

THE UNITED STATES; PLAINTIFF AND APPELLANT, VS. MAGDALENO SABERON, DEFENDANT AND APPELLEE.

G.R. No. 5180. August 04, 1911

Ponente: MAPA, J.

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MAPA, J.:

A complaint of the following tenor was filed against the defendant:

"The provincial fiscal of Cebu charges Magdaleno Saberon with the crime of malversation, that is, of a violation of section 1 of Act No. 1740, committed as follows:

"On or about the 28th of January, 1908, and within the territorial limits of the municipality of Talisay, of this province and judicial district, the said accused Magdaleno Saberon, being, as he was, a public officer, inasmuch as he was the municipal treasurer of Talisay and deputy to the provincial treasurer of Cebu in the said municipality, and having charge, by reason of his office as such municipal treasurer of% the said municipality of Talisay, of public funds, or property, and having been required by the provincial treasurer of Cebu, an officer authorized by law, to render account of the funds in his possession as such municipal treasurer of Talisay and deputy of the said provincial treasurer, did, maliciously and with criminal intent, fail to render an account of the disposition of the sum of one thousand two hundred and seventy-five pesos and sixteen centavos (P1,275.16) which was missing from the cash which should have been on hand under his charge in the municipal safe of the aforesaid pueblo of Talisay; with violation of section 1 of the Act before mentioned."

The defendant filed a demurrer to this complaint, on the following grounds:

- "(1) The facts alleged therein do not constitute a crime;
- "(2) The complaint is not drawn up in conformity with the requirements of the law; and,
- "(3) There is another complaint pending concerning the same facts and charging a different crime."

The court sustained the demurrer by an order, which literally, in part, read as follows:

"The defendant in this cause is charged with a violation of section 1 of Act No. 1740, the said violation consisting, according to the complaint, in the fact that the defendant, while municipal treasurer of Talisay, Province of Cebu, and as such having in his charge public funds, and notwithstanding his having duly been required by the provincial treasurer to render account of the funds in his possession as such municipal treasurer, did fail to render account of the disposition of the sum of P1,275.16 which was missing from the cash which should have been on hand in the municipal safe of the said pueblo of Talisay.

"Against the complaint a demurrer was filed which places in doubt the constitutionality of that part of the said Act which brought about the filing of this complaint, as being in conflict with section 5 of the Act of Congress of July 1, 1902, relative to the Philippine Islands, which provides: 'That no person shall be compelled in any criminal case to be a witness against himself;' and likewise in conflict with section 57 of General Orders, No. 58, which contains the provision: 'A defendant in a criminal action shall be presumed to be innocent until the contrary is proved;' and also with section 59 of the same general order, which provides that the burden of proof

of guilt shall be upon the prosecution.

"The precedent established by the Supreme Court in the case of the United States vs. Navarro (3 Phil. Rep., 143) is binding upon this court in deciding the question raised. Accepting, for the purposes of the present demurrer, the facts set forth in the present complaint, and supposing therefore, as it may well be supposed, that the defendant did commit some defalcation of the funds which were in his keeping, the tendency of the said law would be forcibly to oblige the defendant to testify to facts which might give rise to the filing of an information against him for malversation. In view of the constitutional guaranties, this court finds no more reason for a law which compels public officers to give information in writing on facts that might originate a complaint for malversation, than that which could exist in favor of a law compelling a person who kills another to give a written account to the prosecution of all the facts connected with the victim's death. The mere fact that a defendant is a public officer should not deprive him of the constitutional rights guaranteed to all by the fundamental laws.

"The demurrer is sustained, and the defect in the complaint, being one affecting its essentiality and not correctible by amendment, the court orders the final dismissal of the case and the annulment of the bond given in favor of the defendant."

From this order the prosecution appealed and the case has been raised to this court for the decision of the appeal.

Section 1 of Act No. 1740, a violation of which is charged against the defendant, literally provides as follows:

"Any bonded officer or employee of the Insular Government, or of any provincial or municipal government, or of the city of Manila, and any other person who, having charge, by reason of his office or employment, of Insular, provincial, or municipal funds or property, or of funds or property of the city of Manila, or of trust or other funds by law required to be kept or deposited by or with such officer, employee, or other person, or by or with any public office, treasury, or other depository, fails or refuses to account for the same, or makes personal use of such funds or property, or of any part thereof, or abstracts or misappropriates the same or any part thereof, or is guilty of any malversation with reference to such funds or property, or through his abandonment, fault, or negligence permits any other person to abstract, misappropriate, or make personal use of the same, shall, upon conviction, be punished by imprisonment for not less than two months nor more than ten years and, in the discretion of the court, by a fine of not more than the amount of Such funds and the value of such property."

