"DECISIONS WHICH HAVE CHANGED NEBRASKA HISTORY"

by Bayard H. Paine

Nebraska History Magazine

October-December, 1935

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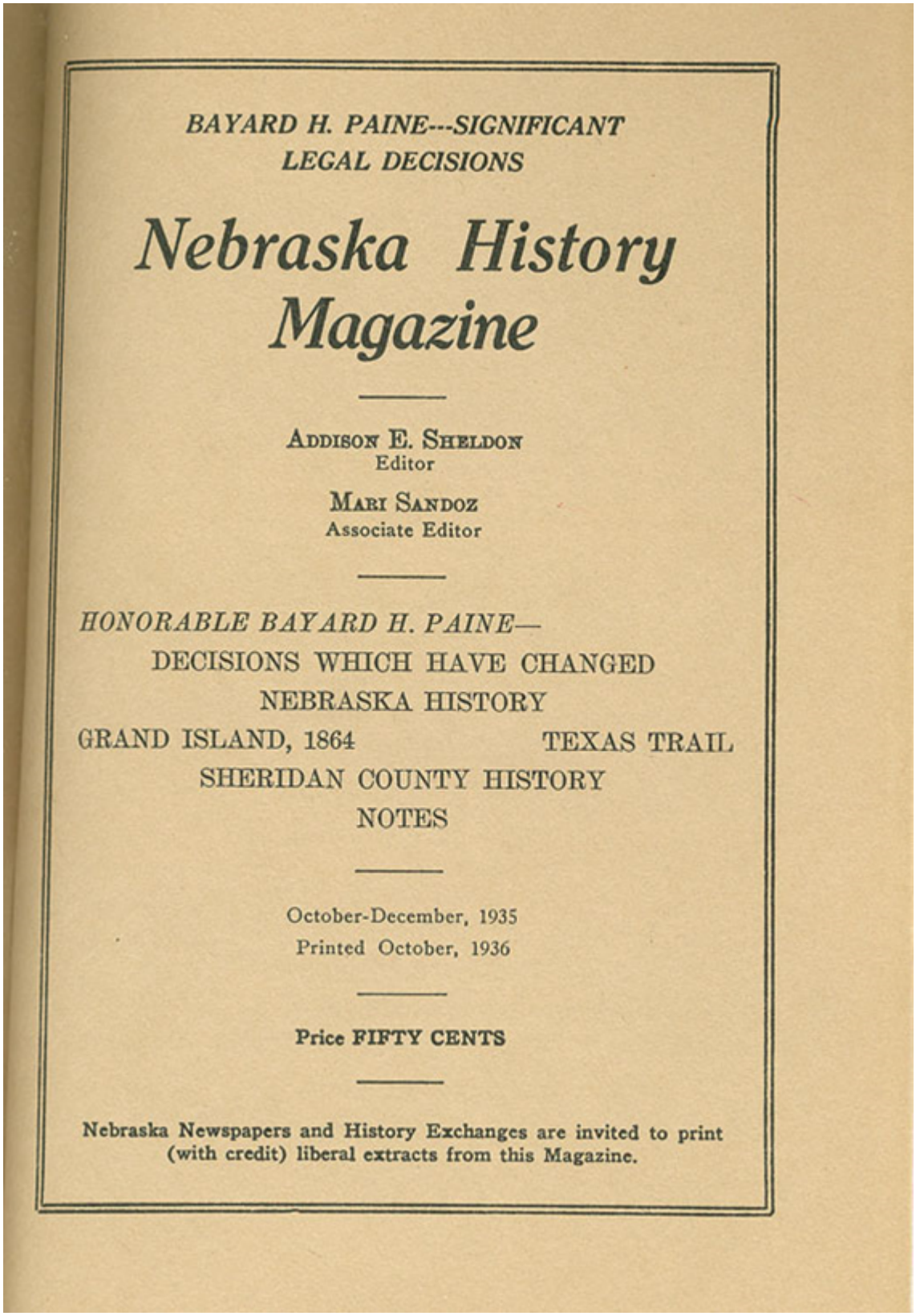
Courtesy Nebraska State Historical Society

Cover



BAYARD H. PAINE---SIGNIFICANT LEGAL DECISIONS

Nebraska History Magazine

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HONORABLE BAYARD H. PAINE—
DECISIONS WHICH HAVE CHANGED
NEBRASKA HISTORY
GRAND ISLAND, 1864 TEXAS TRAIL
SHERIDAN COUNTY HISTORY
NOTES

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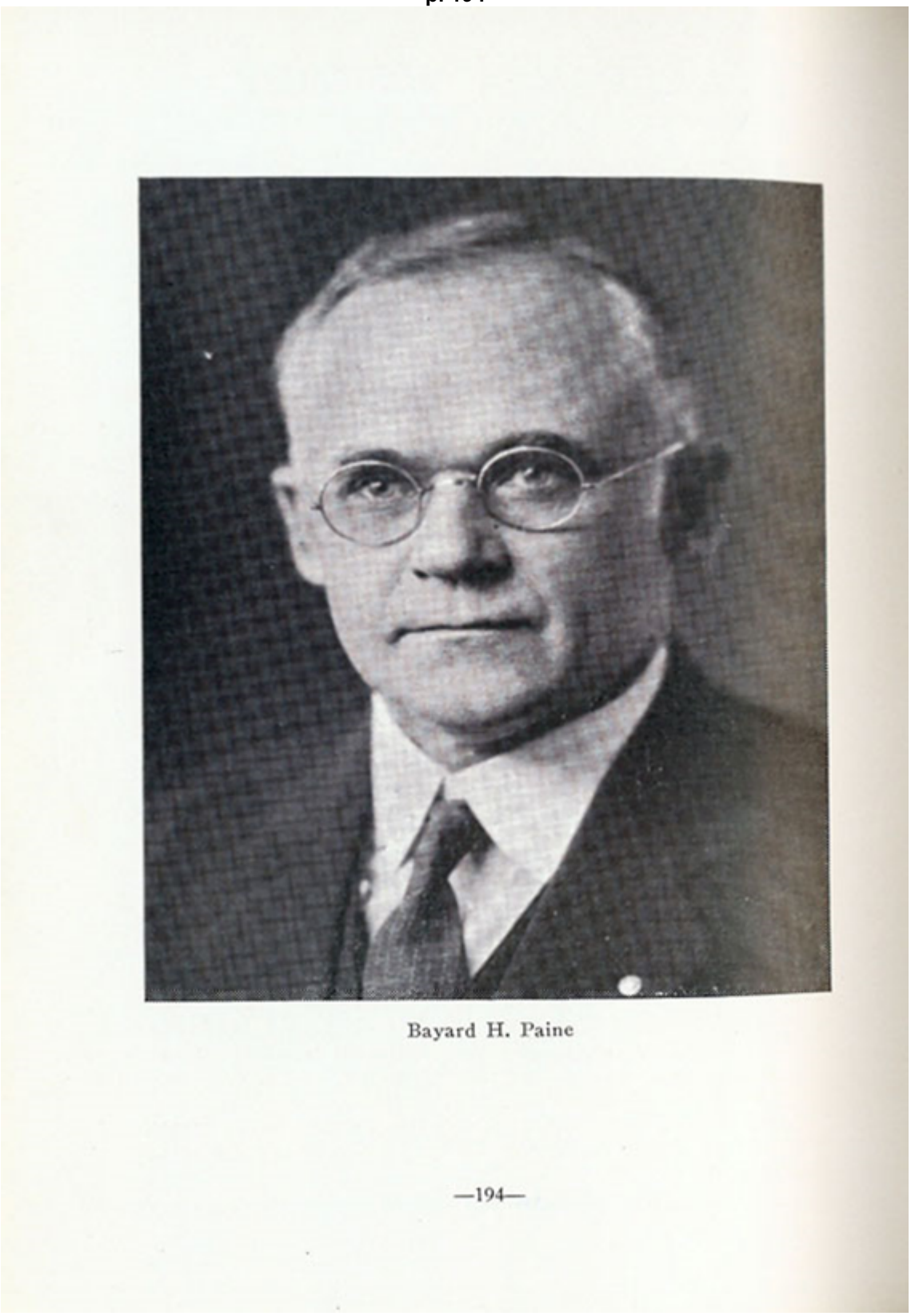

Bayard H. Paine

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DECISIONS WHICH HAVE CHANGED NEBRASKA HISTORY

By Bayard H. Paine

Address at 1935 Annual Meeting of the Nebraska State Historical Society.

In attempting to bring to you an account of some of the early decisions which have changed Nebraska history, I found myself swamped with the abundance of interesting material.

For instance, there were several slaveholders in Nebraska City. Two of the slaves of S. B. Nuckolls were spirited away over the underground railroad which ran through Tabor, Iowa, and Mr. Nuckolls attempted to recoup his loss by suing those suspected by him of assisting their escape for damages, but a little search convinced me that no further details can be found except those given in Sheldon's *Nebraska, The Land and The People.*

The Governor Boyd citizenship case, the impeachment of Governor Butler, and the Bartley bond cases were each of such interest that an evening could be spent in discussing them.

The Quin-Bohanan murder case of the early Eighties, which resulted from an argument as to the correct spelling of the word "peddler" or "pedlar," is interesting, but did not change Nebraska history nor yet clarify the two forms of spelling the word.

The history of House Roll No. 12, introduced January 12, 1891, by Fred Newberry, a red-headed Hamilton County farmer, which became the famous Newberry Bill, and the Maximum Rate cases growing out of it, shook the state, as well as the railroads, but it does not lend itself to an abbreviated discussion.

However, I have selected perhaps a dozen cases which actually affected the history of our state in a greater or less degree.

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The Value of a Widow's Homestead Right in Nebraska

Dean Henry H. Foster, of the Nebraska College of Law, in an article in the *Nebraska Law Bulletin* for October, 1924, tells us that the First Territorial Legislature of Nebraska in 1855 adopted 100 pages of Iowa law, and among the laws adopted was the following:—"If the debtor is the head of a family, there is further exempt * * his homestead as provided by law." This is the simplest homestead act ever passed by a legislature.

Five years later the second homestead act was passed, and from that time every session of the legislature tampered with the homestead laws by amendments until in 1879 the law of Nebraska declared in general terms that a homestead consisting of a dwelling house and the land upon which it was situated, not exceeding 160 acres if in the country, or two lots if in a city, should be exempt from judgment liens or forced sale by a creditor. If the title to this homestead stood in the name of the husband, then upon his death the wife would be entitled to live in this homestead for life, and the decisions of our probate courts, district courts and the supreme court for nearly fifty years had uniformly held that such homestead property, whether a quarter-section of land or two town lots with the residence thereon, was limited in value to $2,000 in all cases.

Then came the famous case that overturned all of these decisions. George Meisner of Shelton, Buffalo County, Nebraska, a thrifty-landowner, cattle-feeder and banker, some fourteen years before his death married a young school-teacher as his second wife. Upon his death without a will, a determined lawsuit ensued.

It is said in the concurring opinion of Judge Hamer, who resided at Kearney in the same county, that George Meisner was worth more than a million dollars at the time of his death.

One of his real estate holdings was a valuable section of land just outside of the city of Shelton, and upon the northwest quarter of this section he and his second wife resided at the time of his death. It was stipulated that this quarter-section alone was worth $25,000.

