UNITED STATES v. WILLIS.

Case No. 16,728.

{1 Cranch, C. C. 511.}[1]

Circuit Court, District of Columbia. Nov. Term, 1808.

GAMING—COMMON-LAW AND STATUTORY OFFENCES.

Playing at any game, even for money, is not of itself an offence at common law. The offence is created by statute, and can only be punished as the statute directs.

{Cited in U. S. v. Rounsavel, Case No. 16,199; U. S. v. Helriggle, Id. 15,344.}

Mr. Taylor, for defendant, moved to quash the indictment, which was at common law, for assembling to the number of ten or more, and playing at "snap and rattle," or "in and out," to the corruption of the public morals, and to the common nuisance of all the good citizens of the county of Alexandria. Private vices are not indictable. 4 Bl. Comm. 41.

To play at any game is no crime at common law, even to play for money; therefore there can he no offence unless it he attended with such circumstances as would in themselves amount to a riot, or a nuisance, or to actual breach of the peace without the playing. 4 Bl. Comm. 171. All the penalties under the English law are statutory. If it were unlawful to play for money, no recovery for money won could be had at common law, yet such actions may be sustained, and the defendant even holden to bail. 2 Bac. Abr. 619, "Gaming," A; 11 Coke, 87b. And the statutes of England only prohibited playing to a certain amount The act of Virginia of the 8th of December, 1792, § 5, p. 175, which creates the offence, declares how it shall be punished, viz. by fine of 20 dollars upon conviction before a justice of the peace.

Mr. Jones, for United States, admitted that he had no precedent for the indictment in all its parts, but contended that it is good as an indictment as a nuisance. It is sufficient to charge it to be to the nuisance of the citizens of the county of Alexandria. It is not necessary that it should be charged as a nuisance to all the citizens of the United States. He admitted that gaming is not per se indictable at common law. The Virginia law shows that gaming is a pernicious vice and a public evil. Every kind of public gaming is therefore unlawful; every unlawful act is not an indictable offence, but every unlawful act done in a public manner and tending to corrupt the general morals of the community is a misdemeanor at common law. He admitted that private vices are not punishable at common law. But public lewdness, bawdy-houses, eaves-droppers, communis rixatrix, and the like, are indictable misdemeanors. Gaming in England is lawful, yet the keeping of a common gaming-house is indictable at common law, because it is injurious to society. The statute of Virginia punishes all gaming at a public place, but does not describe particularly the offence charged in this indictment. The punishment ought to be proportioned to the offence, but the statute punishes all alike by a fine of 20 dollars. If the statute declares a punishment of a common-law offence, and contains no negative words, you may still indict and punish at common law. It has been so decided in this court

THE COURT stopped the counsel on the other side who were about to reply, being of opinion that the indictment is not good at common law. The statute has created the offence and the punishment

FITZHUGH, Circuit Judge, contra.

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