It is alleged that these provisions are contrary to section 5 of the Act of Congress of July 1, 1902, which prescribes that "no person shall be compelled in any criminal case to be a witness against himself" since it tends, according to the trial court, forcibly to oblige the defendant to testify to facts which might give rise to the filing of an information against him for malversation. The lower court is under the impression, apparently, that any public officer who fails or refuses to account, when duly required to do so, for the funds or property of which he may have charge, by reason of his employment, is unquestionably guilty of malversation, and that it is under this construction that the law punishes the said act; for, were it not so, if the refusal to render an account of the funds did not necessarily imply, in the mind of the court, a defalcation or misappropriation of such funds, then there would be no basis or foundation for the statement that the imposition of a penalty for such a refusal is for the purpose of obliging or tends to oblige an officer to testify to facts which may give rise to a complaint against him for the crime of malversation. Such an opinion does not appear to us to be correct. True it is that the unjustified refusal to render an account may produce a suspicion that there are at least irregularities in the officer's bookkeeping, but neither is this in itself conclusive proof of misappropriation, nor does the law in imposing punishment in any wise take into account the more or less correct condition of the funds which may be in his charge. The law makes the mere fact of that refusal a crime and punishes it as such, in absolute distinction from the other fact, entirely immaterial to the case, as to whether or not the funds in the safe entrusted to the officer are

intact. So true is this .that, although such funds are found to be intact and the official having them in charge is found not to have committed the smallest or most insignificant defalcation, still he would not be exempt from the criminal liability established by law if he refused or failed to render an account of said funds on being requested to do so by competent authority. The reason for this is that Act No. 1740, in so far as its provisions bearing on this point are concerned, does not so much contemplate the possibility of malversation as the need of enforcing by a penal provision the performance of the duty incumbent upon every public employee who handles government funds, as well as every depositary or administrator of another's property, to render on account of all he receives or has in his charge by reason of his employment. Moreover, it may be said, looking at the matter from another point of view, that the design of the Act before mentioned was to impart stability to the good order and discipline which should prevail in the organization and workings of the public service by punishing the employee who should disobey an order or a demand, lawfully made by a competent officer, for the rendition of accounts - a disobedience which it would be absurd to suppose could be supported and protected, directly or indirectly, by any of the fundamental laws of the Philippines - in the same manner that it would be absurd also to suppose that our constitution protects or could protect, under the mantle of impunity, the public officer who should refuse to comply with a duty that was inherent in the very nature of his office, to render an account of the funds or property received by him for deposit or administration. And if this is true, as it undoubtedly is, then it can in no wise be said that the law which punishes those acts is contrary to section 5 of the Philippine Bill, or is in any other respect anti-constitutional.

The doctrine laid down by this court in the case of the United States vs. Navarro (3 Phil. Rep., 143), cited in the order appealed from, has no application to the present case. In that case the majority of this court held that article 483 of the Penal Code had been repealed by the Philippine Bill, because in their opinion, it imposed upon the accused the necessity of testifying as a witness in his own defense, which certainly may not be said of Act No. 1740 in the part thereof alleged to have been violated by the defendant.

Sections 57 and 59 of General Orders, No. 58, are also cited in the order appealed from, as being contrary to the Act referred to. The first of these sections prescribes that a defendant in a criminal action shall be presumed to be innocent until the contrary is proved; and the second, that the burden of proof of guilt shall be upon the prosecution. As it is seen, these provisions establish rules of procedure, while Act No. 1740, in the part thereof under review, is restricted solely to defining and punishing as a crime the act of refusal of a public employee to render an account of the funds and property in his charge, when duly required to do so by a competent officer; for which reason there does not exist, nor can there exist, any opposition or antagonism between the aforesaid legal provisions, because they treat of entirely different matters which have no points of contact between them. It is obvious that the prosecution must prove, else the accused could not be convicted of the said crime, that the latter was required to render an account by a competent officer, and that he then refused to do so, and when such proof has been produced the provisions of the before-cited sections of General Orders, No. 58, that relate to the prosecution's proving the defendant's guilt in order to obtain the conviction of the latter at trial, have been complied with.

From the foregoing, the conclusion is drawn that, in our opinion, the act charged against the defendant consisting, according to the complaint, in his having refused or failed to render an account of the funds which he had under his charge, and this notwithstanding his having been required to do so by an officer authorized by law for such purpose, does not constitute, technically speaking, the crime of malversation, though penalized in the same law (Act No. 1740) which punishes this crime, for malversation consists, properly, in the abstraction of the funds or in their application to improper uses, either by the officer himself in charge thereof or by any other person voluntarily permitted by him, through his negligence or abandonment, to abstract or misappropriate the same. And although in the complaint the act charged is specified as a crime of malversation, this circumstance does not alter

and can not alter the true legal nature of the said act, neither can it affect the judgment to be rendered in due season and in which the crime described in the complaint must be denominated in accordance with the law, and not in accordance with the designation thereof given by the accused or the complainant. (U. S. vs. Treyes, 14 Phil. Rep., 1270; and U. S. vs. Gellada, 15 Phil. Rep., 120.)

