45 Phil. 314

[G.R. No. 20874. October 23, 1923]

WISE & COMPANY, PLAINTIFF AND APPELLANT, VS. GREGORIO C. LARION, DEFENDANT AND APPELLEE.

D E C I S I O N

STREET, J.:

This action was instituted in the Court of First Instance of the Province of Iloilo by Wise & Co. to recover a sum of money from the defendant, Gregorio C. Larion, alleged to have been converted and misappropriated by him while acting in the capacity of cashier of the plaintiff's Iloilo branch. As an incident to the prosecution of the case the plaintiff obtained an order for writ of attachment against the defendant and said attachment was levied upon certain personal property; but this attachment was subsequently dissolved. The defendant answered generally, denying the allegations of the complaint and alleging as a special defense that the defendant had been criminally prosecuted for *estafa*, in four separate actions, founded upon the misappropriation of the moneys sued for in this action, in one of which actions the defendant had been acquitted and in the other three the informations had been dismissed; wherefore the defendant relied upon said criminal prosecution as *res judicata* in this case. By way of counterclaim the defendant sought to recover the sum of P5,000, as damages alleged to have been incurred by him by reason of the wrongful and unlawful suing out of the attachment which had been obtained by the plaintiff.

At the hearing the trial judge found favorably to the accused upon the issue presented by his special plea of acquittal in one prior criminal action and the dismissal of three other criminal causes against him,—all founded upon an alleged *estafa* of the moneys here sued for. He therefore absolved the defendant from the complaint and gave judgment in favor of the defendant

(plaintiff in the cross-complaint) for the amount of P710, as damages incurred by reason of the attachment already mentioned. From this judgment Wise & Co. appealed, and it has assigned errors, not only to the action of the court in absolving the defendant from the complaint, but also to the action of the court in awarding damages to the plaintiff for the wrongful attachment of the defendant's property.

It appears in evidence that the house of Wise & Co., with its principal office in Manila, has a branch in the city of Iloilo, of which one F. W. Whiteley was manager, and the defendant, Gregorio C. Larion, was an assistant to the manager and acting cashier, during the time of the transactions which gave origin to this litigation. It further appears that the said F. W. Whiteley was unfaithful to his trust and an admitted embezzler. On November 29, 1920, the firm of Hong Guan & Co., of Iloilo, issued a check, No. 31538C (Exhibit A), drawn upon the Philippine National Bank at Iloilo, and payable to bearer for the sum of P1,270, the amount of its indebtedness on that date to Wise & Co. This check was delivered by Hong Guan & Co. to the collector of Wise & Co. and in return therefor Hong Guan & Co. received a receipt (Exhibit B) for the amount of P1,270, signed by G. C. Larion, the defendant herein, showing that the indebtedness indicated in the receipt had been paid. The check which had been delivered to the collector appears to have passed directly into the hands of Whiteley who was then, for some reason or other, hard pressed for money; and he determined to appropriate the proceeds of the check. To this end he instructed Larion to deposit this check in his (Larion's) own personal account in the Philippine National Bank. At the same time Whiteley told Larion that he (Whiteley) needed money and directed that the proceeds of the check be turned over to himself. Larion was fully aware that Whiteley was bent on the misappropriation of the money but nevertheless, after some hesitation, proceeded to do as told. He accordingly indorsed his own name on the back of the check and deposited it to his own personal account in the bank. The money concerned in this irregular transaction was not entered in the books of Wise & Co. by Larion; but Whiteley gave to Larion a signed statement in writing to the effect that what Larion had done with this check was by Whiteley's instructions. (Exhibit 2.)

The deposit of check 31538C was effected on December 2,1920; and it appears that a few days prior thereto Larion had deposited two other similar checks,

belonging to Wise & Co. to his own account, one for P1,270 and another for P1,630. On December 5 he likewise deposited a fourth check belonging to Wise & Co. to his own personal account, in the amount of P1,000. It does not appear by any documentary evidence that the three checks last above referred to were deposited by Larion in his own personal account upon the instructions of Whiteley, but Larion says that they were so deposited by Whiteley's direction; and on December 6, 1920, Whiteley signed the document (Exhibit 1) to the following effect:

> "Received from Gregorio Larion the sum of Philippine Pesos five thousand one hundred seventy (P5,170) this being the total amount of cheques Nos. 195843 for P1,630, No. 31525C for P1,270, No. 31538C for P1,270 and No. 31546C for P1,000,
> paid by Hong Guan & Co. for which I accept entire responsibility.
>
> "Iloilo, December 6, 1920.
>
> (Sgd.) "F. W. WHITELEY"

Larion states that shortly prior to the transactions mentioned he had let Whiteley have the sum of P500 upon personal account, and that on December 1, 1920, he delivered the sum of P1,000 to Whiteley and on December 6, the further sum of P3,670, making a total of P5,170, in conformity with the statement of the foregoing receipt. Larion says that he knew very well that Whiteley was stealing from his house and that he (Larion) had scruples about making himself a party to the transactions above stated but that out of deference to Whiteley's superior rank, and disliking to incur his illwill, he acquiesced in the transactions.

