Record. No.....

State of Maryland,

vs.

Stevenson Archer.

IN THE

Court of Appeals of Maryland.

Record of Proceedings removed from Criminal Court of Baltimore City, as upon Writ of Error.

ATTY.-GENL. WHYTE,
CHARLES G. KERR,
For State.

BERNARD CARTER,
GANS & HAMAN,
For Archer.

Filed May 15th, 1890.

IN THE CRIMINAL COURT OF BALTIMORE,
May Term, 1890:

STATE OF MARYLAND, *vs.* STEVENSON ARCHER.	No. 510 (A.) Docket of 1890. Embezzlement.

Indictment.

(Endorsed: "True bill.—E. J. Codd, Foreman;" duly presented to the Court by the Grand Jury, and filed among its records 29th April, 1890.)

STATE OF MARYLAND,
City of Baltimore, to wit:

The jurors of the State of Maryland for the body of the city of Baltimore, do on their oath present, that *Stevenson Archer*, late of said city, yeoman, late Treasurer of the State of Maryland, on the second day of January, in the year of our Lord one thousand eight hundred and ninety, was then and there holding office in this State, to wit, the State of Maryland, to wit, the office of Treasurer of said State, duly elected and qualified; and afterwards, to wit, on the day and year aforesaid, at the city aforesaid, by virtue of his office as such Treasurer as aforesaid, was then and there in possession of certain evidences of debt, to wit, seventeen Frederick city in the State of Maryland four per cent. bonds, each of the par value of one thousand dollars, current money; thirty-seven Baltimore and Ohio Railroad Car Trust four and a half per cent. bonds, each of the par value of one thousand dollars, current money; three Piedmont and Cumberland Railway five per cent. bonds, each of the par value of one thousand dollars, current money, and sixty-one Treasury Relief Bonds of the State of Maryland, issued under the Act of Assembly of the State of Maryland, of the year eighteen hundred and seventy-eight, chapter two hundred and thirty-eight, authorizing a loan to relieve the Treasury of said State; which said last mentioned evidences of debt were then and there the property of the said State, and unlawfully and fraudulently did *embezzle the same*; which said evidences of debt, to wit, the said seventeen Frederick city in the State of Maryland four per cent. bonds, each of the value of one thousand dollars, current money, and the said thirty-seven Baltimore and Ohio Railroad Car Trust four and a half per cent. bonds, each of the par value of one thousand dollars, current money; the said three Piedmont and Cumberland Railway five per cent. bonds, each of the par value of one thousand dollars, current money, and the said sixty-one Treasury Relief Bonds of the State of Maryland, issued under the Act of Assembly of the State of Maryland, of the year eighteen hundred and seventy-eight, chapter two hundred and thirty-eight, authorizing a loan to relieve the Treasury of the said State, he, the said Stevenson

Archer, was bound to account for and deliver to Edwin H. Brown, Treasurer of this State, to wit, the State of Maryland, duly appointed and qualified, his successor in office; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

Second Count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said *Stevenson Archer*, on the said second day of January, in the year of our Lord eighteen hundred and ninety, was then and there holding office in this State, to wit, the State of Maryland, to wit, the office of Treasurer of said State, duly elected and qualified; and afterwards, to wit, on the day and year aforesaid, at the city aforesaid, by virtue of his office as such Treasurer as aforesaid, was then and there in possession of certain evidences of debt, to wit, seventeen Frederick city in the State of Maryland four per cent. bonds, each of the par value of one thousand dollars, current money; thirty-seven Baltimore and Ohio Railroad Car Trust four and a half per cent. bonds, each of the par value of one thousand dollars, current money; three Piedmont and Cumberland Railway five per cent. bonds, each of the par value of one thousand dollars, current money, and sixty-one Treasury Relief Bonds of the State of Maryland, issued under the Act of Assembly of the State of Maryland, of the year eighteen hundred and seventy-eight, chapter two hundred and thirty-eight, authorizing a loan to relieve the Treasury of the said State; which said last mentioned evidences of debt were then and there the property of the said State, and unlawfully and fraudulently did *appropriate the same to his own use;* which said last mentioned evidences of debt, to wit, the said seventeen Frederick city in the State of Maryland four per cent. bonds, each of the par value of one thousand dollars, current money; the said thirty-seven Baltimore and Ohio Railroad Car Trust four and a half per cent. bonds, each of the par value of one thousand dollars, current money; the said three Piedmont and Cumberland Railway five per cent. bonds, each of the par value of one thousand dollars, current money, and the said sixty-one Treasury Relief Bonds of the State of Maryland, issued under the Act of Assembly of the State of Maryland, of the year eighteen hundred and seventy-eight, chapter two hundred and thirty-eight, authorizing a loan to relieve the Treasury of said State, he, the said *Stevenson Archer*, has bound to account for and deliver to Edwin H. Brown, Treasurer of the State, to wit, the State of Maryland, duly appointed and qualified, his successor in office; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