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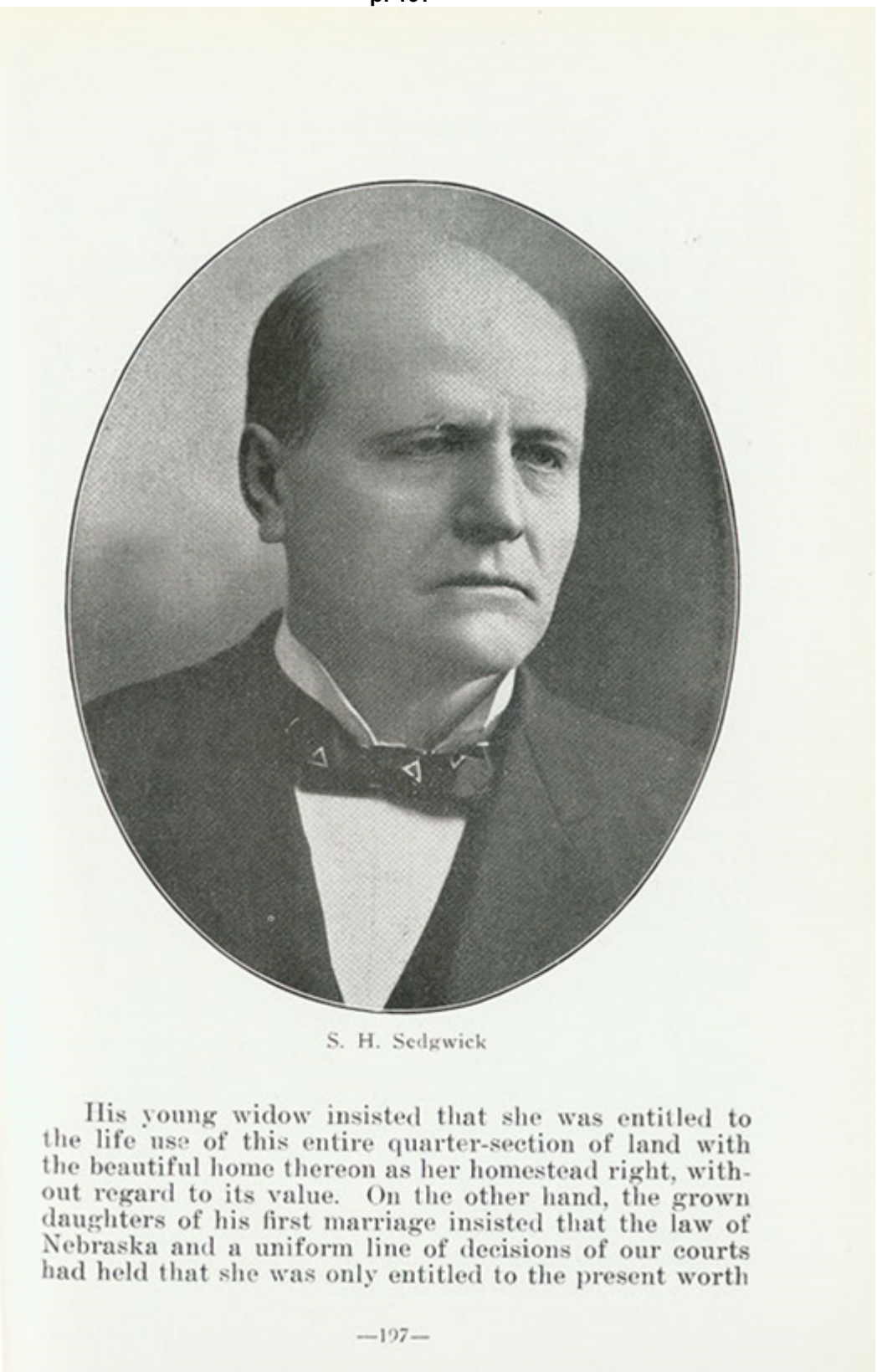

S. H. Sedgwick

His young widow insisted that she was entitled to the life use of this entire quarter-section of land with the beautiful home thereon as her homestead right, without regard to its value. On the other hand, the grown daughters of his first marriage insisted that the law of Nebraska and a uniform line of decisions of our courts had held that she was only entitled to the present worth

Courtesy Nebraska State Historical Society

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of $2,000, and in the trial before Judge Hostetler he followed this line of authorities and decreed that the present value of her $2,000 interest in the homestead property was worth $1,464 in cash, and no more, as based on her life expectancy.

Here was a widow with ample resources and a determination to change the law in Nebraska for the benefit of all widows thereafter. She employed as her attorneys the distinguished Halleck F. Rose of Omaha and Judge E. C. Calkins of Kearney, whose term as a supreme court commissioner had just expired. The daughters by the first marriage employed Judge John J. Sullivan of Columbus, who had been a brilliant member of the supreme court up to five years before the death of Mr. Meisner, and Fred W. Ashton of Grand Island, one of whose distinctions was that he came within twenty-two votes of defeating George W. Norris for Congress.

When the case was presented to the supreme court of Nebraska, the arguments were not closed when the attorneys had presented their pleas in open court, but it is easy to read between the lines that the members of the supreme court divided at once into two camps. The decision was finally rendered by Judge Sedgwick, with a concurring opinion by Judge Hamer. A strong dissenting opinion was written by Judge Fawcett, which was concurred in by Judges Barnes and Letton, and thus this opinion became one of those four-to-three decisions which are always studied with the greatest interest by attorneys.

Judge Sedgwick defined a homestead as the house and the land where the family dwells; however, he admitted that if creditors were seeking to sell the homestead for debts it is only exempt up to $2,000 in value, while, on the other hand, if it is not a question of creditors seeking to collect debts, but simply a question of the respective rights between the widow and other heirs, then the entire homestead vests in the widow for life, without regard to its value. This decision gave Mrs. Meisner the life use of a tract of land worth $25,000 in the place of $1,464 cash, and overruled all former opinions of this court on this point.

Although this holding has been assailed many times since it was released in 1912, it has withstood all attacks

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during the ensuing twenty-three years, and may doubtless be safely relied upon by widows hereafter.

Some Cases Affecting Ranching in Nebraska

For perhaps fifteen years, ending in the eighties, Texas cattle were slowly trailed up to Nebraska through Oklahoma and Kansas as the grass started in the spring. These cattle were first trailed to Fort Kearny, then to Plum Creek, now known as Lexington, but later the northern end of the trail was Ogallala, Nebraska, which was a wide-open town, with saloons and dance halls and with Texas and Mexican cowboys making things lively.

The old ranches along the Platte River, such as the Fox Creek ranch, Horse Creek ranch, and the ranches owned by Ben Gallagher, William Paxton, Jack Morrow, Gilman Brothers and John Burke, to mention only a few of them, bought these long-horn Texas steers, fattened them on Nebraska grass and shipped them east on the Union Pacific.

These Texas cattle were all branded when they reached Nebraska, and allowed to run at large on the range, and twice a year great round-ups were held on both sides of the Platte River and the calves were branded and the cattle counted and separated by the owners.

Homesteaders were not encouraged to move into these cattle ranges, and when they took up 160 acres of the best land along a creek bottom or on a hay flat, they were discouraged from farming in every way that could be devised. Stubborn homesteaders, who would not listen to reason, sometimes came to an untimely death, —"shot by parties unknown."

Mitchell and Ketchum

On December 10, 1878, occurred the capture, lynching and burning of two men by what was known as the Olive gang in the unorganized territory now known as Custer County. The affair was of such a gruesome nature that the details were published in all the eastern papers, and it was cited as the culminating act in the war of ranchmen to keep out homesteaders.

To bring some of the facts to mind, I secured the four-volume record in this case of Olive vs. The State. The trial was had before the time of typewriters, and

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Mr. F. M. Hallowell, the official reporter, and A. H. Cramer, clerk of the district court, had written out the entire record in pen and ink.

The indictment for murder was returned against I. P. Olive, Frederick Fisher, Pedro Dominicus, Dennis Gartrell and others in March, 1879. The crime having occurred in unorganized territory lying west of Sherman County, which was in the fifth judicial district of the famous William Gaslin, Jr., he could, under the law, direct the trial to be held in any county in his district. He did not hold the trial in Buffalo, Sherman, or Kearney Counties, which were located nearer to the scene of the crime, but fixed the place of the trial as Adams County.

When the legislature met in 1879, Governor Garber referred to the lynching and burning of these two men as an outgrowth of the conflict between the cattlemen and the homesteaders, and asked an appropriation of $10,000 to reward the men who had risked their lives in capturing the outlaws.

The defendants, being wealthy ranchmen, employed the best attorneys that could be secured, Mason and Whedon of Lincoln, Hinman and Neville of North Platte, Hamer and Conner of Kearney, and the silver-tongued James Laird of Hastings, who was elected congressman at the next election.

When the trial began, the first and most important state's witness, C. W. McNamar, was examined by Attorney-General C. J. Dilworth, who conducted the prosecution. McNamar testified that he saw Luther Mitchell and Ami Ketchum in Plum Creek; that they were handcuffed and put in a spring wagon, and driven toward Olive's ranch, which was located about forty-five miles directly north of Plum Creek; that he followed them out some fifteen or twenty miles, and that three men on horseback overtook him in the dusk of the evening and that one of these men was I. P. Olive; that the next morning he drove to Olive's ranch and Olive did not know what had become of Mitchell and Ketchum, but that with five other men he went in search of them in the afternoon, and in a pocket in Devil's Gap canyon near the Loup River and less than three miles from Olive's ranch, they found the bodies of the men, which

Courtesy Nebraska State Historical Society

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Mitchell and Ketchum Burnt Bodies

had been gashed with knives, shot with rifles, hanged from a tree, and also burned.

I recall as a small boy that one or both of these bodies were taken through Grand Island on a Union Pacific train, which stopped there for meals, and planks were obligingly placed up into the baggage car by willing hands, the coffin was opened, and the greater part of the population of Grand Island walked up through the baggage car and examined the remains.

The trial at Hastings attracted people from all over the state. An uncle of mine came from Cass County to attend the trial. My father drove us over to Hastings in our emigrant wagon, and we attended several sessions of the trial, sleeping in the emigrant wagon nights. The city was filled with ranchmen and cowboys as well as homesteaders, and rumors were current that ranchmen would overpower the sheriff and free the defendants, but all such fears proved groundless. An order was made that the sheriff should not allow any of the audience to carry guns into the courtroom, but another

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rumor is that this did not prevent Judge Gaslin from having a Colt's revolver near at hand.

The jury finally returned a verdict of guilty of murder in the second degree, and the defendants were sentenced to the penitentiary for life. An appeal was taken to the supreme court, and in the eleventh volume of the Nebraska *Reports* we find that the first thirty-seven pages are taken up with the decision in this case, which was written by Judge Lake, with a strong dissent by Chief Justice Maxwell. The case was reversed, it appearing that Custer County was not entirely unorganized territory, as officers had been elected, and while it had not been attached by the legislature to any judicial district except as unorganized territory, yet probably the trial should not have been held at Hastings. Other errors occurred in the admission of evidence and in the instructions to the jury. The warden of the penitentiary says that the records there disclose that I. P. Olive was held in the penitentiary for one year, seven months and twenty days, and then discharged by an order of the court.

In February, 1912, the *World-Herald* of Omaha printed an account of the tragedy from the Olive side as told by the negro cook whom Olive had brought up from Texas with cattle. He claimed that they had been missing their cattle, and the theft of some had been traced to Ketchum and Mitchell and that when they went over with their men to investigate, Mitchell had shot and wounded Bob Olive, and that shortly thereafter I. P. Olive and his men killed them. The result of this occurrence was that the homesteaders banded together to protect their homesteads against the range cattle, and in some instances, as in Frontier County, a group of homesteaders erected a log fort, from which they threatened to shoot the cattle if driven over their farm lands.

