Kansas State Temperance Union legal documents

Section 7, Pages 181 - 210

This bound volume contains affidavits, warrants, and legal briefs naming the State of Kansas as plaintiff for cases pertaining to the sale of alcohol. The Kansas State Temperance Union actively prosecuted the "unlawful and illegal sales of intoxicating liquors." Although Kansas was the first state to adopt a constitutional amendment prohibiting the sale of intoxicating liquors, the law was largely unenforced. This volume includes accusations that Daniel Read Anthony, Jr. knowingly allowed the sale of alcohol to occur on his property. Kansas Attorney General F. S. Jackson is frequently mentioned throughout the volume. Due to water damage, some text is illegible or difficult to read.

Date: 1907-1908

Callnumber: Temperance History Coll. #645, Box 2

KSHS Identifier: DaRT ID: 227864

Item Identifier: 227864

www.kansasmemory.org/item/227864

cers supporter of [illegible] his statements. [illegible] big business on "Smoke Joy" [illegible] drug store.

Geo. Huycke, Editor Reporter.

Strong supporter of Stubbs and Bristow. In favor of law and order. Says Grover fears public sentiment against enforcement of liquor law. No confidence in Grover.

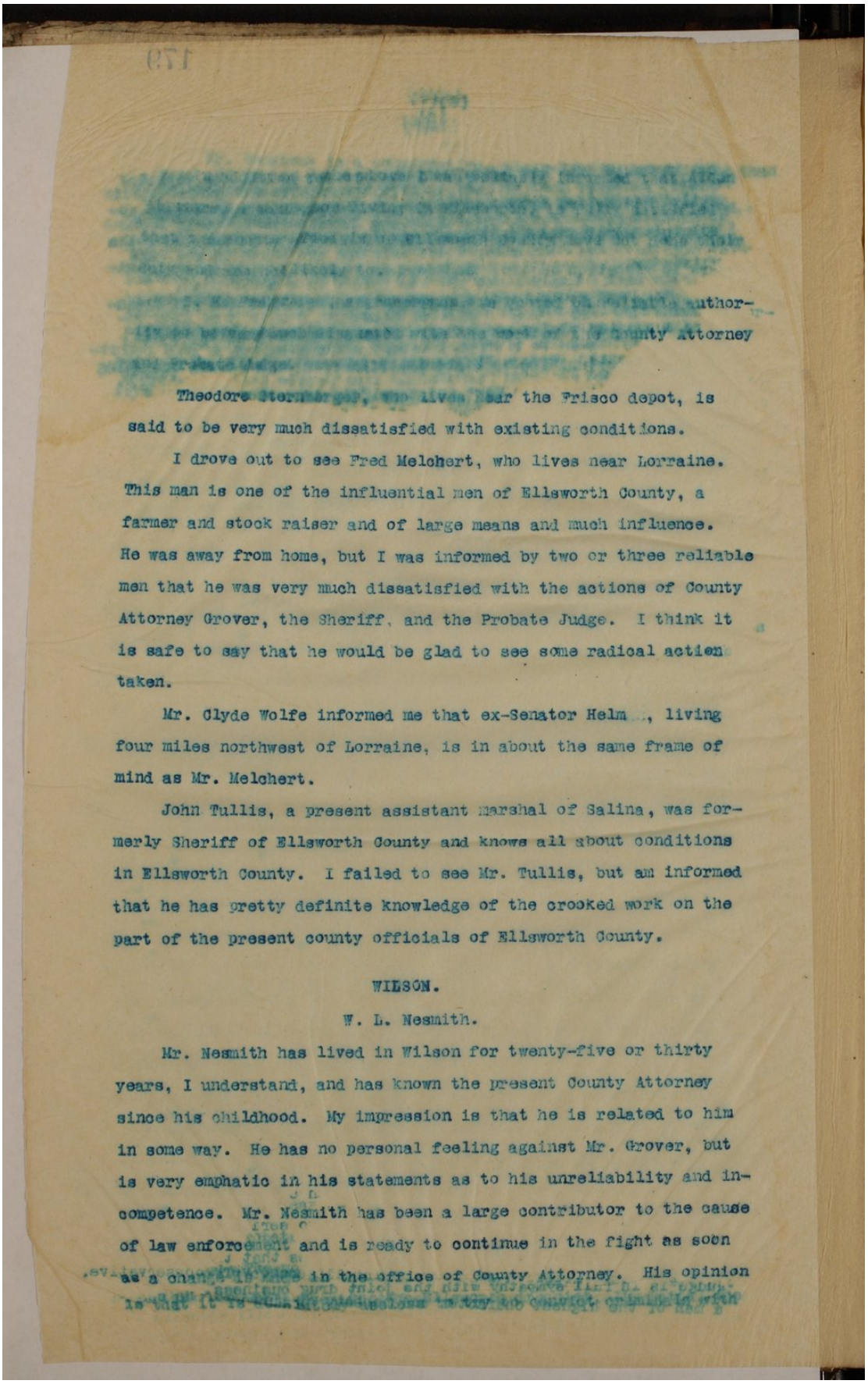
Clyde Wolfe, Lawyer. Feb. 25,08.

Mr. Wolfe states that on Feb. 24th he was in Sheriff's drug store and saw two or three men go back of the prescription case with the clerk. In a few minutes the clerk came out and rung up twenty-five cents on the cash register. The men walked out, no sign of having carried away any goods. This, Mr. Wolfe states, is an every day occurrence; and is a matter of common knowledge.

Mr. Wolfe also has personal knowledge of beer being sold openly at Black Wolf in two different places. He also states that liquor is sold openly to all comers at Holyrood at the present time. He states that he has reliable information that two drug stores and Bohemian Hall are violating the law at Wilson. James Latta, druggist, is a close friend of County Attorney Grover. The Zeiman drug company, also at Wilson, sells in violation. He states that one drug store at Kanopolis sells in violation.

Wolfe is a young attorney of good family, but by reason of his temperance sentiments he has been driven out of his law practice. Last summer he worked on a farm near Wilson and is now teaching school in the country.

He has had some experience working with County Attorney Grover and is fully satisfied that Grover will do no serious damage to the liquor men of Ellsworth County. He states that the Probate Judge is in full sympathy with the joint drug business.



...thor-...County Attorney ...

Theodore Sternberger, who lives near the Frisco depot, is said to be very much dissatisfied with existing conditions.

I drove out to see Fred Melchert, who lives near Lorraine. This man is one of the influential men of Ellsworth County, a farmer and stock raiser and of large means and much influence. He was away from home, but I was informed by two or three reliable men that he was very much dissatisfied with the actions of County Attorney Grover, the Sheriff, and the Probate Judge. I think it is safe to say that he would be glad to see some radical action taken.

Mr. Clyde Wolfe informed me that ex-Senator Helm..., living four miles northwest of Lorraine, is in about the same frame of mind as Mr. Melchert.

John Tullis, a present assistant Marshal of Salina, was formerly Sheriff of Ellsworth County and knows all about conditions in Ellsworth County. I failed to see Mr. Tullis, but am informed that he has pretty definite knowledge of the crooked work on the part of the present county officials of Ellsworth County.

WILSON.

W. L. Nesmith.

Mr. Nesmith has lived in Wilson for twenty-five or thirty years, I understand, and has known the present County Attorney since his childhood. My impression is that he is related to him in some way. He has no personal feeling against Mr. Grover, but is very emphatic in his statements as to his unreliability and incompetence. Mr. Nesmith has been a large contributor to the cause of law enforcement and is ready to continue in the fight as soon as a change is made in the office of County Attorney. His opinion is that it is...

year
ists
His co...fidg...
ceptional opp...

N. Coover, at Wilson.

Mr. Coover is a fair-minded man. He does not agree entirely with Mr. Nesmith's opinion of Grover. I think that Mr. Coover would be glad to try Grover for awhile longer. He is evidently a personal friend and would regret very much to see any appointment made which would reflect in any way on Grover's honesty or ability.

W. F. Wolfe, Carpenter Shop. At Wilson.

I did not see this man, but was reliably informed that he was active in temperance work and had spent considerable time in assisting to secure evidence against violators of the law. He is quoted as being very much dissatisfied with Grover's course and would no doubt be glad to see a change made in some way.

BLACKWOLF.

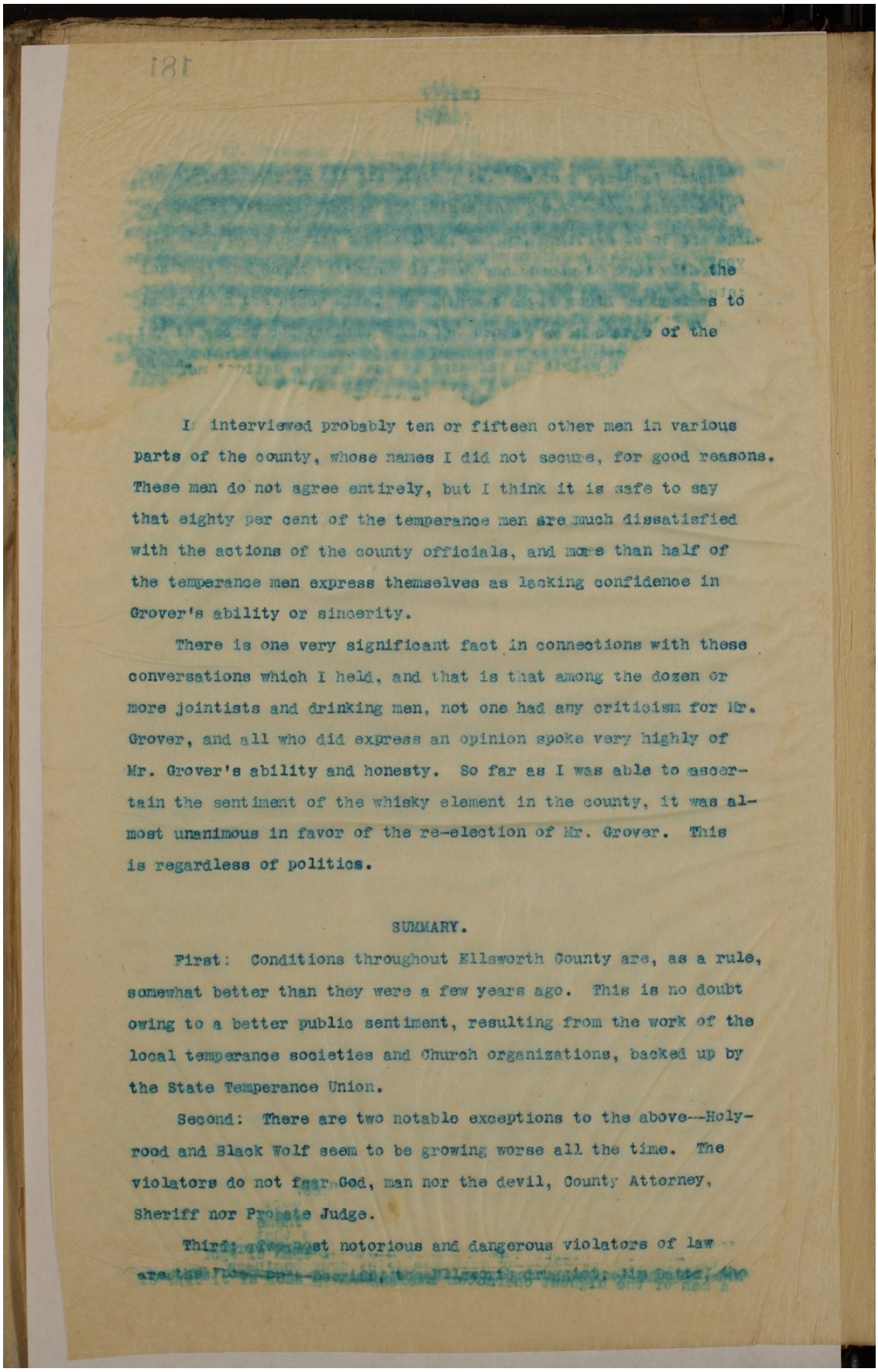
I did not visit this town personally, but have reliable information that joints are run openly very much on the same order as those at Holyrood. It is a Bohemian town and no serious attempt seems to have been made by the County Attorney to close up these vile resorts.

KANOPOLIS.

At Kanopolis the liquor is handled mainly at the big hotel. A joint drug store, which has been running recently, is now closed. It seems that gambling is carried on regularly at the hotel and liquor is sold by the proprietor. I made no attempt to secure evidence along this line through lack of time.

Dr. T. K. Griffith.

