Brief for the State. The State of Kansas versus Joseph E. McNaught

Brief for the State in the Supreme Court of the State of Kansas. The State of Kansas, plaintiff versus Joseph E. McNaught, Defendant.

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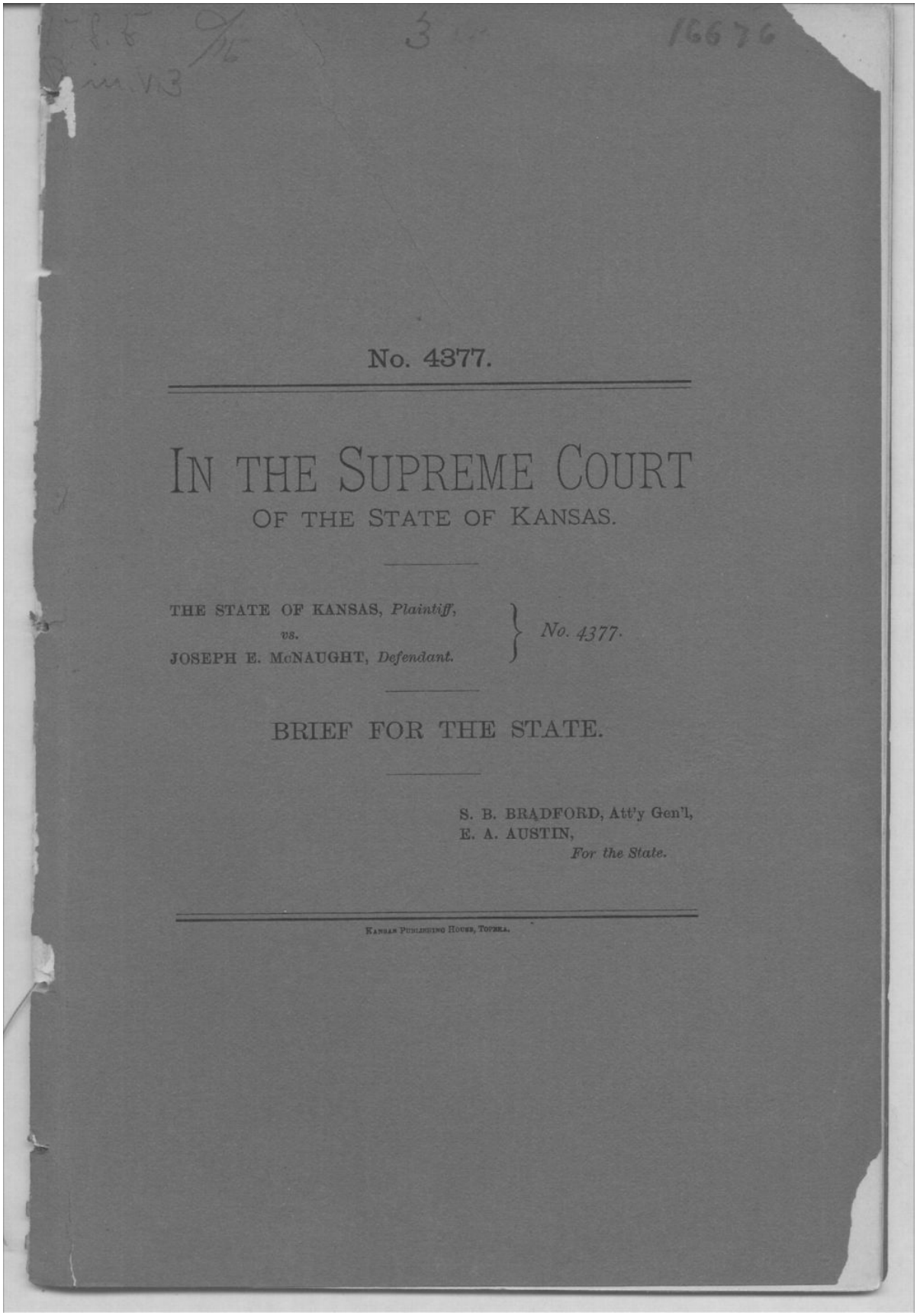

No. 4377.

IN THE SUPREME COURT
OF THE STATE OF KANSAS.

THE STATE OF KANSAS, *Plaintiff*,
vs.
JOSEPH E. McNAUGHT, *Defendant*. } *No. 4377.*

BRIEF FOR THE STATE.

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JOSEPH E. McNAUGHT, *Defendant*. } *No. 4377.*

BRIEF FOR THE STATE.

THIS is a prosecution for a violation of the prohibitory liquor law, appealed to this court from the district court of Crawford county. The complaint upon which the defendant was tried reads as follows, (omitting caption and verification:)

JOHN TONTZ, being duly sworn, on his oath says: That on or about the 6th day of July, 1885, in the city of Girard, at the county of Crawford, in the State of Kansas, one Joseph E. McNaught, then and there being, and then and there having a permit to sell intoxicating liquors as provided by law, did then and there unlawfully sell intoxicating liquors to certain persons whom he, the said Joseph E. McNaught, then and there had reason to believe purchased said intoxicating liquors for other than the excepted purposes, to wit: medical, scientific, and mechanical purposes, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Kansas.

Second. And affiant further saith, that on or about the 6th day of July, 1885, in the city of Girard, at the county of Crawford, in the State of Kansas, one Joseph E. McNaught, then and there being, and there having a permit to sell intoxicating liquors as provided by law, did then and there unlawfully sell intoxicating liquors to certain per-

sons who then and there were in the habit of becoming intoxicated, contrary to the form of the statute in such case made and provided, and against the dignity of the State of Kansas.

Third. And affiant further saith, that on or about the 6th day of July, 1885, in the city of Girard, at the county of Crawford, in the State of Kansas, one Joseph E. McNaught, then and there being, and then and there having a permit to sell intoxicating liquors as provided by law, did then and there unlawfully allow intoxicating liquors sold by him, the said Joseph E. McNaught, as a medicine and otherwise, to be drunk on his premises, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Kansas.

Fourth. And affiant further saith, that on or about the 6th day of July, 1885, in the city of Girard, at the county of Crawford, in the State of Kansas, one Joseph E. McNaught, then and there being, and then and there having a permit to sell intoxicating liquors as provided by law, did then and there unlawfully sell intoxicating liquors by then and there selling the same without having presented to him therefor the written or printed prescription of any practicing physician or any written or printed statement of the purchaser of said liquors, as required by law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Kansas.

The prosecution was instituted before a justice of the peace, where a verdict and sentence under the second count resulted, from which the defendant took an appeal to the district court. At the August term, 1885, of the district court, a trial was had, resulting in a verdict of guilty on the fourth count, which, on a motion for a new trial, was set aside.

At this trial, it appears by the journal entry (page 5½ of the record) that the defendant moved the court to try the defendant on the second count only of the complaint upon which he was convicted in the lower court, and from the judgment upon such conviction his appeal was taken to this court, which motion was by the court overruled, holding the trial in the district court was *de novo* upon the original complaint.

By the bill of exceptions, (page 9 of the bill and page 20 of the record,) it appears the defendant moved to strike said complaint from the files and discharge said defendant from custody, for the reason that said complaint was unauthorized,

and was in contemplation of law no complaint, and did not state a public offense in either count thereof; whereupon the State, by the county attorney, asked leave to amend said complaint by verifying the same himself, and by attaching thereto the authority which he gave said Tontz to make said complaint, which leave was granted, and the complaint was amended by attaching to it the letter of the county attorney, giving consent to the prosecuting witness to file the complaint, and by attaching a verification by the county attorney on information and belief. The motion to strike the complaint from the files was then overruled.

At the January term, 1886, the defendant was again tried, a verdict of guilty being returned on all four counts. The court granted a new trial on the third and fourth counts, and refused a new trial on the first and second. From the sentence thereon this appeal is taken. The only bill of exceptions is one allowed and settled at the January term, 1886.