Fencing Government Land

Shortly thereafter the driving of Texas cattle to Nebraska was discontinued and the ranches were stocked with a much better grade of cattle. To protect these cattle the larger ranches fenced in their ranges, including all of the government land, paying nothing for the use thereof.

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A few of the large ranches had developed the art of intimidation to a science, and no homesteader dared to file within their fence lines.

Then a new difficulty arose, for in 1886 Congress passed an act making it a crime to fence in public lands with privately owned land. This at once became a dead letter and was never enforced in Nebraska, at least until Theodore Roosevelt became president.

The great Spade ranch was one of the largest, having thousands of acres within its fences in Sheridan, Cherry and Garden Counties. All of its cattle and personal property were branded with the ace of spades. The headquarters were at Ellsworth, located thirty miles east of Alliance, on the Burlington, in Sheridan County.

Bartlett Richards, who made his home at Coronado Beach, California, and Will G. Comstock, were the owners of this vast property, reputed to be worth up in the millions. Their summer homes were at Ellsworth, and the ranch was well managed in every detail.

When the order of Roosevelt went out that all fences on government land should come down, these men with many of the other larger ranch owners went to Washington and finally prevailed upon Roosevelt to give them an extension of time for one year to take the fences down. At the end of the year no fences had been taken down. The President was somewhat riled, and directed the United States Attorney to begin prosecutions. Judge Irving F. Baxter, who had served as county judge and also as district judge in Douglas County, was the U. S. Attorney for Nebraska, and on May 25, 1905, he filed an indictment in the federal court at Omaha against Richards and Comstock.

After trial had begun they entered a plea of guilty to certain counts of the indictment, and on the same day, November 13, 1905, Judge William H. Munger, who had been appointed to the United States bench by Grover Cleveland, sentenced them to pay fines and costs, and to be imprisoned in the custody of the United States Marshal for six hours. Thereupon, they each paid fines of $300 and paid costs of $339.31, making a total amount paid of $939.31. The unusually short sentence given them by Judge W. H. Munger was because the United States Attorney had made a statement to the judge in

Courtesy Nebraska State Historical Society

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their behalf, telling what fine business men they were, and recommended a light sentence. The United States Marshal at that time was T. L. Matthews of Fremont, and he took Messrs. Richards and Comstock up to the Omaha Club, of which they were members, and they had dinner and sat around awhile; the six hours passed very quickly and they were released. This matter got into the newspapers, and President Theodore Roosevelt read it and was mad clear through. He at once discharged Mr. Matthews as United States Marshal, and said that he regretted that federal judges were appointed for life and that he could not discharge the judge. However, the President discharged the United States Attorney at once.

The Nebraska delegation in Congress, headed by Senator J. H. Millard, endorsed Hon. Charles A. Goss, now Chief Justice, for appointment as United States Attorney, but President Roosevelt would not appoint him until he had first sent for him to come to Washington and asked him whether he would vigorously prosecute ranchmen who had fenced up government land. Upon Judge Goss assuring him that he would prosecute them vigorously, using good judgment in all steps taken, President Roosevelt said, "That's right, we all have to use common sense," and appointed him on the spot.

Conspiracy Trials

The Kinkaid act, fathered by Moses Kinkaid, of the Big Sixth district of Nebraska, was passed April 28, 1904, going into effect June 28th. This act gave a full section of land to homesteaders instead of quarter-section, and such homesteaders were called Kinkaiders. Under this law some of the larger ranchmen devised the plan of securing Civil War soldiers, as well as widows of veterans, to homestead all of the government land within their ranches. These soldiers could prove up within a very short time, as their Civil War service was credited on their homestead, and some of them for a few dollars would gain title to a section of land and at once turn it over to the ranchmen.

Real estate agents in the pay of the ranchers searched over the whole United States to find soldiers or widows, and in one case proven in court one widow had filed five

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times under variations of her name, but only secured her expenses and $5.00 for making each filing.

Then the government acted. It first sent civil engineers to survey the ranches, and then sent on "G-men," who cut the fences and rolled up miles of barbed wire which were left to rust.

Indictments for conspiracy in securing such fraudulent titles were brought against some twenty-six men.

The first of these famous conspiracy cases to be brought to trial was against Richards, Comstock, Jamison and Triplett. This trial began on November 20, 1906, lasted for one month, and was tried before Hon. William H. Munger, and verdicts of guilty were returned by the jury against all of these four defendants. Thereupon, Richards and Comstock were each fined $1,500 and sentenced to imprisonment for one year. Jamison and Triplett were fined $500 each and sentenced to imprisonment for eight months.

In these cases S. R. Rush, an attorney of Omaha, assisted Judge Goss. Mr. Rush was a patient and careful investigator, and mastered every fact relating to these titles. He continued in this work of prosecuting conspiracy cases for more than fifteen years, and was given the title of Special Assistant to the Attorney-General. He prosecuted such cases in Oregon, California, and in many other states, and uniformly secured convictions.

Hon. Thomas C. Munger, of Lincoln, was appointed United States District Judge on March 1, 1907, and at once took up the trial of the remaining conspiracy cases, those against Thomas M. Huntington, Ammi B. Todd and Fred Hoyt. Huntington, Todd and Hoyt were fined $1,000 each and sentenced to jail for a shorter time.

Bonds were given and the cases were appealed to the United States Circuit Court of Appeals. On November 7, 1910, mandates were received affirming all of these sentences, and upon order of the Attorney-General, Bartlett Richards was transferred to the Adams County jail to serve his sentence of one year. Unfortunately he died within the year.[1]

[1]Mari Sandoz furnished me the information, taken from the Rushville **Recorder** under date of September 8, 1911, that Bartlett Richards had just died at a sanitarium in Hastings of gall-stones. In Miss Sandoz' new book, she tells us some of the experiences of her father,

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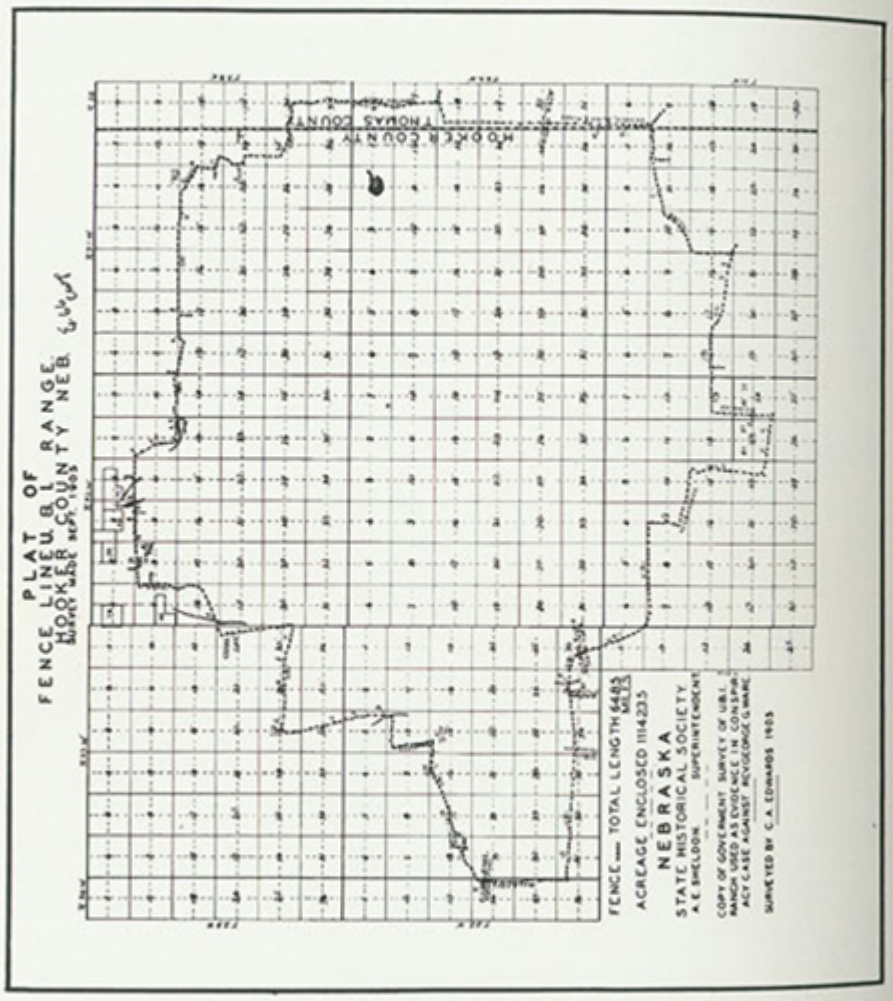

U. B. I. Ranch Fence Line

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In the prosecution of the owners of the large ranches, one of the most striking was that of Rev. George G. Ware, who lived in the Black Hills, but was the principal owner of the U. B. I. Land & Cattle Company, and with other stockholders and employes was prosecuted for conspiracy in getting Civil War soldiers to secure patents to land in their range. The U. B. I. ranch had also fenced in government land with their own, having fenced in land, as shown by Exhibit 66, identified by the reporter, Charles W. Pearsoll, which was eighteen miles wide at its widest part and sixteen miles north and south, in Hooker County, Nebraska.[2]

The jury brought in a verdict of guilty on certain counts. Rev. Ware was ordered to pay a fine of $1,000 and be imprisoned in the common jail for one year. Rev. Ware appealed his case to the Circuit Court of Appeals of the United States, which affirmed the sentence. A petition for writ of certiorari was filed in the United States Supreme Court, which writ was finally denied on October 21, 1907, and he served his sentence in the county jail at Grand Island.

This series of prosecutions against the most extensive ranch owners, at the sharp direction of President Theodore Roosevelt, convinced millionaire ranchmen that they could not fence in the government land, and revolutionized the plan upon which great ranches had been built up over western Nebraska.

Immediately there was a great influx of homesteaders to take lands, and some amusing results followed. At one time a number of Jews came out from New York City and filed on land in Cherry County, knowing nothing about ranching or farming. Some of them gave up their filings for a song but a few stuck to their sod houses until they had proved up on their claims. At one time fifty negro families took claims around Brownlee in the southeastern part of Cherry County, and many of them still reside there. Between 1910 and 1925 many of these homesteaders, who had lived on their sections,

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who had been a locator, was familiar with all of the land in this locality, and when these conspiracy trials began, was secured by the government as one of its star witnesses.

[2]See map.

Courtesy Nebraska State Historical Society

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sold out their holdings at from $1,000 to $5,000 a homestead.

Thus the Kinkaid homestead law resulted in great good to western Nebraska, and the larger ranches gradually increased their holdings in an honest and legitimate manner, buying up good titles at fair prices and in this way extending their ranches.

Among these larger ranches I might name the Miner and Abbott ranches in Grant County, the A. R. Modisett ranch in Sheridan County, the Reimers ranch in Hooker County, while one of the very largest ranches is that of the late Ed. M. Brass, of Grand Island, whose ranch holdings of fine bottom lands and hay valleys, with perfect titles and well improved, extends for some forty-six miles in Cherry County. Mr. Brass at the time of his death was a director of the Federal Reserve Bank at Kansas City.

When the Supreme Court Compelled the Legislature to Act.

I asked Judge William B. Rose, the senior member of our supreme court, to tell me what was the most exciting case ever argued in the supreme court. His prompt answer was that it was when that court issued a writ of mandamus to Sam Elder.

