Weiss, George vs State of MO 1854 Cole Co. / 1st Cir. 194/a

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THE STATE OF MISSOURI, ss.

The State of Missouri, To the Judge of the first Judicial Circuit ——— in said State, GREETING:

WHEREAS, In the Record and Proceedings in a certain cause lately pending in the Circuit Court of Cole County in the Judicial Circuit aforesaid ———
wherein The State of Missouri was plaintiff and George F Weiss was defendant ———

in an action of indictment for selling whiskey manifest error hath intervened, to the great damage of the said defendant as by his complaint, we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the county of Cole, in said State, on the first Monday in July next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.

Witness, WILLIAM E. DUNSCOMB, Clerk of our said Supreme Court, at office, in the City of Jefferson, the third ——— day of May in the year of our Lord one thousand eight hundred and fifty four

Wm E Dunscomb

State of Missouri } In Cole Circuit Court
County of Col }

In Obidiance with & to the commonds of the within writ I G. A. Parsons Clerk of the Cole Circuit Court Have made out a true and perfect transcript of the papers and Recorded in the within Entitle cause to wit the State vs George F Wip and Have with Returned the same to the Clerk of the Supreme Court of the State of Missouri

In witness Whereof I G. A. Parsons Clerk of the Cole Circuit Court Have Hereunto set my Hand & official seal of said Court at office this the 27th Day of May A.D. 1854

G A Parson Clerk

By Joseph W Mosby D C

The State of Missouri
vs
George F. Weis } Indictment for selling whiskey - Cole County

Edward A. Powers, Plaintiff
vs
James Browder, administrator of Jonas Heath & others - } Civil action - Defendants - Morgan County -

State
vs } precipe
Weiss

Powers
vs } precipe
Heath's adm. & others

filed May 3 1854
Wm E Dunscomb
Clerk

Cole & Magan

Monroe

State of Missouri }
County of Cole. }

Pleas before the Honorable George W. Miller Judge of the first Judicial circuit in the State of Missouri in a certain cause lately pending in the Cole circuit Court Wherein the State of Missouri was plaintiff and G. F. Weiss was defendant. Be it remembered that at a regular term of the cole circuit court begun and held at the court House in the city of Jeffuson on the third Monday in August in the year of our Lord one thousand Eight hundred and fifty three, Present the Honorable Geo W Miller Judge the following proceedings were had "to Wit." Now at this day comes Sive Gunsaullus Sheriff of the County of Cole. and returns here into court the following Grand Jurors duly Summonsed from the body of the Inhabitants of the County of Cole. to Wit. Wm D Kerr foreman, A. W. Cearnel. Wm Buckner. J Knight S. E. Short B. S. Endol. Wilson Amos. D B Peters, Isham Durham Philip Miller Thomas Starke John Berry Peter E Davis C. O. C. Music. James B. McKinzie & R. R Jefferson. Who being duly impannelled and Charged by the court retired to Consider of their Presentments. and on the fourth day of said court returned in to court and among others

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made the following presentment. to wit
In words and figures following to wit

State of Missouri } In the Cole County Circuit
County of Cole } Court August term 1858

Cole County - to wit

The Grand Jurors for the State of Missouri, Summoned from the Inhabitants of the County of Cole aforesaid upon their oaths present that George F. Weiss late of said County on the ~~first~~ third day of June in the year of our Lord one thousand eight hundred and fifty three at the County of Cole aforesaid unlawfully did sell Intoxicating liquors and fermented drinks to wit one quart of Whiskey one quart of brandy one quart of wine one quart of Gin one quart of rum one quart of ale one quart of beer, and then and there permitted the same to be drank at the place of sale to wit at the county of cole aforesaid without the said George F. Weiss then and there having a grocer license a drain shop licence a Merchants licence a tavern licence or any other kind of licence continuing in force authorising him so to do contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State

James B. Gardenhire
Circuit Attorney

on the back of which Indictment is the following Endorsement, to wit A true Bill,

Wm D Kerr, foreman of the Grand Jury.

