

## EULOGIO RODRIGUEZ, SR., PLAINTIFF AND APPELLANT, VS. CARLOS TAN, DEFENDANT AND APPELLEE.

*G.R. No. L-3913. August 07, 1952*

Ponente: BAUTISTA ANGELO, J.

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### **BAUTISTA ANGELO, J.:**

Plaintiff seeks to collect from the defendant the aggregate sum of P18,400 as salaries and allowances, and the sum of P35,524.55 as damages, upon the plea that the latter usurped the office of Senator of the Philippines which rightfully belongs to the former from December 30, 1947, to December 27, 1949.

Plaintiff claims that on December 30, 1947, defendant usurped the office of Senator of the Philippines, and from that date until December 1949, he continuously collected the salaries, emoluments and privileges attendant to that office amounting to P18,400; that protest having been filed by plaintiff against defendant, the Senate Electoral Tribunal on December 16, 1949, rendered judgment declaring plaintiff to have been duly elected to the office; and that by reason of such usurpation, plaintiff suffered damages in the amount of P35,524.55 for expenses he incurred in prosecuting the protest.

On February 2, 1950, defendant filed a motion to dismiss alleging, on one hand, that the judgment rendered by the Senate Electoral Tribunal in the protest case is a bar to this action under the principle of *res judicata*, and, on the other, that said Tribunal denied without any reservation the claim of the plaintiff for expenses incurred in prosecuting the protest.

The issue having been thus joined upon the motion to dismiss, the Court entered on an order dismissing the complaint with costs. From this order plaintiff has appealed.

The averment in the complaint that "defendant usurped the office of Senator of the Philippines" is a conclusion of law, not a statement of fact,—inasmuch as the particular facts on which the alleged usurpation is predicated are not set forth therein. Hence such averment cannot be deemed admitted by the motion to dismiss (*Fressel vs. Mariano Uy Cliaco & Sons & Co.*, 34 Phil., 122). Moreover, such averment is negated by the decision of the Senate Electoral Tribunal in the protest case which says that defendant was one of those proclaimed elected as Senator in the general elections held on November 11, 1947. Defendant, cannot, therefore, be considered a usurper as claimed in the complaint

With this preliminary statement, let us now proceed to determine the only issue involved in this appeal, to wit, whether defendant, who has been proclaimed, took the oath of office, and discharged the duties of Senator, can be ordered to reimburse the salaries and emoluments he has received during his incumbency to the plaintiff who has been legally declared elected by the Senate Electoral Tribunal.

Plaintiff claims that, as defendant was found by final judgment not to have been entitled to the office of Senator, and, as such, he was during the time he discharged that office a mere *de facto* officer, he should reimburse to the plaintiff the salaries and emoluments he has received on the following grounds; (1) because the salaries and

emoluments follow and are inseparable from legal title to the office and do not depend on whether the duties of the office are discharged or not; and (2) because such a rule tends to curb election frauds and lessens the danger and frequency of usurpation or intrusion into the office. Plaintiff invites the attention of the Court to the annotation appearing in 93 A.L.R. 258, 273 et seq., supplemented in 151 A.L.R. 952, 960, et seq., wherein more than 100 cases are cited in support of the rule.

Defendant, on the other hand, contends that the rule invoked by plaintiff, while sound and plausible, cannot be invoked in the present case, since it runs counter to the principle and rule long observed in this jurisdiction to the effect that one who has been elected to an office, and has been proclaimed by the corresponding authority, has a right to assume the office and discharge its functions notwithstanding the protest filed against his election, and as a necessary consequence he has likewise the right to collect and receive the salaries and emoluments thereunto appertaining as a compensation for the services he has rendered. Defendant avers that plaintiff already attempted to seek the reimbursement of the salaries and emoluments he had received in the protest he has filed against him but failed and the implicit denial of his claim by the Senate Electoral Tribunal constitutes a bar to his right to collect the same salaries and emoluments in the present case.

After a careful consideration of the issue in the light of the law and precedents obtaining in this jurisdiction we are inclined to uphold the point of view of the defendant. There is no question that the defendant acted as a de facto officer during the time he held the office of Senator. He was one of the candidates of the Liberal Party in the elections of November 11, 1947, and was proclaimed as one of those who had been elected by the Commission on Elections, and thereafter he took the oath of office and immediately entered into the performance of the duties of the position. Having been thus duly proclaimed as Senator and having assumed office as required by law, it cannot be disputed that defendant is entitled to the compensation, emoluments and allowances which our Constitution provides for the position (article VI, section 14). This is as it should be. This is in keeping with the ordinary course of events. This is simple justice. The emolument must go to the person who rendered the service unless the contrary is provided. There is no averment in the complaint that he is linked with any irregularity vitiating his election. This is the policy and the rule that has been followed consistently in this jurisdiction in connection with positions held by persons who had been elected thereto but were later ousted as a result of an election protest. The right of the persons elected to compensation during their incumbency has always been recognized. We cannot recall of any precedent wherein the contrary rule has been upheld.

A case which may be invoked in support of this point of view is *Page vs. IT*. S. (127 U. S. 67; 32 Law ed. 65), decided by the Supreme Court of the United States. In that case, one William A. Pirce was declared elected, received a certificate of election, was sworn and took his seat in the Congress of the United States. His election was contested by Charles H. Page, and as a result the House of Representatives found that Pirce was not duly elected and declared his seat vacant. An election was thereafter held to fill the vacancy and Page was duly elected. Thereupon Page was sworn in and took his seat. Page later sued to recover the salary received by Pirce during his incumbency. The Supreme Court ruled that he was not entitled to it holding that "one whose credentials showed that he was regularly elected a member of Congress, and who was sworn in and took his seat, and served, and drew his salary, was—although his seat was contested, and subsequently he was declared by Congress not to have been elected, and his seat was declared vacant—the predecessor of the person elected to fill the vacancy". This case, though, it arose under a special statute, is significant in that it regarded Pirce as the lawful predecessor of Page in the office to which he was later legally elected. Pirce was declared entitled to the salary and emoluments of the office.