In the election of November, 1890, James E.. Boyd, Democrat, of Omaha, received on the face of the returns 71,331 votes, John H. Powers, the Populist, 70,187, and L. D. Richards, Republican, 68,878. It is now believed by many that Powers was really elected. However, on the face of the returns Boyd was elected.

When the legislature met on January 7, 1891, it was its duty, in joint session, to at once canvass the vote as returned by the counties to the secretary of state and by him delivered to the legislature, and announce which of the state officers were duly elected.

George Meiklejohn, of Nance County, was the outgoing lieutenant-governor. He insisted that until the legislature was duly organized he had the right to preside over the joint session.

On the other hand, Sam L. Elder, of Clay County, a Civil War veteran and an all-around popular man, had been elected Speaker of the House by the Populists, who,

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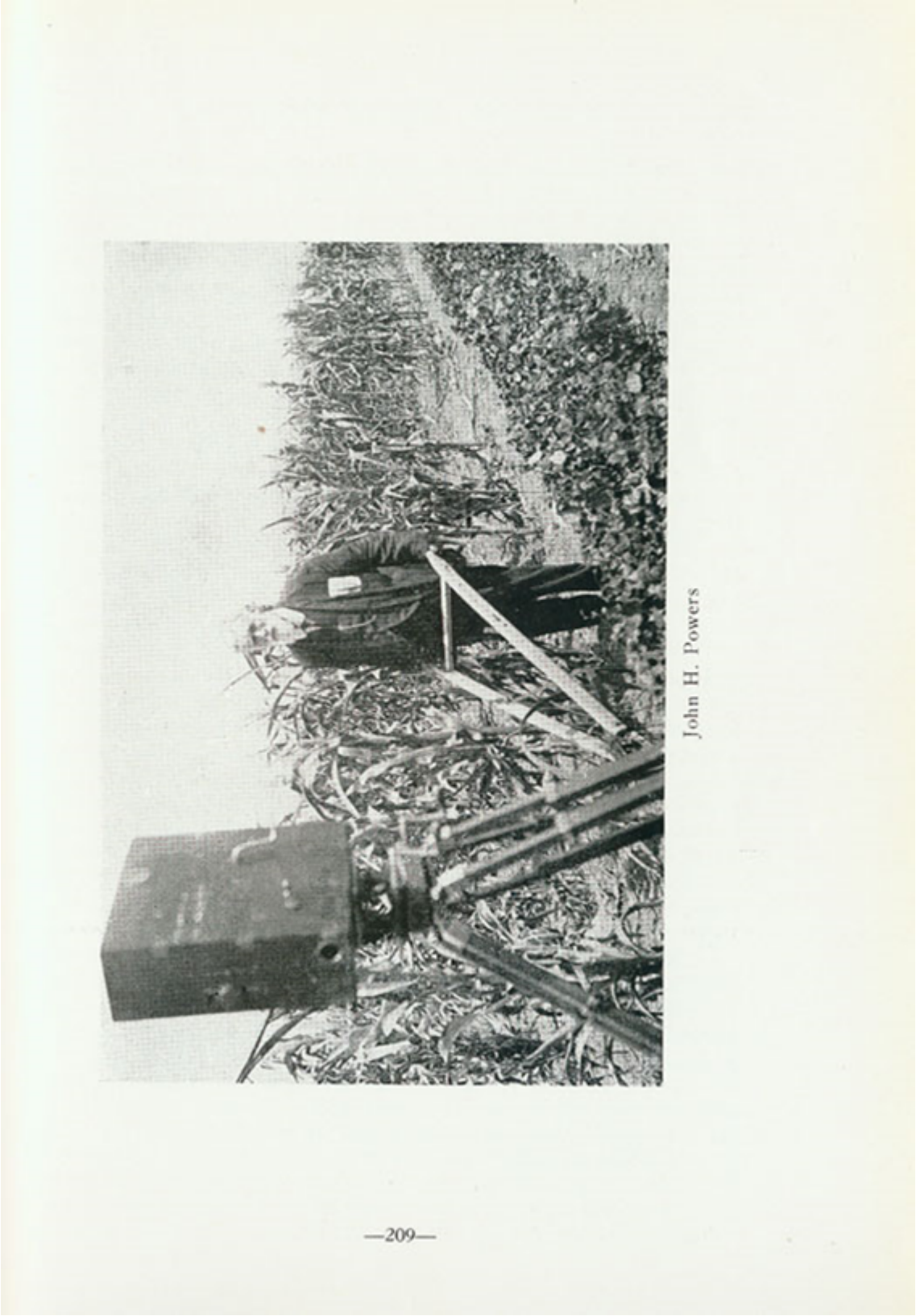

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for the first time in Nebraska history, had fifty-four votes to twenty-five Democrats and twenty-one Republicans.

When the joint session assembled, Speaker Elder insisted that he was the presiding officer, and Meiklejohn at the same time asserted his rights, so they both attempted, and continued, to preside over the session. General Thayer, a Republican, was the outgoing governor, and under the circumstances not only refused to relinquish the office to Boyd, but called out a company of the state militia to guard and protect him.

The Populists in the joint session voted to turn the election returns over to a special committee to examine and report their findings, to delay the matter as long as possible.

Thereupon, Boyd hired General John C. Cowan and several other attorneys to bring a mandamus action to require Sam Elder as Speaker of the House to open the returns and declare the result of the fall election.

Both Elder and Meiklejohn were on the speaker's rostrum, each one claiming he was presiding. They would not adjourn, and the joint session of the legislature stayed in session all night, some of the members sleeping on cots. Early the next morning this mandamus case was called for immediate trial in the supreme court. The courtroom was packed to the doors. Although no one was admitted to the courtroom except upon a pass from the officer in charge of the militia which lined the halls of the capitol, with bayonets fixed, many stood on chairs out in the hall and listened through the open doors.

General Cowan was a striking figure,—long black hair and flashing black eyes,—and was assisted by John D. Howe in his arguments for Boyd. William V. Allen, Populist, who became United States Senator, and was a giant both in figure and intellect, answered with logical analysis the fiery arguments of Cowan. Allen maintained that the supreme court did not have any authority whatever to mandamus the legislature, which was a coordinate branch of the state government; that the legislature was in regular joint session and had exactly the same power that the supreme court had, and the legislature being an independent body of equal power,

Courtesy Nebraska State Historical Society

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would not obey any order of the supreme court about its procedure, and asked the court how it would enforce a writ of mandamus in case the judges decided to issue it. "Suppose you do send your writ of mandamus in there and the legislature refuses to honor it?" The situation was tense. Many state officers, as well as a number of the members of the legislature, were armed with revolvers, and both sides had been afraid to leave the capitol during the night.

General Cowan in his reply to Allen made one of the greatest patriotic speeches ever made in Nebraska, enlarging upon the unlimited power of the supreme court. The arguments were completed, the packed courtroom silent; no one knew whether riot would break out right then or what might happen. Certainly no one in that entire crowd had the slightest idea but that the three members of the supreme court would retire to their consulation room, discuss the situation, and then return and render their decision in the usual and ordinary way,—but the court did not retire. Chief Justice Cobb simply leaned over and spoke quietly to Judge Maxwell, and then to Judge Norval, who had just become a member of the bench, after which the Chief Justice at once began to render the decision by calmly discussing each argument as made. He said that there was no dispute between the legislature and the supreme court, but the fact was that Sam Elder personally as speaker had a mere clerical duty to perform, which was to open and read the result of the returns of the election, and that it was just his personal duty, which he had failed to perform, which duty he should perform at once; and said that the writ of mandamus would issue against Sam Elder, commanding him immediately to open and publish the returns from each and every county of the state, and to declare the persons receiving the highest number of votes to be elected as state officers in the presence of the majority of each house duly assembled.

General Cowan instantly walked up to the clerk's desk and pulled out of his pocket a writ of mandamus, all ready to be signed by the Chief Justice, which was done at once. Many standing around outside as well as those in the courtroom were afraid that the shooting would start the minute that writ was signed, but Gener-

Courtesy Nebraska State Historical Society

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al Cowan had his plans carefully laid in case he won the decision, for he had brought up Sam McClay, the sheriff of Lancaster County, who was there with a posse of deputy sheriffs, all ready to serve that writ. At the moment that the Chief Justice signed and handed back the writ to Cowan he handed it to Sheriff Sam McClay and directed him to act. The legislature in joint session was then behind locked doors, being in executive session. Sheriff Sam McClay made for the door, and with his posse broke it down and rushed down to the front and served the writ on Sam Elder. That was the exciting moment. What would follow? Elder decided that he would obey the order of the supreme court. He at once opened up the returns and declared that Boyd had been elected governor on the face of the election returns, together with all the rest of the state officers. Thus a tragedy was averted in Nebraska statecraft.

Women as Office Holders.

The right of our women to hold office was established by two Nebraska decisions.

It first reached the supreme court in the case of State ex rel. Crosby v. Cones (15 Neb. 444). Six attorneys were engaged in this case, with General John C. Cowan leading one side and Honorable John M. Thurston the other. The decision was rendered by Samuel Maxwell, who held that as the statute permitted women possessing the necessary qualifications to vote for school officers they were therefore qualified to serve if elected as school trustees.

Following this decision it was debated in all parts of the state whether women, who were now allowed to vote at school elections and to be elected members of a schoolboard, could hold other offices. Very shortly women began to be elected to the office of county superintendent in one county after another.

Then came the case of Gertrude Jordan v. Ernest B. Quible (86 Neb. 417, 27 L. R. A. n. s. 531), which aroused the greatest interest on the part of every woman in the State of Nebraska.

Gertrude Jordan, 30 years of age, had been for seven years deputy county treasurer of Cherry County. She enjoyed the work and decided to run for county treas-

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urer. She resigned as deputy on June 1st prior to the election in order to make her campaign, in which she received 925 votes to her opponent's 683, a handsome majority of 242 votes, and she received the certificate of election.

The old county treasurer refused to give up the money or records of the office to her, and argued that a county treasurer must be a voter to be qualified for that office, and that as she did not have the right to vote for a county treasurer she was not qualified to hold the office.

Judge William B. Rose rendered the opinion of the divided court, holding that Gertrude Jordan *was* eligible under the facts in the case to hold the office of county treasurer of Cherry County.

Judge Charles B. Letton in a concurring opinion reached the same conclusion by saying that for years women had been deputy county treasurers and deputy county clerks and in the absence of their principals had performed duties of the office, and that women had prior to that time been elected to the office of county superintendent in several counties, and to say that this woman did not possess the necessary qualifications to hold the office of county treasurer, when she had been seven years deputy county treasurer, would be to turn the clock back and violate common experience and common sense.

Judge Jacob Fawcett voted no, and wrote a sharp dissenting opinion, saying that women did not have the right under our constitution or our laws to hold any office except school offices, and that if their rights were extended it should be done by the legislature and not by the court; that if it was admitted that a woman might be elected county treasurer one might also be elected governor. Judge Fawcett admitted that in his opinion there were many women in the state who would make more efficient governors than some of the men who had filled the office, but that our constitution had declared who should be electors, and that it was an absurdity to hold that the plaintiff could be elected to an office for which she was not eligible to vote at that election.

The opinion of Judge Rose in this case was doubtless against the weight of authority at the time it was rendered on March 28, 1910, for while it was published

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in the selected cases in 27 *Lawyers' Reports Annotated*, new series, page 531, yet in the notes it was shown that Judge Cooley in his *Constitutional Law* held that when the law was silent respective qualifications for office it must be understood that electors are eligible and no others. This Nebraska opinion broke with precedent and led the way for other states to follow.