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This Cause came on to be tried at a Regular term of the cole circuit court begun and held at the court House in the city of Jefferson on the third Monday in February in the year of our Lord one thousand eight hundred and fifty four, and on the Eighth day of said court. When the following proceeding were had to Wit in words and figures following "to Wit"

State of Missouri
vs
G. F. Weiss } Indictment for selling liquor without licence

Now at this day comes the circuit attorney who prosecutes on behalf of the state and the said defendant by his attorney and being demanded of and concerning the premisses and how he will acquit of the same ~~say~~ & for plea says he is not Guilty in manner and form as is charged against him in said indictment and thereupon comes a Jury "to Wit" J.B. Read H Roads Charles Moore Jos O Bormayer Frederick Rotzer Nelson Goodwin Mr H Ferguson, George W Hough John Sisk E Bleordell W.E. Stone D C Neely twelve Good and lawful men duly Elected Tried and sworn and a true deliverance to make between the state of Missouri plaintiff and George F Weiss defendant upon their oaths do say that said defendant is guilty in manner and form as is charged against

him in said indictment, and assess his fine to the sum of twenty dollars it is therefore considered by the court that the said defendant pay unto the State of Missouri a fine of twenty dollars, and the cost of this suit said out and expended and that he is ordered into the custody of the Sheriff until the fine and cost be paid, and afterward to wit on the same day the following entry appears of Record to wit in words and figures following to wit

State of Missouri
vs
George F Weiss } Indictment for selling Liquor without Licence

Motion for New Trial filed and over Ruled,

and afterward on the same day the following entry appears of Record in words and figures following to wit

George F Weiss
ads.
State of Missouri }

Motion in arrest of Judgement filed, and over ruled

And afterward on the twelfth day of said Court the following entry appears of Record in words and figures following to wit

State of Missouri
vs
George F Weiss

Bill of Exception filed

which is in words and figures following to wit.

In the Cole Circuit Court
of February Term 1854

The State vs George F Wiss } Indictment

Be it Remembered that on the Trial of this Indictment the State for the purpose of sustaining the Indictment proposed to prove that the defendant had sold one half pint of Bar to the Introduction of which proof the defendant objected but the Court overruled the objection and permitted the Evidence to be given to the opinion of the Court in permitting such proof the defendant Excepted thereupon the State proved the defendant had sold within a year, before the finding of the Indictment a half Pint of bar, and thereupon the jury found the defendant Guilty and assessed his fine at the sum of twenty dollars. the defendant then moved the Court to set aside the verdict and grant him a New trial which motion is in words and figures following to wit

} In the Circuit Court of Cole County
of February Term 1854

The State
vs
George F Wiss } Indictment for selling Whiskey

The defendant moves the Court to set aside the verdict in this cause and grant him a New trial for the Reason that the Court permitted the State to give in compe

tent and Illegal evidence upon the trial

George F Weiss

The court over ruled the motion and to the judgement of the court in over ruling the motion the defendant Excepted

The Defendant then moved to arrest the Judgement on the verdict and the motion was over ruled the motion was in words and figures following to wit

In the Cole Circuit Court
of February Term 1854

The State of Missouri
vs
George F Weiss } Indictment for selling whiskey

The said defendant moves the Court to arrest the Judgement in this Cause because the Indictment is insufficient in Law,

George F Weiss

To the over ruling of the motion in arrest the defendant Excepted and now moves the Court to sign seal and make this bill of Exception a part of the Record which is done accordingly

G W Miller Pres

State of Missouri } ss
County of Cole }

I G A Parsons clerk of the Circuit Court within and for the County of Cole aforesaid do hereby certify that the above and foregoing is a true

and perfect copy of the proceedings had in this cause as fully as the same appears of record in my office.

In witness whereof I G A Parsons clerk of the aforesaid circuit court as aforesaid have hereunto set my hand and seal of said court at office this the 19th day of May A.D. 1854

G. A. Parsons clerk

By Joseph Mosby D C

July 7 1854 ~~3.~~

State of Missouri
vs. Whiskey
George F Weiss p.e.

filed May 29 1854

Wm E Drumcomb
Clerk

Cole

1st

In the Supreme Court
of July Term 1854

The State of Mississippi, Defendant in Error
vs
George F. Weis, Plaintiff in Error.

Morrow for plaintiff in Error.

At the ~~Spring~~ August term of the Cale Circuit Court, George F. Weis was indicted for selling Whisky, Brandy, Beer &c without an license of any kind authorizing him to do so.