We are sympathetic to the rule earnestly advocated by the plaintiff which holds that the salaries and emoluments should follow the legal title to the office and should not depend on whether the duties of the office are discharged

or not, knowing that it is predicated on a policy designed to discourage the Commission of frauds and to lessen the danger and frequency of usurpation or intrusion into the office which defeat the will of the people. We are conscious that, if the rule m adopted, it would indeed have a wholesome effect in future elections and would serve as a deterring factor in the commission of frauds, violence and terrorism which at times are committed in some sectors of our country to the detriment of public interest. But an examination of the cases relied upon by him, discloses that in some states, like Indiana, New York, Michigan, California, Lousiana, Idaho, Missouri and Washington, the doctrine advocated is premised on express statutory provisions which permit recovery of the damages sustained by reason of usurpation (Mechem, A Treatise on the Law of Public Offices and Officers, pp. 223-224; 93 A. L. R. pp. 284-287), whereas in the rest the ruling is based on common law (Kreitz vs. Behrensmeyer, 24 A. L. R. 223-224). Under such predicament, it is indeed hard to see how we can extend here the force and effect of such doctrine as we are urged, knowing well that, as a rule, "neither the English nor the American common law is in force in these Islands, nor are the doctrines derived therefrom binding; upon our courts" (U. S. vs. Cuna, 12 Phil, 241; Arnedo vs. Llorente and Liongson, 18 Phil., 257, 262), while, on the other hand, there is nothing in our statutes which would authorize us to adopt the rule. For us to follow the suggestion of the plaintiff would be to legislate by judicial ruling which is beyond the province of this Court. Nor are we justified to follow a common law principle which runs counter to a precedent long observed in this jurisdiction.

Another reason that may be invoked in opposition to the claim of the plaintiff is the principle of *res judicata*. It appears that plaintiff had already set up this claim in the protest he filed against the defendant before the Senate Electoral Tribunal, but when the case was decided on the merits the Tribunal passed up this matter *sub silentio*. In our opinion, this silence may be interpreted as a denial of the relief. This is a matter which can be considered as an incident to the power and authority given to the Electoral Tribunal by our Constitution, whose jurisdiction over election cases is ample and unlimited (Sinidad et al vs. Vera et al., Case No. 1, Senate Electoral Tribunal), and when the Tribunal chose to pass *sub silentio*, or ignore altogether, this important claim, the clear implication is that it deemed it unjustified. This matter, therefore, cannot now be passed upon in line with the doctrine laid down in the case of *Kare vs. Locsin*, (61 Phil, 541), wherein this Court, among other things, said:

"Locsin drew his pay by resolution and authority of the lature. The propriety of those payments cannot be question this complaint. We recognize Locsin's right to receive retain the compensation because the Legislature voted it to him in spite of Mr. Kare's pending contest and claim to that compensation. The Legislature's determination of Mr. Locsin's right to compensation necessarily carries the corollary of Mr. Kare's lack of right to the same compensation. The Legislature might possibly have required reimbursement by Locsin had it been its intention to recognize Mr. Kare's claim to the same compensation; but not having done so, Locsin's superior right to this compensation is *res for the courts*." (*Kare vs. Locsin*, 61 Phil., pp. 541, 546.)

The same consideration may be made with regard to the claim for damages contained in the second cause of action of the complaint.

Wherefore, the order appealed from is affirmed, with costs against the appellant.

Bengzon, Montemayor, and Labrador, JJ., concur.

Paras, C. J., concurs in the result.

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## CONCURRING

**PADILLA, J.:**

I concur in the affirmance of the order appealed from which dismissed the complaint, on the ground that the plea of usurpation by the defendant of the office to which the plaintiff was adjudged by the proper Electoral Tribunal to be entitled is not an allegation of fact. Usurpation is per se unlawful. A de facto officer enters upon the performance of the duties and functions of an office under a color of authority or title. A candidate proclaimed elected to an office by the agency set up by law to make the proclamation cannot be deemed a usurper. Cases cited by the dissenter which hold that a person entitled to an office as adjudged by the courts is also entitled to recover the fees collected and emoluments of and appertaining to the office from the ousted holder hereof, are either based on common law or upon express statutory provisions. In this jurisdiction the common law Aas never been applied and there is no statute which allows recovery of salaries and emoluments received by or paid to an officer who later on is adjudged not to be titled to the office.

Nevertheless, if the defendant, directly or indirectly, ad committed unlawful or tortuous acts which led to and resulted in his proclamation as senator-elect, when in truth and in fact he was not so elected, he would be answerable for damages. In that event the salary, fees and emoluments received by or paid to him during his illegal incumbency would be a proper item of recoverable damage.

In the present case it is not pleaded that the defendant Had committed such acts.

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**DISIDENTE****PABLO, M.:**

La mayoría admite que el demandado era un senador de facto y no de jure. Si esto es así, entonces esta obligado a restituir al demandante todos los emolumentos que recibió como senador de facto.

No es necesario hacer un esfuerzo para llegar a tal conclusión si se tiene en cuenta que los emolumentos se dan al que es legalmente elegido, y no a otro. Un sentido ordinario de justicia obliga la restitución al que haya sido privado de dichos emolumentos por el que los recibió sin derecho alguno.

Se arguye que en Filipinas no existe una ley que dispone la restitución de los sueldos recibidos por el funcionario de facto al funcionario de jure, como en los estados de In-diana, Michigan y Nueva York, y que el derecho consuetudinario no rige en Filipinas. Precisamente, porque no existe tal ley, el Tribunal Supremo, inspirándose en altos principios de justicia, debe establecer como doctrina la de que el que haya ocupado ilegalmente un cargo debe restituir al funcionario de jure todos los sueldos que haya recibido. La regla universal que rigió desde que el hombre comenzó a tener noción de la justicia es la siguiente: "dar a cada uno lo que es suyo." Si en la conciencia del hombre existe una noción honda y fuertemente arraigada, esta la de la justicia. Y fue la justicia la fuerza motriz derroco imperios. Las reivindicaciones sociales fueron inspiradas por sentimientos de justicia. Y las convulsiones sociales no son mas que signo sintomático del hambre y sed de justicia.

