UNITED STATES v. WILLIAMS.

Case No. 16,708.

{1 Cranch, C. C. 174.}[1]

Circuit Court, District of Columbia. July Term, 1804.

CRIMINAL LAW—ACCESSORIES.

There cannot be an accessory at common law to an offence which does not amount to a" felony.

Indictment {against Stuart Williams} for feloniously receiving, harboring, and maintaining one Daniel Hennessee, who had been convicted, under the act of congress of 1790 (1 Stat 112), of stealing a pair of silver candlesticks. The indictment did not state that Hennessee had been convicted of feloniously stealing.

Motion in arrest of judgment: (1) Because it does not appear in the indictment that D. Hennessee was convicted of any felony, but only of a misdemeanor, and there could be no accessory to the offence of which Hennessee was convicted. (2) That D. Hennessee, the principal, is stated to have been convicted of stealing one pair of candlesticks, one saddle, and one bridle. Whereas the record and conviction, produced in evidence, only find him guilty of stealing the candlesticks, and not the other articles charged in his indictment.

P. B. Key, for defendant. (1) D. Hennessee was convicted of a trespass only, under the act of congress. And although the act gives an indictment against accessories after the fact, yet Williams, not being indicted under the statute, cannot be punished under the statute. The indictment against Hennessee does not state the act to have been done feloniously. Where the indictment does not state

the act to have been done feloniously, it is only a trespass. 4 Tuck. Bl. Comm. 306. No circumlocution can supply the word "feloniously" (felonice). 2 Hawk. P. C. 320. Hennessee is only charged with an offence which is a trespass at common law. It is said that felony is derived from "fee," which signifies the feud or land, and "Ion," forfeiture. Hence, felony is a crime which forfeits land. Cr. Cir. Comp. (6th Ed.) 95, 96, 104. This indictment against Hennessee, is a good indictment under the act of congress. At common law, there can be no accessory after the fact, except in felony. 4 Tuck. Bl. Comm. 37, 38. And the felony must be completed at the time the assistance is given. 1 Stat. 114. The indictment against Williams is not under the statute. The statute has made it less than felony; it gives no forfeiture of lands or goods. The indictment against Williams is at common law, and states that Williams, well knowing that Hennessee had committed the said theft, &c. 4 Tuck. Bl. Comm. 37, 38. If indicted at common law, he cannot be punished under the statute. The statute judgment cannot be given upon a common law indictment. 2 Hawk. P. C. 357. Where clergy is taken away expressly by any statute, the offence must be laid in the indictment against that very statute, and the words of it, or the offender shall have his clergy. 1 Hale, P. C. 529; Post Crown Law, 356, 357; Kelyng, 104. See Cr. Cir. Comp. 412, "Larceny."

Mr. Mason, U. S. Atty. The act of congress speaks of it as a felony, "larceny aforesaid." Stealing is felony at common law. The facts stated in the indictment against Hennessee amount to felony. It was not necessary, in the indictment under the statute, to charge the act to have been done "feloniously," to obtain a judgment under the statute. Every offence which produced a forfeiture of lands or goods, was, at common law, a felony. It is sufficient to show, that Hennessee's offence was felony at common law. The jury say he did feloniously harbor, and receive, &c. It is a good indictment under the statute, though not contra form an statute. Cr. Cir. Comp. 412. As to the second point, the variance between the allegation and the evidence; it ought to have been made at the trial. It is now too late.

Mr. Key. The United States may waive the felony, and indict for the trespass. The act of congress makes it an intermediate offence between trespass and felony. It is the punishment only that makes a felony. The act of congress gives this court the power to punish it more severely than if it was a mere trespass, and not so severely as by common law. The act of congress is not to be lightly construed to create a felony.

Judgment arrested. Because the indictment against the principal did not charge him with a felony.

KILTY, Chief Judge, absent

[1] {Reported by Hon. William Cranch, Chief Judge.}