For the foregoing reasons, and with a reversal of the order appealed from, the demurrer filed against the complaint is overruled, and it is directed that the case be remanded to the court of its origin in order that it may proceed to the proper trial thereof in accordance with law,

Arellano, C. J., Torres, Johnson, and Carson, JJ., concur.

DISSENTING

MORELAND, J.:

My judgment is entirely at variance with the prevailing opinion. I especially object to that part of it reading as follows:

"True it is that the unjustified refusal to render an account may produce a suspicion that there are at least irregularities in the officer's bookkeeping, but neither is this in itself conclusive proof of misappropriation, nor does the law in imposing punishment in any wise take into account the more or less correct condition of the funds which may be in his charge. The law makes the mere fact of that refusal a crime and punishes it as such, in absolute distinction from the other fact, entirely immaterial to the case, as to whether or not the funds in the safe entrusted to the officer are intact. So true is this that, although such funds are found to be intact and the official having them in charge is found not to have committed the smallest or most insignificant defalcation, still he would not be exempt from the criminal liability established by law if he refused or failed to render an account of said funds on being requested to do so by competent authority. The reason for this is that Act No. 1740, in so far as its provisions bearing on this point are concerned, does not so much contemplate the possibility of malversation as the need to enforce by a penal provision the performance of the duty incumbent upon every public employee who handles government funds, as well as every depositary or administrator of another's property, to render an account of all he receives or has in his charge by reason of his employment. Moreover, it may be said, looking at the matter from another point of view, that the design of the Act before mentioned was to impart stability to the good order and discipline which should prevail in the organization and workings of the public service by punishing the employee who should disobey an order or a demand, lawfully made by a competent officer, for the rendition of accounts, - a disobedience which it would be absurd to suppose could be supported and protected, directly or indirectly, by any of the fundamental laws of the Philippines * * *"

It clearly appears, from the quotation, and particularly from the parts underscored, that the court holds that there are two crimes defined and punished by Act 1740: One, a failure or refusal to render an account of official acts: the other, embezzlement, evidenced by an actual conversion or by an unexplained failure, refusal, or inability to account for funds actually missing.

The court makes a distinction between the expressions "render an account of," and "account for." This is apparent in every line of the opinion. It is the whole foundation of the decision. With that distinction I entirely agree. Act 1740 and the Acts hereinafter referred to make that distinction clearly and fully. There may be a vast legal gulf between a refusal to give an account of official acts and a refusal to account for funds. In the one case the incumbent may be simply a disobedient official. In the other, he may be a thief. In the one case the official may turn over every penny of the funds in his hands, but, through pique, spite, ill will, or fancied illtreatment, refuse to

render a statement of his receipts and disbursements, i. e., render an account of his official acts. In such case he is not an embezzler. He is simply, a disobedient, but entirely honest, official. In the other case, refusing or failing to account for, that is, produce, the fund in his hands, he becomes, *prima facie*, an embezzler.

Now, the court holds that Act 1740, in addition to creating the crime of embezzlement, makes the mere failure or refusal to render an account of official acts a crime, and punishes it in the same manner and to the same extent as embezzlement. To put it differently: The court holds that even though the offending official voluntarily produce and turn over every penny belonging to the Government, he is, nevertheless, guilty of a crime under Act No. 1740 if he refuse to render an account of his official acts; that is, if he refuse to give to the examining officer a statement of the receipts, disbursements, etc., of his office, with proper receipts and vouchers. To illustrate what the court holds in the prevailing opinion: A. is a provincial treasurer. The district auditor goes to A.'s office and demands that he render an account of his official acts performed during the preceding month. A. produces and turns over to the district auditor every centavo of the money belonging to the Government. Not a penny is missing or withheld. But for some reason he refuses to give the district auditor a statement of his official acts, that is, to render an account. Under these facts the court holds that A. is guilty under Act 1740, not of embezzlement, but of the crime of refusing to give the district auditor a statement of his account, and that he is punishable, in the discretion of the court, by ten years' imprisonment, a fine, and perpetual disqualification to hold public office or employment of any kind in the Philippine Islands. In other words although he voluntarily turn over every dollar of the Government's money and is therefore guilty of nothing more than disobedience, he is nevertheless to be treated under Act 1740 as an embezzler and a thief and to be given exactly the same punishment as one who not only refuses to give a statement of his accounts but also maliciously and criminally steals and embezzles every penny of the Government's money.