Third Count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said *Stevenson Archer*, on the said second day of January, in the year of our Lord eighteen hundred and ninety, was then and there holding office in this State, to wit, the said State of Maryland, to wit, the office of Treasurer of said State, duly elected and qualified, and afterwards, to wit, on the day and year aforesaid, at the city aforesaid, by virtue of his office as such Treasurer aforesaid, was then and there in possession of a large sum of money, to wit, the sum of nine thousand eight hundred and thirty-one dollars and twenty-five cents,

current money; a further description of which money is to the jurors aforesaid unknown; which said money was then and there the property of the said State of Maryland, and unlawfully and fraudulently did *embezzle* the same; which said money, to wit, the said sum of nine thousand eight hundred and thirty-one dollars and twenty-five cents, current money, a further description of which is to the jurors aforesaid unknown, he, the said *Stevenson Archer*, was bound to pay over, account for, and deliver to Edwin H. Brown, the Treasurer of this State, to wit, the said State of Maryland, duly appointed and qualified, his successor in office; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

Fourth Count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said *Stevenson Archer*, on the said second day of January, in the year of our Lord eighteen hundred and ninety, was then and there holding office in this State, to wit, the office of Treasurer of the State of Maryland, duly elected and qualified; and afterwards, to wit, on the day and year aforesaid, at the city aforesaid, by virtue of his office as such Treasurer as aforesaid, was then and there in possession of a large sum of money, to wit, the sum of nine thousand eight hundred and thirty-one dollars and twenty-five cents, current money; a further description of which money is to the jurors aforesaid unknown; which last mentioned sum of money was then and there the property of the State of Maryland, and unlawfully and fraudulently did *appropriate to his own use* the same; which said money, to wit, the said sum of nine thousand eight hundred and thirty-one dollars and twenty-five cents, current money, a further description of which is to the jurors aforesaid unknown, he, the said *Stevenson Archer*, was bound to pay over, account for, and deliver to Edwin H. Brown, the Treasurer of this State, to wit, of the said State of Maryland, duly appointed and qualified, his successor in office; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

CHARLES G. KERR,
The State's Attorney for the city of Baltimore.

Demurrer.

(Filed 13 May, 1890.)

State,
vs.
Archer.
} In the Criminal Court of Baltimore.

MR. CLERK:—Please enter demurrer short to indictment 510 A., and to each count thereof.

BERNARD CARTER,
GANS & HAMAN,
Attorneys for Defendant.

13 May, 1890.—Joinder of issue by State; demurrer argued, and same day sustained by Court and order to quash filed.

State of Maryland, vs. Stevenson Archer. | In the Criminal Court of Baltimore. No. 510 A., Docket of 1890.

Ordered, this thirteenth day of May, 1890, that the demurrer filed in this case be sustained, and that said indictment be and the same hereby is quashed.

WILLIAM A. STEWART.

Petition for Removal as upon Writ of Error.

(Filed 14 May, 1890.)

State of Maryland, vs. Stevenson Archer. | In the Criminal Court of Baltimore. May Term, 1890. No. 510 A., Docket 1890.

To the Honorable William A. Stewart,
Judge of the Criminal Court of Baltimore:

The petition of the State of Maryland respectfully shows, that on the 13th day of May, 1890, a general demurrer to the indictment in this case was entered on the docket on the part of the defendant, and that on the same day this Court adjudged the demurrer to be good and quashed the indictment.

Your petitioner alleges that it is aggrieved by the judgment sustaining the said demurrer and quashing the said indictment, and alleges that such decision by this Court was erroneous on the following points, namely:

1. The Court ought not to have sustained the demurrer and quashed the indictment.

2. The Court ought not to have decided that section 80, of Article 27, of the Code of Public General Laws, did not apply to the Treasurer of the State of Maryland.