Suffrage

Judge Rose tells us that he received a great many letters from all over the United States relating to this opinion, which was given great prominence in the leading newspapers in this country. This case, deciding that Nebraska women could hold any office in our state to which they were duly elected, doubtless gave Nebraska women new courage to join heartily with women of other states in working for suffrage, which they received by the Nineteenth Amendment, when it was adopted by Tennessee, the thirty-sixth state, on August 18, 1920.

It is a popular but mistaken idea that the Nineteenth Amendment conferred upon every woman the absolute right to vote in every state in the Union. It did not do that by its very terms, for Section 1 reads as follows:— "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex." However, there are several other "abridgements" which deprive women the same as men. For instance, in more than a dozen states old pauper laws have been brought out of the ash heap and persons on relief are not allowed to vote. It seems a tragedy that because a person is temporarily on relief he is deprived of the right to vote. Then too, if the law of any state requires ownership of personal property to qualify one to vote, a woman would not be allowed to vote in that state unless she complied with all the requirements.

It was provided in the *General Statutes* of Nebraska for 1873 that only free, white males over twenty-one years of age were competent to serve on grand or petit juries, and later the words "free" and "white" were cut out by the legislature, but our present law still provides that a juror must be a male, so women cannot yet serve as jurors in Nebraska. However, Section 77-1802

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Robert W. Furnas

of our Nebraska *Statutes* provides that every male over twenty-one years and under fifty years shall be assessed a poll tax of $2.50 a year, and naturally women are deprived of the pleasure of paying this poll tax.

The Libel Suit of Governor Furnas.

The outstanding libel suit of the early days in Nebraska was that brought by Governor Robert W. Furnas against Dr. George L. Miller and his partner, Lyman Richardson, the owner of the Omaha *Herald*, which was ably edited at that time by Dr. Miller, a rabid Democrat. The Omaha *Herald* had published a formal charge against Governor Furnas, saying tht he had accepted a bribe of $3,000 for his vote as a member of the Third Territorial Legislature against the removal of the capital from Omaha after having previously cast his vote for removal.

The trial of this libel suit was begun on June 19, 1873, and excited the greatest interest over the entire state. Three outstanding attorneys were engaged upon each side

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of the case. General John C. Cowan, Judge O. P. Mason and Seth Robinson prosecuted the suit for Governor Furnas, and Judge Eleazer Wakeley, James W. Savage and George W. Ambrose represented Dr. Miller and partner. The evidence was sharply in dispute. Every step of the trial was hotly contested. The trial resulted in a hung jury, ten jurors voting for the defendants and only two for Governor Furnas, who claimed to have been tricked by a band of political conspirators, and swore that he never received a dollar of money for his vote.

However, Dr. Miller considered that he had won the case in convincing ten of the jurors of the truth of his charge, and immediately published a pamphlet containing the testimony and circulated copies of it freely in all parts of the state. As a result, perhaps, of this publicity, Governor Furnas retired from politics at the end of his term as governor.

In 1878 he founded this Nebraska State Historical Society. He organized the first State Board of Agriculture, and was its secretary from 1884 until his death, and his services to agriculture, according to Dr. Sheldon, produced greater results than those of any other Nebraskan in the first half century of the state's history. He made an outstanding record for public service that can never be forgotten, regardless of this famous libel suit.

The Nebraska Murder Case that Repealed the Entire Nebraska Criminal Code.

The case of Bennet, Administrator, vs. Hargus, 1 Neb. 419, is especially humiliating to legislators. The record of it is found in the last 100 pages of Volume 1 of the Nebraska *Reports,* in which supplement are published twenty-one cases decided by the supreme court of the Territory of Nebraska. Among these cases appears this one of Bennet, Administrator, v. Hargus. The holding of the case is simply to the effect that a right of action that is founded upon a law which has been repealed cannot prevail. We find the facts set out in Sheldon's *Nebraska, The Land and the People,* and in the many articles about the case in the newspapers published during the Third Territorial Assembly.

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Simpson Hargus and James E. Lacy in April, 1856, had a violent altercation over a piece of land located near Nebraska City, which ended in a fight. As a result of this assault Lacy died two days later. Hargus was arrested for the murder, and two trials were held, in both of which he was vigorously defended by Judge Allen A. Bradford. In spite of all his attorney could do, Hargus was found guilty and sentenced to ten years imprisonment. Judge Bradford was an exceedingly unscrupulous lawyer, and notorious for the acts of crookedness to which he would resort.

The legislature in the territorial days was known as the assembly, which consisted of a large body called the house, and an upper body called the council. Judge Bradford was the member of the council from Otoe County. When the Third Territorial Assembly met, he introduced a bill to repeal the criminal laws of the territory which had been adopted at the First Territorial Assembly, and also to repeal the civil code of laws which had been adopted from the code of Iowa. Bradford put the bill through both houses, but it was vetoed by Territorial Governor Izard, who called the attention of the legislature to the serious consequences that would follow if the territory should be deprived of its criminal and civil codes. After some further debate, the bill was passed over the governor's veto by a vote of twenty-four to two in the house, H. Johnson and W. E. Moore being the only ones who voted against it, and by a vote of twelve to one in the council, Dr. George L. Miller of Omaha being the one standing out. One newspaper, the *Nebraskan*, in referring to the fraud practiced upon the assembly, said that they were forced to the conclusion that Bradford was the most dangerous and corrupt man in the assembly, and that the only purpose of repealing the laws was to allow his client, the murderer, Hargus, to escape the penalty of his crime.

Robert W. Furnas of Nemaha County, afterwards governor of our state, was a member of this council, and on March 5, 1857, in an article in the Nebraska *Advertiser*, said that the members of the council had considered Judge Bradford an honest and conscientious man, and had only voted for it on Judge Bradford's assurance

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that it only repealed the conflicting portions of the criminal code, which assurance had been given with all apparent candor and honesty. As a result, when the appeal in the murder case reached the supreme court it was found, of course, that the entire criminal law had been repealed by this act, with no saving clause for actions already pending, and therefore the murderer, Hargus, could not be punished.

Oliver P. Mason, later the first Chief Justice after Nebraska became a state, then brought an action on the part of the estate of the murdered man, setting out in his petition that Hargus had killed Lacy in April, 1856, and asked that the heirs be paid $5,000 civil damages for his death.

Judge Eleazer Wakeley, in deciding this case, said that while the statutes of 1855, as adopted in the First Assembly, did provide that when a wrongful act produced death the perpetrator was civilly liable for the injury, which law was in force at the time of the murder, yet in February, 1857, this civil code was repealed, along with the criminal code, and that this repealing act took effect from its passage, and for that reason the court held that the administrator of the estate of the murdered man could not recover damages from the murderer.

With all the publicity given to Bradford's duplicity in deceiving the members of the assembly about the effect of the passage of his act, one would think that the voters of Otoe County would have lost all confidence in him, but, remarkable as it may seem, they re-elected him a member of the Fourth Territorial Assembly. After that session adjourned he moved to Colorado to practice law, and, according to Sheldon's *History,* was appointed by President Abraham Lincoln as one of the judges of the supreme court of Colorado Territory. This repeal of the civil and criminal code by the third session of the territorial assembly has been stamped by every writer as one of the rawest and most fraudulent pieces of legislation ever passed in Nebraska.

I am giving you the details of this case for the reason that the knowledge of this occurrence has shaken the confidence of the members of each incoming legislature, and has placed upon each member since that time

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the responsibility of ascertaining the true motives and reasons back of each bill they are asked to support by their vote.

Bradford kept his client from punishment, either criminally or civilly, but by his course he flagrantly violated the ethics of the legal profession.

—o—

Bill Hooker, Bull Whacker

"Pizen" Bill Hooker of Milwaukee, Wisconsin, editor of **The Bullwhacker, The Prairie Schooner** and other accounts of frontier experience, writes for a map of the Sidney-Deadwood Trail, about which he is writing a book. Hooker forwards an article, **The Battle of Sidney Crossing,** story of a skirmish between his bull train and a party of Sioux at the Platte crossing.

In the course of correspondence with the editor, "Pizen" Bill gives the story of the murder of Bob Porter by Ed Patterson, who was hung at Sidney. Other interesting bits tell about his unusually active life as freighter, printer, reporter, columnist, editor, historian and lecturer. One of his newsy letters reports on survivors of the early frontier:

> "Major A. B. Ostrander, who served at Phil Kearny, used to get mad as a hatter when anyone mispelled that name; * * *. I knew him very well when he was a city employe in New York before he wrote **A Soldier Boy of the Sixties.** About two years ago, at the age of ninety, the old man committed suicide by putting a bullet through his brain at his home in Seattle. * * * We were together a good deal in New York, and he helped organize the Society of Plainsmen which we held together for a number of years. Now most of the members have died, the only ones living being Edmund Seymour, a Wall street banker and broker, who was associated with Bartlett Richards in the cattle business in Wyoming and Nebraska; now he is as he has been for twenty-five or more years, president of the American Bison Society. Another surviving member is Mr. M. S. Garretson, curator of the heads and horns museum in Bronx park, and myself. All the others have died, I believe, including Col. Stokes, who freighted out of the Black Hills the first quartz to be assayed at Denver."

Courtesy Nebraska State Historical Society

(cover)

BAYARD H. PAINE – SIGNIFICANT LEGAL DECISIONS
Nebraska History Magazine

Addison E. Sheldon
Editor
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HONORABLE BAYARD H. PAINE –
DECISIONS WHICH HAVE CHANGED NEBRASKA HISTORY

GRAND ISLAND, 1864 TEXAS TRAIL
SHERIDAN COUNTY HISTORY
NOTES

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(p. 194) *(image of Bayard H. Paine)*

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Decisions which have changed Nebraska History.
By Bayard H. Paine
Address at 1935 Annual Meeting of the Nebraska State Historical Society.

In attempting to bring to you an account of some of the early decisions which have changed Nebraska history, I found myself swamped with the abundance of interesting material.

For instance, there were several slaveholders in Nebraska City. Two of the slaves of S. B. Nuckolls were spirited away over the underground railroad which ran through Tabor, Iowa, and Mr. Nuckolls attempted to recoup his loss by suing those suspected by him of assisting their escape for damages, but a little search convinced me that no further details can be found except those given in Sheldon's *Nebraska, The Land and The People*.

The Governor Boyd citizenship case, the impeachment of Governor Butler, and the Bartley bond cases were each of such interest that an evening could be spent in discussing them.

The Quin-Bohanan murder case of the early Eighties, which resulted from an argument as to the correct spelling of the word "peddler" or "pedlar," is interesting, but did no change Nebraska history nor yet clarify the two forms of spelling the word.

The history of House Roll No. 12 introduced January 12, 1891, by Fred Newberry, a real-headed Hamilton Country famer, which became the famous Newberry Bill, and the Maximum Rate cases growing out of it, shook the state, as well as the railroads, but it does not lend itself to an abbreviated discussion.

However, I have selected perhaps a dozen cases which actually affected the history of our state in a greater of less degree.

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The Value of a Widow's Homestead Right in Nebraska

Dean Henry H. Foster, of the Nebraska College of Law, in an article in the *Nebraska Law Bulletin* for October, 1924, tells us that the First Territorial Legislature of Nebraska in 1855 adopted 100 pages of Iowa law, and among the laws adopted was the following: - "If the debtor is the head of a family, there is further exempt * * his homestead as provided by law." This is the simplest homestead act ever passed by a legislature.