Dr. T. K. Griffith is a man of intelligence, very conservative,



181

[redacted] the
[redacted] s to
[redacted] of the
[redacted]

I interviewed probably ten or fifteen other men in various parts of the county, whose names I did not secure, for good reasons. These men do not agree entirely, but I think it is safe to say that eighty per cent of the temperance men are much dissatisfied with the actions of the county officials, and more than half of the temperance men express themselves as lacking confidence in Grover's ability or sincerity.

There is one very significant fact in connections with these conversations which I held, and that is that among the dozen or more jointists and drinking men, not one had any criticism for Mr. Grover, and all who did express an opinion spoke very highly of Mr. Grover's ability and honesty. So far as I was able to ascertain the sentiment of the whisky element in the county, it was almost unanimous in favor of the re-election of Mr. Grover. This is regardless of politics.

SUMMARY.

First: Conditions throughout Ellsworth County are, as a rule, somewhat better than they were a few years ago. This is no doubt owing to a better public sentiment, resulting from the work of the local temperance societies and Church organizations, backed up by the State Temperance Union.

Second: There are two notable exceptions to the above---Holyrood and Black Wolf seem to be growing worse all the time. The violators do not fear God, man nor the devil, County Attorney, Sheriff nor Probate Judge.

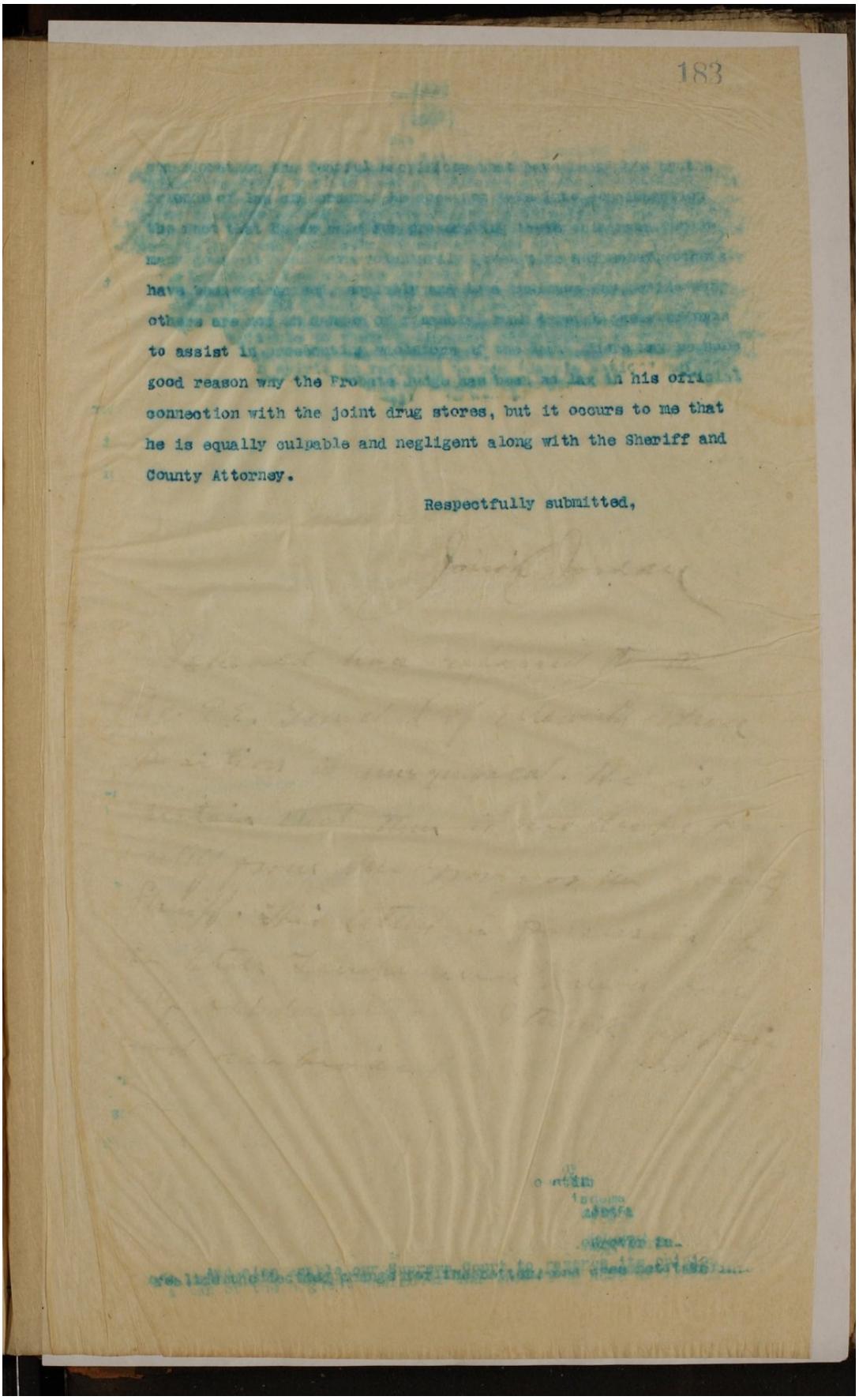
Third: [redacted]

who

usually ch
ably Christia
Not one person showed any malice in his criticism of these perjured officials. But they have reached the end of their rope. They feel helpless and discouraged. They have spent time and money, perhaps not wisely at all times, and they are worn out and are ready to throw up their hands.

Fifth: In my judgment the County Attorney and Probate Judge should be dealt with severely and "brought to time" in some way. The best way to reach this result is a problem which I am unable to solve. I am inclined to think that the County Attorney might get some results if he should receive a "prodding" from the Attorney General. Not having a personal acquaintance with the man my opinion is not worth much on this point. But I do not think there is any question in regard to the Probate Judge. His refusal to take away permits from such notorious jointists as Jim Latta and Sheriff is absolutely indefensible. The Sheriff of the County is no doubt a man of good impulses, but his constant use of whisky has incapacitated him from doing his duty properly, and his deputies seem to be generally unreliable.

It should be understood that these interviews are given freely and without any pumping or attempting to lead a man to make the statements which they did. I was somewhat prejudiced in favor of the County Attorney after talking with one or two men in Ellsworth and was hoping that I might be able to make a report which would exonerate him. But the farther I dug into the matter the worse it looked for Mr. Grover. The only excuse that I could possibly find for his action is that conditions in years past have been very bad and public sentiment has been almost universally in favor of a wide open policy. I think that Mr. Grover fails to



to assist in
good reason why the Probate Judge has been so lax in his offici
connection with the joint drug stores, but it occurs to me that
he is equally culpable and negligent along with the Sheriff and
County Attorney.

Respectfully submitted,

is good [illegible]

the enforcement [illegible]

"The annual license [illegible] state law upon the business of selling or offering for sale intoxicating liquors, within the state, by any traveling salesman who solicits orders in quantities of less than five gallons cannot be regarded, when applied to interstate transactions, repugnant to the commerce clause of the Federal Constitution, in view of the provisions of the Wilson act of August 8th, 1890 (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), that intoxicating liquors coming into the state shall be as completely under its control as if manufactured therein."

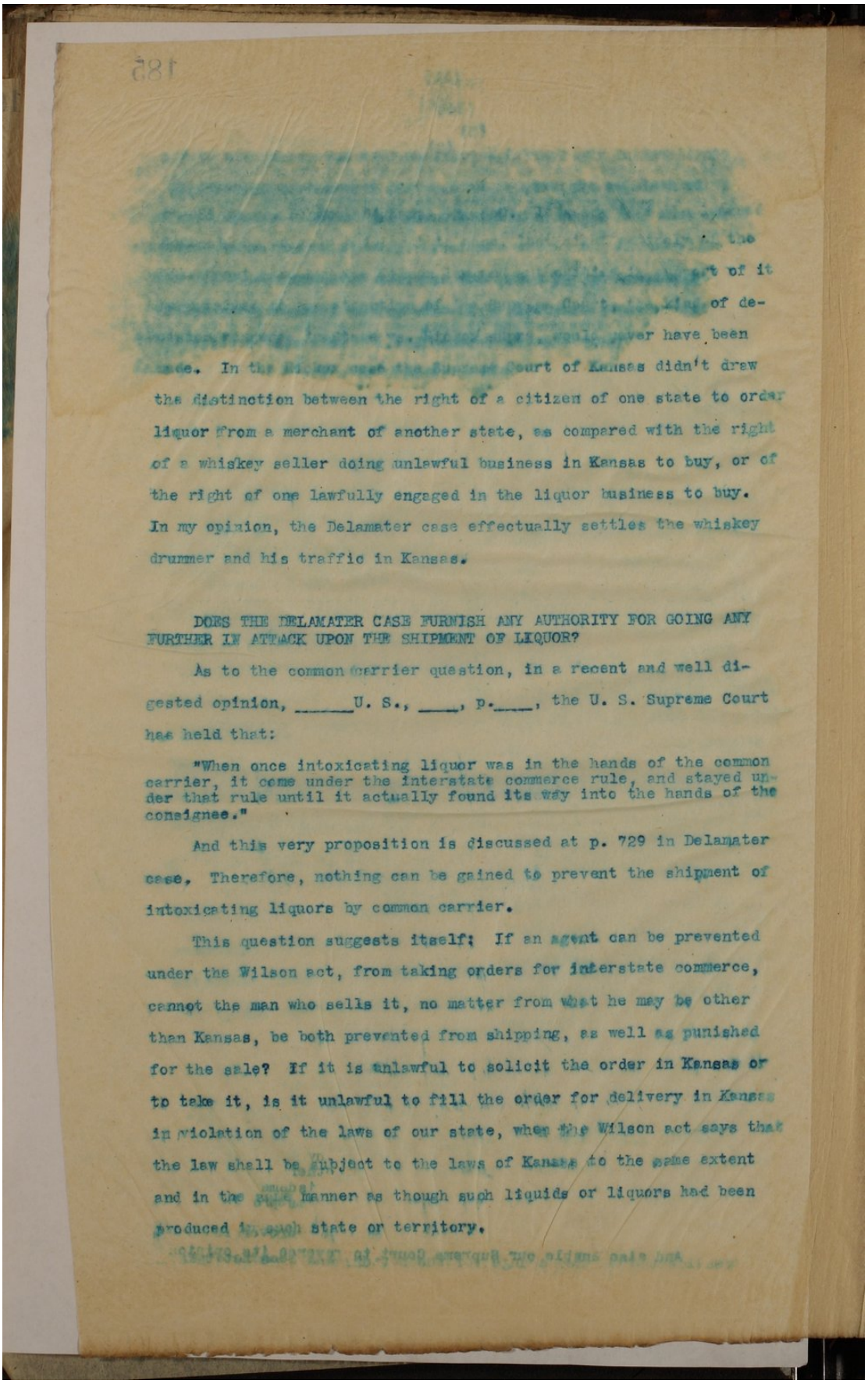
And it quotes that part of the Wilson act applicable as follows:

That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors have been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The substance of the Delamater case is that Delamater was a traveling salesman for a liquor firm in St. Paul, Minnesota, and was soliciting orders in South Dak. for liquors in quantities of less than five gallons. His mode of control was to take an order from the prospective customer, send it to Des Moines and have it approved by the house in Des Moines, and then the liquor was shipped to the citizen in South Dak. He was arrested for violating the statute of South Dak., which imposed an annual license charge upon the business of selling or offering for sale, intoxicating liquors within the state, by any traveling salesman who solicits orders by the jug or bottle, in lots less than five gallons. The Delamater case without question, makes it possible to convict any traveling salesman in Kansas, who is taking orders for liquor, and makes very effective Section 2479, General Statutes 1901, which reads as follows:

"Any person who shall take or receive any order for intoxicating liquors from any person in this state, other than a person authorized to sell the same, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished therefor as provided in this act for selling intoxicating liquors."

And also enable our Supreme Court to [illegible] decision in



[illegible] the
[illegible] of it
[illegible] of de-
[illegible] ver have been
[illegible]de. In the [illegible] Court of Kansas didn't draw the distinction between the right of a citizen of one state to order liquor from a merchant of another state, as compared with the right of a whiskey seller doing unlawful business in Kansas to buy, or of the right of one lawfully engaged in the liquor business to buy. In my opinion, the Delamater case effectually settles the whiskey drummer and his traffic in Kansas.

DOES THE DELAMATER CASE FURNISH ANY AUTHORITY FOR GOING ANY FURTHER IN ATTACK UPON THE SHIPMENT OF LIQUOR?

As to the common carrier question, in a recent and well digested opinion, _____U. S., ____, p.____, the U. S. Supreme Court has held that:

"When once intoxicating liquor was in the hands of the common carrier, it come under the interstate commerce rule, and stayed under that rule until it actually found its way into the hands of the consignee."

And this very proposition is discussed at p. 729 in Delamater case. Therefore, nothing can be gained to prevent the shipment of intoxicating liquors by common carrier.