At this second trial the defendant interposed the following motion, (omitting the caption:)

> And now comes the said defendant, Joseph E. McNaught, and moves the court to discharge said defendant from custody, for reasons as follows, to wit:
>
> 1st. Because there is no legal complaint or accusation filed in this court against this defendant.
>
> 2d. He further moves the court to strike from the files of this court certain papers thereon, purporting to be a complaint, warrant and recognizance, because there was no certification thereof as the law requires.
>
> 3d. Because he is not charged with any public offense or misdemeanor under the laws of the State of Kansas, and therefore asks to be discharged from his recognizance and the custody of this court, and defendant therefore asks judgment accordingly.

This motion being overruled for the reason that the complaint upon which trial was about to be had was a new and amended complaint, allowed by the court under sec. 22, ch.

83, Comp. Laws, the defendant filed a plea in abatement, which reads as follows, to wit, (omitting caption:)

And the said Joseph E. McNaught, in his own proper person, cometh into court here, and, having heard the first, second and third counts and charges as therein set forth read, sayeth that the State ought not further to prosecute the said counts, charges, and complaint against him, the said Joseph E. McNaught, because he sayeth that heretofore, to wit, at the August and September term of the district court of the eleventh judicial district of the State of Kansas, sitting within and for the county of Crawford and State of Kansas, at the fall term thereof, A. D. 1885, it was then and there presented that the said Joseph E. McNaught, then and there described as Joseph E. McNaught, late of Girard, in the county aforesaid, druggist, on the 6th day of July, 1885, in each of said counts, and upon the fourth count of said charge and complaint, the jury, duly impaneled, sworn, and charged to try the said four counts as charged in said complaint, rendered a verdict at the fall term of said court, A. D. 1885, in words and figures as follows, to wit: [Caption.]

We, the jury, find the defendant, Joseph E. McNaught, guilty as charged in the fourth count in the complaint in this action, in the form and manner therein charged, under the election of the county attorney thereon. Which verdict is indorsed as follows: "$326. State vs. McNaught. Verdict. Filed September 1, 1885. L. H. Kidder, Clerk District Court; by M. A. Wood, Deputy."

The said charge and complaint at the fall term of said court, upon which this defendant was tried, was the same identical complaint that he is now charged with, and upon which he was tried at the January term, 1886, and not other and different, and is in words and figures as follows, to wit:

[Here is set out in said plea exact copies of the four counts contained in the complaint upon which said defendant was tried in the justice's court, and at the August term of the District Court of Crawford county, Kansas. And then immediately after the close of the fourth count of said complaint, said plea contained as follows, to wit:]

Upon said four counts and verdict a judgment was rendered by this court, which appear by the journal and record thereof, and is here referred to and made a part of this plea, as by the records thereof more fully and at large appears, which judgment still remains in full force and effect, and not in the least reversed or made void; and the said Joseph E. McNaught in fact sayeth that he, the said Joseph E. McNaught, and the said Joseph E. McNaught so charged and acquitted as last aforesaid, are one and the same person, and not other and different persons.

And that the said misdemeanors of which he, the said Joseph E. McNaught, was so charged and acquitted as aforesaid, and the misdemeanors of which he is now charged, are one and the same misdemeanors, and not other and different misdemeanors.

And this he, the said Joseph E. McNaught, is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the three present counts and charges so as aforesaid specified. JOS. MCNAUGHT.

The State demurred to this plea, but the court on its own motion refused to receive and entertain the plea, and ordered it to be stricken from the files of the cause because the same was not verified by the party offering the plea—under sec. 162, ch. 82, Comp. Laws, which reads:

"SEC. 162. No plea in abatement or other dilatory plea to an indictment or information shall be received by any court unless the party affirming such plea shall prove the truth thereof by affidavit or some other evidence."

The defendant asked leave to verify the same, which was granted, but the plea was not refiled nor action requested thereon. (See record, p. 362.)

Upon the introduction of evidence by the State, the defendant objected to any evidence being introduced, for the reason that no one of these counts states facts sufficient to constitute a cause of action against the defendant under the laws of the State of Kansas; that there was no legal or valid complaint, or information, or charge or accusation against the defendant under any of the counts in the complaint, and that there is no complaint or legal information filed in this cause against the defendant; and asked for his discharge.

This objection and request were overruled.

After the State rested, the defendant moved the prosecution be required to elect upon which of the four counts it would rely for convictions, and also upon what particular sales or supposed transaction and offenses or offense it would rely for conviction under the count or counts it should elect to prosecute under or upon. The State elected to rely upon all the counts in the complaint for conviction.

Upon the first count it elected to rely for a conviction upon sales made by the defendant to the witness, John Sommers.

Upon the second count it elected to rely upon sales made by the defendant to one W. H. Colean.

The defendant moved to further compel the State to make its election more definite and certain, by stating what particular sale or transaction, and to name some particular sales to said Sommers and Colean upon which it would rely; which motion the court overruled.

The evidence is voluminous, and running through it are numerous objections and exceptions. The defendant, in his brief, refers to but few objections and exceptions of this kind. The first is a question found on lines 20 and 21 of page 57 of the record. The second is the question, and the answer to the question, found in the lines 13, 14 and 17 of page 63 of the record. After the conclusion of the evidence the court instructed the jury as follows (omitting caption):

Gentlemen of the Jury: You have been impaneled and are called upon in this cause to determine by your verdict herein the question of whether or not the defendant, Joseph E. McNaught, is guilty of the offenses imputed to him. He is charged by complaint filed in this court in four counts, this case coming into this court on appeal from justice's court, as follows:

(Here I read the complaint in each of its counts, and make the same a part of the statement of this case.)

Which constituted what is known in the law of this State as a misdemeanor in each of said counts, for which the defendant, if guilty, may be punished as provided by law.

All the averments of this complaint as to each of said counts are denied by the defendant.

Of this charge and crime, and each of them separately, said defendant, Joseph E. McNaught, is presumed to be innocent, and he may have the right to and does stand upon the presumption of such innocence until every material allegation of said complaint, and every ingredient of the offenses or crimes therein charged against defendant, are proved by the evidence in this case beyond a reasonable doubt; for the defendant is presumed to be innocent until the contrary is proved.

And when there is a reasonable doubt whether his guilt is satisfactorily shown, he must be acquitted.

To this extent the law is a shield and a protection to the said defendant without evidence on his part, and it so stands until broken down, or overcome by the evidence in this case, which satisfies your minds beyond

a reasonable doubt of the guilt of the said defendant, as charged in said complaint; and if you entertain such doubt in this case from the evidence therein, upon any single fact or element necessary to constitute said crime, it is your duty to give said defendant the benefit of such doubt, and acquit him.

A reasonable doubt in this prosecution is that state of the case which, after the entire comparisons and consideration of all the evidence in the case, leaves your minds in that condition that you cannot say that you feel an abiding conviction to a moral certainty of the truth of the aforesaid charge, that is, to a certainty that convinces and directs the understanding, and satisfies the reason and judgment of you who are bound to act conscientiously upon the evidence in this case, as the court has permitted it to go to you.

In considering this case you should not go beyond the evidence to hunt for doubts, nor should you entertain such doubts from mere caprice, or such as are based upon groundless conjecture.

Such doubt must arise, if at all, from a candid and impartial consideration of all the evidence in the case.

Section 1, Laws 1881, chapter 128; sec. 1, Laws 1885, chapter 149; sec. 2, Laws 1885, chapter 149; sec. 3, Laws 1885, chapter 149; sec. 5, Laws 1881, chapter 128; sec. 6, Laws 1881, chapter 128; sec. 6, Laws 1885, chapter 149; sec. 10, Laws 1881, chapter 128; sec. 14, Laws 1885, chapter 149; sec. 17, Laws 1881, chapter 128—these are the sections of the statute under which the several counts in this complaint are drawn and this action now being prosecuted, which read as follows:

(Here I read the said sections in the order above set out, and make the same a part of these instructions.)

It will be observed from the reading of these sections that the manufacture and sale, or the bartering of any spirituous, malt, vinous, fermented or other intoxicating liquors, except for medical, scientific and mechanical purposes, is unlawful and criminal in this State.