Que justificación tiene un funcionario de facto para retener el sueldo que corresponde al cargo que ilegalmente ocupó? Que justificación tiene para privar del sueldo al que fue legalmente elegido? Privar de su sueldo al que fue elegido par el sufragio popular es repugnante a la conciencia universal.

Esta doctrina tendría efecto purificador en las luchas electorales: no se haría uso en ellas de las malas artes que han sido empleadas en muchas elecciones. El publico en general y especialmente aquellos que se valen de medios más o menos ilícitos para ganar una elección tendrían muy en cuenta que un acta de elección obtenida ilegalmente no proporciona beneficios sino una carga. Quien desconfiare de la pureza o legitimidad de un acta de

elección podría inclusive rehusar ocupar el cargo.

En *Albright contra Sandoval*, 54 Law Ed., 502, el Tribunal Supremo de los Estados Unidos, al que fue apelada la decisión del Tribunal Supremo Territorial de New México, relata los hechos de la siguiente manera:

"This action was brought for the past fees and emoluments of the office, amounting, it is alleged, to the sum of six thousand, one hundred eighty-four dollars and sixteen cents (\$6,184.16).

"The grounds of action are, as alleged, that Sandoval, defendant in error, was duly elected to the office; that Albright, plaintiff in error, on the 27th of March, 1903, usurped the same, and excluded the plaintiff there from, and received and appropriated to his own use the fees and emoluments' of the office until 19th of November, 1904, when the plaintiff (defendant in error here), by a judgment in a 'certain proceeding entitled the Territory of New Mexico on the relation of Jesus Maria Sandoval against the said George F. Albright, was restored to the possession of the said office.' The judgment was made part of the complaint."

Después de considerar las alegaciones de una y otra parte, dice:

"It is clear that the only questions of fact presented by the pleadings were as to the amount received and the amount expended by Albright. This was the view taken of them by the supreme court that court said: The right of office and that the appellee (defendant in error here) was the de jure officer were fully determined in the former suits, and cannot be considered in this; therefore the court below properly sustained the demurrer to all such parts of the answer as sought to raise this issue. The suits referred to by the court were *Territory ex rel. Sandoval v. Albright*, 12 N. M. 293, 78 Pac. 205, 13 N. M. 64, 79 Pac. 719, 11 A. & E. Ann. Cas. 1165, 200 V. S. 9, 50 L. ed. 346, 26 Sup. Ct. Rep. 210.

"The court therefore addressed itself to the two propositions which it conceived were left in the case, the right of Sandoval to recover the fees received by Albright, and the right of the latter to set off against them his disbursements for expenses. The court, passing on the first proposition, found, it said, no statute of the territory governing this subject, but decided that 'the common law, in the absence of a statute, authorizes a recovery by the officer de jure in such cases. On the second proposition it found that there could be no question of Albright's good faith, and that it considered the cases made good faith 'the controlling consideration for the allowances of expenses to an ousted de facto officer,' and affirmed the judgment of the trial court.

"Under these views it is not necessary to decide whether the judgment in the quo warranto proceedings is conclusive of the issues in this case, as contended by defendant in error. The decision upon the respective rights of the parties arising from the statute of the territory may be rested on the grounds which we have expressed, and we come to the proposition whether Sandoval can recover the fees and emoluments received by Albright, and whether, if he can, may the latter set off his expenses. The first proposition is not controverted by Albright, although he suggests that there are some well-considered cases the other way, and he cites *Stuhr v. Curran*, 44 N. J. L. 181, 43 Am. Rep. 353. He also cites *Taylor v. Beckham*, 178 XT. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep., 890, 1009; *Butler v. Pennsylvania*, 10 How. 402, 13 L. ed. 472, for the view that there is no such thing as property in a public office. However, his ultimate concession is that the weight of authority is to the effect that a de jure officer may recover from the de facto officer the emoluments of the office, less the reasonable expenses incurred in earning such fees, when the de facto officer entered into the office in good faith and under color of title. And this was the view of the supreme court of the territory. To sustain the first proposition, the court reviewed *Stuhr v. Curran*, supra, and cites against it, *United States use of Crawford v. Addison*, 6 Wall. 291, 18 L. ed. 919; *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168; *Hunter v. Chandler*, 45 Mo. 452; *Glascok v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *Douglass v. State*, 31 Ind. 429; *People ex rel. Benoit v. Miller*, 24 Mich. 458 9 Am. Rep. 131; *People ex rel. Dorsey v. Smith*, 28 Cal. 21; *Nichols y. MacLean*, 101 N. Y. 538, 54 Am. Rep. 730, 5 N. E. 347; *Kreitz v. Bethrensmeyer*, 149 Ill. 503, 24 L. R. A. 59, 36 N. E. 983; *Vaux v. Jefferson*, 2 Dyer, 114b; *Arris v. Stukely*, 2 Mod. 260; *Lee VM Drake*, 2 Salk. 468; *Webb's Case*, 8 Coke, 45b; 1 Selwyn, N. P. 81; 1 Chitty, PI. 112. It is not necessary to make a review of these

cases. It is enough to say that they sustain the proposition for which they are cited.

Confirmando la decisión apelada y declaró que el funcionario de jure puede recobrar del funcionario de facto los emolumentos del cargo.

El caso de Page contra Estados Unidos, 32 L. ed. 65, citado por la mayoría, no tiene aplicación al caso particular; no existe similitud entre los dos.