About four months later Hawkins, a director of Wise & Co., came to Iloilo from Manila as representative of the house in order to investigate the conditions in the Iloilo branch; and on April 4, one Strickland arrived to relieve Whiteley as manager of that branch; and during April, Hawkins and Strickland were investigating discrepancies in Whiteley's accounts. While these investigations were going on Larion was called upon more than once for information, but he observed silence and refused to reveal anything detrimental to Whiteley.

The upshot of the matter was that when the defalcation of Whiteley was revealed Larion was involved in suspicion with his employers as an accomplice of Whiteley. What happened to Whiteley does not appear in the record, but four separate prosecutions for *estafa* were instituted in the criminal court of Iloilo against Larion. Only one of these actions ever came to trial, and that was the prosecution founded upon the *estafa* alleged to have been committed in the misappropriation of the proceeds of check 31538C for the sum of P1,270 already referred to. The defendant pleaded not guilty in that case and the cause was heard upon proof submitted by both parties; after which the court acquitted the defendant. In the other three cases Larion had not yet been arraigned at the time of his acquittal in the first case; and the fiscal, upon the announcement of the decision of the court in the first case absolving Larion from criminal responsibility, suggested to the court that the other cases were of an identical character and he asked that the prosecutions be dismissed. That action was accordingly taken.

There can be no question that the defendant, Gregorio C. Larion, made himself civilly liable to Wise & Co. by cooperating in the manner above stated with Whiteley in the embezzlement of the checks already referred to. It may be that Larion is innocent, as he claims to be, of any participation in the criminal design of Whiteley and that he merely followed Whiteley's directions out of pure complaisance. The situation, however, looks exceedingly suspicious in any point of view and as to his civil liability we think there can be no question—apart of course from the question of *res judicata* based upon the criminal proceedings, presently to be considered.

Speaking from the standpoint of civil liability purely, the defendant knowingly participated in acts which constituted a fraud upon his employer; and although he relied upon Whiteley to stand between him and the house of Wise & Co., the undertaking of Whiteley does not absolve the defendant from responsibility to the house. Civilly speaking, Larion made himself an accomplice in the misappropriation of these checks, or their proceeds, by Whiteley; and the circumstance that Larion may have yielded to the persuasions of Whiteley out of mere complaisance does not change the situation.

The trial judge apparently recognized the *prima facie* civil liability of Larion to Wise & Co., as the judgment absolving the defendant from such

liability was placed exclusively upon the supposed effects of the disposition made of the criminal cases. And in this connection his Honor cited the case, decided by the Supreme Court of the United States, of Almeida Chantangco and Lete *vs*. Abaroa (40 Phil., 1056). It there appeared that the defendant had been accused of the malicious and unlawful burning of a storehouse and its contents but he had been acquitted of the crime of arson in a criminal prosecution. Later a civil action was instituted to recover of the same person the damage resulting to the owner of the storehouse from the fire. The defendant in the said civil action pleaded his acquittal in the criminal case as a bar; and upon appeal to the Supreme Court of the United States it was held that, under the law prevailing in the Philippine Islands, said acquittal in the criminal case operated as a bar to the civil action. In the opinion in that case the Supreme Court of the United States reached the conclusion that civil liability does not exist where a defendant has been absolved from criminal liability for the act or acts upon which civil liability is based; but it was pointed out that if the burning instead of being malicious and unlawful, as was alleged in that case, had been due to some fault or negligence of a character that could not give rise to criminal liability the result would have been different. We do not propose in this opinion to undertake to analyze the decision of the Supreme Court of the United States and point out the possibility that the language there used may be too broad. It is enough for our present purposes to say that where, as here, the facts on which civil liability is based are of such nature as inevitably to constitute a crime, if anything, acquittal in a criminal prosecution is an insuperable obstacle to the civil proceeding. In the case before us the act of Larion in appropriating check No. 31538C was designedly done, even though done under Whiteley's directions; and that act constituted a misappropriation of the employer's money in which was necessarily involved both a criminal and civil liability. In this connection it should be noted that the *estafa* consisted of the misappropriation by an employee of funds belonging to his employer, in violation of subsection 5 of article 535 of the Penal Code; and the only thing necessary to establish either civil or criminal liability is the mere fact of misappropriation with intent to deprive the employer of the property. It results that the plaintiff cannot recover in this action for the misappropriation of check 31538C.