You will also observe therefrom that the only persons having authority, or authorized to manufacture, sell, or barter for those purposes are manufacturers and druggists who have permits so to do as provided in sections one and six, just read you; hence, among the important and pertinent questions for you to determine from the evidence in this case upon the first count set out in this complaint under the election of the county attorney to which your attention will be called are:

1st. Did said defendant, at the city of Girard, in the county of Crawford and State of Kansas, within the time hereinafter charged you, sell intoxicating liquors?

2d. Did he have a permit to do so, as provided by law?

3d. Did he unlawfully sell intoxicating liquors to certain persons who he then and there had reason to believe purchased said intoxicating liquors for other than medical, scientific and mechanical purposes—all as charged in the first count in the complaint in this action, in the form and manner therein charged?

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If you answer all these questions in the affirmative from the evidence in this case beyond a reasonable doubt, and so believe them to be affirmatively true, and resolve them all against the defendant, you will be justified in finding the defendant guilty as charged in the first count set out in the complaint, otherwise you should acquit him on that count.

And the important and principal questions for you to determine from the evidence in this case under and by the terms of the second count set out in the complaint are:

1st. Did the defendant, in the city of Girard, at the county of Crawford and State of Kansas, within the time hereinafter charged you, sell intoxicating liquors?

2d. Did he have a permit so to do as provided by law?

3d. Did he then and there unlawfully sell intoxicating liquors to certain persons who then and there were in the habit of becoming intoxicated as charged in the second count in the complaint in this action — all in the form and manner therein charged under the election of the county attorney, to which your attention will hereafter be called?

If from the evidence in this case under the rules herein given you beyond a reasonable doubt, you answer all these questions in the affirmative and so believe them all to be affirmatively true, and as such so resolve them all against the defendant, you will be justified in finding the defendant guilty as charged in the second count in the complaint; otherwise, you should acquit the defendant on said count.

And the important and pertinent questions for you to ascertain and determine from the evidence in this case on the third count in said complaint are:

1st. Did the defendant, in the city of Girard, in the county of Crawford and State of Kansas, within the time hereinafter charged you, sell intoxicating liquors?

2d. Did he have a permit so to do as provided by law?

3d. Did he then and there unlawfully and knowingly allow intoxicating liquors, sold by him as a medicine and otherwise, to be drank on his premises — all as charged in the third count set out in the complaint in this action in the form and in the manner therein, under the election of the county attorney on this count, to which your attention will hereafter be called?

If, from the evidence in this case beyond a reasonable doubt, you answer all these questions in the affirmative, and so believe them to be affirmatively true, and so resolve them all against the defendant, you will be justified in finding the defendant guilty as charged in the third count in the information; otherwise, you should acquit the defendant on that count.

And the pertinent and important questions for you to determine from the evidence in this case on the fourth count in the complaint are:

1st. Did the defendant, in the city of Girard, in the county of Crawford and State of Kansas, at or about the time therein charged under the rule herein given you, sell intoxicating liquors?

2d. Did he have a permit as a druggist so to do?

3d. Did he then and there unlawfully sell intoxicating liquors without having presented to him therefor the written or printed prescription of any practicing physician, or any written or printed statement of the purchase of said liquors, as provided in section three (3) just read you—all as charged in the fourth count in the complaint in this action, in the form and in the manner therein charged, under the election of the county attorney, to which your attention will hereafter be directed?

If, from the evidence in this case beyond a reasonable doubt, you answer all these questions in the affirmative, and so believe them to be affirmatively true, and so resolve them all against the defendant, you will be justified in finding the defendant guilty as charged in the fourth count set out in the complaint, otherwise you should acquit him on that count; and relative to all of said counts, I may say to you that all spirituous, malt, vinous and fermented liquors to be used as a beverage are considered and held to be intoxicating within the provisions and meaning of said act, and this is conclusive upon you, and if you believe from the evidence in this case beyond a reasonable doubt that the defendant has sold spirituous, malt, vinous, or fermented liquors, or either of them, as charged in said complaint in either count thereof.

Then as to such count as you do so believe the statute steps in and defines them and each of them so sold, if any, to be intoxicating, and it is not for witnesses to say whether such liquors, or either of them, are intoxicating or not.

The provisions of the statute are absolutely conclusive upon that class of liquors, and the effect of the same as to their and each of their intoxicating qualities, and it makes no difference what you or I or witnesses may think about it.

The Legislature have defined, and have the right so to do, what class of liquors shall be held to be intoxicating within the terms of said act, and having done so, you cannot now inquire into the effect of the prohibited class as to their being intoxicating or otherwise.

But it is not by the name the liquor is called that we are to be absolutely governed and controlled.

The question is, are they or either of them (if any) either spirituous, malt, vinous, or fermented?

If so, they come within the intoxicating class.

If they do not come absolutely within the inhibited rules and said class, if they do not come absolutely within the intoxicating class and rules mentioned in said statute, then in such case by whatever name the liquor is called, it is a question which may be inquired into—a question of fact to be found and determined from the evidence in this case, under the rules laid down, whether or not the liquor or mixture sold (if any) will, taken as a beverage, produce intoxication.

A spirituous liquor is one pertaining to or partaking of distilled spirits, particularly alcoholic spirits distilled, as whisky, gin and brandy.

A malt liquor is one made of or containing malt brewed, as beer, ale and porter.

An intoxicating liquor is one which produces or is calculated to produce when drank, either drunkenness, inebriation or a besotted mind, or a besotted condition of the person, or extreme mental excitement, or a high degree of exhilaration of the person drinking the same, dependent in a large degree as to its effect upon the temperament, constitution and condition (mental and physical) of the person drinking the same, at the time it is so taken.

The act to which your attention has just been called, aims at the evil of intemperance, the suppression of the sale of intoxicating liquors in this State to be used as a beverage, and it in no wise seeks to prevent or interfere with the sale of such liquors as are not intoxicating in their effect when used as a beverage; hence it is not every liquor which may have spirituous or malt qualities therein, as above defined, in a small per cent., that are prohibited.

The spirituous or malt qualities of such liquors, whichever they may be (if any), according to their class, must predominate, and must be sold for and to be used as a beverage, and produce in their effect, when so used or drank, intoxication.

What is known as and commonly called whisky, in the absence of evidence to the contrary is presumed to be a spirituous liquor, and what is commonly known as and called beer, in the absence of evidence to the contrary is presumed to be a malt liquor, and each of said liquors, in the absence of any evidence to the contrary, are presumed to be intoxicating liquors.

The Legislature of this State have placed the retail sale of intoxicating liquors exclusively in the hands of the druggists of the State, on account of their supposed knowledge and learning in its use as a medicine and their responsibility and integrity in the handling thereof, and the law demands at their hands that they shall honestly and faithfully carry out and observe the great trust imposed in them and upon them by the law to which I have directed your attention, and the law presumes that they do in good faith and honestly carry out its provisions and observe its terms, and that they do not knowingly violate any of its provisions; and this presumption shields the defendant in this prosecution in each count thereof until the contrary shall be made to appear by evidence (if at all). I may also say to you what the defendant may do by himself, he may do by another under his control and direction and with his knowledge and consent (if at all); hence in this case, if you believe from the evidence in this case beyond a reasonable doubt that the defendant, by any of the persons to whom your attention has been directed, and as claimed by the State to have sold as charged in these counts in this complaint, either as partner, agent, servant or employé, by the direction of this defendant, and under his control, did sell as charged in any of the counts set out in this complaint, then as to such count, if any, the act of such person, if any, is the act of the defendant, and he may and should be held accountable therefor.

I may also say to you that the probate judge of this (Crawford) county is the only person authorized by law to grant a permit to any person to sell or barter, or manufacture and sell, any spirituous, malt, vinous, fermented or other intoxicating liquors in this (Crawford) county, and he has been upon the stand and testified, and the record of his office relating to permits have been offered in evidence for the purpose of showing that the defendant had a permit to sell intoxicating liquors for medical, scientific and mechanical purposes, and I say to you that the record of permits is valid and lawful upon its face.