En 4 de noviembre de 1884, se celebró una elección en el Segundo Distrito Congresional de Rhode Island para elegir a un representante en el 49.º Congreso. William A. Pirce fue declarado electo, recibió su acta de elección del Gobernador del Estado, prestó juramento y ocupó su puesto en el Congreso de los Estados Unidos en 4 de marzo de 1885. Charles H. Page protestó contra su elección. En 25 de enero de 1887 la Cámara de Representantes del 49.º Congreso adoptó la siguiente resolución: "Resolved, that William A. Pirce was not elected a member of the House of Representatives of the Forty-ninth Congress from the Second Congressional District of Rhode Island, and that the seat be declared vacant." La Cámara de Representantes debía tener buenas razones para no declarar electo a Page. Se convocó a otra elección para cubrir el cargo de representante declarado vacante; Charles H. Page, declarado electo, presentó en 25 de febrero de 1887 su certificado de elección expedido por el Gobernador del Estado, el cual consta que él ha sido elegido en 21 de febrero 1887 representante del Estado de Rhode Island en el 49.º Congreso para cubrir el cargo declarado vacante. Page prestó juramento y tomó posesión de su cargo.

Pirce cobró su sueldo de \$9,468.18 por servicios prestados desde el 4 de marzo de 1885 hasta el 25 de enero de 1887 en que su cargo fue declarado vacante.

Page presentó su reclamación contra el Gobierno no contra Pirce—pidiendo que se le pagase el sueldo completo del cargo de representante desde el 3 de marzo de 1885 hasta el 8 de marzo de 1887, alegando que, puesto que Pirce no había sido debidamente elegido miembro del Congreso, no debía ser considerado como predecesor suyo, según el sentido y alcance del artículo 51 de los Estatutos Revisados; y que, por lo tanto, el (Page) debía recibir todo el sueldo correspondiente al cargo por todo el tiempo en que Pirce lo había ocupado.

El artículo 51 de los Estatutos Revisados de los Estados Unidos dice así: "Whenever a vacancy occurs in either House of Congress, by death or otherwise, of any member or delegate elected or appointed thereto, after the commencement of the Congress to which he has been elected or appointed, the person elected or appointed to fill it shall be compensated and paid from the time that the compensation of his predecessor ceased." El Tribunal Supremo de los Estados Unidos, al aplicar esta disposición legal, consideró a Pirce como predecesor de Page, y resolvió que Page solamente tenía derecho a recibir el sueldo desde que Pirce dejó de ser congresista en virtud de la resolución que declaraba vacante el cargo.

Si la Cámara de Representantes hubiera resuelto la protesta declarando que el que fue debidamente elegido era Page y no Pirce, estos dos asuntos serían iguales. En el asunto citado, se declaró vacante el cargo; no se declaró debidamente electo a Page, sino que se convocó una elección. Page, por tanto, no tenía derecho a cobrar el recibido por Pirce: solamente tenía derecho a percibir sueldo correspondiente al cargo de representante después de ser declarado vacante y después de ser elegido en la nueva elección.

Pero en el caso presente no ha sido declarado vacante el cargo de senador ocupado por el demandado. El Tribunal Electoral del Senado declaró debidamente elegido al demandante Senador Rodríguez; si fue elegido debidamente, tiene que percibir el sueldo desde que fue elegido, y no desde que dejó de ocupar el cargo el senador de facto Tan. Si se hubiera declarado vacante el cargo de senador y el Senador Rodríguez, en elección especial, hubiese sido elegido, entonces él no tendría derecho a percibir más que el sueldo desde su elección para cubrir el cargo

vacante; el no seria mas que el sucesor del Senador Tan. Pero no ocurrió así: el Tribunal Electoral del Senado declaro que el demandante fue debidamente elegido Senador en lugar del demandado. Por tanto, dicho demandado—senador de facto—no tenia derecho a recibir el sueldo, sino el Senador Rodríguez, y los emolumentos que recibió deben restituirse al Senador Rodríguez.

En Inglaterra, Irlanda, Terranova y Estados Unidos, excepto en New Jersey, esta doctrina ha sido adoptada en numerosísimos casos decididos por los tribunales supremos. Citaremos algunos:

"On the 25th day of May, 1893, he (John Booker) was duly elected to the office of county clerk of Elizabeth City county, and was thereby entitled to the certificate of election, and to enter upon the discharge of the duties of the said office on the 1st day of July of said year, and to receive the fees and emoluments thereof. He avers that he was always ready and willing, from and after his election, to qualify as provided by law, but was prevented from so doing by the defendant, who, the plaintiff alleges, wrongfully and illegally secured the certificate of election to said office, and intruded himself into the office, and took upon himself the discharge of its duties, and continued illegally to hold the same from the said 1st day of July, 1893, until the 19th day of March, 1894, when, pursuant to the judgment of the circuit court of Elizabeth City county, affirming the judgment of the county court of Elizabeth City county, a certificate of election to the said office was granted to the plaintiff, and the plaintiff then and there qualified by taking the oaths and executing the bond required by law.

"The plaintiff further avers that the defendant enjoyed the said office, and collected and converted to his own use the fees and emoluments thereof, from the said 1st day of July, 1893, to the said 19th day of March, 1894.

"In the case of *Bier v. Gorrell*, 30 W. Va. 97, 3 S. E. 32, Judge Snyder, delivering the opinion, says: It seems to be a principle of natural justice, as well as law, that where one person has injured another, or received compensation which in equity and good conscience belongs to another, he may be required by action to account to such other for the injury done him. In like manner will an intruder in office be required to account to the legal officer for injury done by the intrusion. The legal right to an office confers the right to receive and appropriate the fees and prerequisites legally incident thereto. When such officer performs the duties of his office, he may demand and receive the compensation therefore allowed by law; and he is as fully entitled to such compensation as he would be in any other case entitled to pay for skill and labor done for another at request. The legal fees and emoluments on the office are a part thereof, and belong to the rightful incumbent; and where a person receives, such fees and emoluments on the pretense of title to the office, the de jure officer may recover the profits of the office from him by an action of assumpsit for money had and received to his use. See, also, *Dorsey v. Smyth*, 28 Cal. 21.

"In *Nichols v. Maclean*, 101 N. Y. 526, 5 N. E. 347 the court, says: the right to an office carries with it the right to the emoluments of the office. An office has a pecuniary value, although primarily it is an agency for public purposes. The right to the emoluments of an office follows the true title. In support of these propositions, many cases are cited from England, and from other states of the Union." See also, *Kessel v. Zeiser*, 102 N. Y. 114, 6 N. E. 754.