The case with respect to the three other checks is different, since the

dismissal of the criminal actions based on the misappropriation of those checks, before the accused had been arraigned, could not constitute *res judicata* in any sense (U. S. *vs*. Madlangbayan, 2 Phil., 426); and it is established doctrine in this jurisdiction that the prosecution of a criminal action to a successful conviction of the accused is not a condition precedent to the bringing of a civil action (Rakes *vs*. Atlantic, Gulf & Pacific Co., 7 Phil., 359), especially in *estafa* cases.

With respect to the alleged wrongful suing out of the attachment by the plaintiff against the defendant, it appears that the order for this attachment was signed by the justice of the peace of Iloilo, acting in the absence of the Judge of the Court of First Instance. As the order was made on May 5, 1921, we take judicial knowledge of the fact that this was vacation time and that the regular court was not then in session in Iloilo. Moreover, it appears that Honorable Fermin Mariano, a resident of another province, had been appointed to act as vacation judge for his own district and also for the province and district of Iloilo. The presumption therefore is, and we take the fact to be, in the absence of proof to the contrary, that Judge Fermin Mariano was not personally jpresent in Iloilo on the date that the justice of the peace signed the order for the attachment. It results that said order must be attributed to the justice of the peace in the exercise of the jurisdiction of a Judge of First Instance pursuant to section 1 of Act No. 2131. Moreover, inasmuch as the order for the attachment purports to be signed by the justice of the peace "in the absence of the Judge of First Instance," it must be assumed that said justice of the peace was lawfully acting in the exercise of the jurisdiction which pertains to him under the conditions stated. (Sec. 334 [15], Code of Civ. Proc.) It follows that the order for the attachment was valid, notwithstanding the fact that the attachment was for a sum in excess of P2,000, and therefore beyond the ordinary jurisdiction of a justice of the peace; and we are unable to agree to the conclusion of the court below that the attachment was issued without legal authority.

From what has been said it will be seen that the plaintiff had a good cause of action upon at least three of the checks, and the writ of attachment was issued by competent authority. As the sufficiency of the ground of attachment has not been drawn in question, the attachment was in all respects valid; and a necessary conclusion is that the defendant is not entitled to recover the

damages which were awarded to him under the cross-complaint for the alleged wrongful suing out of the attachment.

The judgment appealed from will be reversed, and judgment will be entered in favor of the plaintiff to recover of the defendant the sum of P3,900, with interest from May 4, 1921, and the plaintiff will be absolved from the cross-complaint. So ordered, without special pronouncement as to costs.

Johnson, Malcolm, Avanceña, and *Romualdez, JJ.,* concur.

DISSENTING

VILLAMOR, J.:

I am of the opinion that the judgment appealed from should be affirmed.

DISSENTING

JOHNS, J.:

I vigorously dissent from all of that portion of the majority opinion which holds that, because the defendant was tried and acquitted on the *estafa* charge, the plaintiff cannot recover for the misappropriation of the amount of check No. 31538C.

The facts are fully, fairly and clearly stated in the majority opinion, in which it is said:

> "There can be no question that the defendant, Gregorio C. Larion, made

> himself civilly liable to Wise & Co. by cooperating in the manner above stated with Whiteley in the embezzlement of the checks already referred to. It may be that Larion is innocent, as he claims to be, of any participation in the criminal design of Whiteley and that he merely followed Whiteley's directions out of pure complaisance. The situation, however, looks exceedingly suspicious in any point of view and as to his civil liability we think there can be no question—apart of course from the question of *res judicata* based upon the criminal proceedings, presently to be considered."

In other words, the plaintiff had a just and valid claim against the defendant for the amount of check No. 31538C. But, because a criminal information was filed by the Government charging the defendant with the crime of *estafa* as to the amount of the check, upon which he was tried and acquitted, the debt is wiped out, and the plaintiff cannot recover from the defendant, even though it was a just and valid debt. That is not a good law. It purports to be founded on the provisions of the Code and the former decisions of this court and, in particular, the case of Almeida Chantangco and Lete *vs*. Abaroa, decided by this court on March 27, 1907, and reported in volume 8, Phil., 178, which was afterwards affirmed by the Supreme Court of the United States in 218 U. S., 476; 54 L. ed., 1116, and published in volume 40, Phil, 1056.

