

**ALFRED B. JONES, PETITIONER, VS. J. E. HARDING, CHIEF OF THE
MANILA POLICE, ET AL., RESPONDENTS.***G.R. No. 4338. December 02, 1907*

Ponente: TORRES, J.

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On a certain day in the month of December, 1906, the exact date whereof is not stated, Mariano Cauilan, Francisco Cauilan, Maria Asuncion Maggay, and Maria Maggay, through their attorney in fact, Robert S. MacDougall, sold and conveyed to Fred. W. Prising eight-fifteenths of their interest in the hacienda named "Calabbacao," situated between the towns of Cordoba and Amulung, Province of Cagayan, without entering in the registry of property the deed of sale executed between the contracting parties. Until the 22d day of March of the present year Domingo Maggay, who owned two-fifteenths of the undivided land which forms the said hacienda, had no knowledge of the sale made by his coowners therein to said Prising, and for this reason on the 25th of April following he filed a petition with the Court of First Instance of Cagayan asking that the aforesaid vendors and vendee be summoned and required to state the conditions under which the sale was made, the total price paid by the vendee, the amount of the expenses of the contract, or any lawful expenditure incurred on account of the sale and useful improvements on the thing sold; and that after such statement the plaintiff be authorized to redeem, as coowner, the said eight-fifteenths interest in the aforesaid property the plaintiff to be subrogated to the same conditions stipulated between the purchaser and the defendant vendors, and that judgment be entered against the latter with costs and for any other proper remedy under the law, and to such purpose he cited article 1522 of the Civil Code. The plaintiff alleged that on the 27th of March, 1907, as he was not aware of the terms and conditions of the said purchase and sale, he availed himself of the services of a notary public in order to request the purchaser, Prising, to state the conditions of the contract and the consideration for the sale and amount of expenses in connection therewith or any other expenditure for lawful and useful purpose made on the thing sold, but the defendant, Prising, absolutely refused to answer the questions put to him, and for said reason the plaintiff's attorney in fact made a written offer to Prising, the purchaser, of the total amount paid by him as consideration for the purchase and the lawful and useful expenses incurred by him, demanding that the defendant be subrogated by Domingo Maggay in the said contract, but the said defendant, Prising, declined the offer and refused to produce a copy of the contract, which MacDougall also refused to do, and upon the latter's principals being requested likewise, they replied that they were entirely ignorant of the conditions of the contract and that they had never seen a copy of the same.

At this juncture and while the action was pending in the Court of First Instance of the said province, the attorneys for the plaintiff applied to the Hon. Judge Newton W. Gilbert, who presides in Part I of the Court of First Instance of Manila in order that he, as the commissioner named by the judge of the Court of First Instance of Cagayan, should take depositions of Attorneys J. Courtney Hixson and Alfred B. Jones, residents of Manila, as necessary and important witnesses whose testimony was to be made use of in the said litigation, but when the said Jones and Hixson were questioned separately, after letting them know that Prising had stated that the three promissory notes signed by N. T. Hashim & Co., each for the sum of P30,000, had been delivered to them for safe-keeping and

collection, Attorney Ilixson having actually received the same, Attorney Alfred B. Jones objected thereto, stating that the question could not be answered because it referred to a privileged communication, and were he to answer same, the secret which existed between the deposing attorney and his client, Prising, would be divulged. The judge over-ruled the objection and ordered that the question be answered, to which Attorney Jones said that everything he knew in the matter of the said promissory notes was inviolable by virtue of the provisions of section 31 of the Code of Civil Procedure.

The judge said in his decision that Prising, the client, by making the statement waived the secret, if any, and that therefore the attorney could not refuse to answer.

Attorney Jones alleged that his client was compelled to testify in the manner in which he did, and that if the respondent were to do so the secret of his client would be divulged, and therefore, with all due respect, he declined to answer.

Thereupon the judge, by his order dated October 9 last, held that the witness was guilty of contempt and ordered his arrest until such time as he answered the question put to him.

In view thereof, Attorney Alfred B. Jones applied for a writ of habeas corpus in order that the order for his arrest might be set aside and his liberty directed, alleging that he was unlawfully deprived of liberty because the said judge of the Court of First Instance had no jurisdiction to order his arrest, and that in so doing he (the judge) violated the "Philippine bill" and the general laws in force in these Islands, he (Jones) having been arrested without due process of law, and that the said judge had exceeded the limit of his powers, as the supposed crime of contempt had not been made the subject of an information or of a complaint filed with the Court of First Instance.