The defendant has offered no evidence on this point, and it is for you to determine from all this evidence, under the rules herein given you, whether or not the defendant had such a permit as charged in each count in said complaint.

To justify you in finding the defendant guilty as charged in the first count in the complaint, you must believe from the evidence in this case, beyond a reasonable doubt, that the defendant, in the city of Girard, in the county of Crawford and State of Kansas, under the election of the county attorney for this count, then and there having a permit to sell, did unlawfully sell beer to John F. Sommers, and that then and there this said defendant had reason to believe that said John F. Sommers purchased said intoxicating liquors for other than medical, scientific and mechanical purposes—all as charged in said complaint in said count; and for the purpose of determining these ingredients of this offense you may inquire from the evidence:

Did the defendant sell intoxicating liquors to said person?

If so, when, where, and under what circumstances?

Did the defendant have a permit so to sell?

Was the same sold upon a prescription and statement, or upon a statement alone?

What did the statement therefor show to be the purpose or object for which the liquor was sold?

Was the person therein named sick?

Did the defendant know that he was not sick?

Did he have good reason to believe that such person was not sick?

And for that purpose you may inquire:

How long did defendant know said John F. Sommers?

Was he acquainted with his habit?

Did he know his disease?

Did he have good reason to believe said liquor would be used as a beverage, or did he believe it would be used as a medicine?

The number of times and the frequency the said Sommers got such liquors (if at all), the purpose for which gotten, and all the facts, acts, evidence, and circumstances surrounding these alleged sales, as you have heard it on this trial, calculated to aid you in determining what the facts in this case are upon said count.

To justify you in finding the defendant guilty as charged in the second count in said complaint, you must believe from the evidence in this case, beyond a reasonable doubt, that the defendant, at the city of

Girard, in the county of Crawford, in the State of Kansas, under the election of the county attorney for this court, then and there having a permit to sell intoxicating liquors as a druggist, did then and there unlawfully sell intoxicating liquors to W. H. Colean, who was then and there in the habit of becoming intoxicated, as charged in the second count in said complaint; and for the purpose of determining these matters you may and should inquire from the evidence in this case:

Did the defendant sell intoxicating liquors, beer, April 30, 1885, to W. H. Colean, in the county of Crawford and State of Kansas and in the city of Girard?

Did he have a permit as a druggist to sell intoxicating liquors?

Was or is said W. H. Colean in the habit of becoming intoxicated?

If so, when and where, and under what circumstances, and all the matters to which I have heretofore called your attention, and all the evidence, circumstances, acts, sayings and doings of the defendant and the said W. H. Colean, calculated to aid you in ascertaining what the facts in this case are on this count, as you have heard it on the trial of this cause.

It is not necessary for the State to prove that the defendant knew that said Colean was a habitual drunkard (if any).

The statute does not make such knowledge a constituent part of the offense, and when without reference to the intent the statute forbids the doing of an act in certain circumstances, and the defendant was under no obligations to do it unless he knew it to be lawful.

If he does the forbidden act he violates the law irrespective of his knowledge or ignorance of whether said Colean was an habitual drunkard, (if he was one.)

And to justify you in finding the defendant guilty as charged in the third count in this complaint in this action, you must believe from the evidence in this case beyond a reasonable doubt, that the defendant, in the city of Girard, in the county of Crawford and State of Kansas, under the election of the County Attorney for this count, and then and there having a permit to sell as a druggist, did then and there unlawfully allow intoxicating liquors sold by him as a medicine and otherwise to be drank on his premises by J. Martin of two bottles of beer, under said election as charged in said third count, and for the purpose of determining these matters you should carefully scrutinize the evidence in this case, and the circumstance surrounding it, as you have heard it upon the trial of this cause calculated to throw light thereon, and to aid you in determining what the facts in this case are upon the charge imputed to him by the terms of this count in this complaint.

And before you would be justified in finding the defendant guilty as charged in the fourth count in this complaint, you must be satisfied and believe, from the evidence in this case, beyond a reasonable doubt, that the defendant, in the city of Girard, at the county of Crawford, having a permit to sell intoxicating liquors as a druggist, did then and there unlawfully sell intoxicating liquors—two bottles of beer—to Henry J. Wells, by then and there selling the same without having pre-

sented to him the written or printed prescription of any practicing physician, or any written or printed statement of the kind and character provided by law, to which your attention has been directed..... ..... of the purchase of such liquors from him by said Henry J. Wells, under said election, as charged in the fourth count of said complaint; and for the purpose of determining these questions, you should carefully weigh and consider all the evidence in this case as you have heard it upon this trial, calculated to aid you in ascertaining what the facts in this case are.

You will observe from the statute to which your attention has been directed, that the druggist having a permit to sell intoxicating liquors, is only authorized thereby to sell for medical, scientific and mechanical purposes; and for those purposes in the manner pointed out by statute, which, for medical purposes, for persons other than physicians and druggists, is upon the written or printed statement of the applicant, or upon the written or printed prescription made and signed by a physician lawfully practicing his profession in the county wherein such druggist may be doing business, and such written or printed statement of the applicant.

Which statement setting forth the particular purpose for which the liquor is required, the kind and quantity desired, and that it is not intended for a beverage, nor to sell or give away, and that the liquor is necessary and actually needed for the use of the patient to be named in the statement, which statement shall be signed by the applicant in each case in the presence of and attested by the druggist to whom they are presented.

And to authorize the druggist to sell for mechanical and scientific purposes, it must be upon the written or printed statement of applicant, setting forth the particular purpose for which the liquor is required, the kind and quantity desired, and that it is not intended for a beverage, nor to sell or give away, which shall be signed by the applicant in each case in the presence of and attested by the druggist to whom they are presented.

I may also say to you that the term "attested by the druggist," means the act of witnessing the statement and subscribing his name thereto as a witness. Upon either of these statements being filed, as provided in the statute to which I have directed your attention, the druggist is authorized to furnish the kind and quantity of liquor therein mentioned for the purpose therein named; and in such case, if the druggist acts in good faith, he is protected by such statement, whether the person obtaining the same thereon uses the same for the purpose therein named, or not.

The statement, if filled out under the rules which I have herein given you, is a protection to the druggist and authorizes him to fill and furnish the liquors therein mentioned if he acts as heretofore suggested to you in good faith; but such statement will not authorize the sale of intoxicating liquors to be used as a beverage, to be drank upon the premises or otherwise, and if the druggist, knowing and understanding that the

same is to be so used, and a statement obtained for that purpose and for the purpose of evading the terms and provisions of said act, on the part of the person making the statement.

And the druggist, under such circumstance such statement would be no protection to the druggist.

If it is understood between the purchaser of intoxicating liquor on such a statement and the druggist that such liquor is not obtained for medical purposes, as set out in the statement therefor, but are obtained and sold by the druggist upon such statement for the purpose of being used and drank as a beverage, a sale under, and a statement under, such circumstances will be no protection to the druggist; hence, in this case, if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant in this action, in the city of Girard, county of Crawford and State of Kansas, as charged in the first count in the complaint, having a permit to sell intoxicating liquors as a druggist, did sell the same as therein charged to John T. Sommers for other than medical, scientific and mechanical purposes as so charged upon such statement, knowing that such liquor was not obtained for the purposes therein mentioned, and knowing, or having good reason to believe, that the same was obtained to be drank as a beverage—all as charged in the complaint in said count, you would be justified in finding the defendant guilty as therein charged; otherwise, you should acquit him on that count.

As heretofore suggested, the law requires that the druggist shall only sell or barter for medical, scientific and mechanical purposes, and the law requires that the defendant shall act in good faith in the observance thereof, and if he, in any manner seeking to avoid the terms and provisions and for the purpose of evading it, knowingly and intentionally sells any of said liquors mentioned in section one of the act read you, for other purpose than those mentioned in said section, he is to be held responsible for his acts (if any) governed in this case by the election of the county attorney aforesaid.

And for the purpose of determining these questions, you may and should take into consideration the character of the place kept by the defendant, what is kept therein, the manner in which it is furnished, its make-up, and the frequency with which the person or persons obtained intoxicating liquors, if at all obtained, the same.