Five years later the second homestead act was passed, and from that time every session of the legislature tampered with the homestead laws by amendments until in 1879 the law of Nebraska declared in general terms that a homestead consisting of a dwelling house and the land of upon which it was situated not exceeding 160 acres if in the country, or two lots if in a city, should be exempt from judgment liens or forced sale by a creditor. If the title to this homestead stood in the name of the husband, then upon his death the wife would be entitled to live in this homestead for life, and the decisions of our probate courts, district courts and the supreme court for nearly fifty years had uniformly held that such homestead property, whether a quarter-section of land or two town lots with the residence thereon, was limited in value to $2,000 in all cases.

Then came the famous case that overturned all of these decisions. George Meisner of Shelton, Buffalo County, Nebraska, a thrifty-landowner, cattle-feeder and banker, some fourteen years before his death married a young school-teacher as his second wife. Upon his death without a will, a determined lawsuit ensued.

It is said in the concurring opinion of Judge Hamer, who reside at Kearney in the same county, that George Meisner was worth more than a million dollars at the time of his death.

One of his real estate holdings was a valuable section of land just outside of the city of Shelton, and upon the northwest quarter of this section he and his second wife resided at the time of his death. It was stipulated that this quarter-section alone was worth $25,000.

(p. 197) *(image of S. H. Sedgwick)*

His young widow insisted that she entitled to the life use of this entire quarter-section of land with the beautiful home thereon as her homestead right, without regard to its value. On the other hand, the grown daughters of his first marriage insisted that the law of Nebraska and a uniform line of decisions of our courts had held that she was only entitled to the present worth . . .

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. . . of $2,000, and in the trial before Judge Hostetler he followed this line of authorities and decreed that the present value of her $2,000 interest in the homestead property was worth $1,464 in cash, and no more, as based on her life expectancy.

Here was a widow with ample resources and a determination to change the law in Nebraska for the benefit of all widows thereafter. She employed as her attorneys the distinguished Halleck F. Rose of Omaha and Judge E. C. Calkins of Kearney, whose term as a Supreme Court commissioner had just expired. The daughters by the first marriage employed Judge John J. Sullivan of Columbus, who had been a brilliant member of the supreme court up to five years before the death of Mr. Meisner, and Fred W. Ashton of Grand Island, one of whose distinctions was that he came within twenty-two votes of defeating George W. Norris for Congress.

When the case was presented to the supreme court of Nebraska, the arguments were not closed when the attorneys had presented their pleas in open court, but it is easy to read between the lines that the members of the supreme court divided at once into two camps. The decision was finally rendered by Judge Sedgwick, with a concurring opinion by Judge Hamer. A strong dissenting opinion was written by Judge Fawcett, which was concurred in by Judges Barnes and Letton, and thus this opinion became one of those four-to-three decisions which are always studied with the greatest interest by attorneys.

Judge Sedgwick defined a homestead as the house and the land where the family dwells; however, he admitted that if creditors were seeking to sell the homestead for debts it is only exempt up to $2,000 in value, while, on the other hand, if it is not a question of creditors seeking to collect debts, but simply a question of the respective rights between the widow and other heirs, then the entire homestead vests in the widow for life, then the entire homestead vests in the widow for life, without regard to its value. This decision gave Mrs. Meisner the life use of a tract of land worth $25,000 in the place of $1,464 cash, and overruled all former opinions of this court on this point.

Although this holding has been assailed many times since it was released in a1912, it has withstood all attacks . . .

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. . . during the ensuing twenty-three years, and may doubtless be safely relied upon by widows hereafter.

Some Cases Affecting Ranching in Nebraska

For perhaps fifteen year, ending in the eighties, Texas cattle were slowly trailed up to Nebraska through Oklahoma and Kansas as the grass started in the spring. These cattle were first trailed to Fort Kearny, then to Plum Creek, now known as Lexington, but later the northern end of the trail was Ogallala, Nebraska, which was a wide-open town, with saloons and dance halls and with Texas and Mexican cowboys making things lively.

The old ranches along the Platte River, such as the Fox Creek ranch, Horse Creek ranch, and the ranches owned by Ben Gallagher, William Paxton, Jack Morrow, Gilman Brothers and John Burke, to mention only a few of them, brought these long-horn Texas steers, fattened them on Nebraska grass and shipped them east on the Union Pacific.

These Texas cattle were all branded when they reached Nebraska, and allowed to run at large on the range, and twice a year great round-ups were held on both sides of the Platte River and the calves were branded and the cattle counted and separated by the owners.

Homesteaders were not encouraged to move into these cattle ranges, and when they took up 160 acres of the best land among a creek bottom or on a hay flat, they were discouraged from farming in every way that could be devised. Stubborn homesteaders, who would not listen to reason, sometimes came to an untimely death, -- “shot by parties unknown.”

Mitchell and Ketchum

On December 10, 1879, occurred the capture, lynching and burning of two men by what was known as the Olive gang in the unorganized territory now known as Custer Country. The affair was of such a gruesome nature that the details were published in all the eastern papers, and it was cited as the culminating act in the war of ranchmen to keep out homesteaders.

To bring some of the facts to mind, I secured the four-volume record in this case of Olive vs. The State. The trial was had before the time of typewriters, and . . .

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. . . Mr. F. M. Hallowell, the official reporter, and A. H. Cramer, clerk of the district court, had written out the entire record in pen and ink.

The indictment for murder was returned against I. P. Olive, Frederick Fisher, Pedro Dominicus, Dennis Gartrell and others in March, 1879. The crime having occurred in unorganized territory lying west of Sherman County, which was in the fifth judicial district of the famous William Gaslin, Jr., he could, under the law, direct the trial to be held in any county in his district. He did not hold the trial in Buffalo,

Sherman, or Kearney Counties, which were located nearer to the scene of the crime, but fixed the place of the trial as Adams County.

When the legislature met in 1879, Governor Garber referred to the lynching and burning of these two men as an outgrowth of the conflict between the cattlemen and the homesteaders, and asked an appropriation of $10,000 to reward the men who had risked their lives in capturing the outlaws.

The defendants, being wealthy ranchmen, employed the best attorneys that could be secured, Mason and Whedon of Lincoln, Hinman and Neville of North Platte, Hamer and Conner of Kearney, and the silver-tonged James Laird of Hastings, who was elected congressman at the next election.

When the trial began, the first and most important state's witness, C. W. McNamar, was examined by Attorney-General C. J. Dilworth, who conducted the prosecution. McNamar testified that he saw Luther Mitchell and Ami Ketchum in Plum Creek; that they were handcuffed and put in a spring wagon, and driven toward Olive's ranch, which was located about forty-five miles directly north of Plum Creek; that he followed them out some fifteen or twenty miles, and that three men on horseback overtook him in the dusk of the evening and that one of these men was I. P. Olive; that the next morning he drove to Olive's ranch and Olive did not know what had become of Mitchell and Ketchum, but that with five other men he went in search of them in the afternoon, and in a pocket in Devil's Gap canyon near the Loup River and less than three miles from Olive's ranch, they found the bodies of the men, which . . .

(p. 201) *(image of Mitchell and Ketchum Burnt Bodies)*

. . . had been gashed with knives, shot with rifles, hanged from a tree, and also burned.

I recall as a small boy that one of both of these bodies were taken through Grand Island on a Union Pacific train, which stopped there for meals, and planks were obligingly placed up into the baggage car by willing hands, the coffin was opened, and the greater part of the population of Grand Island walked up through the baggage car and examined the remains.

The trial at Hastings attracted people from all over the state. An uncle of mine came from Cass County to attend the trial. My father drove us over to Hastings in our emigrant wagon, and we attended several sessions of the trial, sleeping in the emigrant wagon nights. The city was filled with ranchmen and cowboys as well as homesteaders, and rumors were current that ranchmen would overpower the sheriff and free the defendants, but all such fears prove groundless. An order was made that the sheriff should not allow any of the audience to carry guns into the courtroom, but another . . .

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. . . rumor is that this did not prevent Judge Gaslin from having a Colt's revolver near at hand.

The jury finally returned a verdict of guilty of murder in the second degree, and the defendants were sentence to the penitentiary for life. An appeal was taken to the supreme court, and in the eleventh volume of the Nebraska *Reports* we find that the first thirty-seven pages are taken up with the decision in this case, which was written by Judge Lake, with a strong dissent by Chief Justice Maxwell. The case was reversed, it appearing that Cuter County was not entirely unorganized territory, as officers had been elected, and while it has not been attached by the legislature to any judicial district except as unorganized territory, yet probably the trial should not have been held at Hastings. Other errors occurred in the admission of evidence and in the instructions to the jury. The warden of the penitentiary says that the records there disclose that I. P. Olive was held in the penitentiary for one year, seven months and twenty days, and then discharged by an order of the court.

In February, 1912, the *World-Herald* of Omaha printed an account of the tragedy from the Olive side as told by the negro cook whom Olive had brought up from Texas with cattle. He claimed that they had been missing their cattle and the theft of some had been traced to Ketchum and Mitchell and that when they went over with their men to investigate, Mitchell had shot and wounded Bob Olive, and that shortly thereafter I. P. Olive and his men killed them. The result of this occurrence was that the homesteaders banded together to protect their homesteads against the range cattle, and in some instances, as in

Frontier County, a group of homesteaders erected a log fort, from which they threatened to shoot the cattle if driven over their farm lands.

Fencing Government Land

Shortly thereafter the driving of Texas cattle to Nebraska was discontinued and the ranches were stocked with a much better grade of cattle. To protect these cattle the larger ranchers fenced in their ranges, including all of the government land, paying nothing for the use thereof.

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A few of the large ranches had developed the art of intimidation to a science, and no homesteader dared to file within their fence lines.

Then a new difficulty arose, for in 1886 Congress passed an act making it a crime to fence in public lands with privately owned land. This at once became a dead letter and was never enforced in Nebraska, at least until Theodore Roosevelt became president.

The great Spade ranch was one of the largest, having thousands of acres within its fences in Sheridan Cherry and Garden Counties. All of its cattle and personal property were branded with the ace of spades. The headquarters were at Ellsworth, located thirty miles east of Alliance, on the Burlington, in Sheridan County.

Bartlett Richards, who made his home at Coronado Beach, California, and Will G. Comstock, were the owners of this vast property, reputed to be worth up in the millions. Their summer homes were at Ellsworth, and the ranch was well managed in every detail.

When the order of Roosevelt went out that all fences on government land should come down, these men with many of the other larger ranch owners went to Washington and finally prevailed upon Roosevelt to give them an extension of time for one year to take the fences down. At the end of the year no fences had been taken down. The President was somewhat riled, and directed the United States Attorney to begin prosecutions. Judge Irving F. Baxter, who had severed as county judge and also as district judge in Douglas County, was the U.S. Attorney for Nebraska, and on May 25, 1905, he filed an indictment in the federal court at Omaha against Richards and Comstock.

After trial had begun they entered a plea of guilty to certain counts of the indictment, and on the same day, November 13, 1905, Judge William H. Munger, who had been appointed to the United States bench by Grover Cleveland, sentenced them to pay fines and costs, and to be imprisoned in the custody of the United States Marshal for six hours. Thereupon, they each paid fines of $300 and paid costs of $339.31, making a total amount paid of $939.31. The unusually short sentence given them by Judge W. H. Munger was because the United States Attorney had made a statement to the judge in . . .

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. . . their behalf, telling what fine business men they were, and recommended a light sentence. The United States Marshal at that time was T. L. Matthews of Fremont, and he took Messrs, Richards and Comstock up to the Omaha Club, of which they were members, and they had dinner and sat around awhile; the six hours passed very quickly and they were released. This matter got into the newspapers, and President Theodore Roosevelt read it and was mad clear through. He at once discharged Mr. Matthews as United States Marshall, and said that he regretted that federal judges were appointed for life and that he could not discharge the judge. However, the president discharged the United States Attorney at once.