There is a marked distinction between the facts upon which those decisions are founded and the facts in the instant case. We make the broad assertion that, upon the facts shown in the record in this case, no former decision of this court has ever held that a prosecution and acquittal for *estafa* is a bar to the recovery by an injured party on a just claim founded upon a breach of confidence and the betrayal of a trust. We have carefully read the decisions of this court and the Supreme Court of the United States in the Abaroa case, and make the broad statement that it is not in point and does not sustain the majority opinion. In that case, a criminal information was filed charging the defendant with arson in the burning of a stock of goods, wares and merchandise, valued at $58,473.49, Mexican, upon which he was tried and acquitted. An action was later brought by the injured party against Abaroa to recover the value of the goods, in which it was alleged in the complaint that the stock was burned maliciously or unlawfully by the defendant. It was held that the acquittal on

the criminal charge was a bar to the civil action. There is an important distinction. There, the stock of goods was totally destroyed and wiped out of existence by means of a fire charged to be arson. There was no contractual relation or any element of a contract existing between the owner of the goods and the defendant. Here, the defendant was a trusted employee of the plaintiff, and, through his fraud and collusion with Whiteley, he fraudulently delivered the money of plaintiff to Whiteley. The money taken was not wiped out or destroyed. It continued to exist after the taking in the same manner and form as it did before the taking, and it was taken in violation of confidence and betrayal of a trust founded upon a contract of employment. In the above case, the action was founded upon a tort. In the instant case, it is founded upon a breach of contract and the betrayal of a trust.

Prior to the majority opinion, this court has never held and never intended to hold, that a prosecution and acquittal on a *estafa* charge was a bar to civil action by the injured party to recover on a just and valid debt. In numerous decisions, both in *banc* and in each division, this court has held that it would not be a collection agency to enable persons to collect claims by or through a prosecution for *estafa*, and that in such cases the only claim or remedy was in a civil action.

In legal effect, all of those numerous decisions are overruled by the majority opinion. Again, the majority opinion opens wide the door to fraud. Under it, a trusted employee can take or appropriate to his own use any amount of money of his employer, and then procure the filing of an information against himself for *estafa*, have a prosecution and acquittal of the charge for want of evidence, and after the acquittal, he can then admit that he took the money and appropriated it to his own use, and in the face of such admission, he can plead his acquittal in the criminal action as a bar to a civil action to recover the money which he admits that he stole from his employer.

Strange as it may seem, the question of the constitutionality of such a law was never raised, discussed or decided in any former opinions of this court, or in the Abaroa case by the Supreme Court of the United States.

In legal effect, the majority opinion takes the money of the plaintiff, evidenced by the check, and gives it to the defendant. That is without “due

process of law," impairs the obligation of a contract and violates plaintiff's constitutional rights.

In the instant case, the information was filed by the fiscal, and the prosecution was in the name of the Government. Wise & Company was not a party, either plaintiff or defendant. Neither did it have any control over the prosecution. That was a matter in the sole discretion of the fiscal. If, as the majority opinion holds, the fiscal had elected to try the other charges against the defendant, and he had been acquitted, it would have wiped out the whole debt, but, because the fiscal elected to dismiss the other cases, plaintiff's cause of action as to those claims is not barred. That is putting it in the power of the fiscal alone to say whether or not the defendant should be discharged from all liability, or upon what claims plaintiff can recover.

The principle of law invoked can only be sustained upon the theory that, through the trial and acquittal of the defendant on one of the charges, the question of civil liability as to that charge has become *res judicata*. Those words have a well-defined legal meaning.

In Words and Phrases, volume 7, page 6128, it is said:

> " 'In order to make out a defense of *res adjudicata*, it must appear that the parties were the same, and that the matter involved was the same; and it must also appear that the matter was adjudicated in a suit and before a court having competent jurisdiction to adjudicate the matter.' (Cherry *vs*. York [Tenn.], 47 S. W., 184, 188.)
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> "In order to establish a plea of *res judicata*, there must generally be an identity of parties, of subject-matter, and of cause of action. (Baldwin *vs*. Hanecy, 68 N. E., 560, 562; 204 Ill., 281.)
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> "*Res adjudicata* is determined as existing when it is ascertained that the matters of the two suits are the same, and the issues in the former suit were broad enough to have comprehended all that is involved in the issues in the second suit. (Tankersly *vs*. Pettis, 71 Ala., 179.) To support the plea of *res adjudicata*, the parties must be the same, the subject-matter the same, and the point must be directly in question, and the judgment must be