If properly appointed, it can not be denied that the Hon. Judge Gilbert had the powers of a commissioner, and being deputed by another judge, had jurisdiction to take depositions of witnesses in accordance with the provisions of sections 355, 356, and 361 of the Code of Civil Procedure.

As such commissioner the said judge could order the issue of a subpoena as provided by section 366, and at the trial, or when the witness is on the stand, the judge-commissioner has authority to act in accordance with the provisions of section 408 of the Code of Civil Procedure, which reads:

"Disobedience to a subpoena or refusal to testify.—Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpoena, or requiring the witness to be sworn, and, if the witness be a party, his complaint or answer may be stricken out."

Attorney Alfred B. Jones having refused to answer the questions put to him as to whether or not he and his partner, Hixson, had received the three aforesaid promissory notes which Prising affirmed had been delivered to them, in which refusal he persisted, and considering that whatever might have been his answer to such questions, whether affirmative or negative, the same could never be considered as falling under the rule of privileged communications which an attorney is bound to maintain on behalf of his client, there can be no question but that by his refusal the witness has committed contempt, because the judge could not deny the right of the plaintiff, Maggay, to ask him such questions, granting his (Maggay's) right to redeem the portion of said hacienda sold to Prising, inasmuch as the latter had declared that the promissory notes were delivered by him to Hixson and Jones.

If, taking into consideration that which was affirmed by Prising, the purchaser, any of the above-named attorneys had the right to utterly refuse to answer as to the where-about of the promissory notes signed by the other new purchasers, N. T. Hashim & Co., it would be necessary to deny and disregard the right of the plaintiff, Maggay, to redeem that portion of the hacienda sold by his coowners, which would be an absurdity in law.

Had either of the above-named attorneys answered the question in the affirmative, saying that as a matter of fact the said three notes had been received by them, nothing new would have been disclosed nor would such affirmation have revealed any secret of his client, since the latter had already stated to the judge and other persons present at the proceedings that he had delivered said notes to his lawyers; and should his answer have been in the negative, he would not thereby have revealed any privileged communication of his client, to whom, by his denial, he would only have given the lie, a fact which does not constitute the revealing of a secret which the law forbids.

On this assumption the decision of the judge punishing the contempt committed by the witness, who, persistently and without any reason whatever, refused to testify, is in keeping with the provisions of section 237 of the Code of Civil Procedure, which is of the following tenor:

"Imprisonment until order obeyed.—When the contempt consists of the omission to do an act, which is yet in the power of the accused to perform, he may be imprisoned until he performs it."

The nature and character of an act which is the subject of judicial investigation does not depend on the more or less interested qualification or consideration given it by a witness or litigant whom the discovery of the truth sought for in the litigation might affect. The nature of the suit, the circumstances and conditions of the question or of the affirmative or negative answer thereto are what in each case determine if the information or communication made by a client to his attorney is of the character of a privilege or a secret. It has already been shown that whatever might have been the answer given by either of the two lawyers of Prising, whether affirming or denying his statement, no secret or privileged information, given by the client to his lawyer, would have been thereby revealed.

The Hon. Judge Gilbert, even when acting as a commissioner, or deputy of the judge of the Court of First Instance of Cagayan, has not exceeded his rights in the exercise of his jurisdiction, because if, as such, he had authority to cite witnesses by means of a subpoena, it follows that during the proceedings, and when taking testimony under oath, he could punish or employ the necessary means to avoid or prevent disobedience or any subterfuge to elude or defeat the provisions of law which regulate the proceedings, as otherwise it would be useless to institute actions if the right of a party be allowed to be defeated by the cunning or trickery of the adverse party or his protectors, to the detriment of society and loss of prestige to the law which equally shelters and protects the rights of all citizens.

If Attorney Jones, through persistently refusing to answer a lawful question, committed contempt or disobeyed the presiding judge, his arrest and detention, ordered by the said officer in the exercise of his full jurisdiction, is legal and can not be removed by means of a writ of habeas corpus.