The Nebraska delegation in Congress, headed by Senator J. H. Millard, endorsed Hon. Charles A. Goss, now Chief Justice, for appointment as United States Attorney, but President Roosevelt would not appoint him until he had first sent for him to come to Washington and asked him whether he would vigorously prosecute ranchmen who had fenced up government land. Upon Judge Goss assuring him that he would prosecute them vigorously, using good judgement in all steps taken, President Roosevelt said, “That’s right, we all have to use common sense,” and appointed him on the spot.

Conspiracy Trials

The Kinkaid act, fathered by Moses Kinkaid, of the Big Sixth district of Nebraska, was passed April 28, 1904, going into effect June 28th. This act gave a full section of land to homesteaders instead of quarter-section, and such homesteaders were called Kinkaiders. Under this law some of the larger ranchmen devised the plan of securing Civil War soldiers, as well as widows of veterans, to homestead all of the government land within their ranches. These soldiers could prove up within a very short time, as their Civil War services was credited on their homestead, and some of them for a few dollars would gain title to a section of land and at once turn it over to the ranchmen.

Real estate agents in the pay of the ranchers searched over the whole United States to find soldiers or widows, and in one case proven in court one widow had filed five . . .

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. . . times under variations of her name, but only secured her expenses and $5.00 for making each filing.

Then the government acted. It first sent civil engineers to survey the ranches, and then sent on "G-men," who cut the fences and rolled up miles of barbed wire which were left to rust.

Indictments for conspiracy in securing such fraudulent titles were brought against some twenty-six men.

The first of these famous conspiracy cases to be brought to trial was against Richards, Comstock, Jamison and Triplett. This trial began on November 20, 1906, lasted for one month and was tried before Hon. William H. Munger, and verdicts of guilty were returned by the jury against all of these four defendants. Thereupon, Richards and Comstock were each fined $1,500 and sentenced to imprisonment for one year. Jamison and Triplett were fined $500 each and sentenced to imprisonment for eight months.

In these cases S. R. Rush, as attorney of Omaha, assisted Judge Goss. Mr. Rush was a patient and careful investigator, and mastered every fact relating to these titles. He continued in this work of prosecuting conspiracy cases for more than fifteen years, and was given the title of Special Assistant to the Attorney-General. He prosecuted such cases in Oregon, California, and in many other states, and uniformly secured convictions.

Hon. Thomas C. Munger, of Lincoln, was appointed United States District Judge on March 1, 1907, and at once took up the trial of the remaining conspiracy cases, those against Thomas M. Huntington, Ammi B. Todd and Fred Hoyt. Huntington, Todd, and Hoyt were fined $1,000 each and sentenced to jail for a shorter time.

Bonds were given and the cases were appealed to the United States Circuit Court of Appeals. On November 7, 1910, mandates were received affirming all of these sentences, and upon order of the Attorney-General, Bartlett Richards was transferred to the Adams County jail to serve his sentence of one year. Unfortunately he died within the year.[1]

[1]Mari Sandoz furnished me the information, taken from the Rushville Recorder under date of September 8, 1911, that Bartlett Richards had just died at a sanitarium in Hastings of gall-stones. In Miss Sandoz' new book, she tells us some of the experiences of her father, *(cont. on p. 207)* who had been a locator, was familiar with all of the land in this locality, and when these conspiracy trials began, was secured by the government as one of its star witnesses.

(p. 206) *(map of U.B.I. Ranch Fence Line)*

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In the prosecution of the owners of the large ranches, one of the most striking was that of Rev. George G. Ware, who lived in the Black Hills, but was the principal owner of the U.B.I. Land & Cattle Company, and with other stockholders and employees was prosecuted for conspiracy in getting Civil War soldiers to

secure patents to land in their range. The U.B.I. ranch had also fenced in government land with their own, having fenced in land, as shown by Exhibit 66, identified by the reporter, Charles W. Pearsoll, which was eighteen miles wide at its widest part and sixteen miles north and south, in Hooker County, Nebraska.[2]

The jury brought in a verdict of guilty on certain counts. Rev. Ware was ordered to pay a fine of $1,000 and be imprisoned in the common jail for one year. Rev. Ware appealed his case to the Circuit Court of Appeals of the United States, which affirmed the sentence. A petition for writ of certiorari was filed in the United States Supreme Court, which writ was finally denied on October 21, 1907, and he served his sentence in the county jail at Grand Island.

This series of prosecutions against the most extensive ranch owners, at the sharp direction of President Theodore Roosevelt, convinced millionaire ranchmen that they could not fence in the government land, and revolutionized the plan upon which great ranches had been built up over western Nebraska.

Immediately there was a great influx of homesteaders to take the lands, and some amusing results followed. At one time a number of Jews came out from New York City and filed on land in Cherry County, knowing nothing about ranching or farming. Some of them gave up their filing for a song but a few stuck to their sod houses until they had proved up on their claims. At one time fifty negro families took claims around Brownlee in the southeastern part of Cherry County, and many of them still reside there. Between 1910 and 1925 many of these homesteaders, who had lived on their sections, . . .

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[2]See map.

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. . . sold out their holdings at from $1,000 to $5,000 a homestead.

Thus the Kinkaid homestead law resulted in great good to western Nebraska, and the larger ranches gradually increased their holdings in an honest and legitimate manner, buying up good titles at fair prices and in this way extending their ranches.

Among these larger ranches I might name the Miner and Abbott ranches in Grant County, the A. R. Modisett ranch in Sheridan County, the Reimers ranch in Hooker County, while one of the very largest ranches is that of the late Ed, M. Brass, of Grand Island, whose ranch holdings of fine bottom lands and hay valleys, with perfect titles and well improved, extends for some forty-six miles in Cherry County. Mr. Brass at the time of his death was a director of the Federal Reserve Bank at Kansas City.

When the Supreme Court Compelled the Legislature to Act.

I asked Judge William B. Rose, the senior member of our supreme court, to tell me what the most exciting case was ever argued in the supreme court. His prompt answer was that it was when the court issued a writ of mandamus to Sam Elder.

In the election of November, 1890, James E. Boyd. Democrat, of Omaha, received on the face of the returns 71,331 votes, John H. Powers, the Populist, 70,187, and L. D. Richards, Republican, 68,878. It is now believed by many that Powers was really elected. However, on the face of the returns Boyd was elected.

When legislature met on January 7, 1891 it was its duty, in joint session, to at once canvass the vote as returned by the counties to the secretary of state and by him delivered to the legislature, and announce which of the state officers were duty elected.

George Meiklejohn, of Nance County, was the outgoing lieutenant-governor. He insisted that until the legislature was duly organized he head the right to preside over the joint session.

On the other hand, Sam L. Elder. Of Clay County, a Civil War veteran and an all-around popular man, had been elected Speaker of the House by the Populists, who, . . .

(p. 209) *(image John H. Powers)*

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. . . for the first time in Nebraska history, had fifty-four votes to twenty-five Democrats and twenty-one Republicans.

When the joint session assembled, Speaker Elder insisted that he was the presiding officer, and Meiklejohn at the same time asserted his rights, so they both attempted, and continued, to preside over the session. General Thayer, a Republican, was the outgoing governor, and under the circumstances not only refused to relinquish the office to Boyd, but called out a company of the state militia to guard and protect him.

The Populists in the joint session voted to turn the election returns over to a special committee to examine and report their findings, to delay the matter as long as possible.

Thereupon, Boyd hired General John C. Cowan and several other attorneys to bring a mandamus action to require Sam Elder as Speaker of the House to open the returns and declare the result of the fall election.

Both Elder and Meiklejohn were on the speaker's rostrum, each one claiming he was presiding. They would not adjourn, and the joint session of the legislature stayed in session all night, some of the members sleeping on cots. Early the next morning this mandamus case was called for immediate trial in the supreme court. The courtroom was packed to the doors. Although no one was admitted to the courtroom except upon a pass from the officer in charge of the militia which lined the halls of the capitol, with bayonets fixed, many stood on chairs out in the hall and listened through the open doors.

General Cowan was a striking figure – long black hair and flashing black eyes, – and was assisted by John D. Howe in his argument for Boyd. William V. Allen, Populist, who became United States Senator, and was a giant both in figure and intellect, answered with logical analysis the fiery arguments of Cowan. Allen maintained that the supreme court did not have any authority whatever to mandamus the legislature, which was a coordinate branch of the state government; that the legislature was in regular joint session and had exactly the same power that the supreme court had, and the legislature being an independent body of equal power, . . .

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. . . would not obey any order of the supreme court about its procedure, and asked the court how it would enforce a writ of mandamus in case the judges decided to issue it. "Suppose you do send your writ of mandamus in there and the legislature refuses to honor it?" The situation was tense. Many state officers, as well as a number of the members of the legislature, were armed with revolvers, and both sides had been afraid to leave the capitol during the night.

General Cowan in his reply to Allen made one of the greatest patriotic speeches ever made in Nebraska, enlarging upon the ultimate power of the supreme court. The arguments were completed, the packed courtroom silent; no one knew whether riot would break out right then or what might happen. Certainly no one in that entire crowd had the slightest idea but that the three members of the supreme court would retire to their consolation room, discuss the situation, and then return and render their decision in the usual and ordinary way, -- but the court did not retire. Chief Justice Cobb simply leaned over and spoke quietly to Judge Maxwell, and then to Judge Norval, who had just become a member of the bench, after which the Chief Justice at once began to render the decision by calmly discussing each argument as made. He said that there was no dispute between the legislature and the supreme court, but the fact was that Sam Elder personally as speaker had a mere clerical duty to perform, which was to open and read the result of the returns of the election, and that it was just his personal duty, which he had failed to perform, which duty he should perform at once; and said that the writ of mandamus would issue against Sam Elder, commanding him immediately to open and publish the returns from each and every county of the state, and to declare the persons receiving the highest number of votes to be elected as state officers in the presence of the majority of each house duly assembled.

General Cowan instantly walked up to the clerk's desk and pulled out of his pocket a writ of mandamus, all ready to be signed by the Chief Justice, which was done at once. Many standing around outside as well as those in the courtroom were afraid that the shooting would start the minute that writ was signed, but Gener- . . .

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. . . -al Cowan had his plans carefully laid in case he won the decision, for he had brought up Sam McClay, the sheriff of Lancaster County, who was there with a posse of deputy sheriffs, all ready to serve that writ. At the moment that the Chief Justice signed and handed back the writ to Cowan he handed it to Sheriff Sam McClay and directed him to act. The legislature in joint session was then behind locked doors, being in executive session. Sheriff Sam McClay made for the door, and with his posse broke it down and rushed down to the front and served the writ on Sam Elder. That was the exciting moment. What would follow? Elder decided that he would obey the order of the supreme court. He at once opened up the returns and declared that Boyd had been elected governor on the face of the election returns, together with all the rest of the state officers. Thus a tragedy was averted in Nebraska statecraft.

Woman as Office Holders

The right of our women to hold office was established by two Nebraskan decisions.

It first reached the supreme court in the case of State ex rel. Crosby v. Cones (15 Neb. 444). Six attorneys were engaged in this case, with General John C. Cowan leading one side and Honorable John M. Thurston the other. The decision was rendered by Samuel Maxwell, who held that as the statute permitted women possessing the necessary qualifications to vote for school officers they were therefore qualified to serve if elected as school trustees.

Following this decision it was debated in all parts of the state whether women, who were now allowed to vote at school elections and to be elected members of a schoolboard, could hold other offices. Very shortly women began to be elected to be elected to the office of county superintendent in one county after another.