With this conclusion of the court I wholly disagree. In my judgment Act 1740 defines and punishes embezzlement and nothing else. I give three reasons to support my judgment:

- The plain wording of the Act renders the conclusions of the court legally impossible. The mere reading of the Act shows to my mind at once and conclusively that the Legislature never intended by that Act to define and punish any crime but embezzlement. It follows:

"Section 1. Any bonded officer or employee of the Insular Government, or of any provincial or municipal government, or of the city of Manila, and any other person who, having charge, by reason of his office or employment, of Insular, provincial, or municipal funds or property, or of funds or property of the city of Manila, or of trust or other funds by law required to be kept or deposited by or with such officer, employee, or other person, or by or with any public office, treasury, or other depositary, fails or refuses to account for the same, or makes personal use of such funds or property, or of any part thereof, or abstracts or misappropriates the same, or any part thereof, or is guilty of any malversation with reference to such funds or property, or through his abandonment, fault, or negligence permits any other person to abstract, misappropriate, or make personal use of the same, shall, upon conviction, be punished by imprisonment for not less than two months nor more than ten years and, in the discretion of the court, by a fine of not more than the amount of such funds and the value of such property.

"SEC. 2. In all prosecutions for violations of the preceding section, the absence of any of the public funds or property of which any person described in said section has charge, and any failure or inability of such person to produce all the funds and property properly in his charge on the demand of any officer authorized to examine or inspect such person, office, treasury, or depositary shall be deemed to be *prima facie* evidence that such missing funds or property have been put to personal uses or used for personal ends by such person within the meaning of the preceding section.

"SEC. 3. Every person convicted of a violation of this Act shall *ipso facto* be forever disqualified from holding

any public office or employment of any nature whatever within the Philippine Islands."

It is to me clear that section 1 provides punishment only for that official who, having Government funds or property, "fails or refuses to account for the same," and not for him who merely fails or refuses to render a statement of receipts and disbursements or to give a history of his official acts. This section, to my mind, clearly requires the production of the money itself, and not alone a statement of official acts. The demand is, "Produce the money," not, "Render me a statement of your accounts or a history of your acts," except, possibly, in so far as the rendering of the account is necessary to account for the funds. This section nowhere refers to a failure or refusal to render an account, solely as such, but only to a failure or refusal to account for, to produce and turn over. This assertion is fully confirmed by the provisions of the second section of the Act. This section, in my judgment, precludes the possibility of holding upon logical grounds that the Act refers to any crime other than embezzlement. It says:

"In all prosecutions for violations of the preceding section, the absence of any of the public funds or property of which any person described in said section has charge, and any failure or inability of such person to produce all the funds and property * * * shall be deemed to be prima facie evidence that such missing funds or property have been put to personal uses * * *."

The words "all prosecutions for violations of the preceding section" must be given their usual and ordinary meaning. They mean all prosecutions under section 1, whether that section creates one crime or twenty. No crime defined in that section can escape the all-embracing reach of these words. Now, section 2 is laying down rules, in the form of presumptions, as to the effect of certain evidence, which rules or presumptions are applied to all violations of section 1. We should expect, therefore, that such rules would be made sufficiently broad and comprehensive to touch every crime defined in section 1, whether one or twenty. If one seeks to make certain conditions applicable to all members of a class, we naturally expect him to do so. If in doing so he use language which makes those conditions applicable to only a part of that class, one of two assumptions is necessary; either he did not know the language he was using or he made a very serious blunder in its use. Now, the Legislature, by section 2, sought to make certain rules relating to the weight and effect of evidence, i. e., presumptions, applicable to all violations of section 1. If the Legislature, intending to make such rules applicable to all violations of section 1, uses language which makes such rules applicable to only a part of said violations, what must we necessarily conclude? We must conclude that the Legislature either, did not know the English language or else it made a very serious blunder in its use. Let us see what the Legislature said in making such rules applicable to all violations of section 1. As we have already observed, section 2 provides that:

"In all prosecutions for violations of the preceding section [section 1] the absence of any of the public funds or property of which any person described in said section has charge, and any failure or inability of such person to produce all the funds or property, shall be deemed to be prima facie evidence that such missing funds or property have been put to personal uses * * * within the meaning of the preceding section."