The purposes, or pretended purposes, for which the liquors were sold.

Is it a specific for such purposes?

The physical or mental condition of the person obtaining the same.

The means of knowledge (if any) which the defendant had for knowing the purposes and objects for which the liquor (if any) was obtained, the place where drank, the frequency drank, the quantity obtained, and all the circumstances and evidence surrounding these alleged transactions complained of calculated to throw light upon the guilt or innocence of the defendant of the charges preferred against

him by the counts in this complaint, each count separate by itself, under the election of the county attorney.

I take it that the term "in the habit of becoming intoxicated," as used in the second count in the complaint, is equivalent to and means habitual drunkard, which is defined to be "one who habitually drinks to excess, one who uses intoxicating liquors immoderately."

The law presumes that the party obtaining intoxicating liquors on a statement acts honestly and obtains the same for the purposes therein named, and that he does in all things observe the provisions of the law, and this is to stand until it is overcome by evidence, as shown by the statement itself or other evidence offered on this trial, which satisfies your minds beyond a reasonable doubt that such is not the case, or, in other words, overcomes this presumption.

Each sale of any of the liquors mentioned in section one of said act, for other than the purposes therein mentioned, is a violation of the provisions thereof, whether the sale be by the drink, bottle, or otherwise; each party is responsible and liable for his own acts, and his own acts alone, except as herein modified.

The defendant is not liable nor responsible for the acts of R. F. Johnson, E. Mills, O. Q. Chaflin, or C. H. Howard, unless they were in his employ as agent, servant, clerk or employé, acting under his direction and control and with his knowledge and consent in what they did, as brought within the terms of the election of the county attorney, to which your direction will be called.

But a sale of liquors (if any) prohibited by law at the establishment or place of business of the defendant (if any) by an agent, servant, or clerk of and in the employ of the defendant (if any) usually employed in conducting his business (if any one), is *prima facie* evidence that such sale was made with the knowledge and consent of the defendant and for his use, but such presumption is not conclusive, and if such sale if any is made by such agent, servant, or clerk (if any) was without the knowledge or consent of the defendant, and he in no way participated in or approved or countenanced the same, he should not be charged with or held accountable therefor.

The State, upon motion of the defendant, has been required to elect upon which particular transaction it will rely for a conviction in this case upon each count separately of the defendant in this action, and upon being so required to elect by the count, the State has elected on the first count to rely upon what it claims to be a sale to John F. Sommers for a conviction on this count.

And upon the second count it has elected to stand by and rely upon what it claims sales made to W. H. Colean for a conviction on that count.

And upon the third count it has elected to stand by and rely upon what it claims as a sale made to J. Martin, of two bottles of beer, for a conviction on that count.

And upon the fourth count it has elected to stand by and rely upon what it claims to be a sale of two bottles of beer to Henry J. Wells for

a conviction on that count. And in this case you must confine your investigations, deliberations and verdict thereto; and such sales, each transaction by itself, and each sale by itself; but you may consider all the other evidence in the case as you have heard it for the purpose of determining the character of the place kept by the defendant, his knowledge of the sales and transactions had therein, and whether or not he had a permit, and all the circumstances developed from this evidence calculated to throw light upon the offenses imputed to the defendant under these elections.

It is incumbent upon the State, before a conviction of the defendant can be had in this case, to establish from the evidence therein the averments of the complaint on each count therein, upon which it relies for a conviction therein, except the averments of time, which are governed by the rules of law hereinafter mentioned.

You may find the defendant guilty of the offenses with which he is charged in said complaint, or either of them, or you may acquit him of all, as you shall find the facts to be from the evidence in this case, under the rules of law herein laid down for your guidance; and if, from all the evidence in this case, there is a reasonable doubt of the defendant's guilt on either, any or all of said counts, he must be acquitted on such count or counts as you so entertain such doubt (if any).

One of the modes recognized by law for the impeaching the veracity of a witness is the introduction of persons as witnesses, who testify that they are acquainted with the general reputation for truth and veracity of the witness sought to be impeached, in the neighborhood in which he resides.

If you believe from the evidence in this case that the general reputation of the witness for truth and veracity in the neighborhood where he resides is bad, then that is a matter which you have the right to take into consideration as affecting his credibility as a witness, and the weight which you shall give to his evidence, and determine therefrom and all the evidence in this case the value of the evidence which he has given. You may disregard the same or give credit thereto, as you shall determine the fact to be as to the evidence as you have heard it on the stand.

Before you can find the said defendant guilty of either of the offenses with which he is charged in said complaint aforesaid, you must find, and be satisfied from the evidence in this case beyond a reasonable doubt, that he did in fact, in the county of Crawford and State of Kansas, and since the 1st day of March, A. D. 1885, and before the institution of this prosecution, viz., July 8th, 1885, against him, commit some one of the offenses imputed to him by the counts in the complaint, each count separate to itself — all in the form and in the manner charged in said complaint in said count.

By the laws of this State the accused is made a competent witness to testify in this case, and as such he has been upon the stand and given his version of the said offenses with which he is charged as aforesaid.

The fact that he is charged with an offense is not to affect his credi-

bility as a witness, but in considering the same you may take into consideration his situation and interest in the result of your verdict, and all the circumstances which surround him, and give to his evidence such weight as in your judgment it is fairly entitled to, under the circumstances of this case, the same as to other witnesses, and under the same rules.

Gentlemen of the jury, you are the exclusive judges of the facts established by the evidence in this case, the credibility of the witnesses, and the weight which you will give to the evidence of each of them.

It is your right to determine, from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack thereof, their interest in the prosecution or defense in this action, their means of knowing of the facts concerning which they give evidence, their temper, feeling, or bias —if any has been shown—and from all the surrounding circumstances appearing on this trial, which witnesses you will believe, and which are most worthy of credit in this action, and give credit accordingly; but if the evidence of a witness appears to be fair, is not unreasonable or improbable, and is consistent with itself, and the witness has not in any manner been impeached, then you have no right to disregard the evidence of such witnesses from mere caprice or without cause. Where you find conflicts in the evidence, it is your duty, in passing upon the credibility of the several witnesses who have testified in this case, for the purpose of arriving at a proper verdict in this action, to reconcile all the different parts of the testimony—if reasonably possible—giving to each witness credit for what the law presumes that is truthfulness concerning the facts about which he testifies, but if you cannot do so, then you are to decide for yourselves whom you will believe, under the rules herein given you.

In case you find that a witness has deliberately and intentionally or willfully and corruptly testified falsely as to any material fact in this case, you are at liberty to disregard and reject his entire evidence, but you are not obliged to do so, for a witness may be mistaken or testify falsely as to some part of his evidence, and be truthful and correct as to the remainder thereof, or be corroborated therein, and it is for you to determine, under all the circumstances of this case, how much credit you will give to the evidence of such witness and all witnesses who have testified herein, observing the rules which I have given you. Candidly consider the evidence in this case, free from passion and prejudice, fear or favoritism, and arrive at your verdict from all the evidence submitted to you, and the law thereof as you have heard it from the court.

You will designate one of your number to serve you as foreman, sign your verdict by him as you shall find it, and return it into open court.

If you find the defendant guilty, you will specify in your verdict the count or counts upon which you so find him guilty.

If you find the defendant not guilty, you will so declare by your verdict.

The defendant asks the court to give certain special instructions, some of which were given as asked, and some given as modified, and others refused. These special instructions asked for by defendant read as follows:

1st. That they cannot find the defendant guilty of any offense of which the complaining witness in this cause, John Tontz, at the time he swore to the complaint, had no knowledge.

2d. The defendant further asks the court to instruct the jury that they cannot find the defendant guilty of any offense named in this complaint unless the complaining witness, John Tontz, at the time he swore to the same, had such offense in contemplation.

3d. And further, that you cannot find the defendant guilty of any offense charged in the complaint unless the prosecuting witness had the same in view when he swore to complaint.

