

FRANCISCO ARGOS, PETITIONER, VS. DOMINADOR VELOSO, THE SECRETARY OF JUSTICE AND THE JUDGE OF COURT OF FIRST INSTANCE OF CEBU, RESPONDENTS.*G.R. No. L-2351. May 31, 1949*

Ponente: PARAS, J.

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The petitioner was the pre-war justice of the peace of the municipality of Opon, Province of Cebu. After the liberation, or on April 10, 1945, he resumed his position under a verbal temporary appointment made by the commanding officer of PCAU 15. The petitioner was thereafter replaced, first, by Gregorio S. Gochoco on June 18, 1945; secondly, by Bonifacio Yuson on September 1, 1946; and lastly by the respondent Dominador Veloso on October 15, 1946. In the present action for quo warranto, instituted originally in this Court only on July 12, 1948, the petitioner seeks to obtain his reinstatement to his former judicial position, with the consequent ouster there from of respondent Dominador Veloso.

The respondents have set up the defenses of prescription and abandonment, which are valid. In *Abeto vs. Rodas* (82 Phil., 59), we have already given effect to Rule of Court 68, section 16, which provides that "Nothing contained in this rule shall be construed to authorize an action * * * against an officer for his ouster from office unless the same be commenced within one year after the cause of such ouster, or the right of the plaintiff to hold office arose; * * *". The petitioner's contention that the one-year period does not apply to public officers, but to corporations, and cannot affect, at any rate, officers whose tenure is protected by the Constitution, has been overruled in the case of *Tumulak vs. Egay* (82 Phil., 828).

Petitioner's action cannot prosper, not only because he failed to institute it within one year from the date he was allegedly dispossessed of his lawful position, (even assuming October 15, 1946, to be such date, and not June 18, 1945, when he was first replaced by Gregorio S. Gochoco), but because his subsequent acts showed abandonment of the office, it appearing that from October 29, 1946, to January 24, 1948, he worked in the Surplus Property Commission as skilled laborer and clerk-typist, and that on February 12, 1947, he surrendered his policies to the Government Service Insurance System and received their cash value. It is not pretended that the petitioner could perform the duties of the justice of the peace of Opon while he was in the employ of the Surplus Property Commission. Our decisions in *Floresca vs. Quetulio* (82 Phil., 128), and *Potot vs. Bagano* (82 Phil., 679), are in point. The fact that "petitioner was forced to seek or accept these jobs in order to live would not alter the case even if we assume, for the sake of argument, that economic necessity was a valid plea."

The petition is therefore dismissed, with costs. So ordered.

Moran, C. J., Pablo, Bengzon, Tuason, Montemayor, and Reyes, JJ., concur.

DISSENTING AND CONCURRING IN THE RESULT

FERIA, J.:

I dissent from the decision of the majority in that it holds that the petitioner has abandoned or vacated his office, for having, from October 29, 1946, to January 24, 1948, "worked in the Surplus Property Commission as skilled laborer and clerk-typist," because, as the decision says, "It is not pretended that the petitioner could perform the duties of the Justice of the Peace of Opon while he was in the employ of the Surplus Property Commission. Our decision in *Floresca vs. Quetulio* (82 Phil., 128), and *Potot vs. Bagano* (82 Phil, 679), are in point."

The rule applied by the majority in order to arrive at that conclusion is the well known common law rule that he who while occupying an office accepts another incompatible with the first ipso facto vacates the first office, and that incompatibility "which shall operate to vacate the first office, exists where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both" (*Mechem on Public Officers*, sections 420 and 422). This rule is quoted with approval in the decision of the majority in the case of *Summers vs. Ozaeta* (81 Phil., 754), penned by the same member of this Supreme Court who pens the decision of the majority in the present case.

The application of the above-quoted rule to the case at bar is due to an evident misconception of said rule by the majority and confusion of the nature of an office as contra distinguished from a mere employment "An important characteristic which ordinarily distinguishes an office from an employment or contract lies in the fact that the creation of an office involves a delegation to the person filling the office of some part of the sovereign power or functions of government to be exercised by him for the benefit of the public" (46 C. J., p. 928). It is self-evident that the office of justice of the peace is a public office, while the work of a skilled laborer or clerk-typist in the Surplus Property Commission is a mere employment. The rule refers clearly and expressly to an acceptance by a person who is occupying a public office of another incompatible office, not of an employment. Because there can not be an incompatibility of the nature and duties of a public office and those of an employment, for an employee does not exercise any authority or public function or duty which may be incompatible with that of a public officer or justice of the peace. "The term 'public office' embraces the ideas of tenure and of duration or continuance; hence, an important distinguishing characteristic of an officer is that the duties to be performed by him are of a permanent character as opposed to duties which are occasional, transient, and incidental," as those of a skilled laborer and clerk-typist. (46 C. J., p. 929.)

A public officer who, while occupying, accepts another office which is not incompatible with that he is occupying in the sense above stated by *Mechem*, that is, that the nature and duties of his offices are not such as to render it improper from considerations of public policy for a person to retain both, or who accepts a mere employment, does not vacate ipso facto the first office he is occupying. The fact that, by such acceptance, he could not physically devote all his time required by law for the performance of the duties of his office, if he has to devote part of his time to the performance of the duties of the other office, or to the works for which he is employed, may be a sufficient reason for requiring him to leave the one or the other, or for removing him for cause if he does not do so. But it can not be considered as an implied voluntary resignation of the first office he is occupying.

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in questions. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove

the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment." (46 C. J., pp. 941-943.)

Besides in the present case, the justice of the peace is not required to devote all his time to the works of his office, and he may even practice law if he is a lawyer with the permission of the Court of First Instance.

I concur with the majority in dismissing the action of the petitioner on the ground that it is barred by the special statute of limitation provided for in section 16, Rule 68, alleged by the respondent in his answer, not on the strength of the ruling in the decision of the majority in *Abeto vs. Rodas* (82 Phil., 59), cited in the decision, in which it was held by the majority that it is not necessary to allege, as a defense, that the period of one year fixed as a limitation of action expressly by said section 16 had already expired, for said period is not a limitation of action but a condition precedent; but in accordance with my dissenting opinions in said case of *Abeto vs. Rodas* and in the case of *Tumulak vs. Egay* (82 Phil., 828), in which I maintained that said period of one year is a period of limitation that must be set up as a defense, otherwise it shall be deemed waived, and the very recent decisions of the Supreme Court in the cases of *Martinez vs. Ozaeta*,¹ G. R. No. L-2430; and of *Tavora vs. Ofiana* (83 Phil., 672), in which the said ruling in *Abeto vs. Rodas* was practically revoked and this Court considered said period as a limitation of action to be alleged by the respondent.

DISSENTING

PERFECTO, J.:

We agree with the reasons given in the opinion of Mr. Justice Feria in support of the theory that petitioner had not forfeited his right to continue occupying his pre-war position as justice of the peace of Opon, Cebu.

Not having forfeited his right to occupy the position, the fact that petitioner filed his petition more than a year after the cause of his ouster had arisen, do not deprive him of the right to be restored, the provisions of section 16 of Rule 68 notwithstanding. Regarding the application of said provisions, we stick to the opinion we have already advanced in several cases, especially in those of *Summers* (81 Phil., 754) and *Abeto* (82 Phil., 59).

We vote to grant the petition.

Petition dismissed.

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