We notice, then, first, that this section refers exclusively to the absence of funds or property. There is not one word about a statement of account or of the rendition of a statement of official acts or of the rendition of any account, purely as such. There is nothing whatever except the requirement to produce funds or property. "Produce the funds," is the order, not, "Give me an itemized statement of your account." But this section applies by express language, to every violation of section 1, whatever may be the number of the crimes it creates. Now, if section 2 includes every violation of section 1, and section 2 refers exclusively to missing funds or property, then it would be natural to assume that section 1 must refer exclusively to the crime involved in a failure or refusal to produce funds or property, and not to a failure or refusal to "render an account of official acts," as such. We must either make this assumption or we must say that the Legislature did not know language or that it committed a blunder in

its use. As we have before intimated, it would certainly be going far to hold that the Legislature intended to apply certain rules relative to the weight and effect of evidence to all violations of section 1 and then used language which really applied such rules to a part of such violations only. But this assumption must be made if the court is right in the decision of this case. To repeat: The court asserts that section 1 creates two crimes: One, embezzlement, and the other, the failure or refusal to render an account of official acts, as such. But, as is seen, it is quite impossible for the rules laid down in section 2 to have any application whatever to the alleged crime of a failure or refusal to render an account, as that phrase is used in the prevailing opinion. Nevertheless, section 2, by express words, says that its provisions shall apply to all violations of section 1. In order that sections 1 and 2 shall be harmonious rather than contradictory, it must be held that section 1 creates only one crime, embezzlement. Certainly section 2 refers to only one crime and yet it says expressly that it includes every crime created by section 1. Either section 1 creates only one crime or section 2 does not do what it says it does, namely apply to every crime named in section 1. The conclusion necessarily is that, by the plain provisions of the Act, only one crime is defined and punished therein. The clear wording of section 1 and, if possible, the still clearer wording of section 2 demonstrate that the Legislature intended to define and punish the malversation of public funds, whether committed by actual conversion, by failure, inability or refusal to produce, or by negligence. If the official produces the funds he has committed no crime under that Act, no matter how obstreperous, disobedient and insolent he may be to his superiors. A failure or refusal to render a statement of his accounts is not a crime under that Act. It may be evidence which, taken with other evidence, tends to prove the crime of embezzlement (see Act No. 749); but it is not itself a crime under that Act.

- The title of the Act [No. 1740] shows that the construction of the court in the prevailing opinion can not stand.

The title is as follows:

"An Act providing for the punishment of public officers and employees who fail or refuse to account for public funds or property or who make personal use of such funds or property, or any part thereof, or who misappropriate the same, or any part thereof, or who are guilty of any malversation with reference to such funds or property, or who through abandonment, fault, or negligence permit any other person to abstract, misappropriate, or make personal use of the same."

It would be difficult for general language to express more clearly the purpose of an Act. It, in every line and word, refers exclusively to public funds or property. It would seem to be impossible to mistake the meaning. Its purpose is to punish the officer or employee who (1) fails or refuses to account for public funds (not render an account of receipts and disbursements, i. e., give a history of official acts, strictly as such); (2) makes personal use of public funds; (3) actually misappropriates public funds; (4) is guilty of any malversation of public funds; (5) by neglect permits others to misappropriate public funds. Every word is directed toward the preservation of the funds of the State. Every line is drawn to apprehend and punish the official who does something with public funds to deal with a situation where funds are missing, as a known fact, legally proved.

I desire here to call attention to the error into which the court falls by confusing at a certain point in its decision the expressions "to render an account of official acts" and "to account for funds," after having made the difference in the meaning of these two expressions the whole basis of its claim that Act 1740 creates two crimes instead of one. It will be remembered, that the opinion of the court clearly holds that an official may be guilty of the crime of refusing to "render an account" under that Act even though he voluntarily produce and turn over, that is, "account for," all the funds belonging to the Government. This distinction between the meaning of the two expressions is necessarily the vital element in the holding that there are two crimes instead of one created by the Act. Nevertheless, the only source from which the court obtains any authority whatever for its holding that the Act makes a neglect or refusal to "render an account" a crime is from the expression found in the title and in section 1

of the Act, "who fail or refuse to account for public funds." In other words, the court holds that Act 1740 creates two crimes, one "a failure or refusal to render an account," and the other, "a failure or refusal to account for funds," but finds the creation of both crimes in exactly the same words, namely, "who fail or refuse to account for funds." To put it differently, and, I hope, more clearly: I ask the court, "In what words of the Act do you find your authority for saying that it creates the crime of failing to render an account, although every penny of the funds is produced and accounted for?" The reply of the court necessarily is, "We find that authority in the phrase 'any officer or employee who * * * having charge of funds or property * * * fails or refuses to account for the same.'" I then ask the court, "In what words of the Act do you find your authority for holding that it creates the crime of embezzlement?" The reply of the court necessarily is, "We find that authority in the same phrase." The decision fails to explain how two crimes, entirely different in nature, can be drawn from exactly the same words. It fails to demonstrate how it is possible to say that "to account for funds" are the creative words in the crime of embezzlement, and, in the same breath, say that they are also the creative words in the crime of "refusal to render an account." The two crimes are entirely different in nature. In the latter crime the integrity of the funds may not be at all in question. In the other it always is. To render an account does not necessarily mean to produce the funds. To account for funds requires their production, or its equivalent. The expression "account for funds" may, at times, include "render an account," but it may mean something different or additional. A thief may be able to render an account, as that phrase is used in the prevailing opinion, but he can not account for. An official can render an account, and a correct one, although he may have stolen every dollar in his charge. One who can account for can always render an account of. But one who can render an account of can not always account for. The only phrase in all the Act which lends any color whatever to the claim of the court that the Act makes a failure or refusal to render an account a crime is the phrase to which I have already so many times referred, "any person who having charge of public funds or property * * * fails or refuses to account for the same." How can the same phrase mean two things which may not bear the slightest relation to each other? failure or refusal to render an account is never embezzlement. It may be competent evidence on a trial for embezzlement, but it is not embezzlement itself. But the statute expressly makes a failure or refusal or inability to account for, that is, produce, public funds, prima facie embezzlement. Such failure, refusal, or inability to produce is not only evidence of embezzlement; it is embezzlement, prima facie, if the funds are actually missing. So that, the "failure or refusal to render an account," if made a crime at all by the Act, must be also embezzlement, inasmuch as that crime is, as we have seen, defined by and included in the phrase "fails or refuses to account for public funds," which "failure or refusal to account for public funds" is embezzlement, when it is shown that the funds are actually missing from the depository specified by law.