Which said instructions were given, with the following modification:

And relative to each of said instructions the court saith to you that the law presumes in the first instance that said Tontz had knowledge of, contemplated and had in view each of these offenses at the time he verified said complaint by his affidavit, and this presumption stands until there is a reasonable doubt thereof from the evidence in the case as you have heard it upon this trial; and in order to constitute such knowledge, contemplation and view he need not have necessarily had actual view of a violation.

If he had the same partly from sight and partly from examination of the records, books or papers of the defendant, or either, or from any other source it is sufficient knowledge.

Contemplation and view if he saw fit to do so, and thereon to verify said complaint by his oath.

Given as modified, and the defendant excepts.

And further, you cannot find the defendant guilty of any offense, of which the prosecuting witness had merely hearsay knowledge. . . .

(Refused, and excepted to by the defendant.)

And further, you cannot find the defendant guilty of any offense of which the prosecuting witness had only information and belief founded thereon.

(Refused, and excepted to by the defendant.)

Before you can find the defendant guilty of any offense of which he is charged, you must find from the evidence that he had some personal knowledge thereof, that is, of the offense of which you may find him guilty.

(Refused, and excepted to by the defendant.)

That a clerk selling under a permit is not selling as the agent, clerk or employé of any other person, but is selling upon his own responsibility, and his partner or employé cannot be convicted for a sale so made.

(Refused, and excepted to by the defendant.)

2d. The court instructs the jury that when a person takes out a permit before the probate court or judge of said probate court and is employed by a druggist as clerk or employé, he, the clerk or employé, is responsible and not the employer for any violation of the prohibitory law, or any other law, unless with the consent or order of said employé, or his said employer's knowledge.

(Given.)

The court further instructs the jury that if any clerk, agent or employé of the defendant was a druggist at the time of the alleged offense, and had a permit to dispose of intoxicating liquors in accordance with the provisions of the statute, and made sales according to the statute, then such a person having a permit, and selling liquors thereunder, was not acting as the clerk, agent or employé of the defendant in making such sales, and, therefore, in this disposition of liquors, was not acting as the clerk or agent of the defendant in the ordinary line of his duty

(Refused, and excepted to by the defendant.)

ARGUMENT.

The first question raised in the record on this appeal is, whether the court erred in overruling the motion to discharge the defendant, and to strike from the files the complaint made and filed by the defendant at the last trial?

The complaint upon which trial was about to be had and which it was then moved to strike from the record, is set out in full in the first part of this brief, excepting the verifications. In the bill of exceptions it is stated as follows:

Be it remembered, that the prosecution was instituted on the 8th day of July, A. D. 1885, before one W. B. Crawford, a justice of the peace in and for the city of Girard, county of Crawford and State of Kansas, and that to institute the same the following complaint was filed with said justice on said day, in the words following, to wit. [Here comes copy of complaint as herein set forth.]

And thereupon said justice of the peace issued a warrant for the arrest of said Joseph E. McNaught, and said McNaught was duly arrested on said warrant, brought before said justice of the peace, and tried for said offense by a jury, as shown by the transcript of the justice here following, and being found guilty by the jury, as charged in the second count as charged in the complaint, the said justice pro-

nounced judgment on the verdict of the jury, as shown by said transcript, from which judgment of the said justice of the peace said defendant appealed to the District Court of said county in due form of law, and thereupon transmitted said complaint and all the papers in said cause to the clerk of the District Court of said county, whereupon said clerk indorsed on said complaint:

"No. 326.—Filed July 22, 1885.—L. H. KIDDER, Clerk of the District Court."

By the foregoing it is evident that the complaint was identified as the original complaint filed before the justice.

The language of the bill of exceptions is, that the appeal from the justice is in due form of law, and that the *said* complaint and all the papers in said cause were transmitted to the clerk of the district court, who indorsed thereon the file-marking.

The certificate of the justice to the transcript is as follows:

"I, W. B. Crawford, do certify the above and foregoing to be a true and correct copy of the proceedings had by and before me in the above entitled action, *this day by me transmitted to the clerk of the district court of Crawford county*, TOGETHER WITH ALL THE PAPERS IN THE CASE.

"July 22, 1885. W. B. CRAWFORD, *Justice of the Peace.*"

This is a very different record from that in the case of the *State v. Anderson*, 34 Kas. 116, which begins: "Be it re-"membered, that on a certain day, the following papers were "filed in the office of the clerk of the district court of Cloud "county, to wit"—no showing being made in the record where the paper entitled "complaint" came from, and nothing in the certificate attached to the transcript which formed one of the papers, that in any manner certified or identified the accompanying "complaint" as one of the original papers filed in the case mentioned in the transcript.

The law providing for appeals from the justice of the peace does not prescribe any form of certificate. It says: "The justice from whose judgment the appeal is taken shall "make return of the proceedings had before him, and shall "certify the complaint and warrant, together with all the recog-

"nizances, to said district court." Any form of certificate attached to the transcript or to the papers, is sufficient.

In this case, both the certificate of the justice attached to the transcript, and the bill of exceptions, show that the original complaint was duly certified and transmitted by the justice to the district court.

Prior to the time of the filing of the motion to discharge the defendant and strike the complaint from the files, it had been amended by being verified by the county attorney.

Sec. 22, ch. 83, Comp. Laws, authorizes the filing of a new complaint in the district court. The complaint had all the elements and requisites of an information. It was verified by the county attorney. The reason for the decision of this court in the case of *The State v. Anderson* (17 Kas. 89) does not exist. All doubt as to the charge preferred against the defendant was eliminated. It was absolutely certain that the defendant was tried upon exactly the charge preferred against him. There was, in fact, a new complaint, such as was suggested in that case as proper.

We therefore contend that this case does not come within the decision in the case of *The State v. Anderson* in 17 Kas., nor the decision in the case of *The State v. Anderson* in 34 Kas. The complaint *was* certified by the justice, in substantial conformity with the law, and the complaint which the defendant at this time moved to strike from the record was a new and amended complaint. The motion to discharge, and to strike from the files, was therefore properly overruled.

The next question arises over the action of the court upon the plea in abatement, and we contend first, that the court did not commit error in striking the plea from the files. Sec. 162 of criminal code is direct authority for its action. "No plea in abatement, . . . shall be received by any

"court unless the party offering such plea shall prove the "truth thereof by affidavit or some other evidence."

But if the action taken was not exactly the proper course, no substantial right of the defendant was prejudiced thereby, and he has no cause to complain. His plea, while termed a "plea in abatement," was really a plea in bar. All that was presented was as to the effect of a prior proceeding in the case. Upon this, (as was stated by this court in the case of *The State v. Bowen*, 16 Kas. 477,) no testimony was required, because the proceedings of record had in a case are always taken judicial notice of. It was a question of law as to the effect of a certain verdict which it was proper for the court to determine. And if the records show any variance with the allegations of that record in the plea, the court will decide the plea as the record shows and not as the pleader plead.

This plea, and the proceedings, which the court would take judicial notice of, showed that at a prior trial upon this complaint, the defendant, tried on all four counts, was found guilty under the fourth count, and that on his own motion the court set aside the verdict and granted him a new trial. The effect of the granting of the new trial results, as is very clearly stated in the statute itself, in placing the parties in the same position as if no trial had been had.

In *The State v. McCord*, 8 Kas. 232, on an information charging murder, at a first trial, McCord was found guilty of manslaughter in the third degree. He moved the court to set aside the verdict and grant him a new trial, which was done, and on the second trial he was convicted of murder in the second degree.

In the Supreme Court, the argument for the appellant was much the same as it is in this case.

"The argument in support of this position, the verdict of

'guilty of manslaughter in the third degree' on the first trial, was a verdict of not guilty as to all the higher degrees of the offense than the one of which he was found guilty; that when he moved for a new trial, he only moved for a new trial of the issue, as found against him, and therefore only waived the constitutional guarantee that he should not be twice put in jeopardy for the same offense, so far as was necessary to obtain a new trial, and that it was not necessary to, nor did he waive that constitutional right, except as to the issue found against him."