> rendered upon that point. (Wood *vs*. Wood, 33 South., 347, 349; 134 Ala., 557.)
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> "In order to make a plea of *res judicata* effective, there must be at least the concurrence of two things: First, identity of subject-matter; and, second, identity of persons and parties. (Lindauer Mercantile Co. *vs*. Boyd [N. M.], 70 Pac., 568, 570.)
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> "In order to make a matter *res judicata*, there must be a concurrence of the following conditions: First, identity in the thing sued for; second, identity of the cause of the action; third, identity of persons and parties to the action; fourth, identity of the quality in the persons for or against whom the claim is made. 2 Bouv., Law Dict. That there should be identity of persons and of parties to the action is a necessary consequence of the rule of natural justice. 'Ne inauditus condemnetur.' (Atchison, T. & S. F. R. Co. *vs*. Jefferson County Com'rs., 12 Kan., 127, 135.)
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> "A judgment cannot be *res judicata* as to any right or claim unless both claim and claimant have been before the court. (Gay *vs*. Brierfield Coal & Iron Co., 11 South., 353, 364; 94 Ala., 303; 16 L. R. A., 564; 33 Am. St. Rep., 122.)"

That is elementary law. Upon what legal principle can Wise & Company be deprived of its property in a criminal proceeding to which it was not a party and without having its day in court? If Wise & Company was a party to a criminal proceeding, and its property rights were affected by the decision, it would have a constitutional right of appeal from the judgment to this court, and, yet, no member of this court would contend that Wise & Company had the right of appeal from the judgment of acquittal. Upon what legal principle is Wise & Company bound by the judgment of acquittal? Again, in a criminal case, the inflexible rule is that, to sustain a conviction, the evidence must be sufficient to convict the defendant beyond a reasonable doubt. In a civil action the rule is that plaintiff is only required to prove his case by a preponderance of the evidence. Yet, in the instant case, Wise & Company's civil rights were tried and determined by the rule which gave the defendant the benefit of a reasonable doubt, as a result of which he was acquitted. Under the organic law,

Wise & Company has the constitutional right to have its civil rights measured and decided by a preponderance of the evidence, and in any action to which it is a party, it has the constitutional right of appeal, and, yet, in the instant case, it has been deprived of both those rights, and, in legal effect, its property has been taken from it and given to the defendant.

In defining "due process of law," Words and Phrases, volume 3, pages 2250, 2251, 2254, 2255, and 2256, says:

> Page 2250: "Many definitions of 'due process of law' have been attempted, but it is believed they all come to this: that a party shall have his day in court—trial—which means the right of each party, plaintiff or defendant, to introduce evidence to establish his right to recover on the one hand, and to establish his defense on the part of the other; after which comes judgment. Any judgment which is rendered without these modes of procedure, or in disregard of them, is not due process of law. Any other procedure condemns before it hears, does not proceed upon inquiry, but renders judgment before trial. (Jensen *vs*. Union Pac. Ry. Co., 21 Pac., 994, 995; 6 Utah, 253; 4 L. R. A., 724.)"
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> Page 2251: "No court of justice in this country can acquire jurisdiction over a person, or a right to render a judgment *in personam* against him, without a service upon him in person of a summons in the action, unless he enters his voluntary appearance therein. Nothing else is 'due process of law.' (Moredock *vs*. Kirby [U. S.], 118 Fed., 180, 183.)"
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> Page 2254: "Due process of law forbids that one man's property or right to property shall be taken for the benefit of another, or for the benefit of the state, without compensation. (Holden *vs*. Hardy, 18 Sup. Ct., 383, 387; 169 U. S., 366; 42 L. ed., 780.)
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> Pages 2254-2255: " 'Due process of law,' as applied to judicial proceedings instituted for the taking of private property for public use, means such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceedings
> against the owner, even if he be admitted to defend, cannot convert the process

> used into due process of law, if the necessary result be to deprive him' of his property without compensation. (Chicago, B. & Q. R. Co. *vs*. City of Chicago, 17 Sup. Ct., 581, 584; 166 U. S., 226; 41 L. ed., 979.)"
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> Page 2255: "The mere fiat of the Legislature transferring the property of one person to another is not 'due process of law,' within the meaning of that provision in the Constitution of the United States. (Culbertson *vs*. Coleman, 2 N. W., 124, 128; 47 Wis., 193.)
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> "By 'law of the land' is meant due process of law, and a legislative act which undertakes to deprive one person, against his consent of a vested estate, and to vest it in another for his private use, is not 'due process of law' or the 'law of the land.' (Reynolds *vs*. Baker, 46 Tenn. [6 Cold.], 221, 228.)"
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> Page 2256: "If property can be taken without a forensic trial and judgment, there is no security for life or liberty. None of these things can be taken away by mere legislation. (Taylor *vs*. Forter [N. Y], 4 Hill, 140, 146; 40 Am. Dec., 274; People *vs*. City of Brooklyn [N. Y.], 9 Barb., 535, 552.)"