Further as to the meaning of the phrase "account for:"

A contract provided that, defendant, in consideration of having purchased of plaintiff certain shares of stock in a bank and having received plaintiff's obligation therefor and power of attorney to transfer the same, promised and agreed to account to the plaintiff for one-half the proceeds or avails of a certain mortgage held by the bank on certain real estate. The words in the contract, "to account for," were construed by the Supreme Court of Massachusetts as importing an obligation to pay plaintiff one-half of the proceeds or avails of the mortgage which came to defendant. (*Cushman vs. Richards*, 100 Mass., 232.)

In the case of the *Supervisors of the Town of Franklin vs. Kirby* (25 Wis., 498) the action was against Kirby as principal and the other two defendants as sureties upon a bond given by Kirby as treasurer of said town of Franklin. The condition of the bond was that Kirby should faithfully discharge the duties of his office "and faithfully and truly account for and pay over, according to law, all money" which should come into his hands as such treasurer. The complaint averred that Kirby, in pursuance of his duties as such treasurer, collected the tax of said town for the year 1866, amounting to \$3,588.31, and had not accounted for or paid over, as required by law

to do, the sum of \$3,588.31, but had only accounted for and paid over the sum of \$3,084.84, and that there remained in the hands of said Kirby, received by him by virtue of said office, unaccounted for and not paid over as required by law, the sum of \$503.77; and that he "refused and neglected to pay over or account for said sum of \$503.77, although often required to do so." The appeal was from the order overruling the demurrer to the complaint. Counsel for respondent argued that the obligation to account for was wholly separate and distinct from the obligation to pay over and that the complaint was sufficient because, even though it failed to allege a neglect or refusal to pay over, it did allege a refusal to account for. In discussing the case the court said:

"The respondent's counsel attempts to sustain the complaint by dividing the clause of the statute, requiring him to account for and pay over moneys coming to his hands, into two distinct grounds of liability. But this construction can not prevail. He is required to account merely as a preliminary to paying over.. The latter is the essential thing. And the words 'to account for and pay over' are used in the section fixing the condition of the treasurer's bond, to describe his duty in respect to paying properly at all times, and to ascertaining and paying over whatever balance may be in his hands whenever called upon lawfully by any person entitled to receive it. So long as there is no default in paying-over, it was not the design of that clause to create a distinct ground of action for not accounting; * * *."

In the case of *The State ex rel. McKown vs. Williams* (77 Mo., 463), the question before the court was the construction of the clause in a bond requiring the obligor to "well and truly account for" certain moneys. The court said:

"The learned counsel for appellants suggest that when the guardian charged himself with the wards' money obtained in Tennessee, in his annual settlements, that was a compliance with the conditions of the bond; the breach assigned in the petition being a failure, etc., 'to account for' this money. This is not all that is embraced in this term 'account for.' It is a condition not satisfied short of paying over the trust fund to the cestui que trust."

The same holding was made in the similar case of *The State ex rel. Mount vs. Steele* (21 Ind., 207), where the court said, defining the signification of the expression "account for" found in a guardian's bond:

"This condition requires not only the accounting for the moneys, but their payment according to law. Their payment according to law signifies payment to the ward, or other persons entitled to receive the same. To be sure, when the guardian reports the sale of real estate, he is required to produce the proceeds of the sale and the notes, etc., given to secure the purchase money. (2 R. S. 1852, p. 328, sec. 21.) But this production of the proceeds can be no discharge of the obligation to pay the same according to law. When produced, neither the judge of the court, nor the clerk thereof, is the proper custodian of the funds. The statute does not require the proceeds to be paid over to the clerk, or any other officer, but leaves them in the proper custody of the guardian."

