". By section 28, of "an act to incorporate the City of Boonville", Laws of Missouri, 36 & 39. page 295. an appeal is allowed in all cases from the Mayor's Court to the Circuit Court of Cooper County, where the fine imposed exceeds five dollars.

If then, this was a case authorizing a writ of prohibition, the Circuit Court of Cooper County was the only tribunal in that County which could act in the premises, The law giving existence to the Cooper Court of Common Pleas limits it's jurisdiction to civil cases, — and the act incorporating the City of Boonville provides that the Circuit Court of Cooper County shall exercise appellate control over the Mayor's Court, — but it is now claimed in the teeth of both these statutes that the Court of Common Pleas can exercise this appellate jurisdiction by a writ of prohibition, when it is conceded than it can be done in no other way, — It will not be pretended that the Court of Common Pleas has any jurisdiction over the violation of an ordinance of the City of Boonville, — or that it can by appeal correct any decision of the Mayor in such a case, Now then it can act by writ of prohibition in an at a loss to discover,

The end and objects of the writ of prohibition

an then described in Bacon's Abridgment Vol. 5. page 546, "The object of prohibitions in general is, the preservation of the right of the King's Crown and Courts, and the ease and quiet of the subject, For it is the wisdom and policy of the law, to suppose both best preserved when every thing runs in it's right channel, according to the original jurisdiction of every Court; for by the same reason that one Court might be allowed to encroach, another might; which could produce nothing but Confusion and disorder in the administration of Justice".

Here is a Court with civil jurisdiction only, going outside of it's act of incorporation, and "producing Confusion and disorder in the administration of Justice" by usurping control over a Criminal Court, The doctrine is laid down by all the Common Law authorities, without exception, that a Superior Court cannot issue a writ of prohibition to an inferior Court, unless such Superior Court possesses jurisdiction over the subject matter in Contest, See Bacon's Ab: Title Prohibition (A) page 548. and Cases before cited, - Reese vs. Lawless. 4th. Bibb's Ky. Rep. page 394. which is especially cited, Chitty's Practice. Vol. 2. page 355. - 19th Louisiana Rep. sid page 175. - 4th Robinson's La. Rep. 48, - 10th Robinson 169. - Mayor of Richmond vs James. - 12th Grattan, 17.

4th The Court of Common Pleas is not a Superior Court to the Mayor's Court of Bonville, and the former has no right to issue writ of prohibition, directed to the latter,

They act in different spheres and are entirely independent of each other in every respect.

See Session acts before referred to.

~~Stephens v Beat~~

"All courts from which an appeal lies, are inferior courts in relation to the appellate courts before which their judgment may be carried." 3rd Peters U. S. Rep. page 203 & 4.
No appeal lies from the Mayor's Court of the city of Bonville to the Corpor Court of Common Pleas, and the latter is not therefore a superior Court to the former,

5th After sentence a writ of prohibition will not go to an inferior court unless the want of jurisdiction is evident from the face of the proceedings,

Burrows Rep. Vol. 4. page 2034 & post.
Durnford & East Rep. Vol. 2. page 473.

This writ should not have been granted then, even from a <u>superior</u> court, for sentence had been passed by the Mayor, and no plea to his jurisdiction had been made.
The case of The Mayor of Richmond vs James, 12th Grattan Va. Rep. 17, is almost identically the same case with the present one, and is especially cited. See also Home vs Earl Camden 2nd Henry. Blackstone page 533.

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City of Boonville
vs
M. J. Wertheimer.

Brief of
Stephens & Veit for
Plff. In Error.

filed July 6th 1858
Wm E Duncomb
Clerk

Morris J Wertheimer
vs
The Mayor, Councilmen & Citizens of the City of Booneville

Error to the Cooper court of Common Pleas

This proceeding had its source in a writ of prohibition issued by ~~of~~ the Cooper Court of Common Pleas to the Mayor of the City of Booneville & others restraining them from collecting a fine imposed on the plaintiff Wertheimer by the said Mayor for violating an ordinance of the said City. The 28 sec of the act incorporating the City of Booneville (sep acts 1839 page 299) provides that the Mayor & each justice of the peace within the City shall have jurisdiction of all cases arising under this act & under the ordinances of the City, subject however to an appeal or certiorari in all cases above the sum of five dollars, to the Circuit Court of Cooper County; and such appeals & certiorari shall be granted and taken in the same manner as appeals & writs of certiorari are granted and taken from justices of the peace to the Circuit Courts. The act of Feby 13. 1847 (sep acts 1847 page 185) confers on the Mayor exclusive original jurisdiction over all cases arising under the act of incorporation and upon

all ordinances of the city".