Section 528 of the Code of Civil Procedure reads:

"When the writ shall not be allowed.—If it appears that the person alleged to be restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of a judgment or order of a court of record, and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order, the writ shall not be allowed * * *."

Therefore, in view of the legal considerations set forth, the inexpediency of granting the writ of habeas corpus in order to set aside and vacate the order of arrest issued by the judge on the 9th of October last is evident, and in view thereof the person of the petitioner will be remanded to the custody of the respondents with the costs against the said petitioner. So ordered.

Arellano, C. J., Mapa and Willard, JJ., concur.

DISSENTING

CARSON, J.:

I dissent.

In my opinion the refusal of the witness to answer the question propounded to him was not a contempt.

Section 31 of the Code of Civil Procedure is as follows:

"A lawyer must strictly maintain inviolate the confidence and preserve the secrets of his client. He shall -not be permitted in any court, without the consent of his client, given in open court, to testify to any facts imparted to him by his client in professional consultation, or for the purpose of obtaining advice upon legal matters."

The witness, an attorney, was asked whether he had received from Ins client certain documents. It will not be denied that if the witness had been asked whether his client had told him that he had delivered these documents to some third person, a truthful answer by the witness would be a violation of the confidence of his client, and a disclosure of a fact imparted to him by his client under the seal of professional secrecy. I can see no difference in principle between a disclosure that the client had told the attorney that he had intrusted certain papers to a third person, and a disclosure that the client had intrusted such papers to the attorney himself. I think, therefore, that the witness can not lawfully be required to answer the question propounded to him, unless it appear that under the circumstances of this particular case the provisions of the above-cited section of the code are not applicable.

It is said, upon the authority of a number of English and American decisions, that the privilege given confidential communications between attorney and client does not relieve the attorney from the duty of disclosing the fact that papers and documents of his client have been intrusted to his care or are in his possession. This proposition, stated broadly and without limitations, is not based upon any sound principle, and is not sustained by the authorities. I think the true doctrine as laid down in the decisions touching disclosures which the attorney may be permitted or compelled to make may be stated thus: The privilege granted communications between attorney and client was not intended and should not be permitted to be used as a means whereby the client may conceal the whereabouts of documents the production of which a third person is entitled to secure by virtue of a subpoena duces tecum; or whereby the client may conceal the fact that certain documents are in his possession or in the possession of the attorney, his agent, where a third person is seeking to prove that such documents are in the possession of the client or the attorney, for the purpose of introducing secondary evidence as to their contents. (Greenleaf on Evidence, 16th ed., vol. 1, art. 245, and cases there cited.)

Thus stated, both the reason of the rule and its reasonableness are at once apparent. The privilege is the client's, and it is given him in order to make possible the utmost freedom in the confidential relations between the client and his attorney; but courts will not permit the abuse of this privilege for the purpose of concealing the whereabouts of papers, documents, etc., and thus defeating the right of a third party to put such documents or papers in evidence, or to introduce secondary evidence as to their contents.

But the rule should not be extended or applied to cases which do not fall within the reason upon which it is based. Hence the attorney should not be required to disclose facts touching the possession of papers or documents which have been delivered to him by his client in the course of his employment, unless it appears that a third person is seeking the production of such documents by virtue of a subpoena duces tecum, or that the third person is seeking to prove that such papers or documents are in the possession of the client or his agent, for the purpose of offering secondary evidence as to their contents.

It does not appear that the purpose of the question addressed to the witness in the case under consideration was to

secure the production of the papers, or to ascertain their whereabouts, for the purpose of offering secondary evidence as to their contents; on the contrary, it manifestly appears from the record, and it is substantially admitted in the argument of counsel, that the sole purpose and object of the question is to secure a contradiction of the alleged statement made by the client, and this merely for the purpose of impeaching his testimony.

It is urged that since the client himself has disclosed the fact which the question propounded to the attorney seeks to elucidate, that fact is no longer a secret, and the answer of the attorney could not constitute a violation of a confidence reposed in him by his client. But the evident and admitted object of the question is to discover whether the client did or did not disclose the truth as to the fact in question. If the attorney should answer the question negatively, the answer would tend to prove that the client had not disclosed the truth as to what had or had not taken place between himself and the attorney; and it would then appear that the attorney had disclosed a fact touching his professional relations with his client which the client himself had refused to disclose at the risk of a prosecution for perjury.