This question suggests itself: If an agent can be prevented under the Wilson act, from taking orders for interstate commerce, cannot the man who sells it, no matter from what he may be other than Kansas, be both prevented from shipping, as well as punished for the sale? If it is unlawful to solicit the order in Kansas or to take it, is it unlawful to fill the order for delivery in Kansas in violation of the laws of our state, when the Wilson act says that the law shall be subject to the laws of Kansas to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory.

is

seems

for the sale of
otherthan a
etc.

It will be seen that this section, 2479, makes the seller equally guilty with the one who takes the order. There is a Kansas case, ____ Kans., _____P., that holds that the sale is at the place of delivery. In Brewing Association vs. Nipp, 6 K. A., p. 730, holds under certain circumstances that sale is made in Wichita, although it is shipped from another state. Also in Feineman vs. Sachs, holds, that where a wholesale liquor dealer in Missouri shipps liquor to a joint keeper in Kansas, that aids him in violating the law, and he cannot recover the price. In Glass vs. Ault, 17 Kans., 444; Snyder vs. Koehler, 17 Kans., 432, that a note taken for liquor sold in violation of law cannot be collected. In 60 Kans., p. 753, the Supreme Court holds, that the price of the whiskey may be recovered if the agent take the order, yet it was a sale in Missouri, and the purchase price could be recovered.

In conclusion it would seem however, that the Kansas Supreme Court had not given full force to that portion of the provision of 2479, making it unlawful for any person to directly or indirectly sell to any person in Kansas.

After again reading the Delamater case it is not as broad as I thought it was, and I am inclined to think that the weight of authority is against every proposition that I have suggested herein except that the whiskey drummers are out of business.

The [illegible]

v.

William Quarrels, et al.,

Defendants.

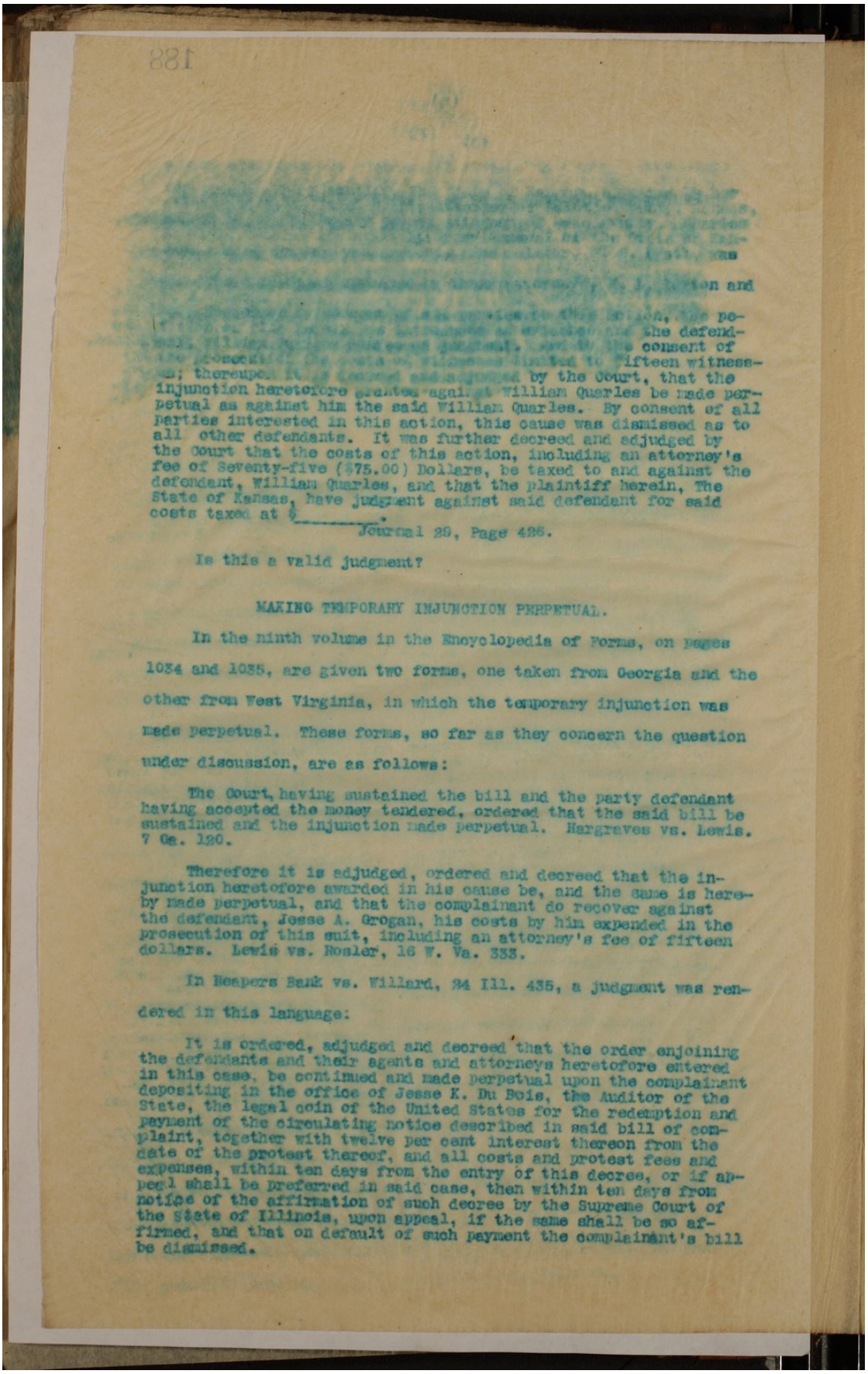
BRIEF UPON THE VALIDITY
OF THE FINAL JUDGMENT ENTERED IN THIS ACTION.

FORM OF JUDGMENT ENTERED.

On the 23rd day of February, 1907, E. C. Clark, at chambers, granted a temporary injunction in the above entitled action, enjoining the above named defendants from keeping and maintaining upon the premises therein described a nuisance, either by themselves, their agents, tenants, employes, successors, assigns, and all other persons whomsoever, and each of them, who might thereafter use, rent, purchase or occupy said premises, and enjoined and restrained them from permitting such nuisance to be kept on said premises, and from selling, bartering or giving away intoxicating liquors thereon in violation of law, and from permitting persons to resort to the said premises for the purpose of drinking intoxicating liquors as a beverage.

The order contained a direction that the words "injunction allowed" be endorsed upon the summons issued in this action. The summons was accordingly issued and afterwards served upon the defendant, William Quarrels. Quarrels also entered his appearance in the case. On the 31st day of May judgment was entered in this action in the following language:

Now on this 31st day of May, 1907, the same being a regular day of the May, A. D. 1907 Term of the District Court of Labette County, Kansas, Sitting at Oswego, this cause came regularly on



881

as

ton and

pe-
the defend-
consent of
fifteen witnesses;
by the Court, that the
injunction heretofore granted against William Quarles be made perpetual as against him the said William Quarles. By consent of all parties interested in this action, this cause was dismissed as to all other defendants. It was further decreed and adjudged by the Court that the costs of this action, including an attorney's fee of Seventy-five ($75.00) Dollars, be taxed to and against the defendant, William Quarles, and that the plaintiff herein, The State of Kansas, have judgment against said defendant for said costs taxed at $_____.

Journal 29, Page 426.

Is this a valid judgment?

MAKING TEMPORARY INJUNCTION PERPETUAL.

In the ninth volume in the Encyclopedia of Forms, on pages 1034 and 1035, are given two forms, one taken from Georgia and the other from West Virginia, in which the temporary injunction was made perpetual. These forms, so far as they concern the question under discussion, are as follows:

The Court, having sustained the bill and the party defendant having accepted the money tendered, ordered that the said bill be sustained and the injunction made perpetual. Hargreves vs. Lewis. 7 Ga. 120.

Therefore it is adjudged, ordered and decreed that the injunction heretofore awarded in his cause be, and the same is hereby made perpetual, and that the complainant do recover against the defendant, Jesse A. Grogan, his costs by him expended in the prosecution of this suit, including an attorney's fee of fifteen dollars. Lewis vs. Rosier, 16 W. Va. 333.

In Reapers Bank vs. Willard, 24 Ill. 435, a judgment was rendered in this language:

It is ordered, adjudged and decreed that the order enjoining the defendants and their agents and attorneys heretofore entered in this case, be continued and made perpetual upon the complainant depositing in the office of Jesse K. Du Bois, the Auditor of the State, the legal coin of the United States for the redemption and payment of the circulating notice described in said bill of complaint, together with twelve per cent interest thereon from the date of the protest thereof, and all costs and protest fees and expenses, within ten days from the entry of this decree, or if appeal shall be preferred in said case, then within ten days from notice of the affirmation of such decree by the Supreme Court of the State of Illinois, upon appeal, if the same shall be so affirmed, and that on default of such payment the complainant's bill be dismissed.

ordered
this Cou
against the defenda
ing his costs of the t
paid out of their testators' assets, and the cause is stricken
from the docket."

iff rec
expended, in
rial of the issue heretofore directed to be

The attention of the Court is called to Note 1 on page 1034, 9th Volume of the Encyclopedia of Forms, which reads as follows:

This form was copied from the original papers in Hamlin v. New York, etc., R. Co., 170 Mass. 548. For the bill in this case see supra, Form No. 10947.

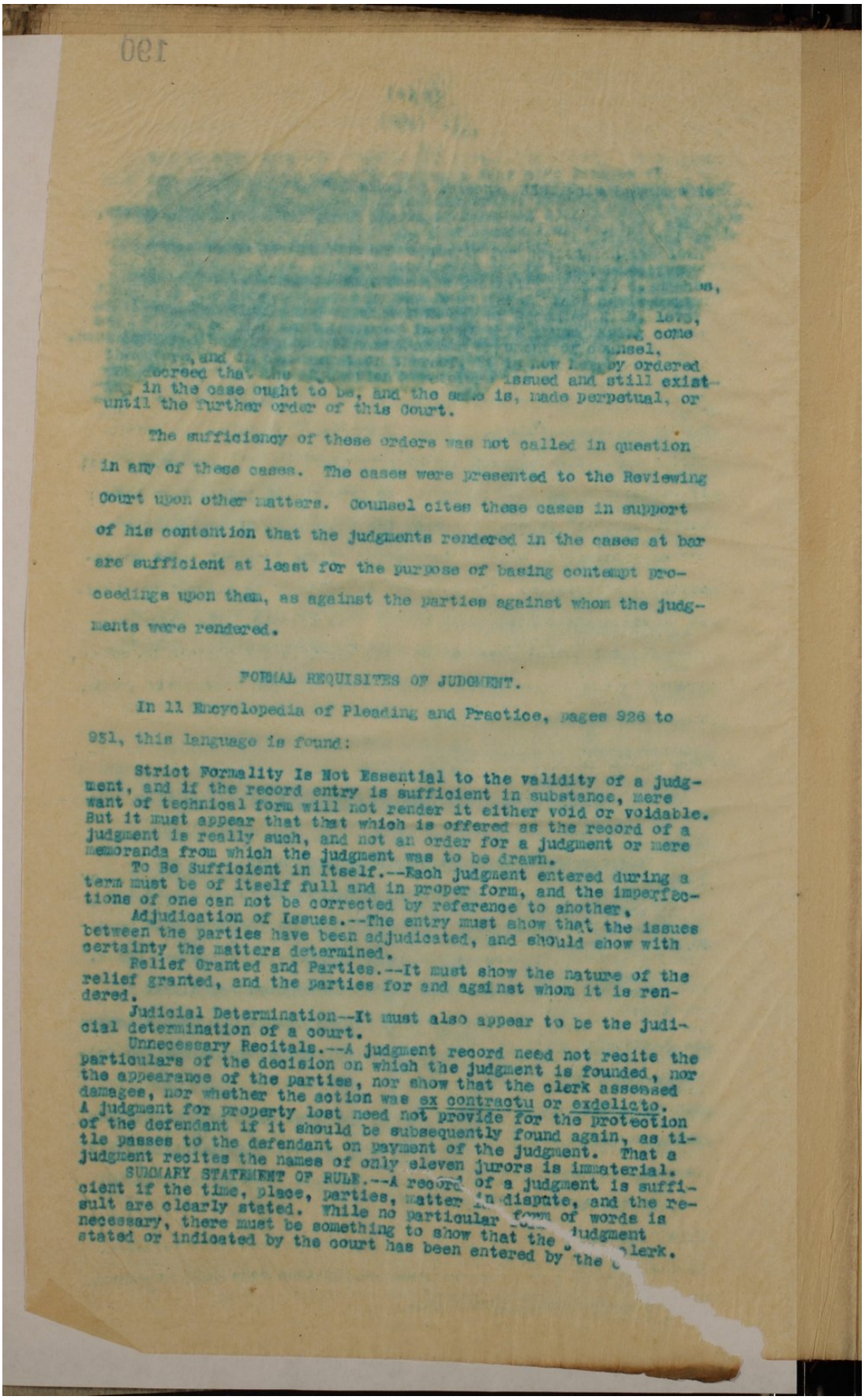
On pages 1035 and 1036 of the Encyclopedia of Forms will be found two other judgments, both taken from Missouri, in which a temporary injunction was made perpetual. In Wilson vs. St. Louis, etc., R. Co., 87 Mo. 435, cited in the 9th Encyclopedia of Forms, this language is found:

Now, at this time come the parties, by their respective attorneys, and by agreement of parties it is considered and adjudged by the court that the injunction heretofore granted in this cause is made perpetual, and it is agreed by the parties that the plaintiff shall not, by this proceeding, be precluded or prevented from pursuing his cause of action in this cause against defendant, and that defendant pay the costs of this proceeding.