The following are two sections of an ordinance passed by the City of Boonville for the regulation of the markets of the said City; Sec 11. Any person who shall purchase ~~at~~ during market hours, at any other place in the City than at the Market-house any article required to be sold at the Market place shall upon conviction forfeit & pay a fine of five dollars :: Sec. 21 Nothing in this ordinance shall be so construed as to prevent any farmer or raiser or any person or firm who packs beef or pork, from selling his meat by the quarter or from selling his bacon hams, shoulders & sides, or from selling spare ribs or sausage meat in the winter time nor so construed as to prohibit the selling of venison or wild game". Under these ordinances the plaintiff was fined five dollars for purchasing out of the market house during market hours fresh fish. He applied for an appeal which was refused by the Mayor as by the charter an appeal did not lie unless the fine was over five dollars: The plaintiff maintaining that fresh fish were wild game within the meaning of the ordinance, and that therefore the Mayor had exceeded his jurisdiction in fining him for purchasing fresh fish as such

articles were expressly excepted from the ordinance applied to and obtained from the Hustings court of Common Pleas a writ of prohibition on the Mayor restraining him from collecting the said fine: On this order or judgment a writ of error has been sued out from this Court.

Many reasons were urged why this case should not be looked into nor reversed by this court. This proceeding falls within that class in which the Supreme Court will reverse a judgment when on the record it appears that there is no legal foundation for the judgment: No bill of exceptions in such cases is necessary: The case may be disposed of as it is presented by the plaintiff's demurrer: We conceive that the Court below has arrived at a result that is directly against the law: The charter in providing that appeals & writs of certiorari should only be allowed in cases where the fine was over five dollars, intended that in cases where the fine was under that sum, the judgment should be final: Surely it did not contemplate that the simple & plain way of correcting the mistakes of a false judgment by appeal should be taken away and a writ of prohibition substituted in its stead: In denying the appeal in such cases, the law in effect declared that the judg

ment of the Mayor should be final: It is compe tent to the Legislature to make such a judg ment final and having done so it is the ~~duty~~ duty of the courts to respect their will: this being so it is unnecessary to determine whether ~~whether~~ ~~wh~~ fresh fish is wild game, or whether the Mayor exceeded his authority in punishing the plaintiff for purchasing fresh fish out of the market place during market hours: but we cannot understand how the Mayor can be said to have exceeded his jurisdiction: If the fine had exceeded five dollars it is not denied but that the party might have appealed: this shows that an appeal was the appropriate remedy for correct ing the false judgment of the Mayor, and the appeal being denied by law shows that the gen eral assembly designed that in this case his judg ment should be final: It is hard to conceive how the question of jurisdiction can be made to depend on the fact whether the judgment was right or wrong: the Mayor undoubtedly had authority to decide whether the ordinance had been viola tated and after he has determined it, how can it be said he had no jurisdiction: according to the argument the court had to decide the case before its jurisdiction could be ascertained: If it was of opinion in favor of the plaintiff it had jurisdiction, if of opinion against him it had

none: In the multiplied number of courts of limited jurisdiction in the English system of juris~~dic~~prudence whose powers are regulated by custom & prescription instances may possibly ~~apply~~ be found which would warrant the application of the enforcement indulged in ~~in the case of~~ by the plaintiff in the case before us, but none can be found where the superintending court has interfered where there was as clear intimation of an act of parliament that the judgment of the inferior court should be final

J. Ewing concurring judgment reversed

W. Scott

Werthemeier
vs
Mayor &c. of the
City of Boonville

Recd

filed March 10 1869
Wm E Duncomb
Clerk

Register Office
City of Bonville Mo
June 21st 1858

The following is a copy of a resolution passed by the Board of Councilmen the the City of Bonville Mo. on the 21st day of June 1858.

Whereas prosecutions against Morris J Wertheimer and others were heretofore instituted before the Mayor of the City City for a supposed violation of the market laws in purchasing Cat fish, upon which prosecutions, writs of prohibition have been issued from the Cooper Court of Common Pleas, and it being the opinion of this Council that said matters should not be prosecuted any further, therefore

Be it resolved that the Mayor of the City and all others be and they are hereby instructed to stop all further proceedings in the said prosecutions and that the same be permitted to remain as they now stand.

The vote being taken on the above resolution, those voting in the affirmative were Messrs Plant, Williams and Wooley, in the negative Messrs Howard and Cope, Mr O, Brien at his request, having been excused from voting; the resolution passed.

And at the next meeting of the Board of Councilmen, July 5th 1858, all the members being present, upon motion of Thomas Plant, he having voted in the affirmative at the last meeting of the Council, the vote on the above resolution was reconsidered; Mr O, Brien now moved that the resolution pass, the vote being taken on said motion, the same was vacated, and the resolution was rejected; those voting in the affirmative were Messrs O, Brien and Wooley, in the negative, Messrs Howard, Plant and Cope,

Mr Williams declined voting, the

I, James Thomson, Register of the City of Boonville Mo, do certify that, the foregoing are the proceedings, had in the Board of Councilmen, relative to the resolution herein set forth, on the 3rd day of July 1858.