It is said that a number of English and American decisions hold that an attorney may be permitted or compelled to testify as to facts which have come to his knowledge in the course of his professional relations with his client, where it appears that the client himself has voluntarily and publicly disclosed these facts. It is evident, however, that not in all such cases could the attorney be permitted or compelled to testify to such facts; such a doctrine, followed to its logical conclusion, would make an attorney for an accused person in a criminal prosecution an available witness against his client, to prove that his client's testimony as a witness in his own behalf is in conflict with admissions made to his attorney in the course of their confidential relations as attorney and client—a conclusion so manifestly absurd and improper as to indicate that in such cases the mere fact that the client disclosed a particular fact is not in itself the ground upon which the attorney may be compelled or permitted to testify as to that fact.

The true ground for the admission of the attorney's testimony in such cases is the implied permission from his client so to do, and of course such permission can not be inferred, unless the client voluntarily made public the fact in question and nothing appears which would negative the inference of such implied permission.

In the case under consideration it appears that the disclosures made by the client were not made voluntarily, and it further appears that he expressly refused to permit his attorney to testify as to the fact in question; under such circumstances the mere fact that the client has himself testified as to the fact in question does not justify an attempt to compel the attorney to testify as to this fact.

There have been cases wherein the client has not been permitted to close the mouth of his attorney and prevent him from giving his version of what took place between them, when the client himself has disclosed his version of the facts, for the purpose of showing that the attorney has incompetently or improperly performed his duties as attorney. (*Hunt vs. Blackburn*, 128 U. S., 464.) But it will be found that even these cases rest on the implied permission of the client, the courts holding that, by disclosing the facts for the purpose indicated, the client waives his right to object to the attorney's giving his own account of the matter. In such cases, the question of compelling the attorney to testify never arises, and they afford no precedent for the attempt to compel the witness in this case to respond to the question propounded to him.

But I would be compelled to dissent from the majority opinion even were I convinced that the attorney was in fact guilty of contempt. In my opinion the commissioner had no lawful authority summarily to impose an indeterminate sentence as punishment therefor.

Section 231 of the Code of Civil Procedure confers authority upon judges and Courts of First Instance to punish certain specified contempts committed in the presence of such judge or court, summarily, and without the right of

appeal, but expressly limits the punishment which may be imposed under such circumstances to a fine not exceeding P200 and imprisonment not exceeding ten days.

The refusal of a witness to "answer when lawfully required" is a contempt under the express provisions of section 231. It is also a contempt as defined by section 232. I take it that one guilty of such a contempt may be proceeded against under either section; but where summary punishment is imposed, it can only be imposed under the provisions of section 231 and may not exceed the limits of the penalty therein prescribed.

It is urged that the indeterminate sentence authorized by section 237 of the Code of Civil Procedure is as applicable to contempts punished under the provisions of section 231 as to contempts punished under the provisions of sections 232 and 230. I do not think that this contention is well founded; it is clearly against the general spirit and tenor of the code provisions touching, contempts, which secure the right of a person charged with contempt to a formal trial and appeal, save only in certain specified cases wherein the punishment which may be inflicted is limited to a comparatively light penalty.

Section 237, authorizing the imposition of indeterminate sentence, following immediately after section 236, which provides for the punishment of contempts defined in section 232, forcibly suggests that these two sections are to be read together, and are applicable only in cases arising under section 232; this view is supported by the fact that sections 232, 233, 234, 235, 236, and 238 are clearly not applicable to cases of contempt set out in section 231, and refer only to contempts as defined in section 232. In this connection the language used in setting out the contempts which may be punished with an indeterminate sentence is suggestive. Section 237 provides that "When the contempt consists of the omission to do an act," an indeterminate sentence may be imposed, and evidently refers to the contempts penalized in section 236. It is difficult to justify the use of the definite article if the contempt mentioned in section 237 relates back to those set out in section 231.

DISSENTING

TRACEY, J.:

I also dissent, on the first ground stated by Mr. Justice Carson.

[1] Case No. 4337, J. Courtney Hixson against the same defendants, and involving the same facts, was decided on the same date and with the same result as to the plaintiff.

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