"Under our form of government, the perpetuity of our institutions and the preservation of the liberty of the people depend upon honest and fair elections; and the highest public policy requires that the laws should be so framed and administered as to secure fair elections. To hold that a defeated candidate, who, by an artifice or device, obtains the certificate of election, and is inducted into office, may retain it until as the result, it may be, of protracted litigation, the rightful claimant prevails, and that in the meantime he may receive and retain the fees and emoluments pertaining to the office without being accountable therefore, is repugnant to natural justice, and offers an inducement to the commission of fraud, by permitting the perpetrator to enjoy its fruits in security. To hold that the injured party must qualify as a condition precedent to his right of action against the intruder would be to allow the wrongdoer to take advantage of his own wrong, for, having secured the certificate of election to which he was not entitled, he has deprived his competitor of the only evidence which

would entitle him to qualify, and to be inducted into office." (*Booker v. Donohoe*, [1897, Supreme Court of Appeals of Virginia] 28 S. E., 584.)

De las cinco decisiones del Estado de Illinois en la A. L. K. citaremos una:

"At the election in November, A.D. 1886, John B. Kreitz and one Behrensmeyer were candidates for election to the office of county treasurer of Adams county, Ill., and, on the canvass of the returns, Kreitz was declared elected by a plurality of 14 votes; where upon he qualified, and entered upon the discharge of the duties of that office, \* \* \* until his death, in 1890.' Appellee contested the election of Kreitz, which, after extended litigation, finally, resulted in appellee being declared duly elected. On the, 6th of April, 1892, appellee filed abclaim against the estate of John B. Kreitz in the county court of Adams county seeking to recover the sum of \$10,000 for fees and salary received by Kreitz.

"It is conceded that no statute exists in this state, declaring the rights of a de jure officer to recover from a de facto officer the salary paid such de facto officer, who has discharged the duties of the office under a wrongful or a mistaken purpose. There is no legislation on that subject in this state. The right of recovery, if it exists, depends, therefore, on the principles of the common law. The common law is a system of elementary rules and of general judicial declarations of principles, which are continually expanding with the progress of society, adapting themselves to the gradual changes of trade, commerce, arts, inventions, and the exigencies and usages of the country. Judicial decisions of common law courts are the most authoritative evidence of what constitutes the common law. By chapter 28, Starr & C. Stat. III, the common law of England is declared in force in this state. By reference to the decisions of the common law courts of England, the common law of that country is to be found. An examination of the decisions of the courts of that country shows a uniform declaration of the principle that a de jure officer has a right of action to recover against an officer de facto by reason of the intrusion of the latter into his office, and his receipt of the emoluments thereof. Among others, the following opinions of English courts may be referred to as sustaining this right of recovery: *Vaux v. Jeferen*, 2 Dyer, 114; *Arris v. Stukely*, 2 Mod. 260; *Lee v. Drake*, 2 Salk. 468; *Webb's Case*, 8 Coke, 45. By the adoption of the common law Of England, the principle announced in these cases was adopted as the law of this state, for the principle is of a general nature and applicable to our constitution. On the basis of a sound public policy, the principle commends itself, for the reason that one would be less liable to usurp or wrongfully retain a public office and defeat the will of the people or the appointing power, as loss would result from wrongful retention or usurpation of an office. The question has frequently been before the courts of the different states and of the United States', and the great weight of authority sustains the doctrine of the common law, as shown by the opinions of the judges in different states; and in most of the states these are based on the common law, without reference to any statute. The following<sup>1</sup> cases are in point; *United States v. Addison*, 73 U. S. 6 Wall. 291, 18 L. ed. 919; *Dolan v. New York*, 68 N. Y. 274; 23 Am. Rep. 168; *Glascok v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *Douglas v. State*, 31 Ind. 429; *Currey v. Wright*, 9 Lea, 247; *Kessel v. Zeiser*, 102 N. Y. 114, 55 Am. Rep. 769; *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730; *People v. Miller*, 24 Mich. 458, 9 Am. Rep. 131; *Hunter v. Chandler*, 45 Mo. 452; *People v. Smyth*, 28 Cal. 21; *Petit v. Rosseau*, 15 La. Ann. 239." (*Kreitz v. Behrensmeyer*, [1894, Illinois Supreme Court] 24 L. R. A., 59).

"McElroy filled said office (tax collector of the City of Bridgeport) for the term ending April 10, 1899, and was a candidate for election for the term succeeding this, as was also the plaintiff. As a result of said election in 1899, McElroy was regularly declared elected and in good faith, believing he had been so elected, he qualified anew, and entered upon the duties of said office for said succeeding term. The plaintiff made no demand for said office at this time, nor did he qualify for it, but he at once brought suit in the superior court to determine whether he had been elected, and upon a full hearing that court decided against him. He then appealed to the supreme court of errors, and that court set aside the judgment of the superior court, and judgment was ultimately rendered in his favor. Immediately thereafter, to wit on August, 1899, he qualified and took possession of said office. McElroy, as an officer de facto, occupied the office from April 10, 1899, to August 8th of the same year, and during this period he collected taxes to the amount of P636,670.65. It had

been for 20 years the invariable custom in said office to retain from taxes collected the fees due to the collector therefore, and to turn over to the city the amount collected, less said fees; and McElroy, as de facto incumbent of said office, followed said custom.

"The next question is whether the plaintiff is entitled to recover from the de facto officer the fees paid to such officer by the city; and the answer to this depends upon the answer to the further question whether this can be done at common law, and without the aid of a statute. The courts of this country that have had occasion to pass upon this last question have almost unanimously answered it in the affirmative. That, in cases like the present, the legal right to the office carries with it the right to the salary and emoluments thereof; that the salary follows the office; and that the de facto officer, though he performs the duties of the office has no legal right to the emoluments thereof,—are propositions so generally held by the courts as to make the citation of authorities in support of them almost superfluous. Nearly all, if not all, cases' hereinbefore cited upon both views as to the liability of the city hold that the de facto officer, for fees and emoluments of the office received by him, is liable at common law to the officer de jure. So far as we are aware, the only well-considered case taking a contrary view of the law is that of *Stuhr vs. Curran*, 44.