Then came the case of Gertrude Jorden Vs Ernest B. Quible (86 Neb. 417, 27 L.R.A. n. s. 531), which aroused the greatest interest on the part of every woman in the State of Nebraska.

Gertrude Jordan, 30 years of age, had been for seven years deputy county treasurer of Cherry County. She enjoyed the work and decided to run for county treas- . . .

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. . . -urer. She resigned as deputy on June 1st prior to the election in order to make her campaign, in which she received 925 votes to her opponent's 683, a handsome majority of 242 votes, and she received the certificate of election.

The old county treasurer refused to five up the money or records of the office to her, and argued that a county treasurer must be a voter to be qualified for that office, and that as she did not have the right to vote for a county treasurer she not qualified to hold the office.

Judge William B. Rose rendered the opinion of the divided court, holding that Gertrude Jordan *was* eligible under the facts in the case to hold the office of county treasurer of Cherry County.

Judge Charles B. Letton in a concurring opinion reached the same conclusion by saying that for years women had been deputy county treasurers and deputy county clerks and in the absence of their principals had performed duties of the office, and that women had prior to that time been elected to the office of county superintendent in several counties, and to say that this woman did not possess the necessary qualifications to hold the office of county treasurer, when she had been seven years deputy county reasurer, would be to turn the clock back and violate common experience and common sense.

Judge Jacob Fawcett voted no, and wrote a sharp dissenting opinion, saying that women did not have the right under constitution to our laws to hold any of office except school offices, and that if their rights were extended it should be done by the legislature and not by the court; that if it was admitted that a woman might be elected county treasurer one might also be elected governor. Judge Fawcett admitted that in his opinion there were many women in the state who would make more efficient governors than some of the men who had filled the office, but that our constitution had declared who should be electors, and that it was an absurdity to hold that the plaintiff could be elected to an office for which she was not eligible to vote at that election.

The opinion of Judge Rose in this case was doubtless against the weight of authority at the time it was rendered on March 28, 1910, for while it was published . . .

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. . . in the selected cases in 27 *Lawyers' Reports Annotated*, new series, page 531, yet in the notes it was shown that Judge Cooley in his *Constitutional Law* held that when the law was silent respective qualifications for office it must be understood that electors are eligible and no others. This Nebraska opinion broke with precedent and led the way for other states to follow.

Suffrage

Suffrage Judge Rose tells us that he received a great many letters from all over the United States relating to this opinion, which was given great prominence in the leading newspapers in the country. This case, deciding that Nebraska women could hold any office in our state to which they were duly elected, doubtless gave Nebraska women new courage to join heartily with women of other states in working for suffrage, which they received by the Nineteenth Amendment, when it was adopted by Tennessee, the thirty-sixth state, on August 18, 1920.

It is a popular but mistaken idea that the Nineteenth Amendment conferred upon every woman the absolute right to vote in every state in the Union. It did not do that by its very terms, for Section 1 reads as follows: - "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex." However, there are several other "abridgements" which deprive women the same as men. For instance, in more than a dozen states old pauper laws have been brought out of the ash heap and persons on relief are not allowed to vote. It seems a tragedy that because a person is temporarily on relief he is deprived of the right to vote. Then too, if the law of any state requires ownership of personal property to qualify one to vote, a woman would not be allowed to vote in that state unless she complied with all the requirements.

It was provided in the *General Statutes* of Nebraska for 1873 that only free, white males over twenty-one years of age were competent to serve on grand or petit juries, and later the words "free" and "white" were cut out by the legislature, but our present law still provides that a juror must be a male, so women cannot yet serve as jurors in Nebraska. However, Section 77-1802 . . .

(p. 215) *(image of Robert W. Furnas)*

. . . of our Nebraska *Statutes* provides that every male over twenty-one years and under fifty years shall be assessed a poll tax of $2.50 a year, and naturally women are deprived of the pleasure of paying this poll tax.

The Libel Suit of Governor Furnas

The outstanding libel suit of the early days in Nebraska was that brought by Governor Robert W. Furnas against Dr. George L. Miller and his partner, Lyman Richardson, the owner of the Omaha *Herald*, which was ably edited at that time by Dr. Miller, a rabid Democrat. The Omaha *Herald* had published a formal charge against Governor Furnas, saying that he had accepted a bribe of $3,000 for his vote as a member of the Third Territorial Legislature against the removal of the capital from Omaha after having previously cast his vote for removal.

The trial of this libel suit was begun on June 19, 1873, and excited the greatest interest over the entire state. Three outstanding attorneys were engaged upon each side . . .

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. . . of the case. General John C. Cowan, Judge O. P. Mason and Seth Robinson prosecuted the suit for Governor Furnas, and Judge Eleazer Wakeley, James W. Savage, and George W. Ambrose represented Dr. Miller and partner. The evidence was sharply in dispute. Every step of the trial was hotly contested. The trial resulted in a hung jury, ten jurors voting for the defendants and only two for Governor Furnas, who claimed to have been tricked by a band of political conspirators, and swore that he never received a dollar of money for his vote.

However, Dr. Miller considered that he had won the case in convincing ten of the jurors of the truth of his charge, and immediately published a pamphlet containing the testimony and circulated copies of it freely in all parts of the state. As a result, perhaps, of this publicity, Governor Furnas retired from politics at the end of his term as governor.

In 1878 he founded this Nebraska State Historical Society. He organized the first State Board of Agriculture, and was its secretary from 1884 until his death, and his services to agriculture, according to Dr. Sheldon, produced greater results than those of any other Nebraskan in the first half century of the state's history. He made an outstanding record for public services that can never be forgotten, regardless of this famous libel suit.

The Nebraska Murder Case that Repealed the Entire Nebraska Criminal Code

The case of Bennet, Administrator, vs. Hargus, 1 Neb. 419, is especially humiliating to legislators. The record of it is found in the last 100 pages of Volume 1 of the Nebraska *Reports,* in which supplement are published twenty-one cases decided by the supreme court of the Territory of Nebraska. Among these cases appears this one of Bennet, Administrator, V. Hargus. The holding of the case is simply to the effect that a right of action that is founded upon a law which has been repealed cannot prevail. We find the facts set out in Sheldon's *Nebraska, The Land and the People*, and in the many articles about the case in the newspaper published during the Third Territorial Assembly.

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Simpson Hargus and James E. Lacy in April, 1856, had a violent altercation over a piece of land located near Nebraska City, which ended in a fight. As a result of this assault Lacy died two days later. Hargus was arrested for the murder, and two trials were held in both of which he as vigorously defended by Judge Allen A. Bradford. In spite of all his attorney could do, Hargus was found guilty and sentenced to ten years imprisonment. Judge Bradford was an exceedingly unscrupulous lawyer, and notorious for the acts of crookedness to which he would resort.

The legislature in the territorial days was known as the assembly, which consisted of a large body called the house, and an upper body called the council. Judge Bradford was the member of the council from Otoe County. When the Third Territorial Assembly met, he introduced a bill to repeal the criminal laws of the territory which had been adopted at the First Territorial Assembly, and also to repeal the civil code of laws which had been adopted from the code of Iowa. Bradford put the bill through both houses, but it was vetoed by Territorial Governor Izard, who called the attention of the legislature to the serious consequences that would follow if the territory should be deprived of its criminal and civil codes. After some further debate, the bill was passed over the governor's veto by a vote of twenty-four to two in the house, H. Johnson and W. E. Moore being the only ones who voted against it, and by a vote of twelve to one in the council, Dr. George L. Miller of Omaha being the one standing out. One newspaper, the *Nebraskan*, in referring to the fraud practiced upon the assembly, said that they were forced to the conclusion that Bradford was the most dangerous and corrupt man in the assembly, and that the only purpose of repealing the laws was to allow his client, the murderer, Hargus, to escape the penalty of his crime.

Robert W. Furnas of Nemaha County, afterwards governor of our state, was a member of this council, and on March 5, 1857, in an article in the Nebraska *Advertiser*, said that the members of the council had considered Judge Bradford an honest and conscientious man, and had only voted for it on Judge Bradford's assurance . . .

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. . . that it only repealed the conflicting portions of the criminal code, which assurance had been given with all apparent candor and honesty. As a result, when the appeal in the murder case reached the supreme court it was found, of course, that the entire criminal law had been repealed by this act, with no saving clause for actions already pending, and therefore the murderer, Hargus, could not be punished.

Oliver P. Mason, later the first Chief Justice after Nebraska became a state, then brought an action on the part of the estate of the murdered man, setting out in his petition that Hargus had killed Lacy in April, 1856, and asked that the heirs be paid $5,000 civil damages for his death.

Judge Eleazer Wakeley, in deciding this case, said that while the statutes of 1855, as adopted in the First Assembly, did provide that when a wrongful act produced death the perpetrator was civilly liable for the injury, which law was in force at the time of the murder, yet in February, 1857, this civil code was repealed, along with the criminal code, and that this repealing act took effect from its passage, and for that reason the court held that the administrator of the estate of the murdered man could not recover damages from the murderer.

With all the publicity given to Bradford's duplicity in deceiving the members of the assembly about the effects of the passage of his act, one would think that the voters of Otoe County would have lost all confidence in him, but, remarkable as it may seem, they re-elected him a member of the Fourth Territorial Assembly. After that session adjourned to Sheldon's *History*, was appointed by President Abraham Lincoln as one of the judges of the supreme court of Colorado Territory. This repeal of the civil and criminal code by the third session of the territorial assembly has been stamped by every writer as one of the rawest and most fraudulent pieces of legislation ever passed in Nebraska.

I am giving you the details of this case for the reason that the Knowledge of this occurrence has shaken the confidence of the members of each incoming legislature, and has placed upon each member since that time . . .

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. . . the responsibility of ascertaining the true motives and reasons back of each bill they are asked to support by their vote.

Bradford kept his client from punishment, either criminally or civilly, but by his course he flagrantly violated the ethics of the legal profession.

Bill Hooker, Bull Whacker

"Pizen" Bill Hooker of Milwaukee, Wisconsin, editor of **The Bullwhacker, The Prairie Schooner** and other accounts of frontier experience, writes for a map of the Sidney-Deadwood Trail, about which he is writing a book. Hooker forwards an article, **The Battle of Sidney Crossing**, story of a skirmish between his bull train and a party of Sioux at the Platte crossing.

In the course of correspondence with the editor, "Pizen" Bill gives the story of the murder of Bob Porter by Ed Patterson, who was hung at Sidney, Other interesting bits tell about his unusually active life as freighter, printer, reporter, columnist, editor, historian and lecturer. One of his newsy letters reports on survivors of the early frontier:

> "Major A. B. Ostrander, who served at Phil Kearny, used to get mad as a hatter when anyone misspelled that name. * * * I knew him very well when he was a city employee in New York before

he wrote **A Soldier Boy of the Sixties.** About two years ago, at the age of ninety, the old man committed suicide by putting a bullet through his brain at his home in Seattle. * * *
We were together a good deal in New York, and he helped organize the Society of Plainsmen which we held together for a number of years. Now most of the members have died, the only ones living being Edmund Seymour, a Wall street banker and broker, who was associated with Bartlett Richards in the cattle business in Wyoming and Nebraska; now he is as he has been for twenty-five or more years, president of the American Bison Society. Another surviving member is Mr. M. S. Garretson, curator of the heads and horns museum in Bronx Park, and myself. All the others have died, I believe, including Col. Stokes, who freighted out of the Black Hills the first quartz to be assayed at Denver."