SHOVER *vs.* STATE.

The christian religion is recognized as constituting part of the common law, its institutions are entitled to profound respect, and may well be protected by law.

The Sabbath, properly called the Lord's day, is amongst the first and most sacred institutions of christianity, and the act for the punishment of Sabbath-breaking (*Digest, Ch.* 51, *Part* 7, *Art.* 5, *p.* 369) is not in derogation of the liberty of conscience secured to the citizen by the 3d section of the Declaration of Rights.

In an indictment under the above act for keeping open a grocery on Sunday, it is not necessary to aver that it was kept open with any criminal intent—keeping it open on that day is the gist of the offence.

When the fact of keeping the grocery open on the Sabbath is established, the law presumes a criminal intent, and the defendant must excuse himself by showing that charity or necessity required it.

Keeping a grocery door open on the Sabbath is a temptation to vice, and therefore criminal.

In such an indictment it is not necessary to aver that the person charged with keeping open the grocery is the owner of it; but if alleged, it must be proven.

Any person who has control of a grocery, may be indicted for keeping it open on Sunday, whether he be owner or not.

Appeal from the Hempstead Ciruit Court.

This was an indictment against George W. Shover, for Sabbath-breaking, determined in the Hempstead Circuit Court, in May, 1849, before the Hon. JOHN QUILLIN, Judge.

There were two counts in the indictment: *First*, "The Grand Jurors, &c., present that George W. Shover, late of, &c., on the 13th day of August, (said day being Sunday,) in the year of Christ eighteen hundred and forty-eight, with force and arms, at, &c., did then and there unlawfully keep open his grocery, contrary, &c., and against," &c.

The *second* count charged the defendant with retailing spirits on the Sabbath.

The counsel of the defendant moved to quash the indictment on the grounds: 1st. That the act upon which the indictment was based was unconstitutional: 2d. That neither count suffi-

ciently charged any offence against the law. The court overruled the motion; defendant declined to plead, the plea of not guilty was entered for him, and verdict against him on the first count of the indictment. Motion for new trial overruled, and exceptions setting out the evidence, &c.

Evidence in substance as follows:

Block testified that, of his own knowledge, or from admissions of defendant, he knew nothing of his keeping, or being interested in any grocery in the county of Hempstead. He knew there was a grocery in Fulton called J. S. Johnson & Co.s, but of his own knowledge did not know who were its owners.

Prescott testified that he knew, of his own knowledge, nothing with certainty of defendant owning or being concerned in any grocery in the county of Hempstead. From rumor, and conversations with him, he inferred that defendant had an interest, or was concerned in, a grocery in Fulton. Did not recollect that defendant ever said he had any interest in the grocery, or was joint owner thereof; but, from defendant assuming some control of the business connected with the grocery, employing a grocery keeper, his conversations, and general rumor, witness inferred that defendant was concerned in and was joint owner thereof. Within one year anterior to the 13th August, 1848, [the time the indictment was found,] he had seen said grocery open on Sunday, and the grocery-keeper selling liquors, and persons going in and out. He had seen defendant there on such occasions, with others, drinking, but never saw him sell any liquor, or act as keeper, or control any one in the grocery. Could not state any particular Sunday when this happened—nor the date—could not come near the date—but was certain it was within one year next before the 13th August, 1848, and saw it frequently on Sunday. Had frequent conversations with defendant, and he several times spoke of employing a bar-keeper. From these conversations altogether, he drew his conclusions.

Cross-examined.—What he had stated above was mere inferrence on his part from conversations with defendant, or founded on general rumor. Could not state what defendant said in any conver-

sation he had with him, the time, or any of the particulars. Could not recollect or repeat what he said in the conversations about employing a bar-keeper, who the bar-keeper was, or when the conversation occurred. It was the general rumor that defendant was concerned in the grocery, and from that rumor, and from his inferences from what defendant said to him alone he concluded defendant was interested in the grocery. The grocery was in Fulton, Hempstead county. Defendant was a partner in a forwarding and commission store in Fulton, lived there, and was employed in carrying on the store with his partners as his ordinary occupation.

Betts testified that he lived in Fulton; and that during the year 1848, prior to the 13th August, it was the rumor in the place, and generally believed, that defendant was interested in and part owner of a grocery there situate. He knew nothing of the ownership of the grocery of his own knowledge. Had seen defendant drinking at the grocery with others. Was usually out of town on Sunday, and did not know what was done at said grocery on that day. Here the State closed.

Block, on behalf of defendant, testified that he had often seen defendant go with others to the grocery referred to above to drink, and had seen him pay for the liquor as others did.

Defendant objected to so much of the above evidence as consisted of rumor, common reputation, or inferences drawn from defendant's conversations, and moved to exclude it, but the court overruled the objection.

The Court charged the jury that common rumor was competent evidence to prove that defendant was a partner or joint owner of the grocery, and that proof of his exercising control over the grocery would render him liable to this indictment, but the mere inferences of the witnesses were not evidence—that witnesses must state facts, and the jury draw conclusions.

CUMMINS, for the appellant, contended that the State was bound to prove that the defendant was the ostensible owner, and had the control of the grocery: that common rumor or reputation

was not sufficient to establish a partnership, (20 *Wend.* 81. 22 *ib.* 274. 5 *Gill. & John.* 383, 405,) and in this case the proof should be as strict as in an indictment for larceny, (*Arch. Cr. Pl.* 167,) or on an indictment for keeping a gaming house, (*Arch. Cr. Pl.* 600 *a*,) and the court erred in permitting rumor of ownership to go to the jury instead of requiring proof of ownership or control of the grocery.