The question at issue here is to be determined by the pleadings.

Among other things, the complaint alleges:

> "2. That from November 15, 1920 to April 29, 1921, the said defendant was cashier of said branch office of plaintiff in Iloilo, and that as such cashier he received with the obligation of delivering to the said plaintiff, on, during and between the dates aforesaid, the sum of fifty-two hundred forty pesos and thirty-six centavos (P5,240.36), Philippine currency.
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> "3. That said defendant fraudulently did take, appropriate and convert to his own use on or about the date before mentioned the said sum of P5,240.36 and that
> although requested so to do has refused and still refuses to pay the said sum or any part thereof to the plaintiff.

> "4. That the said defendant has been guilty of fraud in incurring the obligation upon which this action is brought, in that without authority and without the consent of plaintiff said defendant did convert the said sum of P5,240.36 to his own use in the manner aforesaid."

Wherefore, plaintiff prays judgment.

The majority opinion admits plaintiff's claim is just and valid, and that its right to recover the full amount is established by the evidence, but denies its right to recover the amount of the check in question on the ground that the defendant was tried and acquitted upon a charge of *estafa*. In other words, it is a fact that, in legal effect, the defendant took and appropriated to his own use P5,240.36 belonging to the plaintiff. In the Abaroa case there was no taking or appropriation of the property by the defendant, and he did not receive the use and benefit of the property destroyed or its value. Therein lies the vital distinction between the two cases, an important fact, which is overlooked by the majority opinion.

In the final analysis, we have this situation. The defendant was a trusted employee of the plaintiff and betrayed his trust, and through collusion and fraud, and with his consent and approval, P5,240.36 of plaintiff's money was taken and appropriated, for which the defendant was legally liable to the plaintiff. Four informations, charging him with *estafa*, one for each transaction, were filed by the fiscal upon one of which he was tried and acquitted. Wise & Company was not a party to that prosecution, either as plaintiff or defendant, and did not have the right of appeal from the judgment of acquittal, and in the trial of the case, the defendant was given the benefit of a reasonable doubt. The majority opinion says that the plaintiff had a just, valid claim for the amount of the check upon which defendant was prosecuted for *estafa*. As a result of that acquittal, in legal effect, the amount of that check was taken from Wise & Company and given to the defendant. Under the majority opinion, if the defendant had never been prosecuted, Wise & Company would have a valid claim against him for the full amount, as prayed for in its complaint. But, because he was prosecuted upon one information and acquitted, that claim was wiped out. If the fiscal in his legal discretion had seen fit to try the other cases, resulting in an acquittal, in legal effect, the

whole debt of P5,240.36 would have been wiped out, taken from Wise & Company and given to the defendant. That is to say, it was a matter in the sole discretion of the fiscal, and the fiscal only, as to whether the whole or any part of the just claim of the plaintiff against the defendant should be barred, wiped out and discharged.

The defendant was in the employ of the plaintiff as its cashier under a contract of employment, in and by which his primary duties were to honestly and faithfully pay over, and account for, all of the funds of the employer, which came into his possession and under his control, under his contract of employment. He violated his contract and betrayed his trust, and, yet, because he was acquitted on a charge of *estafa*, as to one of the checks in question, as to that check, he is absolved and released from all liability arising under his contract of employment.

No decision of this or any other court has laid down any such rule of law, and no authority will ever be found to sustain it.

The Supreme Court of Michigan in Micks *vs*. Mason (145 Mich., 212; 108 N. W., 707; vol. 11, L. R. A. [N. S.], p. 653), upon the legal principle here involved squarely decides that an acquittal in a criminal prosecution would not be *res judicata* in a civil action between Wise & Company and the defendant. It is there held:

> "1. A municipal corporation having statutory authority to fix fire limits and direct the manner of constructing buildings within such limits in respect to protection against fire may, by ordinance, provide for the summary abatement of buildings erected within the fire limits which do not meet the requirements of the ordinance as to fireproof construction.
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> "2. An acquittal in a criminal prosecution for maintaining within the fire limits a building alleged to be a nuisance because not complying with a requirement of the municipal ordinance is not *res judicata* upon the question of nuisance, in a proceeding by the owner to enjoin the summary destruction of the building in accordance with the provisions of the ordinance."