De las cinco decisiones del Estado de Kentucky en a A. L. R. citamos la siguiente:

"Millard Hubbard and A. S. Ledford were candidates for the office of sheriff of Clay country at the November election, 1925. The certificate of election was issued by the election commissioners to Hubbard. Burchell who was the Democratic nominee for the office of sheriff was also voted for. He contested Hubbard's election and the right of Ledford to the office. The trial court found in favor of Hubbard, and from that finding Ledford prosecuted an appeal. Hubbard also appealed. Ledford was on the appeal declared elected.

"In January, 1926, Hubbard qualified, assumed the duties of the office, and continued to discharge them until the 15th day of December, 1926, when Ledford qualified and assumed the obligations of the office. He filed this action in the Clay circuit court to recover of Hubbard the emoluments of the office during the period Hubbard served.

"A de jure officer may at common law recover the fees or salary paid to a de facto officer and his right to recover does not accrue until the right to the office is determined by a court of competent jurisdiction. *Kreitz vs. Behrensmeyer*, 149 111. 496, 36 N. E. 983, 24 L. R.A. 59; *Atchison v. Lucas*, 83 Ky. 451; *United States ex rel. Crawford vs. Addison*, 6 Wall. 291, 18 L. ed. 919; *Naylor vs. Carter*, 167 Okl. 125, 27 P. (2d) 843, 93 A. L. R. 254, and annotation.

"The appropriate rule is that where it appears the de facto officer is not a mere intruder or usurper, but has acted in good faith and under a fair color of title to the office, the de jure officer is limited in his recovery of the de facto officer to the fees or salary received, less the amount necessarily and actually expended in conducting the office. See *Albright v. Sandoval*, 216 U. S. 331, 30 S. Ct. 318, 54 L. ed. 502, affirming judgment *Sandoval vs. Albright*, 14 N. M. 345, 93 P. 717, 719; *Id.*, 14 N. M. 434, 94 P. 947; *Lawrence vs. Wheeler*, 90 Kan. 666, 136 P. 315; *Jansky vs. Baldwin*, 120 Kan. 728, 244 P. 1036, 47 A. L. R. 476; *People ex rel. Benoit vs. Miller*, 24 Mich. 458, 9 Am. Rep. 131; *Wenner vs. Smith*, 4 Utah, 238, 9 P. 293; *Crosby vs. Hurley*, 1 Alcock & N. 431; *Bier vs. Gorrel*, 30 W. Va. 95, 3 S. E. 30, 5 Am. St. Rep. 17; *Mayfield vs. Moore*, 53 Ill. 428, 5 Am. Rep. 52; *Lansing vs. Van Gorder*, 24 Mich. 456. (*Hubbard v. Ledford*, [1935, Court of Appeals of Kentucky] 81 S. W. [2d] 569.)

De las dos decisiones del Estado de Michigan citamos una:

"Plaintiff and defendant were candidates for the office of village president at the election held in the village of Ecorse on March 9, 1936. Defendant Voisine was a candidate to succeed himself. According to the return of the election inspectors, Voisine received a majority of one vote and was, therefore, declared elected. Plaintiff Hawkins demanded a recount which was accordingly held by the board of canvassers, resulting in a majority of 10 votes for defendant Voisine. Thereafter, on April 25, 1936, plaintiff instituted proceedings in the nature of

quo warrant to try title to the office, and on March 17, 1937, the circuit court found that the election had resulted in a tie between plaintiff and defendant. The court ordered that the result be determined by the canvassers by drawing lots under provisions of 1 Comp. Laws 1929, Sec. 3192 (Stat. Ann., Sec. 6, 481). The judgment of the circuit court was appealed to the supreme court by defendant Voisine, and the judgment of the trial court was affirmed. On May 3, 1938, at the drawing of lots plaintiff Hawking won. \* \* \*. Plaintiff then filed suggestion of damages, pursuant to 3 Comp. Laws 1929, Section 15278 (Stat. Ann., Sec. 27. 2322, \* \* \*. On trial in the circuit court, judgment was entered in favor of plaintiff, and defendant appeals.

"An official salary is not made dependent upon the amount of work done, but belongs to the office itself without regard to the personal service of the officer. (People v. Miller, 24 Mich. 458, 9 Am. Rep. 131." (Hawkins v. Voisine, [1940, Supreme Court of Michigan] 290 N. W., 827.)

De las dos decisiones del Estado de Delaware citamos una:

"The special count of the declaration alleged that between January 7, 1941, and April 1, 1943, the Levy Court of Kent County, believing that the defendant had been duly elected to the office of County Comptroller for Kent County at the general election held on November 5, 1940, for the term of four years beginning on January 7, 1941, and was entitled to the salary appertaining to the office, paid to the defendant from the monies of Kent County the total sum of \$4,397.63 as the salary due to the duly elected holder of the office for the period between January 7, 1941, and March 16, 1943, which amount the defendant received and accepted as the salary appertaining to the office for the stated period; that thereafter the Superior Court of Kent County, constituting the Board of Canvass for the election, as directed by order of the Supreme Court, on March 11, 1943, recanvassed the votes given at the election for the office of County Comptroller and ascertained that the plaintiff had been duly elected to the office for the statutory term beginning on January 1, 1941, and issued to him a certificate of election, at the same time rescinding the certificate of election theretofore issued to the defendant; and that, thereupon, the plaintiff duly qualified entered into and now occupies the office; wherefore the defendant became liable to pay to the plaintiff and in consideration thereof promised to pay to him the sum of \$4,397.63 received as the salary of the office.

"The not unusual case is presented in which one whose right to a public office has been judicially determined seeks to recover from another in possession under color of title the emoluments of the office.