But the court in the McCord case held that the plain letter of the law, which was constitutional, could not be overturned by any weight of decisions from other states, and that in this state, the necessity of the defendant went so far as to place the parties in the same position as if no trial had been had. In the case of *State v. Rust,* 31 Kas. 509, the case in 8 Kas. is affirmed.

In the *State v. Forner,* 32 Kas. 281, passing upon the effect of an appeal from a justice of the peace to the district court, this court says:

"By the appeal voluntarily taken by the defendant from the judgement of the justice of peace, that judgment was vacated, and the defendant was placed in the same condition as if no trial had been had. After the appeal was perfected, the prosecution was pending in the district court upon the original complaint, and the case stood in that court for trial as an original prosecution there. (*Blackshire v. Railroad Co.*, 13 Kas. 514; *The State v. Curtis*, 29 id. 384.) As the trial in the district court upon appeal must be *de novo*, the defendant took his appeal with a full knowledge of the risks thereof and of all the possible consequences; and the State had the right to offer any evidence tending to establish the charge in the original complaint, regardless of the election had before the justice of the peace. The evidence tending to show an unlawful sale to Nathan White was competent under the complaint, and was properly admitted." (See also *The State v. McCord*, 8 Kas. 232.)

We contend that under the statute, (secs. 273, 274, chapter 82, Comp. Laws,) and the cases cited, the facts stated in the plea and the proceedings had of record, of which the

court will take judicial notice, were insufficient as a plea in bar or in abatement in this case.

The objection made to the introduction of evidence need not be noticed at any length, except to reiterate the argument heretofore made. The several counts of the complaint verified by the county attorney, do state facts sufficient to constitute causes of action against the defendant. And there was a valid complaint or information. The objection was similar to a motion to quash. And the case of *The State v. Blackman*, 32 Kas. 615, is sufficient authority for the overruling of the motion and the objection.

Now with regard to the election made by the State on the trial of this case. In the instructions of the court it is shown that the election was more definite than is elsewhere stated in the bill of exceptions. The jury are instructed that under the election they must find, to support the first count, beyond a reasonable doubt, that the defendant sold beer to John F. Sommers, and that the defendant had reason to believe that Sommers purchased the same for other than the excepted purposes.

The testimony of Sommers does not fix which of the numerous sales that were made to him at the defendant's place business were so made by the defendant. His testimony reads as follows:

JOHN SOMMERS, sworn, and testified as follows:
Ques.: Where do you reside? *Ans.:* Girard.
Q. How long have you been living here? A. Four years.
Q. What is your middle initial? A. F.
Q. How long do you say you have been living here? A. Four years.
Q. Are you acquainted with the defendant in this action? A. Yes, sir.
Q. How long have you known him? A. I got acquainted with him when he first came here; I don't remember just when he came.
Q. You have known him ever since? A. Yes, sir.
Q. I want to call your attention to some statements here; state to the jury whose signature that is. A. That is mine.

Q. What did you get on that statement? A. Beer.
Q. How much? A. One quart.
Q. What did you pay for it? A. Twenty-five cents.
Q. Look at that; what did you get on that? A. Beer.
Q. What amount? A. Two quarts.
Q. What did you pay for that? A. The same as the other.
Q. Look at that; what did you get on that statement? A. Whisky.
Q. What amount? A. One pint.
Q. What did you pay for that? A. I don't remember.
Q. You paid something for it, didn't you? A. Yes, sir.
Q. What did you get on that? A. Beer.
Q. What was the amount? A. One quart.
Q. Paid the same for that as you did the other? A. Yes.
Q. Look at that. A. One quart.
Q. Just look at that and see what you got. A. One quart of beer.
Q. That? A. Half a pint of whisky.
Q. Do you know what you paid for that? A. No, sir.
Q. What did you get on that? A. I got two quarts of beer on that, and that has been changed to twelve—a figure added.
Q. You remember that statement, do you—ex. 80? A. Yes, sir.
Q. State to the jury what you got on that. A. May 12, I believe it is?
Q. What did you get on that, Mr. Sommers? A. Eleven quarts of beer.
Q. What did you pay per bottle for them? A. I don't remember what I paid for them.
Q. You paid for it, did you? A. Yes, sir; I did.
Q. (Paper handed witness.) What did you get on that? A. Two quarts of beer.
Q. How much did you get on that? A. One quart of beer.
Q. What did you get on that? A. Two quarts of beer.
Q. What did you get on that? A. Two quarts of beer.
Q. What did you get on that? A. Two quarts of beer.
Q. That one? A. One pint of whisky.
Q. You paid for all the beer and whisky that you got there, didn't you, Mr. Sommers? A. Yes, sir; I did.
Q. Where did you get this beer and whisky mentioned in these statements? A. I got it in the east-side drug store.
Q. Whose drug store is that? (Objected to, and sustained as to the form of the question.)
Q. State, if you know—do you know whose store that is? A. Howard & McNaught's at present.
Q. Who did it belong to formerly, before Howard went in there? A. It belonged to Claflin & Potter.
Q. Who, after Potter went out? A. Claflin & McNaught.
Q. State to the jury if you are acquainted with one Harrahan, who resides in Chicago, who was here about the 20th of May last? A. I am not acquainted with him.

Q. Do you know a gentleman by the name of Hannahan? A. No, sir.

Q. A friend of Higgings? A. No.

Q. State whether or not you went on a fishing excursion on about the 20th of May? A. Yes, sir.

Q. Who was with you at that time, Mr. Sommers?

(Objected to, overruled, and defendant excepts.)

Q. State who composed that party beside yourself? A. I don't remember who all was along.

Q. Name some of them. Was George Priestly one? (Objected to, overruled, and defendant excepts.) A. I don't remember whether George Priestly was along.

Q. Frank Higgings? A. I don't remember; I could not tell you.

Q. Harrahan? A. Not that I know of.

Q. T. W. Taylor? A. Not that I know of.

Q. H. Afsit, the under-sheriff here? A. I don't remember.

Q. Do you remember anybody that was along besides yourself? A. I remember there was a party of us; but who they were I don't remember.

Q. That was in May, 1885? A. Yes, sir.

Q. Along about the 20th? A. Sometime last May.

Q. State whether or not these eleven quarts of beer were obtained for that excursion?

(Objected to by the defendant.)

Q. State what it was obtained for? (Defendant objects, overruled, and defendant excepts.) A. I got it for my own use and benefit.

Q. State where you took it?

(Defendant objects, overruled, and defendant excepts.)

Q. Where did you take it? A. I took it with the parties I was with.

Q. What was it in—in bottles? A. Yes, sir.

The testimony of other witnesses, the statements returned by the defendant to the probate judge, the appearance of the witnesses and their manner while testifying, make up the proof under this count. Under this testimony, and under the rule laid down in *State v. Crimmins*, 31 Kas. 376, the election shown by the record and the instructions to have been made, was undoubtedly sufficient.

"To have required the county attorney to make his election as definite and certain as the defendant in each case desired, would have resulted in the discharge of both the defendants, although they were each unquestionably guilty, and each guilty of several offenses instead of merely one. Such a result should not be brought about if it could well be avoided. . . . That a court may exercise some discretion in requiring elections to be made in such cases as the present." (*State v. Crimmins*, supra, and cases there cited.)

