

## THE GOVERNMENT OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLANT, VS. JOSE TOPACIO, DEFENDANT AND APPELLANT.

*G. R. No. 34132. March 06, 1931*

Ponente: STREET, J.

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### STREET, J.:

This action was instituted by the Government of the Philippine Islands, on December 16, 1929, for the purpose of recovering from the defendant Jose Topacio, former Director of Posts of the Government of the Philippine Islands, the sum of P281,772.23, alleged shortage in the accounts of the defendant as said director. The defendant answered, denying liability, and by way of cross-complaint, he asked for judgment against the plaintiff for the sum of P3,600, as travel expense incurred on official business, under direction of the Governor-General, and for the further sum of P4,200 as unpaid salary due to him as Director of Posts. In connection with the filing of the original complaint the plaintiff caused an attachment to be issued and levied upon various properties belonging to the defendant; and, in the cross-complaint of the latter, judgment was sought, in the amount of P100,000, against the plaintiff for the wrongful suing out of said attachment. On January 8, 1930, an amended complaint was filed on behalf of the Government, in which the amount of the claim of the plaintiff was reduced to P153,470.63.

Upon hearing the cause the trial court absolved the defendant from the plaintiff's complaint; and, under the cross-complaint, gave judgment for the defendant to recover of the plaintiff the sum of P2,773.42, in reimbursement of travel expense, as well as for P4,200, as unpaid salary. The court, however, dismissed the cross-complaint with respect to the item of damages for the wrongful suing out of the attachment.

From this judgment both parties appealed: The Government from so much of the decision as absolved the defendant from liability for the shortage claimed, as well as from the affirmative judgment given in favor of the defendant against the plaintiff under the cross-complaint for travel expenses and salary; while the defendant appealed from that feature of the decision which denied damages for the wrongful suing out of the attachment.

The liability sought to be fixed upon the defendant in this action arises under section 634 of the Administrative Code, which makes a director primarily accountable for all Government property pertaining to his bureau. It is not pretended in this case that the defendant personally appropriated or misapplied any of the property of the Bureau of Posts during the period with which we are here concerned, or at any other time; and the trial court in our opinion properly found that, in accordance with the proven facts, there was neither fraud nor collusion on the part of the defendant in the creation of any part of the alleged shortage. The question is purely a legal question as to the civil responsibility of the defendant for a shortage imputed to him by the former Insular Auditor, Ben F. Wright, under the circumstances hereinafter stated.

The defendant Jose Topacio became Director of Posts on September 17, 1920, and remained such until March 27, 1930, when he resigned, upon request of the Governor-General, after the initiation of the present action. The shortage, or supposed shortage, with which we are concerned pertains mostly, if not entirely, to the years 1924 and 1925. The accounts of the bureau for these years were duly audited and approved by the Bureau of Audits.

Also, during the period when said shortage is supposed to have occurred, one Raymundo Reyes was superintendent of the property division of the Bureau of Posts. Raymundo Reyes died on June 13, 1925, and his accounts were settled and cleared in ordinary course by the Bureau of Audits without question. At the same time his liability under the Public-Bonding Law was canceled and payment was made to his heirs of the amounts due him for past services.

It should be noted that the Bureau of Audits maintains a division in the Bureau of Posts, and the duties incumbent upon the Bureau of Audits with respect to the business transacted from day to day in the Bureau of Posts are performed by this division. During the years referred to it had been the practice in the accounting division to accept the certificate of the proper dispatching officer as sufficient proof of the dispatch of supplies into the provinces. The letter of the law requires that receipts should be presented for all property sent out, into the provinces or elsewhere; but the practice above-mentioned, of accepting the certificate of the dispatching officials as proof of the dispatch of property had long been followed, almost from necessity, as a result of the length of time necessary to receive receipts for proper audit from the places to which the materials were sent. It was not a good accounting practice to be sure, but it was followed with the entire consent of the Bureau of Audits, and without objection from any one.

After the accounts of the Bureau of Posts for the years mentioned had long been settled, officials of the Bureau of Audits had their attention called, in 1926, to irregularities in the business transacted between the Bureau of Posts and the firm of Viuda e Hijos de Zamora, consisting of what appeared to be short deliveries of material which the firm had contracted to supply for the use of the telegraph division of the Bureau of Posts. The investigation that followed did not result in fixing liability upon any one, but the incident left an atmosphere of suspicion. As a consequence, a reexamination of the accounts of the Bureau of Posts for several years back was thought desirable. In addition to this a physical inventory of the property in the hands of the bureau was made at the end of the year 1926. This investigation brought two facts into prominence, which were: First, that the books of the bureau showed a duplication of credit for property to the value of over P50,000, and, secondly, that there was an overage of stock on hand to the amount of P38,780.40. The duplication of credit is called double-dropping and it consists of the apparent letting out of property, or the dropping of materials from the accounts of the bureau, in separate items, duplicating each other as to the property involved. An overage reveals the existence of hidden property not discoverable from the books. The overage in this case apparently connects itself with the double-dropping that had occurred in the accounts of the bureau prior to the taking of the physical inventory.