In the L. R. A. decision, the whole question is annotated in exhaustive notes, in which numerous authorities are cited, all sustaining the decision of the Supreme Court of Michigan.

Among others, we quote the following:

> "1. *Dissimilarity in object, issues, procedure, or parties.*
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> "It has been laid down by the courts as a general rule, and repeated by text writers, that a judgment in a criminal prosecution cannot be given in evidence in a civil action to establish the truth of the facts on which it was rendered. (2 Black, Judgm. sec. 529; 1 Greenl. Ev. sec. 537; 2 Taylor, Ev. sec. 1693.) This rule rests upon the consideration that the parties to a criminal prosecution and those in a civil suit are necessarily different; and that the objects, results, and course of procedure in the two actions are equally diverse. (State *vs*. Bradnack, 69 Conn., 212; 43 L. R. A., 620; 37 Atl., 492.)"
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> "WANT OF MUTUALITY
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> "It is an axiom of law that no man shall be affected by proceedings to which he is a stranger. He must have been directly interested in the subject-matter of the proceedings, with the right to make defense, to adduce testimony, to cross-examine the witnesses on the opposite side, to control in some degree the proceedings, and to appeal from the judgment. Persons not having these rights are regarded as strangers to the cause, and are not concluded by the judgment rendered in it. It is obvious that the parties in criminal and civil actions cannot be the same; and hence judgments rendered in the former have been excluded in the latter as *res inter alios acta*, when offered to establish the truth of the facts upon which they were rendered. (Corbley *vs*. Wilson, 71 Ill., 209; 22 Am. Rep., 98.)"
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> "In an action to recover damages resulting from an assault and battery, a transcript of the docket of a justice before whom the defendant was convicted is inadmissible to establish the commission of the assault and battery, which was an issue in the civil case, since it is *res inter alios acta*. (Doyle *vs*. Gore, 15 Mont., 212; 38 Pac., 939.)"

"A former adjudication in a criminal action is not generally a bar to a subsequent civil action, because of the different object of the proceedings and their dissimilarity in parties, rules of decision, and procedure. But, when the subsequent action, although civil in form, is quasi criminal in its nature, as in actions to recover penalties or declare forfeitures, it has been regarded as a second prosecution for the same offense, and barred by a prior conviction or acquittal. This rule, of course, is not applicable where the object of the civil action is compensation, and not punishment."

"A judgment of conviction in a criminal prosecution constitutes no bar to a civil action based upon the same act or transaction, since different rules as to the competency of witnesses and as to the weight of evidence exist, and the issue in the criminal proceeding is not necessarily the same, either as to scope, or as to its attendant results, as that involved in the civil action. (Seaboard Air Line R. Co. *vs*. O'Quin, 124 Ga., 357; 2 L. R. A. [N. S.], 472; 52 S. E., 427.)"

"So, a judgment of acquittal, rendered on a criminal prosecution in the court of quarter sessions, wherein the right of the accused to practise medicine was at issue, is not *res judicata* in a proceeding to strike his name from the medical register. (*Re* Campbell, 197 Pa., 581; 47 Atl., 860.)"

"Acquittal of a criminal offense growing out of the same transaction is not a bar to a civil proceeding by warrant of arrest under Pa. act July 12, 1842, P. L., 349. (Morch *vs*. Raubitschek, 159 Pa., 559; 28 Atl., 369.) Said the court: 'The proceedings are entirely different. The former was a criminal prosecution, while this is a civil proceeding at the instance of defendant's creditor. Defendant's acquittal of the criminal charge cannot, in the nature of a plea of *autrefois acquit*, be interposed as a bar to the civil proceedings. * * * The proceeding by warrant of arrest is "collateral to the action for a breach of contract, and in aid of and dependent on it. * * * The proceeding is not at all a criminal one. The fraud is treated as a private injury, giving rise to a corresponding modification of the ordinary private remedy applicable to debts * * *." '

"A private wrong inflicted by a criminal act is not merged in the public wrong, nor is the public prosecution intended to supersede or preclude the

private action. Their purposes are entirely different. The person wronged is not chargeable with the conduct of the prosecution, and, therefore, is not affected by an acquittal.

"Thus, acquittal of one indicted for receiving stolen goods is not conclusive in an action against him by the owner to recover the value of the goods. (Rohm *vs*. Borland, 4 Sadler [Pa.], 319; 7 Atl., 171.)

"Nor does an acquittal on a trial for the theft of a trunk containing money preclude the maintenance of an action of trover against the accused. (Hutchinson *vs*. Merchants' & M. Bank, 41 Pa., 42; 80 Am. Dec., 596.)