3. The Court ought not to have decided that the Treasurer of Maryland was not one of the "officers" included in section 80, of Article 27, of the Code of Public General Laws.

4. That the Court ought not to have decided that the words "which he is bound by law to pay over, account for or deliver to the Treasurer of this State," were not descriptive of the trust, impressed on the "money funds or evidences of debt," which it is a misdemeanor to embezzle; but that they had reference to the "officer," who could not embezzle, under the Act unless at *the time of his appropriating them to his own use*, he was bound to pay over, account for or deliver them to the Treasurer.

5. That the Court ought not to have decided that the Treasurer could not embezzle the funds of the State while in office, because he was not bound to account for, pay over or deliver them until after he had ceased to be Treasurer of the State.

Wherefore the State of Maryland prays that an order may be passed removing the record in this case as upon writ of error to the Court of Appeals for review.

And as, &c.

WM. PINKNEY WHYTE,
Attorney General of the State of Md.

CHAS. G. KERR,
State's Attorney for Baltimore city.

It is hereby ordered, that the record be removed as prayed.

WILLIAM A. STEWART.

STATE OF MARYLAND,
City of Baltimore, to wit:

I hereby certify, that the aforegoing is truly taken and copied from the record of proceedings in the Criminal Court of Baltimore, in the case of State vs. Stevenson Archer, No. 510 A.

(Seal's Place.) In testimony whereof, I hereunto set my hand and affix the seal of said Court, this fourteenth day of May, A. D. 1890.

JOHN S. BULLOCK,
Clerk of Criminal Court of Baltimore.

Filed June 13, 1890.

THE STATE OF MARYLAND

vs.

STEVENSON ARCHER.

IN THE

COURT OF APPEALS

OF MARYLAND.

APRIL TERM, 1890.

GENERAL DOCKET, No. .

Writ of Error from the Criminal Court of Baltimore City.

STATE'S BRIEF.

The defendant in error was indicted in the Criminal Court of Baltimore city, on the 29th day of April, 1890, under section 80 of article 27 of the Code of Public General Laws, relating to fraudulent embezzlement by public officers.

1 Poe's Code, P. G. L., page 485.

The indictment contains four counts:

The first count charges that the said defendant in error, on the 2d January, 1890, held the office of treasurer of Maryland, duly elected and qualified, and by virtue of his said office was in possession of certain "evidences of debt," described fully in said count, and

that these evidences of debt were the property of the State, and that he did fraudulently embezzle the same, which said "evidences of debt" (again described in said count) he, the said Stevenson Archer, was bound to account for and deliver to Edwin H. Brown, Treasurer of the State of Maryland, duly appointed and qualified, his successor in office, &c. (Record, pages 1. and 2.)

The second count, pursuing the like description of him, as treasurer, and his possession of the "evidences of debt" by virtue of his office, &c., charges him with fraudulently appropriating the same to his own use, &c., &c.

The third count, describing his official status and the possession of certain money, belonging to the State, to wit, $9,831.25, charges him with fraudulently embezzling the said money, &c., &c.

The fourth count, pursuing the like description of his official character, and the possession of the money by virtue of his office, charges him with fraudulently appropriating to his own use the said sum of money, $9,831.25, &c., &c. (Record, pages 2 and 3.)

To this indictment, the defendant in error entered a demurrer short, and on joinder, the Court sustained the demurrer and quashed the indictment, as appears by order of the 13th May, 1890. (Record, page 4)

On the 14th May, 1890, the plaintiff in error filed its petition, praying the Criminal Court aforesaid to direct the removal of the Record to this Court, under Rule 1 of the Court of Appeals, and duly assigned therein the errors, which it seeks to have reviewed. (Record, page 4.)

The errors assigned, taken as a whole, are that the Court below should not have decided that section 80 of article 27, of the Code of Public General Laws, did not apply to the Treasurer of the State; that he was not one of the "persons holding office in this State," who could be guilty of embezzlement, as such officer.

The form of the indictment is not questioned. It pursues the language of the statute and is not open to exception.

"When the offence charged was not an offence at common law, it is sufficient to set out the circumstances contained in the statutory definition of the offence, *and "to bring the accused within its material descriptive words."*

1 Starkie, Cr Pl., 178.

This has been the uniform ruling of the Court of Appeals, from the case of State vs. Elborn, 27 Md. 488, down to State vs. Hodges, 55 Md. 138.