The indictment charges that Weis, on a day therein named, sold one gnart of Whisky, one gnart of Brandy, one gnart of Beer &c. To sustain this indictment, the State offered to prove, upon the trial, that Weis had sold a pint of Beer. The evidence was objected to by Weis upon the ground that it was incompetent, illegal and irrelevant. The Court overruled the objection, and permitted the evidence to be given, and the defendant below was convicted and fined, upon the proof that he had sold one pint of Beer. Weis moved for a new trial, and the motion being overruled he brings the case into this Court by writ of Error.

Points and authorities.

The defendant could not be convicted upon this indictment by proof that he had sold a pint of Beer, when the charge was that he

had sold a grant - the statute making the selling by the grant and by the print two distinct offences.

Revised Code - 542. Sections 2 & 3.

The allegations and proof must correspond.

Merrow,
for plaintiff in Error.

In the Supreme Court

The State
v.
Weir.

Statement of the Case by Plaintiff in Error, and points and authorities

In the Supreme Court
of July Term 1854

The State of Missouri, defendant in Error
vs
George F. Wise, Plaintiff in Error,

Now at this day comes the said George F Wise and says that in the record and proceedings aforesaid, and giving the judgment aforesaid there is manifest error in this, to wit:

1. that by the record aforesaid it appears that the judgment aforesaid was given for the said State, whereas by the law of the land the said judgment ought to have been given for the said George F Wise and against the said State of Missouri

2 There is also manifest error in this - to wit: that by the record aforesaid it appears that the Scale Circuit Court permitted the said State to give to the jury illegal, incompetent and irrelevant testimony -

3. There is also manifest error in this - to wit: The refusal of the said Circuit Court to grant the said Wise a new trial.

George F Wise
Maupin, his attorney.

In the Supreme Court

The State
v. } Assignment of Errors
George F. Weise

The clerk will file
this assignment
of Errors —
Monroe
for Weise

filed July 3 1854
Wm E Dunscomb
Clerk

State vs Weiss

At the August Term 1853 of the Circuit Court for Cole County, the defendant George F Weiss was indicted for a violation of the Statute concerning "Groceries and Dramshops—

The defendant was convicted on the trial of the indictment, at February 1854 and was fined $20. He moved for a new trial, which being denied, he excepted, filed his bill of exceptions, ~~and afterwards~~ ~~and sued his~~ ~~Writ of Error;~~ ~~and~~ and now brings the case before this Court, by Writ of Error—

The indictment charges that the defendant Weiss on the 3rd day of June 1853 at the County of Cole, unlawfully did sell intoxicating liquors and fermented drinks towit One quart of whiskey, one quart of brandy, one quart of wine, one quart of Gin, one quart of rum, one quart of ale, one quart of beer, and then and there permitted the same to be drunk at the place of sale, towit at the County of Cole aforesaid without the said George F. Weiss then and there having a grocer's license, a dram shop license, a merchant's license, a tavern license or any other kind of license continuing in force, authorising him so to do: contrary &c.

On the trial it appears from the bill of exceptions, that the State offered to prove in or

der to sustain the indictment, that the defendant had sold one half pint of beer: To this evidence the defendant objected, the Court overruled the objection and permitted the State to prove that the defendant had sold within a year before the finding of the indictment, one half pint of beer, and thereupon the jury found the defendant guilty

The question is as to the admissibility of this evidence; The charge is the selling without license one quart of whiskey &c and permitting the same to be drunk at the place of sale. The charge does not consist in the selling alone, but in that and also in the permitting the same to be drunk at the place where it is sold.

This charge is obviously meant to be against the defendant as a Grocer. A grocer is not permitted to sell in any quantity less than a quart nor is he permitted to suffer what he sells to be drunk at the place of sale.

The Dram-Shop-Keeper may sell if he has license any quantity under ten gallons, and he may suffer it to be drunk at the place of sale.

If there be any difference between the Grocer and the Dram Shop keeper, this evidence ought not to have been admitted. There is obviously a distinction between the persons designated a Grocer and a Dram shop keeper in our Statute.