"And that one prosecuted under N. Y. Penal Code, sec. 654, for wilfully entering upon lands of another and cutting down trees, was acquitted, is not a defense in a civil action to recover the treble damages provided for by such section; since the verdict only bound the people as final, and, even if the criminal prosecution failed, the right to damages remained. (Von Hoffman *vs*. Kendall, 44 N. Y. S. R., 484; 17 N. Y. Supp., 713; appeal dismissed without opinion in 138 N. Y., 629; 33 N. E., 1084.)

"So, a judgment of acquittal of the offense of killing the cattle of another is not admissible in evidence in an action brought under Ga. Code, sec. 1445, by the owner of the cattle against the wrongdoer, to recover triple damages for the killing of the animals. (Tumlin *vs*. Parrott, 82 Ga., 732; 9 S. E., 718.)"

"Thus, a judgment of acquittal on an indictment for murder is not a bar to a subsequent suit by the widow of the deceased to recover damages for the killing of her husband, either against the slayer, or against an alleged aider and abettor, since the redress afforded by the two actions is different. (Gray *vs*. McDonald, 104 Mo., 303; 16 S. W., 398.)

"So, a judgment acquitting one tried for murder is not available in his behalf in a civil action brought against him by the widow of the deceased to recover damages for the alleged homicide. (Cottingham *vs*. Weeks, 54 Ga., 275.)"

"Acquittal of a charge of assault and battery is not a bar to an action to

recover damages therefor. (Rosenberg *vs*. Salvatore, 16 N. Y. S. R., 801; 1 N. Y. Supp., 326.)"

"2. *Civil action to recover compensation*

"An adjudication in a criminal court is not a bar to a subsequent civil action, the object of which is compensation, and not punishment.

"Thus, a judgment of acquittal in a prosecution of a liquor dealer for selling liquor to an intoxicated person is not a defense in an action by the state against him and the sureties on his bond, in which the offense of which he was acquitted is charged as a breach of the bond. (State *vs*. Corron, 73 N. H., 434; 62 Atl., 1044.)"

"Likewise, an acquittal of a postmaster of the charge of making false returns for the purpose of fraudulently increasing his compensation is not a bar to an action upon his official bond to recover the sum found due from him for moneys received upon the adjustment of the Postmaster General, who, in fixing the postmaster's compensation, approximated the amount he would have received if his returns had been correct. (United States *vs*. Jaedicke, 73 Fed., 100.)"

In the face of such overwhelming authorities, I am at a loss to know upon what legal principle the acquittal of the defendant on the *estafa* charge, as to the check in question, could be a bar to a civil action founded upon a contract of employment to recover the amount of the check. But it is claimed that, in legal effect, the plaintiff was a party to the criminal action within the meaning of section 107 of General Order No. 58, which provides as follows:

"The privileges now secured by law to the person claiming to be injured by the commission of an offense to take part in the prosecution of the offense and to recover damages for the injury sustained by reason of the same shall not be held to be abridged by the provisions of this order; but such person may appear and shall be heard either individually or by attorney at all stages of the case,

> and the court upon conviction of the accused may enter judgment against him for the damages occasioned by his wrongful act. It shall, however, be the duty of the promotor fiscal to direct the prosecution, subject to the right of the person injured to appeal from any decision of the court denying him a legal right."

Giving that section its broadest construction, it could only apply to actions for damages or personal injuries, and could not apply to actions founded upon contract. It specifically says that the injured person has the privilege of taking part "in the prosecution of the offense and to recover damages for the injury sustained," and that the court "may enter judgment against him for damages occasioned by his wrongful act."

In the instant case, plaintiff's action is not brought to recover damages or for personal injuries. It is founded upon a contract of employment between the plaintiff and the defendant.

Section 107 only applies to actions sounding in tort, and does not apply to actions arising out of contract.

For some time the Philippine Islands have been under a republican form of government, and its citizens now have well-defined constitutional rights.

Section 3 of the Organic Act provides:

> "That no law shall be enacted in said Islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws. Private property shall not be taken for public use without just compensation." And
>
> "That no law impairing the obligation of contracts shall be enacted."

Although the constitution provides that "private property shall not be taken for public use without just compensation," the legal effect of the majority opinion is to take the private property of Wise & Company, and give it to

the defendant without any compensation.

The acquittal in the criminal action
is not *res judicata* of the civil liability between Wise & Company and
the defendant. In legal effect, the majority opinion amounts to the taking of
the private property of Wise & Company without due process of law, and the
giving of it to the defendant without any compensation, and impairs the
obligation of a private contract between the parties. Upon those points, and to
that extent, I vigorously dissent.

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