Again, in MacMurray--Judge Architectural Iron Co. v. St. Louis, 138 Mo. 615, also cited on page 1035 of the 9th Volume of the Encyclopedia of Forms, this language is found:

This cause coming on to be heard a jury was waived, and the same was argued by counsel for the respective parties, and the court thereupon, against the objection of plaintiff, refused and declined to hear any testimony or to proceed to determine the amount of damages which the plaintiff claims in its petition it will sustain by reason of the change of grade therein mentioned, and thereupon, with the consent of the defendant expressed in open court, the court ordered, adjudged and decreed that the injunction and restraining order entered in this cause on May 24, 1892, be confirmed and stand as the final decree and judgment in this cause, and that the costs of this proceeding be adjudged against and shall be paid by the defendant, and that execution issue therefor.

In 37 American Digest, Century Edition, Columns 2165 and 2180, are found a number of cases cited in such a way as to justify one in concluding that the temporary injunctions were made perpetual in the same way that the temporary injunctions were made perpetual in the cases hereinbefore cited.



...come
...counsel,
...by ordered
...decreed that ... issued and still exist-
...in the case ought to be, and the same is, made perpetual, or
until the further order of this Court.

The sufficiency of these orders was not called in question in any of these cases. The cases were presented to the Reviewing Court upon other matters. Counsel cites these cases in support of his contention that the judgments rendered in the cases at bar are sufficient at least for the purpose of basing contempt proceedings upon them, as against the parties against whom the judgments were rendered.

FORMAL REQUISITES OF JUDGMENT.

In 11 Encyclopedia of Pleading and Practice, pages 926 to 931, this language is found:

Strict Formality Is Not Essential to the validity of a judgment, and if the record entry is sufficient in substance, mere want of technical form will not render it either void or voidable. But it must appear that that which is offered as the record of a judgment is really such, and not an order for a judgment or mere memoranda from which the judgment was to be drawn.

To Be Sufficient in Itself.--Each judgment entered during a term must be of itself full and in proper form, and the imperfections of one can not be corrected by reference to another.

Adjudication of Issues.--The entry must show that the issues between the parties have been adjudicated, and should show with certainty the matters determined.

Relief Granted and Parties.--It must show the nature of the relief granted, and the parties for and against whom it is rendered.

Judicial Determination--It must also appear to be the judicial determination of a court.

Unnecessary Recitals.--A judgment record need not recite the particulars of the decision on which the judgment is founded, nor the appearance of the parties, nor show that the clerk assessed damages, nor whether the action was ex contractu or ex delicto. A judgment for property lost need not provide for the protection of the defendant if it should be subsequently found again, as title passes to the defendant on payment of the judgment. That a judgment recites the names of only eleven jurors is immaterial.

SUMMARY STATEMENT OF RULE.--A record of a judgment is sufficient if the time, place, parties, matter in dispute, and the result are clearly stated. While no particular form of words is necessary, there must be something to show that the judgment stated or indicated by the court has been entered by the clerk.

of the final ... the temporary injunction ... can be ... understanding of the language used. It perpetually enjoins and restrains the defendant, William Quarrels, from doing the prohibited thing. The judgment may be irregular, and it is possible that if exceptions had been taken to the form of the judgment or the manner in which it was rendered, the Supreme Court would, in a proper proceeding, order a correction of the judgment. But no exceptions were taken. The judgment as rendered is allowed to stand. It is valid and binding upon the parties thereto. Its order is specific and certain, or can be made specific and certain by reference to the temporary injunction that had been previously granted in the action.

KANSAS CASES.

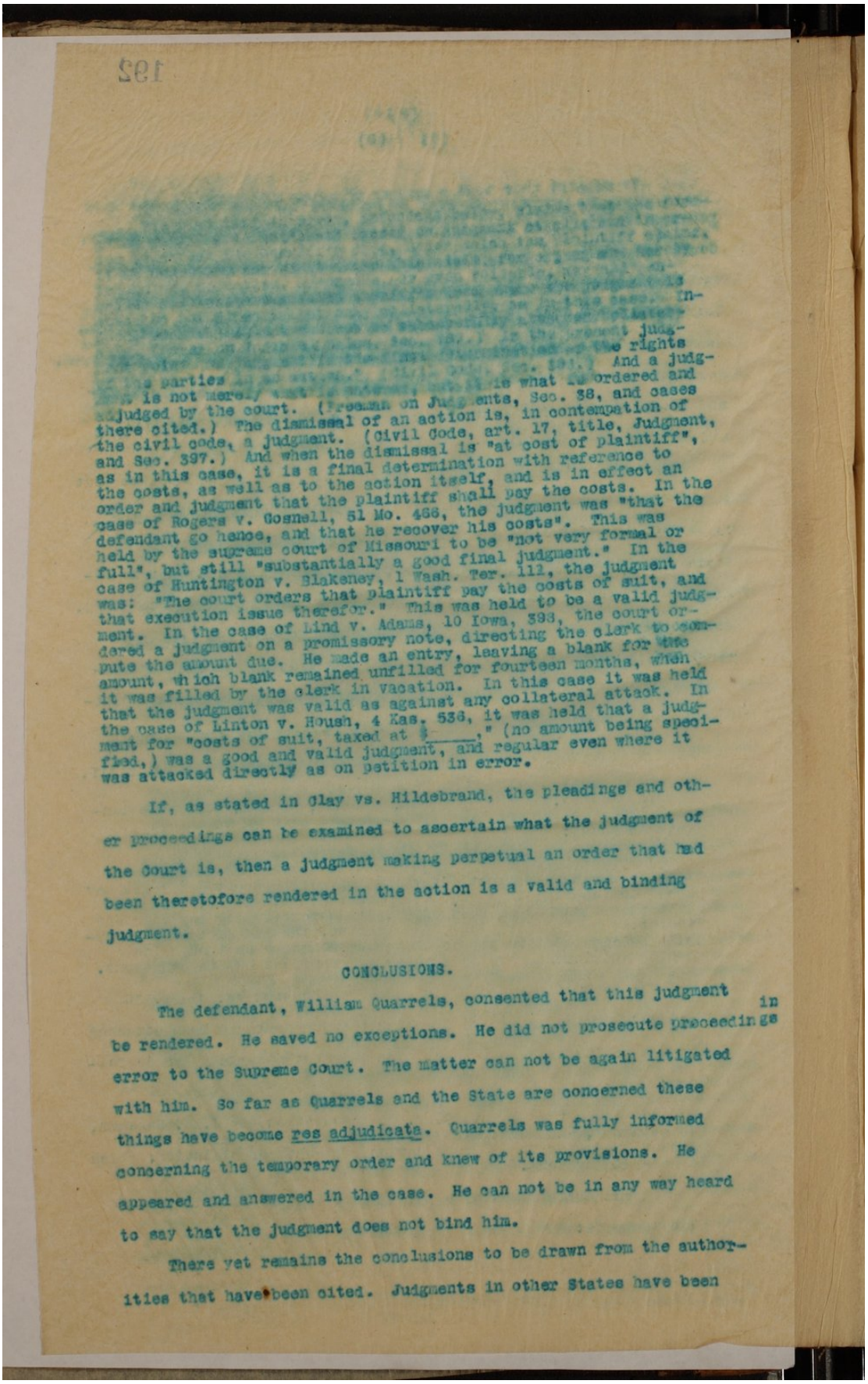
In Clay vs. Hildebrand Bros. & Jones, 34 Kan. 701, this language is found:

Wherever the entry of a judgment is so obscure as not to clearly express the exact determination of the Court reference may be had to the pleadings and other proceedings, and if, with the light thus thrown upon such entry, its obscurity is dispelled and its intended signification made apparent, the judgment will be upheld and carried into effect in the same manner as though its meaning and intent were made clear and manifest by its own terms.

The foregoing language is quoted in Houston vs. Clark, 36 Kan. 415. This was a case in which the judgment had been attacked because of its indefiniteness. The judgment attacked read as follows:

Now comes the plaintiff, C. T. Association, by J. M. Hagaman, the attorney, and moves the Court here to dismiss this action without prejudice to a future action, at cost of plaintiff; which is accordingly done.

In commenting upon this judgment, Valentine, Justice, uses this language:



set

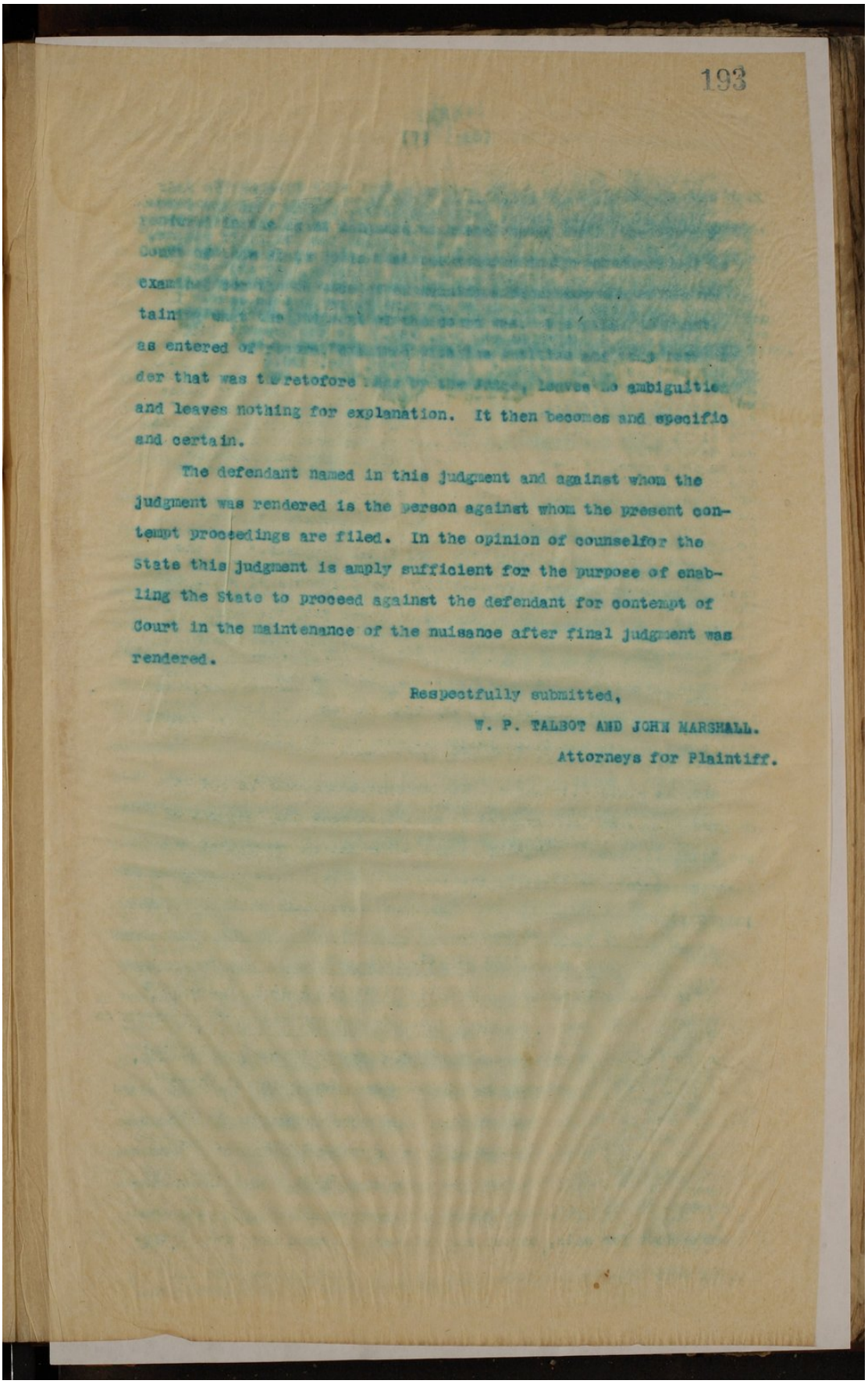
parties
is not mere
adjudged by the court. (Freeman on Judgments, Sec. 38, and cases
there cited.) The dismissal of an action is, in contemplation of
the civil code, a judgment. (Civil Code, art. 17, title, Judgment,
and Sec. 397.) And when the dismissal is "at cost of plaintiff",
as in this case, it is a final determination with reference to
the costs, as well as to the action itself, and is in effect an
order and judgment that the plaintiff shall pay the costs. In the
case of Rogers v. Gosnell, 51 Mo. 466, the judgment was "that the
defendant go hence, and that he recover his costs". This was
held by the supreme court of Missouri to be "not very formal or
full", but still "substantially a good final judgment." In the
case of Huntington v. Blakeney, 1 Wash. Ter. 111, the judgment
was: "The court orders that plaintiff pay the costs of suit, and
that execution issue therefor." This was held to be a valid judg-
ment. In the case of Lind v. Adams, 10 Iowa, 398, the court or-
dered a judgment on a promissory note, directing the clerk to com-
pute the amount due. He made an entry, leaving a blank for the
amount, which blank remained unfilled for fourteen months, when
it was filled by the clerk in vacation. In this case it was held
that the judgment was valid as against any collateral attack. In
the case of Linton v. Housh, 4 Kas. 536, it was held that a judg-
ment for "costs of suit, taxed at $_____," (no amount being speci-
fied,) was a good and valid judgment, and regular even where it
was attacked directly as on petition in error.