"The great weight of authority supports the rule that the rightful incumbent of a public office may recover from an officer de facto the salary received by the latter during the time of his wrongful tenure, even though he entered into the office in good faith and under color of title. The reasons advanced in support of the rule are quite generally regarded as unanswerable. To prevent embarrassment of the public service disbursing officers, charged with the duty of paying official salaries, may rely on the apparent title of an officer de facto, and treat him as an officer de jure without further inquiry; and the payment of the salary to a de facto public officer in possession is a good defense to an action brought by the de jure officer to recover from the public the same salary after he has established his right to the office. But as between the de jure officer and the de facto officer, the emoluments of a public office are incident to the title and not to the possession even though colorable." (Walker v. Hughes, 1944, Delaware Supreme Court, 151 A. L. R., 946.)

Una decision reciente del Tribunal Supremo de Apelacion del Estado de Virginia es la siguiente:

"In November, 1939, A. A. Fleming and W. M. McFall were elected to the respective offices of sheriff and treasurer of Dickenson county, and duly qualified as such for the term beginning January 1, 1940, and ending December 31, 1943.

"At the election held in November, 1943, both of the incumbents were unsuccessful candidates to succeed themselves for the four-year term beginning January 1, 1944, and ending December 31, 1944". On the face of the returns Fleming was defeated for the office of sheriff by J. H. Anderson, who received a certificate of election, qualified, took over and performed the duties of that office until July 16, 1946. Likewise, on the face

of the returns, McFall was defeated for the office of treasurer by Charles P. Mullins, who received a certificate of election, qualified, took over and performed the duties of that office until July 16, 1945.

"On July 9, 1946, in a proceeding to contest the election, the Circuit Court of Dickenson comity held that, 'because of the fraud and irregularities and improper conduct of the parties holding the election, and the friends and adherents of the candidates,' the purported election was void, and accordingly the certificates of election issued to Anderson and Mullins, showing them to have been elected as sheriff and treasurer, respectively, of the county, were canceled as of July 16, 1946. Thereupon, pursuant to Code, section 136, the court appointed Cowan Edwards, as sheriff, and W. B. Trivett, as treasurer, for the four year term beginning January 1, 1944.

"On February 12, 1947, Fleming filed a notice of motion for judgment against Anderson, and each of the latter's deputies, to recover the salaries and emoluments of office which the defendants had received from January 1, 1944, to July 16, 1946, amounting, it was alleged, to approximately \$40,000.

"About the same time McFall filed a similar notice of motion for judgment against Mullins, and the latter's deputies, to recover the salaries which the defendants had received during the same period, and alleged to be approximately \$26,000.

"It is, of course, well settled that, Compensation for services performed by a public officer is an incident to the office and belongs to the de jure officer. Although he may not in some jurisdictions recover from the state or municipality which has paid the compensation to a de facto officer, he nevertheless has the right in most states upon establishing his title to the office to recover from the de facto officer whatever sums have been paid that officer by way of salary, fees, or emoluments, even though the latter may have performed the duties of the office pursuant to an erroneous judgment, or may have held a certificate of election and entered into the office in good faith. It is not a question of intention, but one of legal right to the compensation in dispute. The underlying principle is that the de facto officer before entering on the discharge of the duties of the office and receiving its emoluments is bound to know whether he has title. \* \* \*." (Fleming v. Anderson et al. y Mcfall v. Mullins et al., [June 14, 1948] 48 S. E. (2d) 269.)

De las variaa decisiones transcritas en parte se vera Que la causa de Stuhr contra Curran, de New Jersey, es la unica nota discordante en la doctrina adoptada por varios Tribunates Supremos al efecto de que el funcionario de jure puede recobrar del funcionario de facto los emolus que este haya recibido, y esto tiene su explicacion:

En New Jersey el que no asume el cargo electivo esta sujeto a pena. En Stuhr contra Curran la votacion fuga de 6 contra 5 y entre los disidentes figuraba el Presidente del Tribunal.

No esta desprovisto de fundamento la suposicion de que la doctrina anglosajona que dispone la restitucion del sueldo al funcionario de jure afianza la estabilidad del gobierno por eleccion; pues, a pesar de los fraudes electorales a que de cuando en cuando se recurre para ganar una eleccion, no se emplea la fuerza para vengar agravios. Los perjudicados acuden a los tribunales, y, si tienen razon, ocupan el cargo y reciben los emolumentos del que lo ocupo indebidamente. Los filipinos tambien tienen acceso a los tribunales; pero, para los perjudicados, que vale una decision favorable cuando esta ya por expirar el cargo, objeto de la protesta, y los emolumentos se quedan en poder del funcionario de facto? La victoria es huera, casi inutil.

Res judicata no tiene aplicacion al caso presente. Es verdad que el demandante suscito ante el Tribunal Electoral del Senado la restitucion a el por el demandado de los sueldos que hubiese recibido y que dicho Tribunal no la resolvio expresamente. La mayoría considera la abstencion como una denegacion sub silentio. Esto no constituye decision. Como puede equipararse una omision a una denegacion? El silencio del tribunal sobre una cuestion suscitada no equivale a denegacion. Denegar una peticion es una accion positiva. El silencio no es actuacion es abstencion. En la abstencion no existe decision. Si decision no existe res judicata. Como se puede probar la defensa de res judicata en el caso presente si no existe decision? "Una sentencia es la conclusion de derecho sobre

la materia que obra en autos, o la aplicación del derecho a las alegaciones y a los hechos, tal y como los ha apreciado el tribunal, o tal y como lo han admitido las partes, o como se considere que existen en virtud de su incomparecencia en el curso de unas actuaciones judiciales. La sentencia es solamente aquello que se pronuncia en las partes de un juicio en vista de lo que se somete al tribunal para su decisión." (Gotaraco contra Chan Seng y Razon, 46 Jur. Fil., 567.)

Por otra parte, la abstención del Tribunal Electoral mido haber sido motivada por la falta de jurisdicción, no por carecer de base legal y justificación la reclamación del demandante, pues la Constitución dispone que dicho Tribunal "conocerá exclusivamente de todas las controversias relativas al resultado de las elecciones y a las calificaciones de los miembros del Senado." El Tribunal Electoral tiene jurisdicción para decidir quien fue legalmente elegido, tiene facultades para determinar si el electo está debidamente habilitado para ser miembro del Congreso; pero no tiene jurisdicción para decidir u ordenar que los salarios recibidos por el protestado sean restituidos al protestante vencedor. La facultad de ordenar la restitución de determinada cantidad de dinero está encomendada a los tribunales de jurisdicción general, y no al Tribunal Electoral que es de jurisdicción especial limitada.