Substantially the same may be said on the election made under the second count, as shown by the bill of exceptions and the instructions of the court. Colean's testimony reads as follows:

W. H. COLEAN, sworn, and testified as follows:

Q. Whereabouts do you live? A. I live in Girard.

Q. How long have you been living there? A. A little over a year.

Q. Where did you live immediately before you came to Girard? A. I lived on my farm, about six miles from here.

Q. How long did you reside there? A. Not quite two years.

Q. Are you acquainted with the defendant in this action? A. Yes, sir.

Q. How long have you known him. A. A little over a year.

Q. Do you know where his place of business is? A. Yes, sir.

Q. Whereabouts is it? A. On the east side of the square.

Q. State to the jury whose signature that is. A. It is mine.

Q. What did you obtain on that? A. A bottle of beer.

Q. How much did you pay for it? A. Twenty-five cents.

Q. Whose statement is that? A. Mine.

Q. What did you obtain on that? A. Beer.

Q. Whose statement is that? A. Mine.

Q. How much did you obtain on that? A. A bottle of beer.

Q. How much did you pay per bottle for this? A. Twenty-five cents.

Q. Look at that, and see if it is the same. A. Yes, sir.

Q. That one the same? A. Yes, sir.

Q. That the same? A. Yes, sir.

Q. That the same? A. Yes, sir.

Q. The same? A. I think the same; there are two of them.

Q. What did you pay for that? A. Twenty-five cents per bottle.

Q. What is that? What is that? A. One quart, the same.

Q. What did you pay for it? A. Twenty-five cents is what I recollect.

(*Cross-examined.*)

Q. You say you lived in the country two years? A. Yes, not quite two years.

Q. How far from Girard? A. It is six miles from here to my house.

Q. When did you move to Girard? A. The 15th day of last October a year ago.

Q. Do you know when McNaught came to this place? A. No, sir; I do not.

Q. Now, about what time did you first get acquainted with McNaught so as to personally know him? A. About the time I moved here; about the 15th of October a year ago. I got acquainted with him directly after I moved here.

Q. I ask you if you was ever in his presence when you was intoxicated, if you ever was.

(Objected to as not cross-examination, and sustained; defendant excepts.)

The defendant complains that there were thirteen sales proven under the first count, any one of which was an offense under that count; that each of the jury may have had a different sale in mind when they found the defendant guilty; and that the court erred in permitting sales other than the one relied on to go to the jury.

In his brief he shows that seven of the thirteen sales were not made by the defendant in person. Now the court instructed the jury that "the defendant is not liable nor responsible for "the acts of R. F. Johnson, E. Mills, O. Q. Claflin or C. H. "Howard, unless they were in his employ as agent, servant, "clerk or employé, acting under his direction and control and "with his knowledge and consent in what they did." The defendant claims that the evidence shows that each of these persons had a permit, and that therefore each acted for himself, under his own permit, and the defendant is not liable under any circumstances.

The evidence is that all these persons made their sales at the defendant's place of business. There is no pretense they made them elsewhere. There is some evidence that they were the clerks or servants of the defendant. It is the presumption of the law that the clerk sells with the knowledge of his principal. (119 Mass. 195; 10 Met. 259; 50 N. Y. 319.)

If the clerk made sales at the place of business of the principal, with the knowledge and consent of the principal, the principal is undoubtedly liable, even though the clerk may have an individual permit.

By the instructions, the election is definitely stated to be of a sale of beer—the sales of whisky entirely excluded.

The court has some discretion in this matter of election, as

seen by the cases above cited; and the discretion should not be exercised so rigidly against the State as to cause a failure of justice.

To avoid any injustice to the defendant, the court further instructed the jury that they must confine their investigations, deliberations and verdict thereto (to the sale elected by the State to rely upon for conviction), "but that you consider all "the other evidence in the case as you have heard it, for the "purpose of determining the character of the place kept by "the defendant, his knowledge of the sales and the transac- "tions had therein, and whether or not he had a permit, and "all the circumstances developed from this evidence calculated "to throw light upon the offenses imputed to the defendant "under these elections."

In respect to the second count by the instructions the kind of liquor and the date of the sale is fixed—April 30th, and there is only one statement of that date—(p. 153,) and the instruction with reference to other sales and circumstances excludes possibility of prejudice under that count.

Under the instructions the first objection urged is against the third question which the court says arises in the case for determination by the jury. To fully understand how the question was stated, the entire paragraph of the charge in which it is found should be considered.

Hence among the important and pertinent questions for you to det rmine from the evidence in this case upon the first count set out in this complaint under the election of the county attorney to which your attention will be called are:

1st. Did said defendant, at the city of Girard, in the county of Crawford and State of Kansas, within the time hereinafter charged you, sell intoxicating liquors?

2d. Did he have a permit so to do as provided by law?

3d. Did he unlawfully sell intoxicating liquors to certain persons whom he then and there had reason to believe purchased said intoxicating liquors for other than medical, scientific and mechanical purposes?

All as charged in the first count in the complaint in this action in the form and manner therein charged.

If you answer all these questions in the affirmative from the evidence in this case beyond a reasonable doubt, and so believe them all to be affirmatively true, and resolve them all against the defendant, you will be justified in finding the defendant guilty as charged in the first count set out in the complaint, otherwise you should acquit him on that count.

It is submitted that there is no error in this. It must be construed in connection with the election to which attention was called in stating these questions. It does not, when so construed, let in any other transaction than that elected to be relied upon.

The next objection is to the instructions on page 384 of the record. It is claimed they are wrong and misleading. We submit they are not. A druggist well acquainted with a certain man and his health and his habits, and knowing that he is not sick, and knowing that he is an habitual drinker, cannot willfully close his eyes and his senses against his common knowledge derived from the appearance, the habits, and the character of the person, and because a statement is presented in due form, make such person a sale of intoxicating liquors and escape liability. The statute is not against selling to persons *he knows* are obtaining the same for other than the excepted purposes. It is against selling to persons whom *he has reason to believe* are obtaining the same for unlawful purposes. Knowledge of the purpose is not necessary.

And under the second count for selling to persons in the habit of becoming intoxicated, the court instructed the jury that it was not necessary for the State to prove knowledge on the part of the defendant that Colean was a habitual drunkard. This was right. It is the rule of law everywhere.

Com. *v.* Boynton, 2 Allen, 460.
Com. *v.* Farren, 9 Allen, 489.
Com. *v.* Nichols, 10 Allen, 199.
Com. *v.* Mash, 7 Met. 472.
Com. *v.* Elwell, 2 Met. 160.
State *v.* Hartfiel, 24 Wis. 60.
Barnes *v.* State, 19 Conn. 398.
Farmer *v.* People, 77 Ills. 324.
State *v.* Heck, 23 Minn. 550.

In the Illinois case the following forcible language is used:

"It is unlawful to sell without a license, and he, when a license was granted to him, took it upon the condition among others that he would not sell to a minor without authority from parents or guardians. He impliedly undertook to perform the condition. It was then incumbent upon him in performing his duty to learn and know whether he was violating his undertaking. Being unlawful to sell to any and all classes, he applied for and obtained a license to sell to only a portion of the community, and he must see that he sells to only such as is permitted by his license. If a different construction is given to the statute as contended for, it would almost amount to an abrogation of this prohibition, as knowledge would be difficult to prove in a large number of cases."

In the Minnesota case the court says:

"It was not necessary to prove that the defendant knew that C. was an habitual drunkard. The statute does not make such knowledge a constituent part of the offense; and when, without reference to the intent, the statute forbids the doing of an act in certain circumstances, and a party is under no obligation to do it, unless he knows it to be lawful, if he does the forbidden act he violates the law, irrespective of his knowledge or ignorance of the circumstances mentioned."

Numerous other objections to the instructions are urged — some relating to the counts under which conviction was had, and some under which no conviction was had. But the charge is set out in full in this brief. It is the best argument that can be made. The objections are technical, and are not based on a fair interpretation of the charge.

There is nothing in this case which brings it within the rule laid down in the Brooks case. The complaint was verified by John Tontz, positively, and by the county attorney on information and belief. The record does not show that Tontz did not have the requisite knowledge or information.

The defendant relies on the silence of the record, not on what it contains. The presumptions are in favor of the regularity of the proceedings. The presumption of the law is that Tontz had knowledge of the offenses specified in the complaint. If the defendant believed that Tontz did not know of the offenses relied upon by the State, he should have made it ap-

pear by positive testimony. The *Brooks* case does not confine the proof to the testimony of the prosecuting witness; and it is not necessary for the *State* to show knowledge or information by the prosecuting witness as a foundation for the introduction of other testimony. The point invoked by the defendant in his brief under the *Brooks* case, is not raised in this case.

It is respectfully submitted that the judgment of the court below should be affirmed.

S. B. BRADFORD, Att'y Gen'l,
E. A. AUSTIN,
For the State.