If, as stated in Clay vs. Hildebrand, the pleadings and oth-
er proceedings can be examined to ascertain what the judgment of
the Court is, then a judgment making perpetual an order that had
been theretofore rendered in the action is a valid and binding
judgment.

CONCLUSIONS.

The defendant, William Quarrels, consented that this judgment
be rendered. He saved no exceptions. He did not prosecute proceedings in
error to the Supreme Court. The matter can not be again litigated
with him. So far as Quarrels and the State are concerned these
things have become res adjudicata. Quarrels was fully informed
concerning the temporary order and knew of its provisions. He
appeared and answered in the case. He can not be in any way heard
to say that the judgment does not bind him.

There yet remains the conclusions to be drawn from the author-
ities that have been cited. Judgments in other States have been



(7)

Examined [illegible] tained [illegible] as entered of [illegible] der that was theretofore [illegible] by the Court, leaves no ambiguities and leaves nothing for explanation. It then becomes and specific and certain.

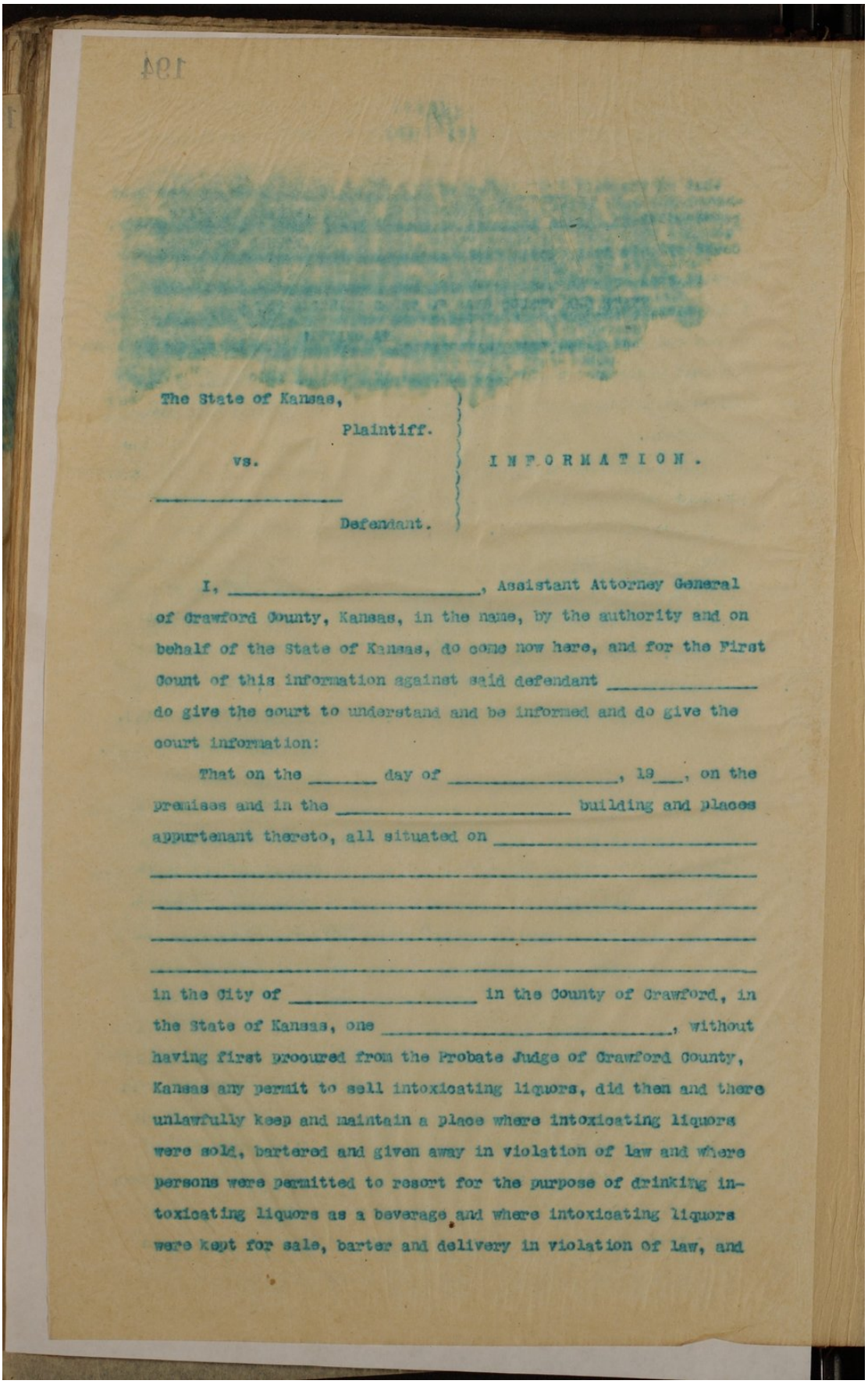
The defendant named in this judgment and against whom the judgment was rendered is the person against whom the present contempt proceedings are filed. In the opinion of counselfor the State this judgment is amply sufficient for the purpose of enabling the State to proceed against the defendant for contempt of Court in the maintenance of the nuisance after final judgment was rendered.

Respectfully submitted,

W. P. TALBOT AND JOHN MARSHALL.

Attorneys for Plaintiff.

Kansas State Temperance Union legal documents



The State of Kansas,
Plaintiff.
vs.
_____
Defendant.

INFORMATION.

I, _____, Assistant Attorney General of Crawford County, Kansas, in the name, by the authority and on behalf of the State of Kansas, do come now here, and for the First Count of this information against said defendant _____ do give the court to understand and be informed and do give the court information:

That on the _____ day of _____, 19___, on the premises and in the _____ building and places appurtenant thereto, all situated on _____

_____

_____

_____

_____

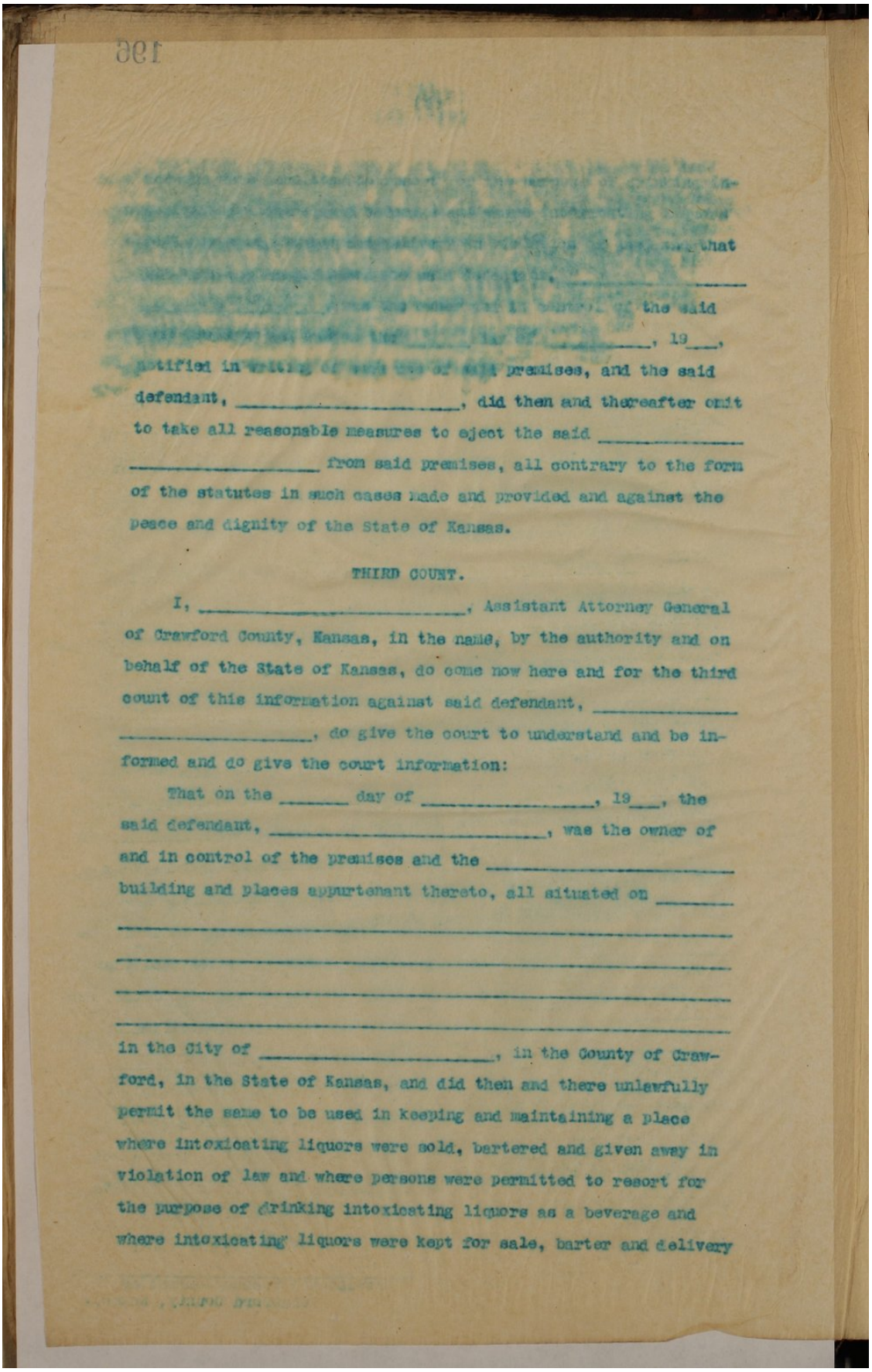
in the City of _____ in the County of Crawford, in the State of Kansas, one _____, without having first procured from the Probate Judge of Crawford County, Kansas any permit to sell intoxicating liquors, did then and there unlawfully keep and maintain a place where intoxicating liquors were sold, bartered and given away in violation of law and where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage and where intoxicating liquors were kept for sale, barter and delivery in violation of law, and

[illegible] permitted to resort for the purpose of drinking intoxicating liquors as a beverage and where intoxicating liquors were kept for sale, barter and delivery in violation of law, all contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Kansas.

SECOND COUNT.

