RAMSEY *vs.* THE STATE.

To constitute the offence prohibited by *sec.* 2, *ch.* 159, *Dig.*, it is not sufficient that defendant sold ardent spirits in quantities less than one quart, without license; but it is necessary that he should have kept a grocery for that purpose.

It is not the mere act of keeping a grocery, but the further act of selling spirits in quantities less than one quart, without license, that constitutes the offence. (*a*)

It is not sufficient that defendant kept a grocery without license, but he must have kept it for the purpose of selling ardent spirits.

To constitute the offence, the party must keep a *grocery*, &c.; keeping spirits for sale in private houses, is not within the prohibition.

Appeal from the Newton Circuit Court.

Ramsey was indicted in the Newton Circuit Court, as follows: "The Grand Jurors, &c., &c., present that Benjamin Ramsey, on the first day of April, A. D. 1848, at, &c., did then and there keep a grocery for the retail of ardent spirits by quantities less than one quart, without first having obtained a license from the county court of said county, authorizing him to exercise the privilege of grocery-keeper, contrary to the form of the statute," &c., &c.

The defendant was tried on the plea of not guilty, at September term, 1849, before the Hon. WM. W. FLOYD, Judge, convicted and fined *one dollar*. He moved for a new trial, which was overruled, and he excepted, took a bill of exceptions, setting out the evidence, &c.

On the trial, plaintiff proved, by John Cecil, that he saw defendant sell spirituous liquors in quantities less than one quart, and receive pay therefor. That he purchased liquor himself of defendant, but did not know whose liquor it was—did not know whether defendant ever kept a grocery or not,—he had goods and also whiskey in the house, but witness did not know for

(*a*) NOTE.—But see *Hensley vs. State*, 1 *Eng. R.* 252.

what purpose, nor by whom the house was kept. He purchased said liquor about the last of March or first of April, 1848, at Martin Tackett's store-house in Newton county, and that defendant seemed to have entire control of the house. The clerk of the court, introduced by defendant, testified that he did not knew whether defendant had license or not—that he was not about the office during the time when the defendant was charged to have sold liquor, but was, at the time of the trial, clerk and keeper of the record.

Martin Tackett, witness for defendant, testified that he knew defendant's occupation about the time alleged in the indictment: that he was about home all the time defendant was doing business at his house, and that he never did keep a grocery. That defendant was selling goods at that time, and did not own a drop of liquor, and did not keep a grocery, to his knowledge. Defendant's business was selling goods; and that the house where defendant was charged to have committed the offence, belonged to witness, and was on his premises—that there was liquor in the house, but that it belonged to witness. He never saw defendant sell liquor in any quantities whatever.

Two other witnesses testified that defendant kept a store, and not a grocery, at the house of Martin Tackett.

Defendant asked the court to charge the jury as follows:

"1. That, unless they find, from the testimony, that defendant did keep a grocery, they must find for the defendant.

"2. That the offence consisted in keeping the grocery, and not in selling liquors in less quantities than a quart.

"3. That, before the plaintiff can recover, she must prove that defendant did keep a grocery without first having obtained a license from the county court for that purpose.

"4. If the jury find, from the proof, that Ramsey kept a house for a store for the retail of dry goods, and not a grocery for the retail of liquor in quantities less than a quart, they must acquit."

Which instructions the court refused to give.

The State's Attorney asked the following instructions:

"1. That if the jury believe, from the evidence before them,

that the defendant kept ardent spirits, in any house, for retail by quantities less than one quart, without a license, they must find the defendant guilty.

"2. If the jury believe that the spirits was kept in the house of defendant, and retailed by him, it is wholly immaterial as to whose liquor it was."

Which instructions the court gave.

BYERS & PATTERSON, for the appellant. The court below erred in refusing to give the instructions asked by the defendant, in giving the instructions asked by the State, and in overruling the motion for a new trial. See *Hensley vs. The State,* 1 *Eng. Rep.* 252.

CLENDENIN, *Atto. Gen.,* contra.

Chief Justice JOHNSON delivered the opinion of the Court.

The indictment is drawn with technical accuracy and in strict accordance with the statute. The testimony is wholly insufficient to support the verdict and judgment. The party is indicted for keeping a grocery for the retail of ardent spirits by quantities less than one quart, without first having obtained a license from the county court of Newton county, authorizing him to exercise the privilege of a grocery-keeper. To constitute the offence charged, it is not sufficient that the defendant should have sold ardent spirits in quantities less than one quart, but it is equally necessary, and indeed indispensable, that he should have kept a grocery for that purpose. There is no evidence in the record to establish that essential point. The witness, who testified in relation to the sale of the spirits, expressly stated that he did not know whether the defendant ever kept a grocery or not.

The first instruction, asked by the defendant, was improperly refused. The instruction asked was, that, unless the jury should find, from the evidence, that the defendant did keep a grocery, they must find for the defendant. This was strictly appropriate, and consequently should have been given in charge to the jury.

The second was properly refused. This was, "That the offence consisted in keeping the grocery, and not in selling liquors in less quantities than a quart." It is not the mere act of keeping a grocery, but the further act of selling vinous or ardent spirits in quantities less than one quart, and that without having first obtained license for that purpose. The third is, that, before the plaintiff could recover, she must prove that the defendant did keep a grocery, without first having obtained a license from the county court for that purpose. It is not sufficient that the party kept a grocery without first having obtained a license for that purpose; but he must have kept it for the sale of ardent spirits. The instruction, therefore, was not co-extensive with the charge, and, consequently, should not have been given. The substance of the fourth is, that the jury could not convict, unless they were satisfied, from the evidence, that the defendant kept a grocery. This was essential to constitute the offence, and, consequently, should have been given.

The first instruction asked by the State is, that, if they believed, from the evidence, that the defendant kept ardent spirits in any house, for retail, by quantities less than one quart without a license, they must find him guilty. This was improperly given by the court. The term "grocery," is an essential part of the description of the offence, and, in the absence of proof upon that point, the charge is not made out, and consequently a conviction would be unauthorized. The second instruction asked by the State was improperly given for the same reason. The Legislature have not seen proper to prohibit the sale of spirits in private houses. The allegation is that the defendant kept a grocery. This is an essential part of the description of the crime and must be established by the proof in order to warrant a conviction.

The judgment of the circuit court of Newton county, herein rendered, must, therefore, be reversed, and the cause remanded, with instructions to proceed therein according to law and not inconsistent with this opinion.