UNITED STATES v. HARBISON.

Case No. 15,300.

{13 Int. Rev. Rec. 118.}

Circuit Court, E. D. Tennessee. Jan. Term, 1871.

INTERNAL REVENUE—ILLEGAL DISTILLING AND RETAILING OF LIQUORS—AIDING AND ABETTING.

{1. The owner of a distillery, who rents the same to another, knowing that the latter intends to use it for distilling whisky in violation of law, is guilty of aiding and abetting such unlawful manufacture, within the meaning of the statute.}

{2. To be a retailer of liquor, within the meaning of the statute, one need not keep a shop or store or carry on the business for a livelihood. It is enough to warrant a conviction for selling by retail without a license that defendant did sell whisky, in small quantities on several occasions.}

{This was an indictment against J. C. Harbison, for violation of the internal revenue laws.}

On the trial of this case the only witness introduced by the government was James Williamson, who testified that about the month of December, 1866, he leased from the defendant a still and fixtures, on which witness made one run of eleven gallons of whisky, of which he was to and did pay the defendant one-seventh part for the use of said still and fixtures. Witness also stated that another person had rented from defendant, upon the same terms, the same still and fixtures some time in October and November, 1866, and had made two or three small runs thereon. Witness also stated that he had at three different times during the spring and summer of 1867 purchased whisky from the defendant, getting one quart each time, and paying seventy-five cents for each quart, all of which, witness stated, occurred within the district. No evidence was offered by the defence.

T. R. Camick, attorney for defendant, insisted that defendant could not be convicted for distilling, as charged in the first count, because, under the language of the statute, only the principal in the transaction could be said to "be carrying on the business of distiller," and that the doctrine of "aiders and abettors being guilty as principals" does not apply in such cases. As to the charge of retailing, defendant's attorney contended that occasional acts of retailing did not constitute a liability under this statute; but that, before a conviction could be had, the government must prove the defendant to have engaged in retailing spirituous liquors as a business or means of livelihood. Defendant's attorney cited and relied on the former holdings of Judge Trigg in the case of U. S. v. Cooper {Case No. 14,863}, and U. S. v. Logan {Id. 15,624}, as sustaining both of the positions above insisted on.

E. C. Camp, U. S. Dist. Atty., while admitting that the holding of Judge Trigg in the two cases cited sustained the positions taken by the attorney for defendant, yet insisted that those cases were not sustained either by sound reason or the authorities; while the results that would arise from such a construction of the law would be such as to defeat

the very end intended to be accomplished by the law itself, and but serve to enable guilty parties to find a way of escape from punishment.

EMMONS, Circuit Judge (charging jury): I shall call your attention to that portion of the proof only which is uncontradicted. It is unnecessary to look beyond that of Williamson, if you give full credit to him. Your verdict will be the same under this indictment, whether one or many offences are proven under each count. There is but one for distilling and one for retailing. (His honor here read full minutes of the testimony of the witness Williamson, and said): Substantially he swears that the defendant was the owner of a still and apparatus for the manufacture of whisky; that on several occasions he leased them for the purpose of being unlawfully used, and received as rent one-seventh of the gross product of whisky made. Details are given. No counter testimony has been offered by the defendant. The witness is unimpeached and uncontradicted, and, if you think his statement consistent and rational, he is entitled to credit. You have no right to reject what he says as untrue by assuming the existence of some unproved hypothesis, or upon any imaginary surmise that by possibility he may be mistaken or untruthful. You may criticise and weigh the testimony as carefully as possible; but, when this duty is performed, if it would obtain your credence in the ordinary affairs of life, you have no right arbitrarily, and without reason, to say you will disregard it. If upon this evidence you believe that Harbison did the acts sworn to, they constitute the offence of distilling without a license. It is not necessary that a defendant should carry on the business personally, that he should be responsible for the labor, or interested as owner, or act as chief agent. It is enough that he aids and abets the manufacture, knowing that it is carried on in violation of law. A citizen has no right to aid in breaking the laws of his country, and is bound alike in law and morals to abandon all service for another the moment he has good reason to believe his business is carried on in disregard of them. Should the owner of an illicit distillery be absent from the state, or, being within it, be unknown, if such were not the rule, this statute might, through the instrumentality of agents and laborers, be broken with impunity. It is a necessary doctrine that all who knowingly aid are alike guilty. A thousand may be as much so as one, if they have common knowledge of illegality. The imaginary I hardship of this doctrine is wholly answered

when it is conceded that a laborer or other employe, without any knowledge that the law was violated, would be innocent. While the principle goes no further than to hold all guilty who, directly or indirectly, knowingly participate in the commission of the offence, neither justice nor policy would restrain its full application. If you believe, therefore, that Harbison was a party to an agreement in pursuance of which a distillery and apparatus, or any part of it, was used in the unlawful manufacture of whisky, you will find him guilty under the first count. The witness also swears that in the spring of 1867, on three occasions, the defendant sold a quart of whisky at each time, and that he received in payment seventy-five cents per quart. If you believe this evidence, you will find defendant guilty under the second count. In order to constitute one a retailer, he need not keep a shop or store, like a merchant, or carry on the business for a livelihood. It is enough that he sells liquor by retail. It seldom happens that all or any considerable part of the sales actually made can be proved. In order lo enforce this law, it must be held that the citizens shall not at all sell by retail without a license: The extreme cases imagined at the bar, where one neighbor, in cases of sickness or other sudden emergency, sells a single quart, to relieve distress, have no application here. If they had, I am unable to perceive how the motive of the sale can relieve illegality. Very little whisky would be sold if the trade were limited to calls of mercy. The safer way to prevent prosecutions in such circumstances, occurring in the midst of so many attempts to evade the law, is for gentlemanly and ordinarily well-conditioned citizens to present or lend to the suddenly suffering neighbor the little whisky which such exigencies really demand. This interpretation of the law, so necessary for its enforcement, will have no tendency to repress neighborly sympathy or prevent the procuration of all necessary medicinal supplies. If you give credit to the testimony, you will find the defendant guilty under the second count.

The jury, without retiring, convicted the defendant both of distilling and retailing.