I, _____, Assistant Attorney General of Crawford County, Kansas, in the name, by the authority and on behalf of the State of Kansas, do come now here, and for the Second Count of this information against said defendant, _____ _____, do give the court to understand and be informed and do give the court information:

That on the _____ day of _____, 19___, and on the _____ day of _____, 19___, and continuously and on divers days and times from the said _____ day of _____ 19___ until the said _____ day of _____, 19___, on the premises and in the _____ building and places appurtenant thereto, situated on _____ _____ _____ _____ _____ in the City of _____, in the County of Crawford, in the State of Kansas, one _____, without having first procured from the Probate Judge of Crawford County, Kansas, any permit to sell intoxicating liquors, did then and there unlawfully keep and maintain a place where intoxicating liquors were sold, bartered and given away in violation of law and where



that

_____ the said

_____, 19___,

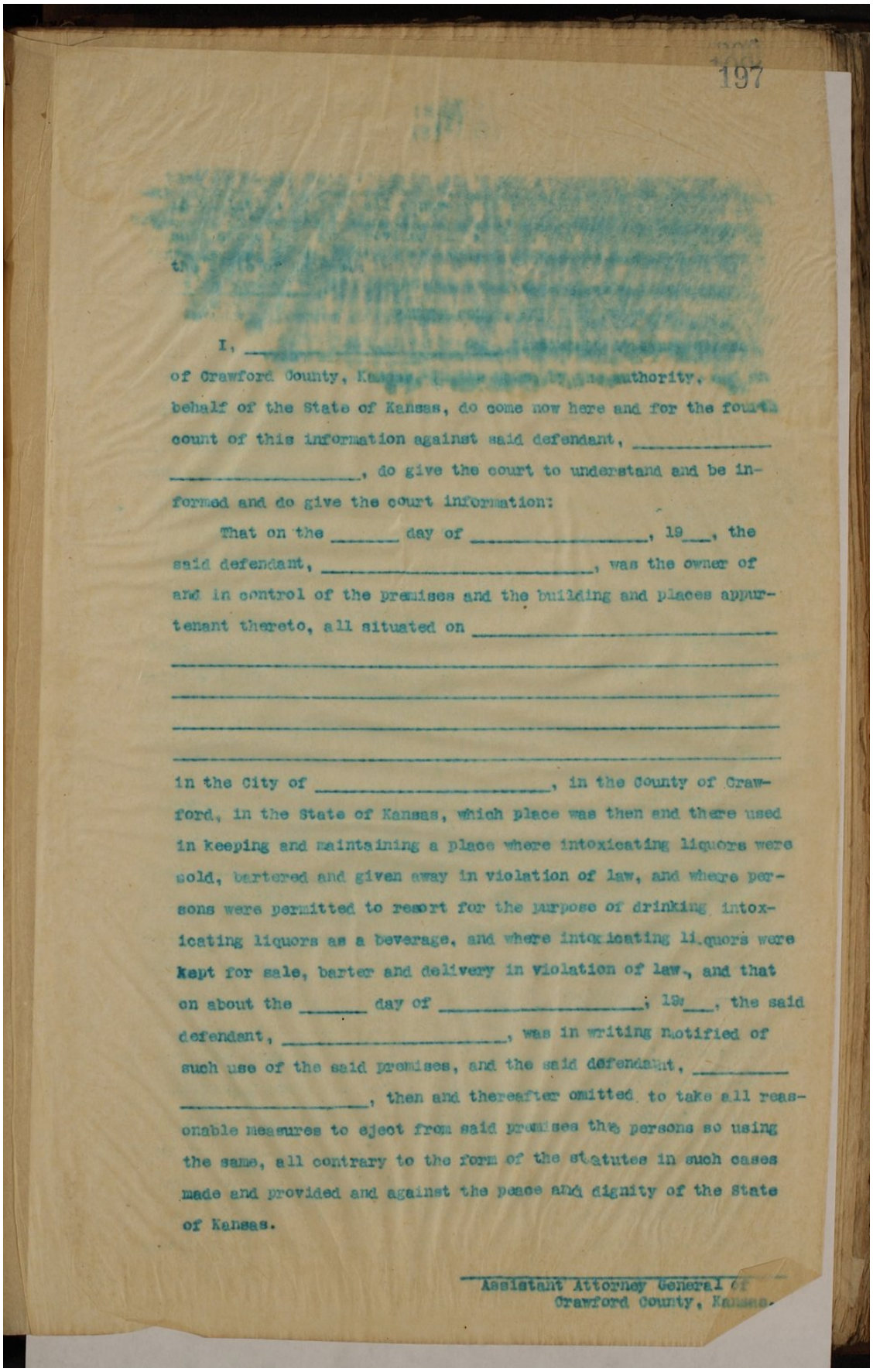
notified in writing of such use of said premises, and the said defendant, _____, did then and thereafter omit to take all reasonable measures to eject the said _____ _____ from said premises, all contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Kansas.

THIRD COUNT.

I, _____, Assistant Attorney General of Crawford County, Kansas, in the name, by the authority and on behalf of the State of Kansas, do come now here and for the third count of this information against said defendant, _____ _____, do give the court to understand and be informed and do give the court information:

That on the _____ day of _____, 19___, the said defendant, _____, was the owner of and in control of the premises and the _____ building and places appurtenant thereto, all situated on _____ _____ _____ _____ _____ in the City of _____, in the County of Crawford, in the State of Kansas, and did then and there unlawfully permit the same to be used in keeping and maintaining a place where intoxicating liquors were sold, bartered and given away in violation of law and where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage and where intoxicating liquors were kept for sale, barter and delivery

Kansas State Temperance Union legal documents



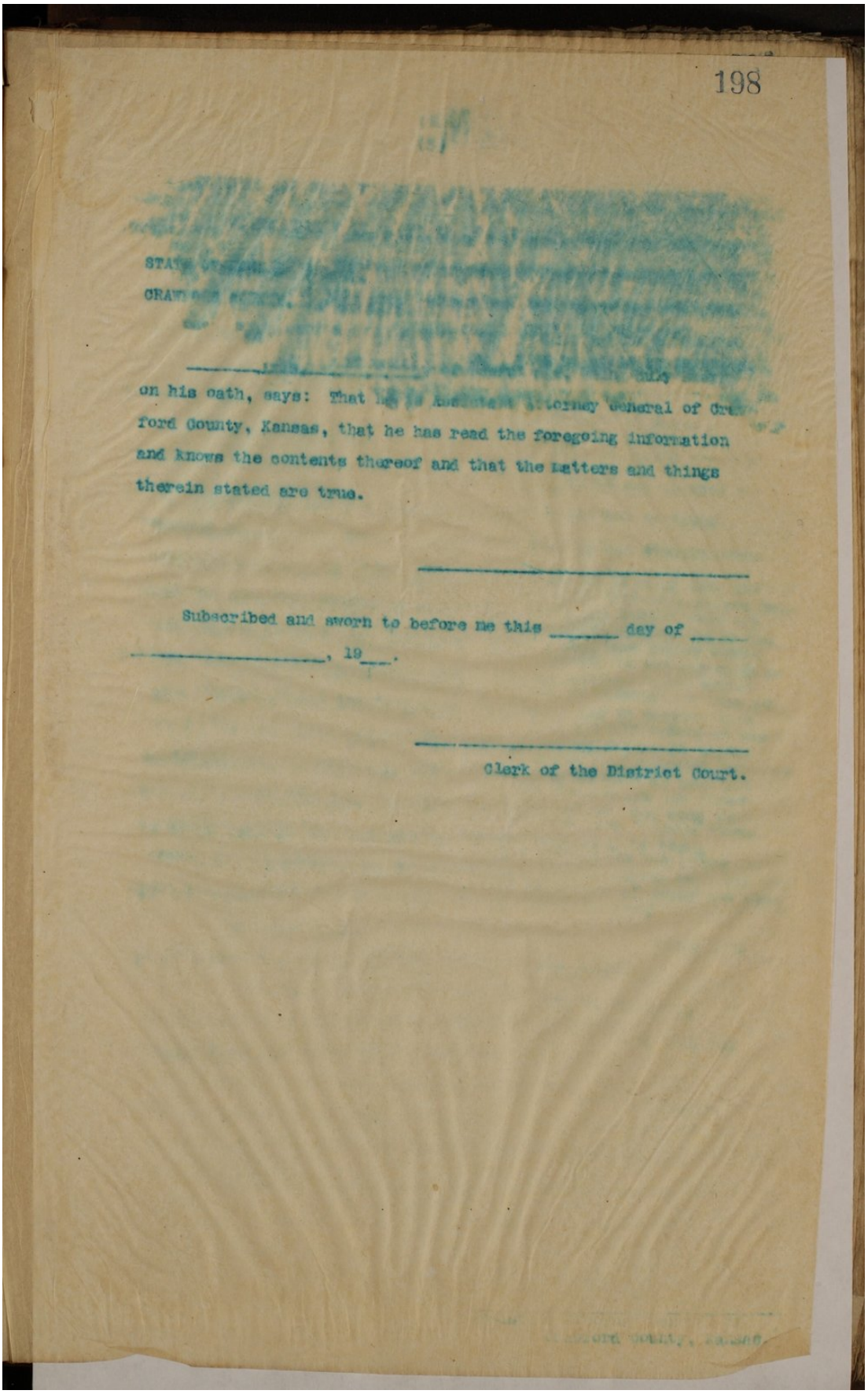
197

I, _____
of Crawford County, Kansas, [illegible] authority, on
behalf of the State of Kansas, do come now here and for the fourth
count of this information against said defendant, _____
_____, do give the court to understand and be in-
formed and do give the court information:

That on the _____ day of _____, 19___, the
said defendant, _____, was the owner of
and in control of the premises and the building and places appur-
tenant thereto, all situated on _____
_____
_____
_____
_____
in the City of _____, in the County of Craw-
ford, in the State of Kansas, which place was then and there used
in keeping and maintaining a place where intoxicating liquors were
sold, bartered and given away in violation of law, and where per-
sons were permitted to resort for the purpose of drinking intox-
icating liquors as a beverage, and where intoxicating liquors were
kept for sale, barter and delivery in violation of law, and that
on about the _____ day of _____, 19___, the said
defendant, _____, was in writing notified of
such use of the said premises, and the said defendant, _____
_____, then and thereafter omitted to take all reas-
onable measures to eject from said premises the persons so using
the same, all contrary to the form of the statutes in such cases
made and provided and against the peace and dignity of the State
of Kansas.

_____
Assistant Attorney General of
Crawford County, Kansas.

Kansas State Temperance Union legal documents



198

STATE OF KANSAS,
CRAWFORD COUNTY, ss.

_____, being first duly sworn on his oath, says: That he is Assistant Attorney General of Crawford County, Kansas, that he has read the foregoing information and knows the contents thereof and that the matters and things therein stated are true.

_____

Subscribed and sworn to before me this _____ day of _____, 19___.

_____
Clerk of the District Court.

Robert Norris,

Defendant.

NECESSARY ALLEGATIONS.

The defendant contends that under our statutes an information charging perjury should, among others, contain the following allegations:

An allegation showing where the case or proceeding or thing to be determined was pending or under investigation.

An allegation showing affirmatively that the defendant was sworn or affirmed in due form of law.

Where the charge of perjury is based upon an affidavit there should be an allegation that the affidavit was used in the proceeding or that it was intended to be so used.

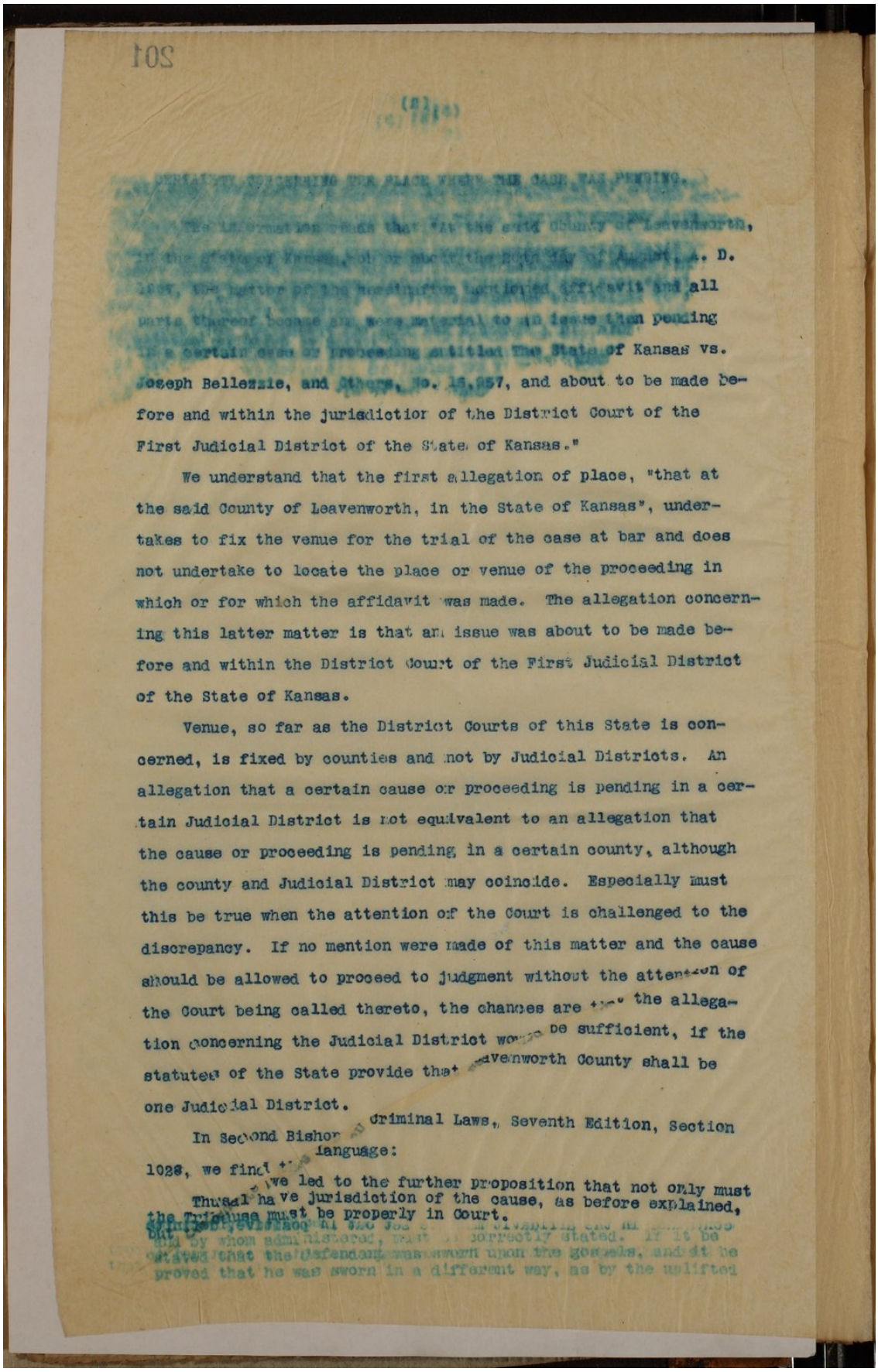
An allegation affirmatively setting out what is the truth concerning which the false statement is charged to have been made.