In the case of *Auburn State Bank vs. Brown* (172 I11., 284), the court said:

"The meaning of the words 'accounted for,' as applied to the case in hand, is, that the property in question has been devoted by the executors to the purposes of the proper and due administration of the estate in pursuance of the will of the deceased. Even though the description in the inventory ought to be deemed insufficient, yet as an appraised value was affixed to whatever the description intended to represent, it availed to create- a liability on the part of the executors to answer and account therefor. Their action in the matter of allotting the land to parties entitled to take under the will, and conveying it and delivering possession to such persons and making report thereof to the court, constituted an accounting for the land, within the meaning of the statute."

See also *The "Idaho"* (93 U. S. 575), where it was substantially held that "account for" means to "turn over." "The expression 'holden to account for' means not only to render an account of, but 'to be responsible for,' and stands in opposition to the right of appropriation for one's own use and benefit." (*Thomas vs. Mahan*, 4 Me., 513.)

"The accounting to which a guardian may be subjected, by proceedings before the surrogate, is not only a statement of his receipts and disbursements, with the amount of the trust fund still remaining in his hands, but it is, in addition to such account stated, a rendering and giving up to the party entitled of the moneys and property in respect to which the accounting party is liable. The payment is a part of the accounting." (Pyatt vs. Pyatt, 46 N. J. Eq., 285,290.)

Moreover, the penalty prescribed by Act 1740 shows conclusively that its intention was to punish one crime only and that, embezzlement. The Act provides that a person guilty under its provisions:

"Shall * * * be punished by imprisonment for not less than two months nor more than ten years and; in the discretion of the court, by a fine of not more than the amount of such funds and the value of such property."

How can one who is not guilty of embezzlement, but only of the alleged crime of refusing to "render an account," be fined in "the amount of such funds and the value of such property?" He has embezzled no funds or property. On the contrary, he has freely and honestly accounted for them and turned them over to the proper authority. The court is authorized to imprison and fine. It would be utterly impossible, under the provisions of the Act, for it to fine an accused who had embezzled no money or property. To hold that the Act creates and punishes two crimes instead of one leads to an absurdity when it comes to an application of the penalty. Every word and line of the Act shows that its sole purpose was to define and punish the crime of embezzlement.

To my mind, the necessary conclusion, therefore, is that the title of the Act, as well as the body thereof, clearly indicates the intention of the Legislature to define and punish the crime of embezzlement only. Its purpose is to punish the loss of public money or property, and not to insure obedience in one official to the orders of another. Its purpose is to punish stealing and not disobedience - embezzlement and not insubordination.

3. The third ground upon which I rest my judgment in dissent is that there is another Act or, rather, two correlative Acts, Nos. 1792 and 749, defining and punishing the precise crime which the court alleges in its opinion is defined and punished by Act No. 1740, which said Acts are still in force.

Section 30 of Act 1792 reads as follows:

"Any officer or agent whose duty it is to collect and receive moneys arising from the revenues of the Insular Government, or moneys accruing to the same, of whatever kind, who shall fail to render complete accounts of such receipts to the Auditor or to transmit the same within five days after the expiration of the month to which they pertain, or shall neglect to render the same when requested to do so, or who, being accountable for moneys advanced him for purposes of disbursement, shall neglect to account therefor immediately upon receipt of the Auditor's written request, shall be subject to such penalties as may be prescribed by law, and the Auditor may request the Governor-General to direct prosecution under Act Numbered Seven hundred and forty-nine in any case which in his judgment may seem to require such action: Provided, That postal accounts of postmasters shall be rendered within five days after the close of each quarter."

Act No. 749 reads as follows:

"SECTION 1. All officers or agents of the Insular Government whose duty it is to collect or receive revenues or other moneys and deposit the same in the Insular Treasury or a designated depositary shall make deposits or remittances of the same, regardless of the amount received or collected, as often as once a month, where safe and possible, and if there is no opportunity for such remittance within the month, as soon thereafter as possible, and a deposit shall be made in every case as soon as possible where the revenue or moneys in the hands of any officer or agent amounts to five hundred dollars, United States currency, or its equivalent in Philippine or Mexican currency: Provided, That no such officer or agent shall be required to make a deposit oftener than once a day: And provided further, That postmasters who are authorized to issue and pay money orders shall remit by registered mail to their designated depositary all sums received by them from sales of money orders in

excess of their authorized reserve or the amount of the advices of unpaid orders on hand less than two weeks, such remittances to be made with each and every mail dispatched from their respective offices which may convey mail to their designated depository.

