

Opinion No. 16-1819

June 9, 1916

BY: FRANK W. CLANCY, Attorney General

TO: Honorable William C. McDonald, Governor of New Mexico, Santa Fe, New Mexico.

Requisition from Governor of Tennessee.

IN THE MATTER OF THE EXTRADITION OF T. B. WILLIAMS.

OPINION

{*383} By requisition from the Governor of Tennessee, the arrest and delivery of said Williams to an agent of that state is asked of the Governor of New Mexico. Upon an examination of the accompanying papers I had serious doubts as to the sufficiency of the application made to the Governor of Tennessee for the requisition, and wrote to the Attorney General of Tennessee for information, with the expectation of some possible correction in the papers. I particularly desired to know what might be the statute of Tennessee which would make such a transaction as that described in the indictment a criminal offense, and apparently in response to my inquiries, the Governor of New Mexico has received an affidavit made by Nat Tipton, who is Attorney General of the Sixteenth Judicial Circuit of the State of Tennessee, stating among other things, that that office in Tennessee is the same as that of a district attorney. In that affidavit is the statement that the indictment was found under Sections 6579 and 6580 of Shannon's Code of Tennessee. Reference to that work will show that those two sections, and Section 6583, which is material to the present discussion, are as follows:

"6579. Fraudulent breach of trust. -- Every fraudulent breach of trust is declared to be a criminal offense, and punishable as hereinafter provided."

"6580. What is. -- The fraudulent appropriation of personal property or money by anyone to whom it has been delivered on deposit, pledge, sequestration, or to be carried or repaired, or in whose hands or under whose control it may be by his position as clerk, agent, factor, or bailee, or on any other contract or trust by which he was bound to deliver or return the thing received or its proceeds, is a fraudulent breach of trust."

"6583. Distinction between breach of trust and larceny. -- The two cases above specified of breaches of trust, refer to a receiving with intent to comply with the contract under which the delivery is made, and a subsequent determination of fraud. If the contract be used merely as the means of procuring possession, with an intent to make a fraudulent appropriation, it is larceny."

Another section of the Code which is also of importance, is Section 6545:

"6545. Contract with fraudulent intent. -- If a contract of loan for use, or of letting and hiring or other bailment or agency, be used merely as the means of procuring possession {*384} of property with an intent to make a fraudulent appropriation at the time, it is larceny."

It is well settled upon authority that in a proceeding of this kind, inquiry is proper as to whether the indictment charges an offense under the laws of the demanding state. The indictment in the present case charges that Williams, on the 16th of November, 1914, in the County of Lauderdale

"then and there, unlawfully, feloniously and fraudulently did appropriate certain valuable personal property to-wit: the sum of Seven and 50-100 dollars good and lawful money of the United States of America, the property of E. L. Cook, which the said E. L. Cook paid to the said T. B. Williams at his request and on his representation that he would procure and deliver him the said E. L. Cook a health and accident policy and under said contract he was bound to deliver said health and accident insurance policy or to return to said E. L. Cook said sum of Seven and 50-100 dollars, neither of which he has done, but to the contrary has falsely, unlawfully, feloniously and fraudulently appropriated said sum of Seven and 50-100 dollars to his use."

Although Mr. Tipton states that the indictment was found under Sections 6579 and 6580, yet inspection of the sections hereinbefore quoted, and a comparison of their language with that of the indictment, will show that the indictment lacks an essential allegation necessary to the description of an offense under Section 6580, so as to distinguish it from a charge of larceny under Section 6545. By Section 6583 the cases specified of breaches of trust refer to a receiving with intent to comply with the contract under which the delivery is made, and a subsequent determination of fraud, and that if the contract be used merely as the means of procuring possession with intent to make fraudulent appropriation, the crime is larceny, evidently referred to the definition of larceny in Section 6545, which declares that if the contract be used merely as the means of procuring possession of property with intent to make a fraudulent appropriation at the time, the offense is larceny. The language used in the indictment is appropriate to Section 6580, but there is no allegation that Williams received the \$ 7.50 with the intent to comply with the alleged contract under which the delivery was made, and that he subsequently determined to defraud Cook of his money. Nor does the indictment contain any allegation of an intent, on the part of Williams at the time of receiving the money, to make a fraudulent appropriation of it, so as to make the indictment substantially good under Section 6545.

In my opinion the indictment is fatally defective for the reasons stated, and it is well settled upon authority that the authorities of the state upon which demand is made by the governor of another state may properly consider the question of the sufficiency of the indictment under the laws of the demanding state.

The foregoing is respectfully submitted to the Governor of New Mexico for his consideration.