Given under my hand and Seal office at the City of Boonville Mo on this 3rd day of July AD 1858.

James Thomson
City Register

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M. Wertheimer

v }

The City of Bonville

Certificate of Register

Whereas prosecution against Morris J Werthei-imer and others were heretofore instituted before the Mayor of the City for a supposed violation of the Market laws, in purchasing Cat fish upon which prosecutions, Writs of prohibition have been issued from the Cooper Court of Common Pleas, and it being the opinion of this Council that said matters should not be prosecuted any further, therefore

Be it resolved that the Mayor of the City and all others be and they are hereby instructed to stop all further proceedings in the said prosecutions, and that the same be permitted to remain as they now stand

City Register's Office
Boonville Mo July 1st 1858

I, James Thomson, Register of the City of Boonville, do certify that the above is a true Copy of a resolution, passed by the Board of Councilmen of said City on the 19th June AD 1858, as now appears upon the Records of the City aforesaid

Given under my hand and seal of Office at Boonville Mo, this day and date above written.

James Thomson, City Register

A.

Morris J. Wertheimer defendant in error
vs. } Error to Cooper Ct. Common Pleas
The Mayor, Councilmen and citizens of the City of Boonville } plaintiffs in error

This was a proceeding begun by the defendant in error by petition to the Cooper Court of Common Pleas, for a writ of prohibition against the Mayor Councilmen, and citizens of Boonville to prohibit and restrain the said Mayor &c. from collecting a fine which had been imposed upon the defendant in error, by the said Mayor, for a supposed violation of the Market laws of said City. The plaintiff states in his petition that on the 14th day of May 1857 he was arrested by the Constable of the City of Boonville on a warrant issued by Henry E. W. McDearmon, Mayor of said City, charging plaintiff with a violation of the ordinance of said City for regulating the Markets thereof, in this: that the plaintiff "did, on the 14th day of May 1857, during market hours, at a place in the City of Boonville, other than at the Market house, purchase

fresh fish contrary to the ordinance in such case made and provided; and that afterwards on same day he was brought by said Constable before the said Henry E. W. McDearmon the Mayor as aforesaid, who then and there imposed a fine of $5. and costs upon plaintiff, amounting to $8.10.

Plaintiff further states that fresh fish is "wild game", and not required by any ordinance of said City to be sold or purchased at the Market house, but on the contrary may be sold and purchased at any place in said City, and at any hour without violating any law or ordinance of the City.

Plaintiff then suggests that the said Mayor in issuing said warrant, and causing the plaintiff to be arrested, and in imposing said fine, acted beyond his authority and jurisdiction, - the purchasing of fresh fish being no offence under any law or ordinance of said City, or any known law, and prays for a writ of prohibition &c.

The sections of the ordinance of said City, copied into the record read as follows:
Sect. 11, Any person who shall purchase, during market hours, at any other place in the City than at the Market House any article required to be sold at the Market place shall, upon conviction, forfeit and pay a fine of five dollars.
Sect. 21, Nothing in this ordinance shall be so construed as to prevent any farmer or raiser, or any person or firm who packs beef or pork, from selling his meat by the quarter, or from selling his bacon hams, shoulders and sides, or from selling spare ribs or sausage meat in the winter time, nor so construed as to prohibit the selling of venison or wild game.
(See Record page 3)

The Mayor's docket shows the complaint warrant and fine
(Record page 4)

At the May term of the Cooper Court of Common Pleas, it appears from the record (page 5) that the defendant (Mayor &c) made their voluntary appearance, before any writ issued

and demurred to the petition, which demurrer was overruled, and thereupon it was ordered that a writ of prohibition go in favor of plaintiff against defendants prohibiting them from collecting said fine until the further order of the court, and returnable to the next term, to which the cause was continued

At the November term of the Court the defendant filed answer to petition, in which it is admitted that plaintiff was arrested, and the fine imposed as stated in the petition, but in which it is denied that fresh fish is wild game, and denies that fresh fish may be sold and purchased at any place, and any hour, in the City, other than at the Market House, and denies that the Mayor acted beyond his jurisdiction and authority in imposing said fine, and denies that plaintiff is entitled to any relief by writ of prohibition.
(Page 8 of record)

At the January term of said Court, the cause being submitted for final hearing, the Court found that the Mayor acted beyond his jurisdiction

in imposing the fine on plaintiff, and the prohibition was made final

(Pages 9 & 10. of record)

The defendant in the prohibition now brings the case to this Court by writ of error.

