

## HENSLEY vs. THE STATE.

An indictment charging that the defendant "did keep a grocery for the retail of ardent spirits, and did retail ardent spirits to J. L. by less quantities than one quart, without first having procured license" &c., does not sufficiently charge any offence against the 2d sec. 148th chap. Rev. Stat., concerning "Taverns and Groceries."

The offence consists in keeping the grocery and the purpose for which it is

kept; and the indictment should charge that it is kept *for the retail of ardent spirits by quantities less than a quart*.  
The allegation that the defendant "did keep a grocery for the retail of ardent spirits, and did retail ardent spirits to J. L. by less quantities than one quart," &c., is not equivalent to a charge that he kept the grocery *for the retail of ardent spirits by quantities less than a quart*.  
To constitute a good indictment, under the above statute, it should expressly charge, 1st, that the defendant did keep a tavern or grocery (as the case may be:) 2d, for the retail of vinous or ardent spirits [as the case may be] in quantities less than one quart, and 3d, without having first obtained a license from the county court of his county, authorizing him to exercise the privilege of a tavern or grocery keeper.  
Proof, that defendant sold ardent spirits to J. L. by less quantities than one quart, might be sufficient to satisfy the jury for what purpose the grocery was kept.

*Appeal from the circuit court of Searcy county.*

THIS was an indictment against John M. Hensley under the 2d sec. 148th chap. Rev. Stat., p. 743, determined in the circuit court of Searcy county, at the June Term, 1844, before the HON. J. M. HOGE, judge.

The indictment was, in substance, as follows:

The grand jurors, &c., present that John M. Hensley on the 10th day of March, A. D. 1843, at &c., did keep a grocery for the retail of ardent spirits, and did then and there retail ardent spirits to Josiah Lane, by quantities less than one quart, without first having procured from the county court of his county (the county afore-said) a license authorizing him to exercise the privilege of a grocery-keeper, contrary, &c.

The defendant's counsel moved to quash the indictment, on the grounds, 1st, that it charged no offence known to the laws of the land: 2d, that it charged two distinct and separate matters, viz: *first*, keeping a grocery without license, and *second*, selling ardent spirits, in quantities less than a quart, to a particular person: 3d, that it did not charge the offence with a continuendo.

The court overruled the motion to quash, the defendant pleaded not guilty, was tried by a jury and convicted. He then moved for a new trial, on the grounds that the verdict was contrary to law and evidence, and that the court erred in overruling his motion to

quash. A new trial was refused him, he excepted, and filed a bill of exceptions, setting out the motion to quash, for a new trial, and the evidence.

The defendant appealed to this court, and assigns as errors: 1st, that the court below refused to grant him a new trial: 2d, no offence is charged in the indictment of which he could be convicted either by the constitution or laws of this State: 3d, the judgment below should have been in his favor.

W. BYERS, for the appellant.

WATKINS, Attorney General, contra.

OLDHAM, J., delivered the opinion of the court.

Hensley was indicted by the grand jury of Searcy county, for a violation of the 2d sec. of the 148th *ch. Rev. Stat.* concerning "Taverns and Groceries."

The act prohibits the keeping of any tavern or grocery for the retail of vinous or ardent spirits, by quantities less than one quart, unless the person shall first obtain a license from the county court of his county. The indictment, in this case, charges that the defendant "did keep a grocery for the retail of ardent spirits, and did retail ardent spirits to Josiah Lane by less quantities than one quart, without first having procured a license," &c. The indictment does not sufficiently charge any offence against the statute. The 2d sec. of the statute enacts that, "no person shall keep any tavern or grocery for the retail of vinous or ardent spirits by quantities less than one quart, unless he shall first obtain a license from the county court of his county, authorizing him to exercise the privilege of a tavern keeper or grocery keeper." The offence consists in keeping a tavern or grocery for the retail of vinous or ardent spirits in quantities less than one quart. The indictment charges that the defendant did keep a grocery for the retail of ardent spirits and did retail to Josiah Lane by quantities less than one quart. This allegation is not equivalent to keeping a grocery for the retail of ardent spirits by quantities less than one quart. The offence con-

sists in keeping the grocery and the purpose for which it is kept; and it is essential to the validity of the indictment that the charges contained in it should be co-extensive with the prohibition of the statute; and the proof, to authorize a conviction, should be as extensive as the charge itself. The allegation that the defendant did retail spirits to Josiah Lane by quantities less than one quart, does not supply the defect in the indictment, but might, if proven, be sufficient evidence to authorize a jury to infer for what purpose the grocery was kept.

To constitute a good and valid indictment, it should expressly charge, 1st, That the defendant did keep a tavern or grocery (as the case may be:) 2d, for the retail of vinous or ardent spirits (as the case may be) in quantities less than one quart, and 3d, without having first obtained a license from the county court of his county, authorizing him to exercise the privilege of a tavern or grocery keeper. The indictment does not sufficiently charge the defendant with a violation of the statute, and consequently the judgment of the circuit court must be reversed.

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