Now, what is necessary to charge under this law, against the defendant?

1. That he was "holding office" in this State, as Treasurer.

2. That as such Treasurer, in the course of his office, he received or was in possession of "money, funds or evidences of debt" belonging to the State.

3. That he was in possession of such money, funds or evidences of debt of the State, which he was bound by law to pay over, account for or deliver to the Treasurer of this State.

4. That he fraudulently embezzled or appropriated the same to his own use.

These requirements are all met in the indictment.

Does the 80th section of article 29 apply to the Treasurer of the State?

What are the rules, by which the proper construction of statutes is made?

Penal laws should not be so strictly construed as to defeat the obvious purpose of the Legislature; and

though they are not to be extended by construction, *they should receive a rational interpretation.*

House vs. House, 5 H. & J. 125.
Keller vs. State, 11 Md. 536.
Ruth vs. State, 20 Md. 441.
State vs. Elborn, 27 Md. 439.

And Courts are bound to give effect to their plain and obvious meaning, *and not to narrow the construction.*

Germania vs. State, 7 Md. 1.
Parkinson vs. State, 14 Md. 195.
Wilson vs. State, 21 Md. 2.

"The duty of the Court is to *enforce* the criminal law, and not to search for unnatural circumstances for pretexts or means to screen offenders from the punishment due to their crimes."

State vs. Leonard, 6 Coldwell, (Tenn.) 310.

Statutes are to be construed so as to meet the legislative intent.

That intention may appear from the occasion and necessity of the law.

Cearfoss vs. State, 42 Md. 403.

U. S. v Lacher 134 U.S. 624. Sen. manuals Part 4

Let us look at the circumstances, surrounding the passage of the original Act, which appears in the Code as section 80 of article 27, P. G. L.

Prior to the assembling of the constitutional convention in 1850, the condition of the public funds was very precarious.

Under the constitution of 1776, the money, funds and evidences of debt of the State were in the hands of the Treasurer, subject only to the supervision of an Auditor General, who held office, but for a brief period, and in 1827, that office was abolished, and, thereafter the Treasurer alone had charge of all the State's money and

funds. He kept all the financial accounts in his own office, and was absolutely free from all check or supervision, and it so continued down to the year 1850, when the convention, to make a new Constitution, assembled at Annapolis. Then, it was seen in what a dangerous predicament the State's funds had been left.

The most astute men in that convention pointed out the danger to the State.

The annual receipt of millions of dollars, the custody of the large Sinking Funds, the productive and unproductive assets of the State, were all under the Treasurer's absolute dominion. The small bond given by him was a poor safeguard to the people for the vast sums he had at his disposal.

The men in that convention, such as Judges Dorsey and Chambers, Louis McLane and Francis Thomas, David Stewart, Thomas Donaldson and many others, saw the necessity of a change, and a Treasury Department was created. Louis McLane drew the constitutional structure of that department, modelled on the plan of the U. S. Treasury, and on those of other States.

The system, with its emendations, if closely pursued, is absolutely complete as a safeguard to the public funds.

That convention appreciated the need of protecting the people against the dishonesty of their financial agents.

Mr. Alexander Randall, speaking on this subject, voiced the sentiment of the majority.

"Sir, it is unwise to talk about the honesty of men as being sufficient security, and to appeal to the past as evidence of its truth. No man, more sincerely and more highly appreciates than I do, the characters of these public officers, with whose services we have been favored. * * * But we may not always have such men as these, and we may have difficulty in making these changes from the very fact, that such changes

would then excite suspicions. We may be so unfortunate in the selection of our agents, *as some of our sister States have been*, and we may have years of useless regrets and thousands of wasted dollars, as the price we pay for the sad experience of having confided incautiously to imaginary ideas of human integrity."

When the Legislature assembled in January, 1852, the message of Governor Lowe called the attention of that body to the fact that it was about to organize a new government, and pointed out the necessity of stringent laws for the protection of the public money in the hands of State's agents, and in 1854 he referred to the same subjects in his message of that year.