"SEC. 2. Any officer or agent of the Insular Government who fails or neglects to comply with the provisions of this Act as to deposits or remittances shall be, upon conviction, punished by a fine in any sum not exceeding two thousand dollars in the discretion of the court, and may be imprisoned until the fine and costs are paid. Such failure to deposit or remit in accordance with the foregoing section on the part of a collecting officer shall be also held to be prima facie evidence of embezzlement of the sum not remitted or deposited in any prosecution for embezzlement thereof.

"SEC. 3. Every officer or agent of the Insular Government or of any provincial government required by law to render accounts to the Insular Auditor, who fails or neglects for the period of two months to render accounts to the Insular Auditor as required by law, or when required to do so by the Insular Auditor pursuant to law, shall be deemed guilty of gross neglect of duty, and upon conviction thereof may be punished by a fine of not exceeding two thousand dollars, in the discretion of the court, and may be imprisoned until the fine and costs are paid. Failure to make the proper accounts for money received shall be held to be prima facie evidence of embezzlement of the sums received and not accounted for."

As is clearly seen, the mere failure or refusal to render an account to the proper official is made a punishable offense under these Acts. Why should Act 1740 do the same thing? The answer to this question is in itself a complete answer to the majority opinion in the case. And when we consider, further, that, if Act 1740 does what the court holds it does, then there are two laws punishing the same offense and punishing it altogether differently, the impossibility of sustaining the theory of the court is more apparent. Act 749 punishes a failure or refusal to render an account with a fine only not exceeding two thousand dollars. There is no minimum. It may be no more than one centavo. No imprisonment whatever can be imposed, except subsidiary. There is no accompanying disqualification to hold office or employment. On the other hand, if Act 1740 makes such failure or refusal a crime, such crime under that Act is punishable by imprisonment of not less than two months or more than ten years, and, in the discretion of the court, by a fine of not more than the value of the property embezzled. Moreover, the convict shall be forever disqualified "from holding any public office or employment of any nature whatever within the Philippine Islands." Thus, if the court is right in its opinion, we have two laws punishing the same act, one law punishing it as it ought to be punished, that is, according to its nature and results, by a fine merely, and the other punishing it in a manner frightfully disproportionate to the nature of the crime and its effects. The very nature of the punishment imposed by Act 1740 demonstrates, of necessity, that it was never intended to include among the offenses defined and punished thereby the mere failure or refusal to render an account of official acts. It is an elementary principle of legislation that the same offense shall not be dealt with under two different laws or punishable in two different ways. The Legislature is never deemed to have expressed two widely different opinions on the gravity and punishability of the same act. This court, by the prevailing opinion, holds that the Philippine Commission has expressed, by two different laws, both of which are still in force, two different opinions as to the nature and gravity of the offense involved in failing or refusing to render an account, saying in one opinion that the offense is so mild in its nature and so insignificant in its results that a mere fine is punishment entirely adequate, and in the other that such offense is so grave in its nature and so destructive in its results that it ought to be classed among the highest of the crimes against property, and that the person committing it ought to be placed among thieves and embezzlers, and punished, in proper cases, with ten years in state prison, a fine, and with perpetual disqualification to hold public office or employment of any kind. I can not give my consent to such a holding. I can not believe that the Philippine Commission intended that an official, who scrupulously produced and turned over to the Government every centavo belonging to it, but who, by reason of pique or obstreperousness, refused to give a history of his official acts, i. e., render an account to his superior,

should be classed among thieves and embezzlers and should be punished in the same way and with the same results to his subsequent life as the one who not only refused to render an account but also maliciously and criminally robbed the Government of every peso intrusted to his care. I do not believe that the Philippine Commission expressed two radically different opinions as to the nature of the same act. I do not believe that it provided two radically different punishments for the same crime. I do not believe that it enacted two laws, radically different in scope and effect, relative to the same subject matter, and left both in force at the same time.

While I can not agree that the information ought in fairness to be held sufficient to charge the crime defined and punished by Acts Nos. 749 and 1792, the allegations therein to that end being, when confronted with the requirements of the statutes, ambiguous and uncertain, to say the least, I am of the opinion that it is legally sufficient to charge the crime of embezzlement. Although not artistically drawn, it contains, in substance and effect, all of the allegations required by law. It alleges (1) the official character of the accused; (2) the receipt by him in such capacity of P1,275.16, public money; (3) a legal demand by the proper authority for its production; (4) the refusal to produce; and (5) the absence of said funds from the depositary provided by law in such cases.

Having found that the crime charged is embezzlement and it being, in my judgment, necessary, in order to convict, to allege and prove the absence of the funds or property, in addition to the failure, neglect or refusal to produce, it is unnecessary for me to consider at this time the question presented on appeal relative to the constitutionality of that portion of the Act which is alleged to make the failure, neglect or refusal to render an account, of itself, a crime.

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