An allegation showing that the Court or Tribunal or officer before whom the inquiry is to be had, or the thing is to be determined, had jurisdiction of the particular subject matter concerning which the false statement is made.

An allegation showing definitely and with certainty what the particular subject of inquiry was.

An allegation showing the character of the proceeding or suit or subject of inquiry.

These propositions will be taken up in their order as above set forth.



PERTAINS CONCERNING THE PLACE WHERE THE CASE WAS PENDING.

The information states that "At the said county of Leavenworth, in the State of Kansas, on or about the 30th day of August, A. D. 1887, the matter of the hereinafter described affidavit and all parts thereof became and were material to an issue then pending in a certain case or proceeding entitled The State of Kansas vs. Joseph Bellezzie, and others, No. 15,957, and about to be made before and within the jurisdiction of the District Court of the First Judicial District of the State of Kansas."

We understand that the first allegation of place, "that at the said County of Leavenworth, in the State of Kansas", undertakes to fix the venue for the trial of the case at bar and does not undertake to locate the place or venue of the proceeding in which or for which the affidavit was made. The allegation concerning this latter matter is that an issue was about to be made before and within the District Court of the First Judicial District of the State of Kansas.

Venue, so far as the District Courts of this State is concerned, is fixed by counties and not by Judicial Districts. An allegation that a certain cause or proceeding is pending in a certain Judicial District is not equivalent to an allegation that the cause or proceeding is pending in a certain county, although the county and Judicial District may coincide. Especially must this be true when the attention of the Court is challenged to the discrepancy. If no mention were made of this matter and the cause should be allowed to proceed to judgment without the attention of the Court being called thereto, the chances are that the allegation concerning the Judicial District would be sufficient, if the statutes of the State provide that Leavenworth County shall be one Judicial District.

In Second Bishop on Criminal Laws, Seventh Edition, Section 1028, we find the following language:

"This would lead to the further proposition that not only must the Tribunal have jurisdiction of the cause, as before explained, the trial must be properly in Court.

[illegible] by whom administered, must be correctly stated. If it be stated that the defendant was sworn upon the gospels, and it be proved that he was sworn in a different way, as by the uplifted

stit
the
Court

And again, in

we find this language:

Assuming it not to be necessary to cite the proceedings wherein the perjury is to be alleged as committed, the indictment may say that before a Court, etc., ÷ ÷ ÷ named, an issue ÷ ÷ ÷ came on to be, and was in due form of law, heard and tried.

If it is necessary to name the Court, Tribunal or officer before whom the matter in issue was to be heard, it must be necessary to name the place where that Court, Tribunal or officer had authority to sit and act, otherwise the allegation becomes a nullity.

CERTAINTY CONCERNING THE AFFIRMATION.

The language of the information filed is as follows:

That Robert Norris did then and there unlawfully, feloniously, willfully and corruptly make solemn affirmation before R. G. McFarland, then and there elected, qualified and acting Clerk of the District Court of Leavenworth County, Kansas, having lawful authority to administer the same, that a certain affidavit and all parts thereof were and are true in substance and effect.

This allegation, reduced to common, every-day language, states that Robert Norris made solemn affirmation before R. G. McFarland, Clerk of the District Court of Leavenworth County, Kansas, that a certain affidavit was true, and that R. G. McFarland had lawful authority to administer to Robert Norris an affirmation. But it does not allege that R. G. McFarland did administer to Robert Norris the affirmation that is required by law. It can be inferentially drawn from the allegation contained in the information that the Clerk of the District Court did administer an affirmation to Robert Norris; but it is only by inference that such a reading can be given to the language used. The fact that Robert Norris was affirmed by the Clerk to the truth of the statements contained in the affidavit must be set out in positive terms

203

[illegible] and

[illegible] that the accused was sworn as alleged in the indictment. It must appear directly, not by inference merely, and any form of averment which does not directly state this fact will be held deficient, however prolix and inclusive it may be.

In the notes found on page 330 of this volume, explaining the text above given, these comments and extracts are found:

Illustrations of the Rule.---An allegation that J. came before G. and H., the magistrates who heard the case, and exhibited a certain information upon oath, is not sufficient, since it does not sufficiently show that J. was sworn before G. and H. Reg. v. Goodfellow, 1 C. & M. 569, 41 E. C. L. 310.

An allegation that the defendant "state and testify", omitting the word "did", has been held bad. Menasco v. State, (Tex. App. 1889) 11 S. W. Rep. 898.

Did Depose and Swear.---In U. S. v. McConaughy, 33 Fed. Rep. 168, the court said. "In this case it is true that the indictment states that the defendant did 'depose and swear', as in the deposition already set forth. But this is by no means the equivalent of the sufficient allegation, 'being duly sworn, did depose and say.' To 'depose' is merely to state or affirm some matter of fact in an affidavit or deposition, and this may be done as well before an oath is administered to the deponent as afterwards. In this case it appears that it was administered to the witness after he had deposed. One may 'swear' who is not duly 'sworn'. In one case the oath, so to speak, is self-imposed, and the swearer incurs no legal liability thereby, while in the other the oath is administered by a person having authority so to do, and the affiant takes it subject to the pains and penalties for perjury."

Being Lawfully Required to Depose, etc.---An allegation that the defendant, "being lawfully required to depose the truth, on his oath legally administered, ÷ ÷ ÷ and being required to testify, ÷ ÷ ÷ did wilfully and corruptly commit the crime and offense of perjury", is insufficient. It is absolutely necessary to allege that he did swear, and the allegation can not be made in this indirect manner. Brown v. State, 91 Wis. 345.

Made and Subscribed, etc.---In State v. Divoll, 44 N. H. 140, the different forms of this allegation in common use were considered, and it was held to be immaterial in what part of the indictment a necessary averment is found, provided the indictment is otherwise sufficient. But it must be distinctly alleged in some form that the accused was sworn; and the allegation, "made and subscribed in open court, ÷ ÷ ÷ wickedly, falsely, wilfully, corruptly, and knowingly, the following false and corrupt oath", is not a sufficient allegation.

A General Allegation that the defendant was lawfully required to declare and depose, etc., is not enough, nor can the defect in the information be cured by the proofs. People v. Gaige, 26 Mich. 30.

In Kelly's Criminal Law and Practice, on page 554, we find this:

Where the perjury took place on a trial, the court must be correctly described, and the manner of the oath or affirmation, and by whom administered, must be correctly stated. If it be otherwise, the defendant cannot be convicted upon the proofs, and it be proved that he was sworn in a different way, as by the uplifted

that the authorized person or officer must in some way appear in allegation to have administered the oath.

The statute reads:

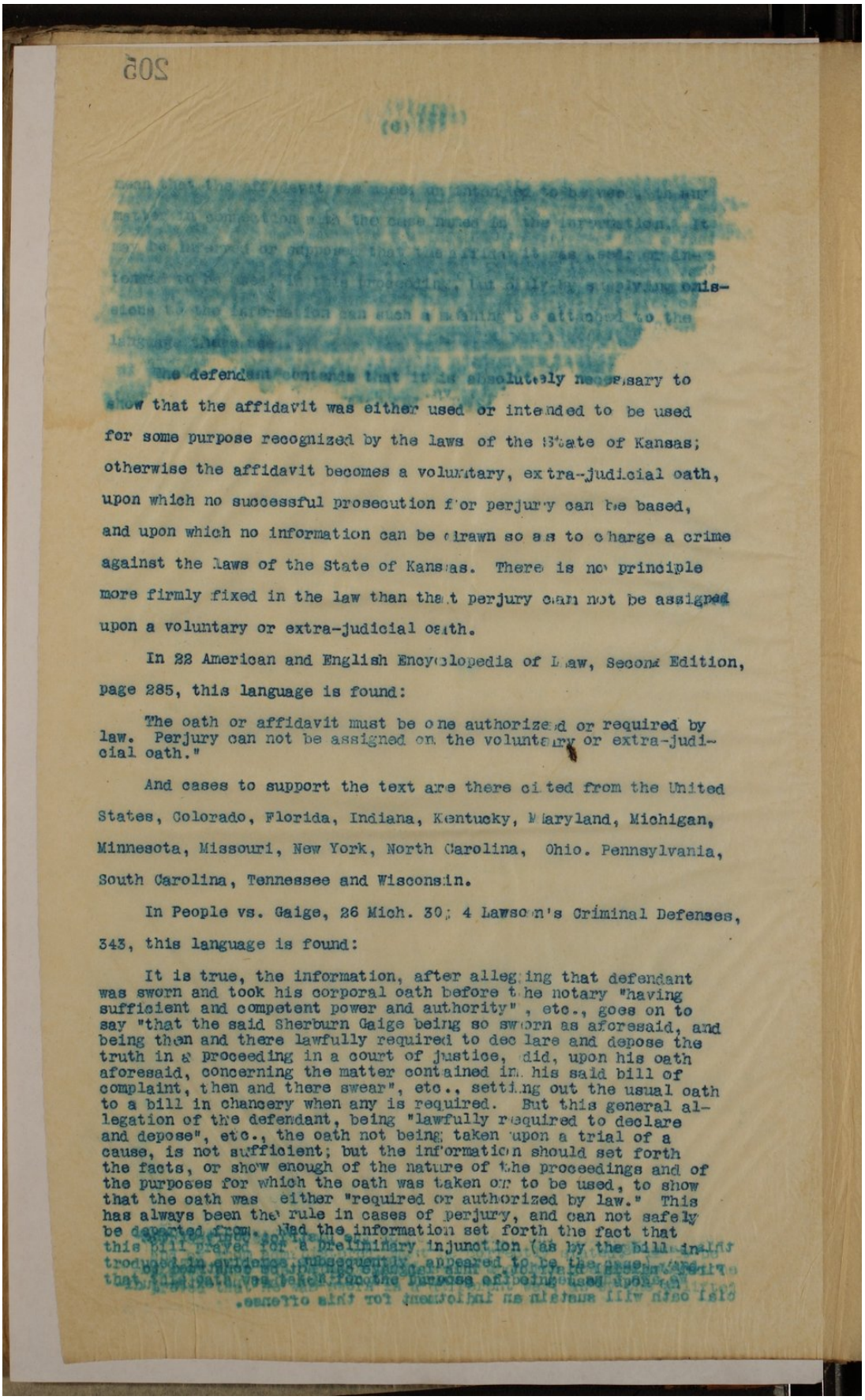
Every person who shall wilfully and corruptly swear, testify or affirm falsely to any material matter upon oath, or affirmation, or declaration, legally administered, in any cause.

This language implies, if it does not state positively, that the oath must be administered to the person who makes the false statement, and not that the person goes and himself makes the oath or affirmation before the officer having authority to administer such oath or affirmation.

THE USE, OR INTENDED USE, OF THE AFFIDAVIT.

The defendant contends that there is no allegation in the information that the affidavit was used, or intended to be used, in any proceeding of any character whatever. The language of the information is that "At the said County of Leavenworth, in the State of Kansas, on or about the 20th day of August, A. D. 1907, the matter of the hereinafter mentioned affidavit, and all parts thereof, became and were material to an issue then pending in a certain case or proceeding entitled The State of Kansas vs. Joseph Bellezzie, and Others, No. 15,957, and about to be made before and within the jurisdiction of the District Court of the First Judicial District of the State of Kansas; whereupon Robert Norris did then and there". etc.