At the time of the meeting of the General Assembly in 1854, there had been a number of defalcations of public officers in other States, and notable ones in our own State. Senator Nathaniel Williams, who had been United States District Attorney under President Jackson, and had been engaged in some remarkable criminal trials, introduced the act, under which this indictment has been framed. It was passed in response to the demand of an honest sentiment, and was the outcome of the popular desire to prevent, if possible, the spoliation of the public treasure.

Not a single negative vote appears upon the journal of either House.

The Act is chapter 196 of the Acts of 1854.

The enacting clause, very slightly changed, appeared in the Code of 1860, and is now in the precise words. Sec 80 of article 27 of Public General Laws (vol. 1, Poe's Code, p. 485).

It is perfectly manifest, from the *title* of the Act, that it was intended to apply to *every public officer holding the funds, money or evidences of debt of the State*. Recent events have given rise to doubts as to the construction of the body of the Act, and we are at liberty to look at the title for aid in its true interpretation.

It was conceded, in the argument for the defendant in error in the Court below, and will be doubtless admitted here, that if the words of the title had been followed in the enacting clause, that the case of the accused would be included within the terms of the Act.

That both the title and the preamble of an act are to be resorted to in case of doubt as to the effect of a statute and its true construction, has been decided by this Court in a number of reported cases.

In Canal Company vs. Railroad Company, 4 G. and J. 90, it is said:

"It is laid down in some of the books that in construing a statute, the title (being no part of it) is not to be regarded; but we have high authority for a different rule of construction — the opinion of the Supreme Court, as expressed in the United States v. Fisher, 2 Cranch, 358" (1804). Again, as to the preamble: "*What more fully discloses the object contemplated*, and which is deemed to occupy so important an office in a statute as to be called *a key to its construction*," &c., &c.

In Miller, &c., vs. Cumberland Cotton Factory, 26 Md. 492, this Court repeated the same language:

"The *object* of the Act of 1847, chapter 228, is *indicated by its title*, viz.:

"An Act for the protection of miners, &c."

In Clark vs. Mayor and City Council of Baltimore, 29 Md. 285, Judge Robinson, speaking for the Court, uses this language:

"If, however, any doubt can arise from the language of the ordinance, let us look at the preamble, which, in case of ambiguity, Chief Justice Dyer says, is the key to open the minds of the makers of the Act." And then the ordinance is considered in the light of the language contained in the preamble.

So it is plain that both title and preamble can be drawn upon for aid in clearing the doubts which may arise from the use of ambiguous language in the body of the Act.

The learned Judge in the same case, in 29 Md. 285, adds:

"This construction of the ordinance is strengthened when viewed in the light of the surrounding circumstances under which it was passed and to which it owed its origin."

The latest authorities in the Supreme Court of the United States affirm the early ruling in 2 Cranch, 358.

In relation to the Revised Statutes of the United States, the Supreme Court held, in U. S. vs. Bowen, 100 U. S. 508, "that when it becomes necessary to construe language in the revision which leaves a substantial doubt as to its meaning, the original statute may be resorted to for the purpose of ascertaining that meaning." 115 U.S. v Lacher 134 US 624

And then in Myer vs. Western Car Company, 102 U. S. 1, the Court says:

"Where, in construing the language of a Code or a revision of statutes, there is a substantial doubt as to its meaning, the original statute may be looked at."

"Looking then to the original Act, we find the text the same as the Code; but the *title*, omitted in the codification, is as follows, &c., &c. * * * "In cases of doubt, the title might always be resorted to for the purpose of ascertaining the meaning of the body of the Act; but, especially, is this true in States like Iowa, where the Constitution provides, that "every Act shall embrace but one subject and matters properly connected therewith, *which subject shall be expressed in the title.*"

The Constitution of Maryland of 1851, which was in force when the Act of 1854, chapter 196 was passed,

contained in the 17th section of article 3, these words: "Every law, enacted by the Legislature shall embrace but one subject, *and that shall be described in the title.*"

So that if there be doubts, a reference to the title is eminently proper in the case.

And it seems to us, with great respect for the argument on the other side, that a reference to the language of the title puts the subject beyond the pale of disputation.

These are the words:

"An Act to punish the fraudulent embezzlement or appropriation of money, funds or evidences of debt by *persons elected to any office*, or holding office under the Governor, of this State, or under the corporate authorities of Baltimore, or under any other authority legally authorized to appoint to such offices."