Under the incentive supplied by the facts above stated, the Insular Auditor decided to exercise the power, conferred in section 657 of the Administrative Code, of opening the accounts of the Bureau of Posts and stating a new balance with respect to those accounts which had been settled within three years. The matter was accordingly taken up, and a new balance was stated, showing a debit balance against the defendant, as Director of the Bureau, in a total amount of P153,470.63. This balance consists of two items, namely, first, the sum of P13,137.33, representing the items improperly credited twice to the bureau in its accounts, and, secondly, the sum of P140,333.30, representing the value of property dispensed by the Bureau of Posts during the period covered by the inquiry, without the production of the corresponding receipts. These are the amounts for which the Government seeks to recover judgment in this action.

With respect to the phenomenon of double-dropping, it is evident that it may result either from defect in the bookkeeping system coupled with ineptitude or lack of skill on the part of the persons charged with the duties of keeping the accounts and letting out the property, or it may result from a fraudulent design to aid in the embezzlement of the property subjected to this process; and where, as in this case, the double-dropping appears to have been in great part skillfully designed to mislead the investigator, it is difficult to escape the conclusion that

these duplicitous credits may in fact have been inserted in the accounts for a fraudulent purpose. But it is clear that double-dropping alone does not amount to a physical misappropriation or embezzlement of the property. If knowingly done, double-dropping constitutes the consummated crime of falsification of an official document, but it is not a misappropriation of the physical property, since, the property, after being doubly dropped, remains as securely in the Government bodegas as it was before that act was accomplished. In order to constitute a physical embezzlement of the property it is necessary that something else should occur, such as the stealing of the property from the bodega, or the use of the double credit to cover short deliveries made by persons who are obligated to supply to the Government property of the sort for which double credit is given in the accounts. To illustrate this, let it be supposed that a contractor is obligated to supply the Bureau of Posts with two thousand telegraph poles. By collusion with the proper person in the accounting division, one thousand telegraph poles are doubly dropped from the accounts of the bureau, leaving an overage of property of that sort in the amount of one thousand poles. Now, to consummate the fraud, it is necessary for the contractor to corrupt some person in the office receiving the supplies, to the end that one thousand poles may be there delivered and a receipt issued for the two thousand which the contractor is under obligation to deliver.

It will thus be seen that a fraud of the sort contemplated involves a complicated process, inasmuch as there must be collusion not only in the bookkeeping department but also in the receiving department. Acting alone, the bookkeeping department may go on indefinitely entering duplicated credits by double-dropping, but this process does not profit the contractor in the least until he is able to make a short delivery and get pay for materials in a greater amount. In other words, the fact of overage, so far as it goes, proves not the consummation, but possibly, the frustration of the fraud contemplated in the act of double-dropping. The plan for defrauding the Government up to the point of making a short delivery may be completely frustrated by the accidental removal of the colluding official or servant in the receiving office. It results that proof of double-dropping alone is not sufficient to establish the fact that the property doubly dropped was in fact embezzled, in the sense necessary to charge the Director of the Bureau with the value of the property doubly dropped, especially when overages are found in excess of the value of the property with which he is sought to be charged. As already suggested, there is no proof whatever in this case showing that any piece of property belonging to the Bureau of Posts, and involved in these accounts, was ever stolen or misapplied by anybody, much less by the bureau chief, the defendant in this action.

With respect to the larger amount of P140,333.30 claimed by the Government from the defendant in consequence of his failure to produce receipts for property sent into the provinces, it should be noted that the non-production of these receipts was as well known when the accounts were first audited and approved, as it was when the accounts were reopened and the second statement made by the auditor. When the first audit was made, the certificates of the dispatching officer were accepted in lieu of the receipts, and that practice, although irregular and contrary to the letter of the law, had been followed for years with the full knowledge and assent of the auditors charged with the supervision of these accounts. It is not proved that any piece of property, of the value of even as much as one peso, which was certified to have been dispatched, was not in fact received and used in the place or office to which it was certified as sent. It is true that some of the papers relating to these shipments show a certain anomaly with respect to the mode of shipment, as where it is made to appear that materials of large size were sent by post, when they must have been sent, if at all, by freight. But this circumstance, though suspicious, is not sufficient to prove embezzlement.

The assumption underlying the case of the Government is that the auditor has lawfully exercised the power of opening the accounts and that his second statement imports all the verity and conclusiveness possessed by any other statement of a balance by him; and in this connection reliance is placed upon section 652 of the Administrative Code, where, in the part here material to be noted, it is said that, upon the trial of any civil proceeding to recover an amount due the Government from an accountable officer, it shall be sufficient evidence,

for the purpose of showing a balance against him, to produce a transcript from the books and proceedings of the auditor showing the civil liability of the officer. We are of the opinion that this strict view of the law is not as applicable to accounts opened and restated under section 657 of the Administrative Code as it might be to statements made upon the original audit.