Douglass & Hayden, for defendant in error.

1st There is nothing in the record to show that any error was committed by the Court of Common Pleas. No ordinance of the City is in evidence requiring fish to be sold at the Market house. The sections of the ordinance copied into the record, require nothing of the kind, and no error being shown, the judgment of the lower court is presumed to be correct.

Walter vs. Cathcart 18 Mo. 256
Coots vs. Morgan 24 Mo. 522
State vs. Felps 16 Mo. 384
St Louis Fir. Ins. Co. vs. Cohen 9 Mo. ~~[illegible]~~ 441
Riney vs. Valendingham 9 Mo. 816
Steel vs. McCutchen 5 Mo. 52

2d. No question of law is saved.
Smith vs. St. Francis Co. 19 Mo. 433

3. There was no motion for a new trial.
Watson vs. Pierce & P. 11 Mo. 358
Rhodes vs. White 11 Mo. 623
Thomson vs. Child 6 Mo. 162

4. The court could not take judicial notice of the city ordinance, and it was therefore to be proved like any other fact, and it was proved, but is not preserved by bill of exceptions. The clerk having copied two sections of the ordinance into the record, does not make them, or any part of the ordinance a part of the record proper.
Upon the first point see Mooney vs. Kennett 19 Mo. 551

upon the other point, that the ordinance which was matter of evidence in the Court below, should have been preserved by bill of exceptions, see Christy's Adm'r. vs. Myers 21 Mo 112. State vs Shehane 25 Mo 567. Johnson vs. Dicken 25 Mo. 580. The necessity of a bill of exceptions has been decided so often by this Court, that no particular reference to the decisions is deemed necessary.

5 But even upon the merits there is no error. If there were any ordinance of the City requiring provisions, generally, to be sold at the Market House within certain hours, and wild game among other things were excepted from the operation of the ordinance, and if ~~it can be shown that~~ fish is wild game, then the purchase of fresh fish, at any place other than the Market house, is no violation, and the Mayor in imposing a fine for an act which was no offence against any law, assumed a jurisdiction which did not belong to him, and

the writ of prohibition was therefore properly issued to prevent the injustice and oppression which he was about to commit upon a worthy and unoffending citizen of the place, over which, in an unfortunate hour for its peace and well-being, he happened to be elected Mayor. Having attained to which respectable eminence, so far beyond anything he could ever have expected, in his utter destitution of all the ordinary qualities of head and heart which should be found in the occupants of such stations, he uses the office intended as a protection to the people, as the engine of oppression and injustice. Instead of being a conservator of the peace, as his office requires, this Henry E. W. McDermon becomes an official barrator, and the instigator of strife and discord among the people whose chief executive officer he happens to be.

Fish are game.
Bacon's Abr. title game pp 431. 435, 436
437. 438, 439-442

2 Kent 348

If fish then are game, the Mayor had no jurisdiction over the act of purchasing, and when he attempted to inflict a punishment, for an act which was no offence, he was properly restrained by prohibition.
Bac. Abr. title Prohibition pp. 206. to
226-227-229-230

Weston vs. City of Charleston ~~10~~ 2 Pet. 449
United States vs. Richard Peters 1 Cond. Rep. 60

Marsden vs. Wardle 77 Eng. Com. L. Rep. 696

Bull. N.P. 219

The Court of Common Pleas had jurisdiction to issue the writ.
Local Acts of Mo. Legislature 1855, pp 75, 76, 77 and sections 1, 10, and 23 of the act establishing the Common Pleas Court

Bac. Ab. title prohibition letter A. pp 207, 208, 209

The suggestion for, and the writ of prohibition, are common law proceedings, and the writ in this case is a civil proceeding, (same reference as above)

The Common Pleas possesses the same powers as the Circuit Court.
Acts 1855 as above

See also 2 Chitty's Practice 355, 356
Crepps vs. Durden 1 Smith's L.C. 600

But the objection to the jurisdiction was not made in the Common Pleas Court, and will not be heard here.

Folden vs. Hendrick 25 Mo. 411
Batchelor vs. Bess 22 Mo. 402
Steamboat Thames vs. Erskine 7 Mo. 211
Long vs. Story 13 Mo. 4
Chamberlain vs. Smith 1 Mo. 515
Alexander vs. Hayden 2 Mo. 171
Cornelius vs. Grant 8 Mo. 59

Rev. Stat. 1855 p. 1300 sect. 33

And having filed a plea in bar, it is then too late to plead to the jurisdiction.
1 Chitty Pl. 425
2 Tuck. 254

120
1
695
740
385

M. J. Wertheimer
D. E. vs

Mayor &c of
Boonville
P. E.

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Brief of Douglas &
Hayden for deft.
in error

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