Is it possible to exclude the Treasurer of this State from the penalties of this Act, without interpolating after the words, "persons elected to any office," this language, "except the Treasurer of the State."

Is this permissible in the construction of a penal statute? If the body of the Act was *in totidem verbis* with the title, could any sound argument be made, that the law did not include the State Treasurer?

Taking, then, the title to aid the Court in finding the legislative intent, does not common sense revolt at the proposition, that a law whose subject must be described in the title to meet the Constitutional requirement, and whose title so describes the object to be the punishment of persons, elected to *any office* of this State, who shall fraudulently embezzle or appropriate "money, funds or evidences of debt," really was never intended to reach that officer, who holds more public money than any other public officer in the State?

Now, the well known definition of embezzlement is the fraudulent appropriation of money, &c., belonging to another, but which came lawfully into the hands of

the embezzler; so this Act was intended to apply to *every public officer*, who has in his hands public money or securities, which he has received on account of the authority, under whom he is appointed.

But let us analyse the enacting clause and see, if we are driven to the title to resolve the doubts suggested as arising from its language:

1. *Any person, holding office in this State*, whether elected or appointed by the Governor, or by any other authority legally authorized to make such appointments.

(*Here is a Description of the Person.*)

2. Who shall fraudulently embezzle or appropriate to his own use, *money, funds or evidences of debt*, which he is bound by law to pay over, account for or deliver to the Treasurer of this State or to any other person, by law, authorized to receive the same.

(*This is the offence.*)

3. Shall be guilty of a misdemeanor, and shall, upon conviction thereof, be sentenced to the penitentiary for not less than 18 months nor more than 10 years.

(*Here the Punishment.*)

Was not Stevenson Archer, on the 2d of January, 1890, "a person holding office in this State," "elected" on joint ballot by the two Houses of the Legislature? Is not this a concessum? Did he not fraudulently embezzle, or misappropriate to his own use, money or evidences of debt belonging to the State? The fact is admitted by the demurrer, yet we are told that this language does not apply to him, but only to *all other* officers having financial relations with the State.

How can this be? Is there "any person holding office in this State," *except the Treasurer*, having in his possession "*funds or evidences of debt*" *belonging to the State*, which he is bound by law to account for or deliver to the Treasurer of the State? Is not this very

language descriptive of the Treasurer, and of him alone? Clerks, registers, tax collectors and the like, hold the "*money*" of the State; but where is the "officer," save and except the Treasurer, who holds "its evidences of debt," for which he is "accountable" to his successor in office, the only officer recognized under the Constitution as the hand of the State to receive its "bonds and evidences of debt," and the constituted custodian, under the law, of the bonds and certificates belonging to the State's Sinking Funds.

If this language does not refer to the Treasurer, can the counsel for the defendant in error tell us to whom it does refer?

But it was contended below that because the kind of "evidences of debt" are described as those "which he (*the person holding office*) is bound by law to pay over, account for and deliver to the Treasurer of the State," and that while holding office as Treasurer the then incumbent was not bound to pay over and deliver them to himself as Treasurer; therefore the law does not reach the accused, "for he couldn't embezzle from himself." The Court below committed the error of acquiescing in the correctness of this argument, which to us seems absolutely unsound.

To give the Act such a construction needs again the process of interpolation, for it is necessary to insert the words *eo instanti* between "by law" and "to pay over, &c." So that the clause would read, "evidences of debt," which he is bound by law, *eo instanti*, to pay over, &c; but the Act will bear no such construction.

The accounting or delivery to the Treasurer is not limited to a time before the act of embezzlement took place. It was not an obligation to be performed *in the present*, but was an accounting or delivery *in futuro* whenever by law the time arrived that the "person holding office" is to deliver the "evidences of debt" to the person entitled to receive them; as in case of this

officer, whose term of office has expired, and whose successor has qualified; and the outgoing official is bound to deliver these evidences of debt to his successor, the then Treasurer. The language used is descriptive of the trust. It refers to valuable effects lawfully in the hands of the embezzler, but impressed with the trust that, belonging to the State, he is to deliver them to the person legally authorized to receive them, to wit, his successor as Treasurer, and at the time when his term of office has expired, and by law he is bound to give account of his stewardship.

To argue otherwise seems to us the veriest casuistry, and is utterly at war with that common sense which should form the basis of every judicial decision in this age of our civilization.