This brings us to the consideration of the meaning of the second and third paragraphs of the section cited, which read as follows:

"SEC. 657. \* \* \*

"When any settled account appears to be infected with fraud, collusion, or error of calculation, or when new and material evidence is discovered, the Insular Auditor may, within three years after original settlement, open such account, and after written notice to the person concerned and after a reasonable time for his reply or appearance, may certify thereon a new balance. A district auditor may exercise the same power in respect to settled accounts pertaining to the branches of the Government under his jurisdiction.

"Accounts once finally settled shall in no case be opened or reviewed except as herein provided."

We are of the opinion that, under the authority of these provisions, the Insular Auditor may, in his discretion, open any settled account when it appears to him to be infected with fraud, collusion, or error of calculation, or when new and material evidence is discovered; and we are unable to give our assent to the proposition advanced by the attorneys for the appellee to the effect that the fraud or collusion which supplies the basis for opening an account should be capable of demonstration before the auditor exercises his discretion to go into the account. Furthermore, after opening the account within the time allowed by law, the Insular Auditor may undoubtedly state a new balance under the conditions stated in the section cited. But we are of the opinion that when the auditor undertakes to state a new balance, he must be prepared to prove, to the satisfaction of the court, the existence of the particular fraud or error which vitiates the original statement. In this connection it should be remembered that the original settlement and statement of an account by the Bureau of Audits itself imports prima facie verity, and in order to overcome the presumption that attaches to the original settlement, it is incumbent upon the auditor to establish the fact that such original statement is vitiated by one or more of the factors mentioned in the second paragraph of section 657, above quoted. The third paragraph of section 657 declares that accounts once settled shall in no case be opened or reviewed except as provided in the second paragraph of said section; and this provision would be entirely meaningless if the auditor were permitted to open an account upon mere suspicion of fraud, or when new evidence which he considers material is discovered, and thereafter to declare a new balance to which the presumption of prima facie verity will attach, without actual proof of fraud or of the sufficiency of the evidence upon which the account was opened. No: the auditor must be prepared to prove the facts justifying the new statement and overcoming the presumption of correctness attaching to the original audit. In the case before us no error has been shown and no new and material evidence discovered that would justify the declaration of a new balance. Neither has any fraud or collusion been proved which would show that the property with the value of which the defendant is charged has been embezzled or misappropriated by anybody. It results that the Government is not entitled to judgment upon the new balance declared by the Insular Auditor as the true balance. The judgment appealed from must therefore be affirmed in so far as it absolves the defendant from the cause, or causes, of action involved in the original complaint.

Error is assigned on the part of the Government to the action of the trial court in awarding to the defendant, under his cross-complaint, the sum of P4,200, due to him as the salary pertaining to the office of Director of Posts from the time that the defendant returned to the Philippine Islands from a trip abroad in 1929, until he submitted his resignation in the latter part of March, 1930. Upon this point it appears that the defendant was, during the period stated, in the City of Manila prepared to render service in the capacity of Director of Posts, but refrained from

reporting for duty upon the suggestion of his Department Head, the Secretary of Commerce and Communications, that, if he should do so, the Governor-General would suspend him. It will be noted further that, if the defendant had been suspended and later exonerated, as he will be exonerated as a result of this decision, he could have been paid, in the discretion of his superior, the whole of the salary earned during the period of suspension. Of course that rule does not apply to the present case because suspension did not occur; but the majority of the Justices who take part in this decision are of the opinion that, in view of the fact that the defendant was kept from performing his duties by superior authority, he is entitled to the salary that he would have earned if he had been permitted to perform those duties.

The Government also assigns error to the action of the trial court in awarding to the defendant, under his cross-complaint, the sum of P2,773.42, in reimbursement for his travel expense in going abroad on official business, as indicated in the opening part of this decision. These expenses are, in our opinion, entirely proper and sufficiently proved, and inasmuch as the auditor has refused to allow the claim, the defendant is entitled to judgment for the amount stated.

With respect to the claim for damages resulting to the defendant from the wrongful suing out by the Government of an attachment upon the defendant's property, we are of the opinion that no recoverable damage has been shown.

From what has been said it follows that the judgment appealed from is in all respects correct, and the same will be affirmed, with the consequent dissolution of the attachment issued at the instance of the Government. So ordered, without pronouncement as to costs.

Avanceña, C. J., Malcolm, Villamor, Ostrand, Johns, and Villa-Real, JJ., concur.

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#### DISSENTING

JOHNSON, J. :

I am fully persuaded from the record that the recommendation of the Attorney-General, that the judgment appealed from should be reversed and that in its stead a judgment should be rendered by this court against the defendant-appellant and in favor of the Government of the Philippine Islands for the sum of P153,470.63, plus the legal interest from the institution of the present action until said amount is fully paid, together with costs,—should be adopted.

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