Do not the provisions of *Art.* 5, *Ch.* 51, *Digest*, compel the observance of the christian Sabbath as a *religious institution*, and not as a *civil* one, and is it not in violation of *Sec.* 3, *Declaration of Rights?*

CLENDENIN, *Att. Gen.*, contra.

Mr. Chief Justice JOHNSON delivered the opinion of the court.

The indictment in this case is based upon the *5th sec., ch.* 51, *Digest.* That section enacts that "Every person, who shall, on Sunday, keep open any store, or retail any goods, wares, or merchandize, or keep open any dram-shop or grocery, or sell or retail any spirits or wine, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined in any sum not less than ten dollars nor more than twenty."

The first objection taken is to the indictment, and is predicated upon the supposed unconstitutionality of the act by which the offence is created. If the act is unauthorized by the constitution, it must arise from the fact that it interferes with the rights of conscience which are secured to all by the Declaration of Rights. A portion of those rights consists in a freedom to worship Almighty God according to the dictates of every one's conscience, and in not being compellable to attend, erect, or support, any place of worship, or to maintain any ministry against their consent. The act in question cannot, with any degree of propriety, be said to trench upon any of the rights thus secured. By reserving to every individual the sacred and indefeasible rights of conscience, the convention most certainly did not intend to leave it in his power to do such acts as are evil in

themselves and necessarily calculated to bring into contempt the most venerable and sacred institutions of the country. Sunday or the Sabbath is properly and emphatically called the Lord's day, and is one amongst the first and most sacred institutions of the christian religion. This system of religion is recognized as constituting a part and parcel of the common law, and as such all of the institutions growing out of it, or, in any way, connected with it, in case they shall not be found to interfere with the rights of conscience, are entitled to the most profound respect, and can rightfully claim the protection of the law-making power of the State. (See the case of *Vidal et al. vs. Gerard's Executors,* 2 *Howard's Rep.* 198.) We think it will readily be conceded that the practice, against which the act is directed, is a great and crying vice, and that, in view of its exceedingly deleterious effects upon the body politic, there cannot be a doubt that it falls appropriately under the cognizance of the law-making power.

The indictment is believed to have been drawn with technical accuracy and to contain all the averments necessary under the statute to a full description of the offence. The very gist of the offence charged in the first count is, the keeping open the grocery on Sunday, and it was not necessary that any criminal intent should have been alleged; as, upon the finding of the fact charged, the law presumes the intent, and unless the defendant is prepared to show that no such intent existed—as that it occurred in the exercise of acts of charity, or that, as a matter of necessity, he could not avoid it—the offence will be fully made out, and consequently nothing can remain to be done but to fix the penalty. The nature and tendency of the act prohibited furnish ample reason why the Legislature did not expressly require the intent to be expressed in the indictment as constituting a material part of the description of the offence. The act of keeping open a grocery on Sunday is not, in itself, innocent or even indifferent, but it is, on the contrary, highly vicious and demoralizing in its tendency, as it amounts to a general invitation to the community to enter and indulge in the intoxicating cup, thereby

shocking their sense of propriety and common decency, and bringing into utter contempt the sacred and venerable institution of the Sabbath. It is not simply the act of keeping open a grocery, but the keeping of it open on Sunday, that forms the head and front of the offence; and when it is alleged to have been done on that day, the description is perfect.

If the objection to the first count be admissible as failing to give a full and perfect description of the offence, we can perceive no good reason why it should not apply with equal force to the second, as it is silent also as to the intent. The charge in the latter count is, that the defendants sold spirits on Sunday, and it is wholly silent as to the intent with which the act was done. It certainly would not be contended that an indictment for selling spirits on Sunday should further aver that it was sold with intent to have it drunk. The Legislature did not conceive the act of selling to be any worse in point of criminality than that of keeping the grocery open, and consequently they have placed them both upon precisely the same footing. They have the unquestionable right, so long as they keep themselves within the pale of the constitution, to command the performance of such acts as are right and to prohibit such as they may conceive, in their wisdom, to be wrong: and their right is equally indisputable to say whether the intention shall be presumed from the mere act prohibited, or whether, in addition to such act, the State shall also show the intent which prompted its commission.

The next objection relates to the sufficiency of the testimony to warrant the conviction. It is manifest from the whole tenor of the evidence as exhibited by the bill of exceptions that both parties, as well the State as the defendant, considered it essential to a conviction that the ownership of the grocery should have been proven before the jury. This the statute did not require, but having unnecessarily averred the fact of ownership, it devolved upon the State to prove it in order to authorize a conviction. The act merely forbids the keeping of a grocery open on Sunday. It certainly cannot be material whether it shall be done by the party having the legal title, or by any other

individual having the control of the establishment at the time of the commission of the alleged offence. If it were incumbent upon the State to show title to the grocery before a conviction could be had for keeping it open on Sunday, it would, in the very nature of things, be utterly impossible in many cases to effectuate the objects of the law. The true question, therefore, under the statute is not, who is the owner of the grocery? but who is shown to have had the control of it at the time of the commission of the act? The State, in this case, did introduce some slight circumstances tending to establish the allegation of ownership, but utterly failed to prove that the defendant had been guilty of keeping the grocery open on Sunday.

The judgment of the Circuit Court of Hempstead county is, therefore, reversed, and the cause remanded with instructions to proceed therein according to law, and not inconsistent with this opinion.