And although the defendant is not charged as a Grocer nor as a Dram Shopkeeper in so many words in the indictment, yet the acts charged to have been done by him are those prohibited by law to be done by a Grocer—

The offence charged in this indictment consists in selling and in permitting the liquor sold to be drank at the place of sale— The proof shews the defendant to be guilty of a different offence from the one charged, and therefore was improperly admitted— The Attorney General likens it, to the case, where the offence is charged to consist of selling any quantity of liquor without license and the pleader inserts the larger quantity and proves the sale, by sale of a less quantity:— Were this such a case doubtless it would be competent to prove the sale of a quantity either greater or less than the amount charged— But we conceive this is an entirely different case: Here one offence is charged; and the State seeks a conviction by proving a different offence— It is not subject to the principle, that the greater contains the less: But here the proof shews an offence different from that charged, and

for which the defendant is liable to be prosecuted and punished: and the conviction on this indictment must not be a bar to an another for the offence made out by the proof in this case.

Whether wisely or not our statute law makes a difference between the grocer and dram shopkeeper. The grocer is not permitted to suffer any liquor he may sell either with or without license to be drunk at the place of sale — the Dramshopkeeper may suffer it to be drunk at the place of sale and indeed this permission to be drunk at the place of sale is now the principal difference between the grocer and Dram shop keeper — The grocer can not sell less than a quart. the Dramshopkeeper may sell any quantity less than ten gallons at a time — The one can not let the liquor be drunk, the other may at the place of sale — The offence here is the selling and suffering the liquor to be drunk at the place of sale. obviously intended to be against the grocer: the proof is against the Dramshopkeeper only —

Upon the whole then we think the Court below erred in submitting the proof to be given to the jury: its judgment is reversed — Judge Scott concurring — he being the only judge with me on the bench at the time the case was argued —

John F. Ryland

July 3 '54 3

State vs Weiss

Opinion

Ryland

filed Sep. 29 1855

Wm E Drury comb

Clerk

Gardenhire, Attorney General, for the State

1 The evidence was admissible. The indictment charged the sale of a quart of intoxicating liquor, and the absence of all license authorizing the sale. The sale of a quart includes the sale of a half pint, and to charge the one is necessarily to charge the other. The greater includes the lesser. If the evidence corresponds with the allegations, in respect to those facts and circumstances which, in point of law, are essential to the charge, it is sufficient. 1 Chitty's Crim. Law, 293. The allegation is the selling of one quart of intoxicating liquor; the fact essential to the charge is, the selling of any quantity, without a license. Rev. Stat. page 342, Sec. 1. This section prohibits the sale of any quanty, without a license. The indictment shows a sale, and negatives all licenses of every description; and the evidence shows a sale and no license of any sort. Surely the fact essential, in point of law, to make the charge good, was proved. Did the defendant show he had a license? No. He was charged with selling a quart, without a groceries or merchants license, and every quantity less and contained in a quart, without a dramshop or tavern license. How was it possible for proof of guilt to miss him at all? If it showed the sale of a quart, and he showed no groceries or merchants license, he was guilty; and if less than a quart, and he showed no dramshop or tavern license (if indeed the latter would protect such a selling) he was still guilty. He was not-

find by the indictment to produce a grocers or merchants license, if he had one, because he was charged with selling a quart, without such license; he was, in like manner, notified to produce a dramshop or tavern license, if he had one, because he was charged with selling every quantity less and contained in a quart, without such a license - not in words, but necessarily, and, in point of law, because the sale of a quart is necessarily - unavoidably the sale of every quantity less and contained in a quart. Where from the evidence it appears that the defendant has not been guilty to the extent of the charge specified, he may be found guilty as far as the evidence warrants, and be acquitted as to the residue; as where he is charged with engrossing 1600 quarters of wheat, and the evidence amounts to but 700. 1. Chitty's Crim. Law. 637. Where the accusation includes an offence of inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the less. Ibid. Thus, a burglarious stealing includes simple theft; murder includes manslaughter; stealing from the person, includes larceny; grand (includes) petit larceny; Robbery, felonious theft; petit treason, murder or less atrocious "homicide." Ibid. And why the sale of a quart of liquor does not include the sale of a half pint, when the absence of all license is charged, and no license of any sort is proved, I cannot tell. Is it because there is a distinction in the Statute between a grocer and a dramshop keeper, resting upon the difference in the quantities each is author-

ized to Doll? Does the Sale of a quart, on this account, the less naturally and necessarily include the Sale of every quanty less than a quart? - of a half pint? It is this existence of the less in the greater, of the parts in the whole, that makes the evidence admissible; and it exists as much - as naturally - necessarily - unavoidably, with such abstraction, as without it?

The State

vs. 3 Error to Cole
3

George G. Weirs

Brief for the
State.