Embezzlement, as an offence, had its origin in an attempt to amend the law of larceny. As we have said its simplest definition is, that it is the act of appropriating to one's own use that which is received in trust for another. And as, in other sections of the 27th article of the Code, in describing embezzlement in a cashier, agent or other employee who appropriates money or evidences of debt in his hands, the trust is specified as that the property is received "for and in the name of or *on account of his employer*;" so in this act against the embezzlement by "a person holding office" and receiving public moneys and evidences of debt, the trust is specified as "evidences of debt, which he is bound by law to account for or deliver to the Treasurer of the State." It is not the public officer as embezzler, to which these words refer, but to the thing embezzled.

This is what the language means, and the whole section contemplates the person who, in his office, receives and holds these "evidences of debt," and which, at the end of his term, he is bound by law to turn over to his successor in office.

The person holding the office as Treasurer is within the mischief, and is clearly within the remedy. "A general rule of construction of the Criminal Code so narrow as that, which was here applied, would strip it of half its vitality."

Judge Woodward in—
Com. vs. Morrissey, 86 Pa. St. 417.

The indictment charges that he was bound by law to deliver these "evidences of debt" of the State to his "successor in office," and this obligation is admitted by the demurrer; if, therefore, he has failed or refused to hand them over to his "successor in office," that act unexplained, is conclusive evidence of the crime of embezzlement.

Upon a statute similar in substance, this has been distinctly held to be good law.

The Code of Tennessee, section 4704, enacts, "that if *any person*, charged with the safe keeping, *collection and disbursement of money or property, belonging to the State or any county*, use any part of said money or property by loan, investment or otherwise, without authority of law, or *convert any part thereof to his own use in any way whatever, he is guilty of embezzlement.*"

Now, in the case above cited, the indictment charged "that the defendant did, unlawfully, fraudulently and without authority of law, embezzle the moneys of the county, and did *convert them to his own use* by failing and refusing to pay over the same to *his successor in office*, &c."

The Supreme Court of Tennessee held this indictment to be good, and decided, that "the failing and refusing to pay over the money to his sucesssor in office is, unexplained, evidence of the conversion of the money to his own use, and if proved, will establish the allegation

in the indictment, that he did embezzle and convert the money to his own use."

State vs. Leonard, 6 Coldwell, 309.
Affirmed in State vs. Cameron, 3 Heiskell, 85.

It seems to us unnecessary to refer to the cases in other States cited by the counsel for the defendant in the Court below, as they all turn upon the specific language of their several statutes, which are entirely dissimilar to our own.

But there is one case, to which the attention of the Court is called, that of The People vs. McKinney, 10 Mich. 81, wherein Judge Christiancy, delivering the opinion of the Court, clearly answers the argument of the counsel of the defendant in this case, on the point, that the State Treasurer is not included in the 80th section of article 27 of the Code.

The language of the Michigan Statute is: "If any officer, clerk or other person, employed in the Treasury of this State, or in the Treasury of any county or in any other public office within this State shall commit any fraud or embezzlement therein, he shall be punished," &c., &c.

The counsel for the defendant urged that this statute was not intended to include the State Treasurer himself; that he, being a public constitutional officer, the head of a department, the only security contemplated against his official misconduct is his official bond, and his only restraints a high sense of honor, liability to impeachment and removal from office, &c.; that the word "officer" was gratified by the Deputy Treasurer, clerks, &c.

The like argument, as to the Treasurer, was made in the Criminal Court of Baltimore, in behalf of the defendant in error here.

But Judge Christiancy said, (page 82): "This argument is not without plausibility; but we do not think it will stand the test of a careful examination."

And the result of that "careful examination," is recorded in the pages from 82 to 85, (too long for reproduction here) and is a complete exposure of the fallacy of the argument made for the defendant in error.

The Court, consequently, concluded that the Treasurer, "who has entire control of the funds, and therefore better opportunities and greater temptation to peculation" than his subordinates in office, was included as an "officer," within the terms of the law.

It was contended in the Court below, and the Court fell into the error of that contention also, that it was impossible to indict a Treasurer of this State for embezzlement under the statute, because the fraudulent appropriation to his own use must take place *during his term of office*, while he is not bound to account for or deliver the funds in his hands *until he ceases to be Treasurer* and his successor has been appointed and qualified; but can this view of the law be correct?