Esta completamente desprovista de base la presunción de que el silencio del Tribunal Electoral del Senado equivale a denegación de la reclamación del demandante. Y aun suponiendo que la presunción este bien fundada, la decisión sub silentio tampoco constituye res judicata porque la dicto un tribunal sin jurisdicción.

La contención del demandado de que la decisión de Kare Locsin resuelve el caso presente, carece de base. Tribunal en dicho asunto dijo: "Locsin cobro su sueldo en virtud de una resolución y por autorización de la Legislatura. No puede discutirse en esta demanda la Propiedad de esos pagos. \* \* \* Es posible que la Legislatura pudo haber requerido el reembolso, por Locsin, si hubiera sido su intención reconocer la reclamación del Kare sobre la misma compensación; pero no habiéndolo hecho así, el derecho preferente de Locsin a esta compensación es cosa juzgada para los tribunales." En el caso presente no aparece que el demandado haya cobrado su sueldo, "en virtud de una resolución y por autorización de la Legislatura" o del Senado. El demandado, como cosa rutinaria, recibió su sueldo como cualquier otro empleado. No recibió su sueldo "en virtud de una resolución y por autorización de la Legislatura."

Es verdad que el demandante suscitó en el mismo expediente de protesta ante el Tribunal Electoral del Senado la restitución a él de los emolumentos recibidos por el demandado; pero dicho Tribunal no resolvió la cuestión y, aunque hubiera resuelto, su resolución no tendría ningún efecto porque, como ya hemos dicho, no tenía jurisdicción sobre la materia. El Tribunal Electoral no es el mismo Senado que "en virtud de una resolución" puede disponer el pago del sueldo o disponer la restitución al demandante por el demandado del sueldo recibido por él o el pago a ambos. No hay, paridad, por tanto, entre el caso presente y el asunto de Kare contra Locsin.

La ley No. 103 dispone que en las disputas industriales y agrícolas el Tribunal Industrial actúe de acuerdo con la justicia y equidad; encomienda al recto sentido de los miembros de Tribunal porque no existe un baremo específico legal que determine la acción que debe tomar en cada paso particular. Este Tribunal en varias ocasiones aplicó los principios de la equidad desatendiendo las injusticias de algunas leyes. No veo la razón por que en casos como el presente este Tribunal no puede decidir aplicando principios de justicia generalmente adoptados para afianzar la estabilidad del gobierno y evitar los golpes de estado, que solemos ver en las repúblicas sudamericanas. "Cuando no haya ley exactamente aplicable al punto controvertido, se aplicará la costumbre del lugar y, en su defecto, los principios generales del derecho." (art. 6 del Código Civil.)

La ley electoral es de origen americano. No es, por tanto, impropio adoptar precedentes americanos en cuanto a su aplicación. El sufragio popular es la piedra angular de las instituciones democráticas. Los pueblos jóvenes son los que

ejercen el derecho del sufragio de una manera admirable; cambian pacíficamente de gobernantes sin derramamiento innecesario de sangre y sin convulsiones morbosas, Sus practicas, su interpretation y aplicación de las leyes del sufragio no deben ser desatendidas; al contrario, deben ser adoptadas si son razonables y justas.

"Un examen de las decisiones recientes de la Jurisprudencia Filipina, y en particular las de los ultimos afeo, demuestra que cada vez mas se invocan las autoridades inglesas y americanas para la formacion de lo que pudiera llamarse derecho consuetudinario filipino, como suplementario del derecho codificado de esta jurisdiction. Un analisis de dos grupos de decisiones recientes, el primero que comprende materias tratadas por las leyes espanolas, y el segundo las tratadas por la legislacion americana-filipina, y afectadas por el cambio de soberania, demuestra que el dereeho casuista anglo-americano ha venido a introducirse practicamente en todas las materias importantes del campo juridico, y que en la gran mayoría de estas materias ha formado la unica base que sirve de guia a este Tribunal en el desarrollo de la jurisprudencia local.

"Durante los ultimos veinte anos se ha desarrollado un derecho consuetudinario filipino o derecho casuistico, basado casi exclusivamente, salvo cuando pugna con las castumbres e instituciones locales, en el derecho consuetudinario anglo americano. El derecho consuetudinario filipino suple y amplia nuestro derecho codificado.

"La jurisprudencia de esta jurisdiction se funda en el derecho consuetudinario ingles, en su forma actual de derecho consuetudinario anglo-americano, casi en una extensión exclusiva.

"Se ha desarrollado, y seguirá desarrollándose, un derecho consuetudinario en la jurisprudencia de esta jurisdicción (que, con el fin de diferenciarlo, puede propiamente denominarse derecho consuetudinario filipino), fundado en el derecho común ingles en su forma actual de derecho consuetudinario anglo-americano, cuyo derecho comun es efectivo en todas las materias de derecho en esta jurisdicción en tanto en cuanto no este en pugna con la fraseología expresa del derecho escrito ni con las costurares o instituciones locales.

"Al interpretar y aplicar el cuerpo del derecho escrito de esta jurisdicción, y al dietar decisiones en casos no comprendidos en el derecho escrito, este Tribunal se funda en las teorías y precedentes de los casos anglo-americanos, con sujecion a la excepción limitada de aquellos casos en que lo que queda del derecho español escrito teorías de derecho civil bien definidas, y de log pocos casos en que dichos precedentes son incompatibles con las costumbres e instituciones locales." (Asunto de Shoop, 41 Jur. Fil 226.)

No debemos olvidar que estamos formando el derecho comun filipino con los elementos mas valiosos que nos proporcionan el derecho romano, español y anglosajón.

En mi humilde opinión, debe revocarse la orden apelada.

Tuason , J., concurs.

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