The only language of the information that in any way approaches a statement concerning the use, or intended use, of the affidavit is concerning the issue then pending and about to be made before and within the jurisdiction of the District Court of the First Judicial District. This language cannot be construed to



205

(c)

The defendant contends that it is absolutely necessary to show that the affidavit was either used or intended to be used for some purpose recognized by the laws of the State of Kansas; otherwise the affidavit becomes a voluntary, extra-judicial oath, upon which no successful prosecution for perjury can be based, and upon which no information can be drawn so as to charge a crime against the laws of the State of Kansas. There is no principle more firmly fixed in the law than that perjury can not be assigned upon a voluntary or extra-judicial oath.

In 22 American and English Encyclopedia of Law, Second Edition, page 285, this language is found:

The oath or affidavit must be one authorized or required by law. Perjury can not be assigned on the voluntary or extra-judicial oath."

And cases to support the text are there cited from the United States, Colorado, Florida, Indiana, Kentucky, Maryland, Michigan, Minnesota, Missouri, New York, North Carolina, Ohio. Pennsylvania, South Carolina, Tennessee and Wisconsin.

In People vs. Gaige, 26 Mich. 30; 4 Lawson's Criminal Defenses, 343, this language is found:

It is true, the information, after alleging that defendant was sworn and took his corporal oath before the notary "having sufficient and competent power and authority", etc., goes on to say "that the said Sherburn Gaige being so sworn as aforesaid, and being then and there lawfully required to declare and depose the truth in a proceeding in a court of justice, did, upon his oath aforesaid, concerning the matter contained in his said bill of complaint, then and there swear", etc., setting out the usual oath to a bill in chancery when any is required. But this general allegation of the defendant, being "lawfully required to declare and depose", etc., the oath not being taken upon a trial of a cause, is not sufficient; but the information should set forth the facts, or show enough of the nature of the proceedings and of the purposes for which the oath was taken or to be used, to show that the oath was either "required or authorized by law." This has always been the rule in cases of perjury, and can not safely be departed from. Had the information set forth the fact that this bill prayed for a preliminary injunction (as by the bill introduced in evidence subsequently appeared to be the case), and that the oath was taken for the purpose of being used upon a

[redacted]

An [redacted] swearing [redacted] law to be verified by oath.

Again, in United States vs. [redacted], 4 McLean, 113, 4 Lawson's Criminal Defences, 362, in the head notes we find this:

To make the taking of a false oath perjury it must be required by law or by usage sanctioned by the law, or by the government.

A Clerk of a Court can not make a usage of administering oaths so as to make a party guilty of perjury who should falsely take such an oath.

A voluntary or extra-judicial oath is not perjury, even if false.

In the opinion McLean, J., says:

The oath was not required to be administered by any law of the United States nor any rule of Court. It was a usage introduced by the Clerk in ascertaining the mileage that witnesses were entitled to claim.

There can be no doubt that the Clerk, in the presence of the Court or any other person acting under the sanction of the Court, is authorized to administer oaths. It is the act of the Court in such a case and not an act done by the authority of the individual who administered it. But where the Clerk, out of Court, in the ordinary performance of his duties, thinks proper to administer oaths for his own convenience or security, which are not required by the law or an order of Court, it is exceedingly doubtful whether such a swearing is within the above section.

An extra-judicial oath lays no foundation for a prosecution of perjury. Indeed the policy of multiplying oaths is questioned by persons of the most enlarged experience. Make anything common of this nature and the solemnity which it would otherwise impart is measurably lost. Custom house oaths in all countries have become a proverb and a reproach and tend but little to secure the public against fraud.

Again, in a note found on page 429 of volume 4 of Lawson's Criminal Defences, we find this:

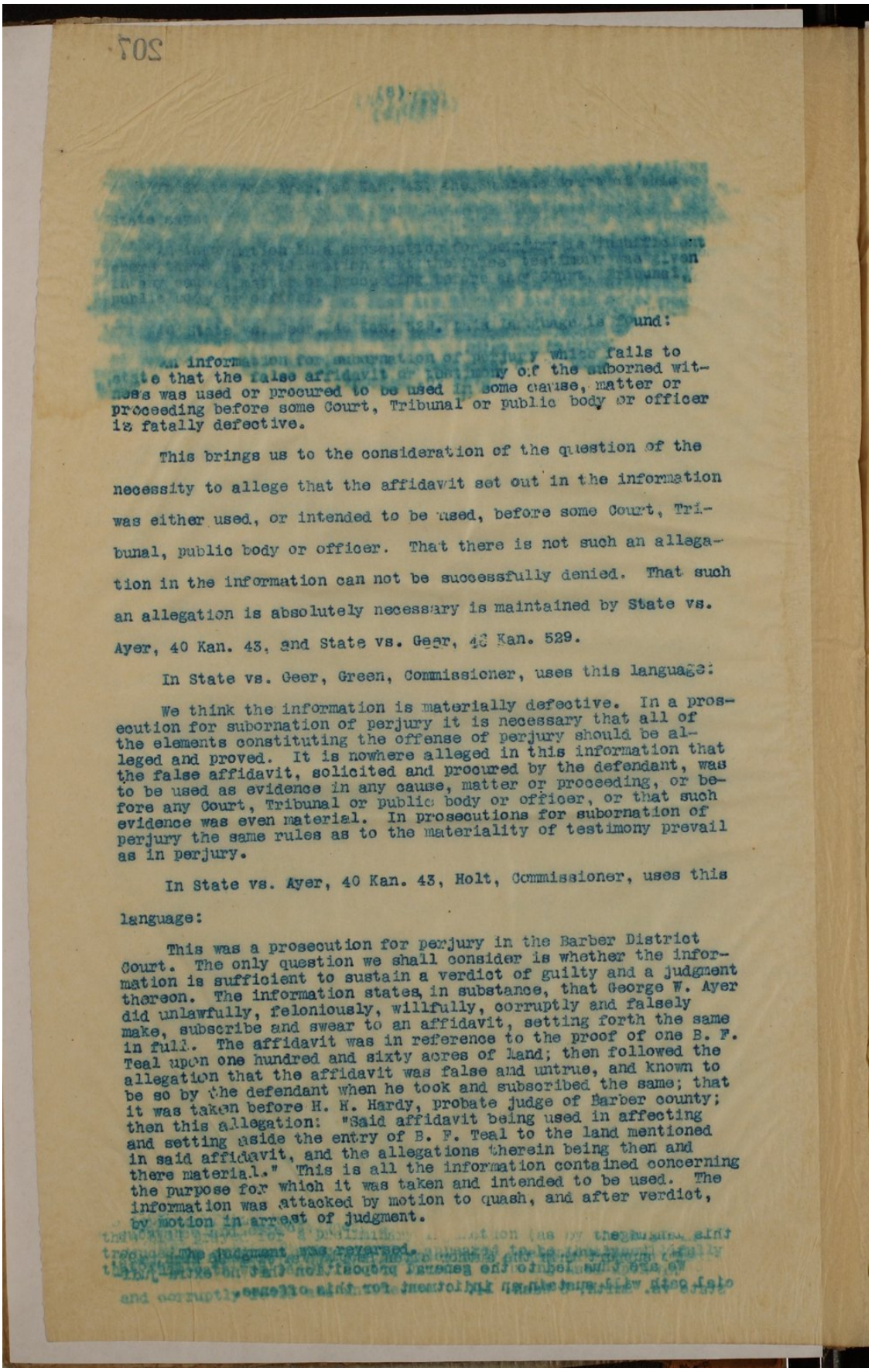
"Also the oath must be one required by law in such a case."

Again, on page 849 of 6 Lawson's Criminal Defences, we find this:

"The false oath must have been required by law."

To support this two cases are cited from the Federal Reporter and one from Dakota.

In 2 Bishop's Criminal Law, 7 Edition, Sec. 1027, we find this language: [redacted] We are thus led to the general proposition that no extra-judicial oath will sustain an indictment for this offense.



207

[redacted] information for subornation of perjury which fails to state that the false affidavit or testimony of the suborned witness was used or procured to be used in some cause, matter or proceeding before some Court, Tribunal or public body or officer is fatally defective.

This brings us to the consideration of the question of the necessity to allege that the affidavit set out in the information was either used, or intended to be used, before some Court, Tribunal, public body or officer. That there is not such an allegation in the information can not be successfully denied. That such an allegation is absolutely necessary is maintained by State vs. Ayer, 40 Kan. 43, and State vs. Geer, 43 Kan. 529.

In State vs. Geer, Green, Commissioner, uses this language:

We think the information is materially defective. In a prosecution for subornation of perjury it is necessary that all of the elements constituting the offense of perjury should be alleged and proved. It is nowhere alleged in this information that the false affidavit, solicited and procured by the defendant, was to be used as evidence in any cause, matter or proceeding, or before any Court, Tribunal or public body or officer, or that such evidence was even material. In prosecutions for subornation of perjury the same rules as to the materiality of testimony prevail as in perjury.

In State vs. Ayer, 40 Kan. 43, Holt, Commissioner, uses this language:

This was a prosecution for perjury in the Barber District Court. The only question we shall consider is whether the information is sufficient to sustain a verdict of guilty and a judgment thereon. The information states, in substance, that George W. Ayer did unlawfully, feloniously, willfully, corruptly and falsely make, subscribe and swear to an affidavit, setting forth the same in full. The affidavit was in reference to the proof of one B. F. Teal upon one hundred and sixty acres of land; then followed the allegation that the affidavit was false and untrue, and known to be so by the defendant when he took and subscribed the same; that it was taken before H. H. Hardy, probate judge of Barber county; then this allegation: "Said affidavit being used in affecting and setting aside the entry of B. F. Teal to the land mentioned in said affidavit, and the allegations therein being then and there material." This is all the information contained concerning the purpose for which it was taken and intended to be used. The information was attacked by motion to quash, and after verdict, by motion in arrest of judgment.

The judgment was reversed.

me..
fra
aff
pro to be made and filed in the case of [illegible]

In the [illegible] to support the text above stated, [illegible]
ments will be found on page 804.

Extra-judicial Oaths--Illustrations of the Rule.--Much of the detail requisite in an indictment for perjury at common law is no longer necessary. But an indictment which charges that the accused made a false affidavit which became material to a matter and proceeding about to be made in and before a certain court for the purpose of obtaining a new trial, or the release of a certain person from imprisonment, is insufficient if it does not further allege that the said affidavit was made for the purpose of being used in the proceeding; or if it was filed, that it was with the knowledge or consent of the defendant. State v. Smith, 3 Wash. 14.

An indictment which simply alleges that the oath taken by the defendant was one required by law does not show that it was for the protection or defense of any private right, and is insufficient under article 188 of the Penal Code of Texas. Shely v. State, 35 Tex. Crim. Rep. 190.

Affidavit to Procure Marriage License.--An indictment for taking a false oath before a surrogate, to procure a marriage license, which charges only the taking of a false oath, without stating that it was for the purpose of procuring a license, or that a license was procured thereby, is defective. Rex v. Foster, R. & R. C. C. 341. But see Reg. v. Chapman, 2 C. & K. 846, 61 E. C. L. 846.

Affidavit as to Residence.--Where perjury was assigned on a false affidavit as to residence, which affidavit was necessary to enable the maker to register as a voter in a certain precinct, it was held that the indictment should allege that the affidavit was used or intended to be used in judicial proceedings. State v. Lloyd, 77 Wis. 630. But in a similar case it has been held unnecessary to allege that the affidavit was filed with the election board; and it is sufficient to aver that the person whose residence was in question was challenged by a legal voter of the precinct. The name of the person need not be given. State v. Hopper, 133 Ind. 460.

Subornation of Perjury.--Under Rev. Stat. Ind., 1881, sec. 2006, an indictment for subornation of perjury, setting forth the procuring of an affidavit in the form of an ordinary complaint for bastardy, but not alleging that any prosecution was commenced under said affidavit, nor that it was filed with the justice, should be quashed. Smith v. State, 125 Ind. 440.

That Affidavit Was Used.--An allegation that a motion was pending on a certain date, and that an affidavit was made on the same date, is not sufficient to show that the affidavit was used on the motion. People v. Fox, 25 Mich. 492.

2. Rex v. Crossley, 7 T. R. 315.

At page 803 of volume 13 of the Encyclopedia of Forms this language is found:

If an information charges perjury to have been committed in swearing to an affidavit it must be shown that the affidavit was made to be used, or that it actually was used, in a judicial proceeding.

[illegible]

State vs. Smith, 3 Wash. 14.