Although his term of office, at the end of two years and on the qualification of his successor, may expire, does he not continue as Treasurer *quoad* the "funds and evidences of debt" in his hands belonging to the State, until he has fulfilled the duty and obligation of accounting for and delivering them to his successor in office? Can it be said, although he received these "funds and evidences of debt" solely by virtue of his office as Treasurer, that, at the end of his term and before he has turned them over to the only lawful receiver of them for the State, they are in his hands merely as in those of a private citizen?

It seems to us that the very statement of the proposition is its own refutation.

We trust that the error of the ruling of the Criminal Court of Baltimore in sustaining the demurrer to the indictment has been already made so manifest that further discussion of the points is not necessary.

WM. PINKNEY WHYTE,
Attorney General.

CHAS. G. KERR,
State's Attorney for Baltimore City.

Filed June 17, 1890.

THE
STATE OF MARYLAND

vs.

STEVENSON ARCHER.

IN THE

Court of Appeals

OF MARYLAND.

APRIL TERM, 1890.

GENERAL DOCKET No. .

BRIEF FOR APPELLEE.

On the 29th of April, 1890, an indictment was filed in the Criminal Court of Baltimore against Stevenson Archer, charging him with embezzlement of the State funds. This indictment is in four counts, which vary only in the description of the funds alleged to have been embezzled, and in the language charging the embezzlement; two of the counts using the expression "did embezzle," and two, the expression, "did appropriate to his own use." A demurrer was entered to the whole indictment and to each count thereof, and these demurrers were sustained by the Criminal Court of Baltimore, whereupon the State, by writ of error, has brought the questions decided by the lower Court to the Court of Appeals for review. The indictment was drawn under section 80 of Article 27 of the Code of Public General Laws, and the sole question presented to this Court for decision is, as to whether this section of the Code embraces the case of embezzlement of State

funds by the State Treasurer. The question being one of statutory construction, it will be necessary first to state the rules by which the Court should be governed in ascertaining the meaning of the Legislature.

RULE 1. *When a penal statute is ambiguous, every reasonable doubt in its construction must be solved in favor of the traverser.*

"All doubts in the construction of a criminal statute are to be solved in favor of the prisoner."

Bishop Stat. Crimes, sections 194, 218.

"It should be a principle of every Criminal Code that no person be adjudged guilty of an offence unless it be created and promulgated in terms which leave no reasonable doubt as to their meaning. If it be the duty of the jury to acquit where such doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law to a case where he labors under the same uncertainty as to the meaning of the Legislature. * * * If these principles be correct, as they are deemed to be, a Court has no option, when any considerable ambiguity arises on a penal statute, but is bound to decide in favor of the party accused. 'It is more consonant to the principle of liberty,' says an eminent English judge, 'that a Court should acquit when the Legislature intended to punish, than that it should punish when it was intended to discharge with impunity.'"

Justice Livingstone, in Schooner Enterprise, 1 Paine, 33-4.

"This is a penal statute and must be strictly construed. * * * If it is ambiguous and susceptible of two constructions consistent with reason, one of which will acquit, and the other convict, the defendant, that construction which will acquit must be adopted."

Kent vs. State, 8 Blackford, 163.

See also, Kent, Ch. J., in People vs. Howell, 4 Johns, 301.
Story, in U. S. vs. Wigglesworth, 2 Story Rep., 374.

RULE 2. *The Court has no power to correct a mistake or supply an omission, or put words into a statute in order to carry out the Court's idea of policy or morals.*

"It is evident a mistake has occurred in drawing the law—something has been omitted; but we *cannot correct the mistake or supply the omissions*—we are compelled to take the law as the Legislature has enacted it. We have no power to change the words or add provisions, in order to make it express what we may suppose to have been the intention of the Legislature. If they have failed to express their real intention, it is for them and not for the Courts to amend the law, and make it express the legislative will * * * Indeed, the idea that the judges, in administering the written law, can mould it or warp it according to their notion, not of what the legislator said, nor even of what he meant, but of what in their judgment he ought to have meant; in other words, according to their ideas of policy, wisdom or expediency, is so obviously untenable that it could never have taken its rise, except at a time when the division lines between the great powers of government were but feebly drawn, and their importance very imperfectly understood."

Bartol, Ch. J., in Maxwell vs. Assessors, 40 Md. 294.

"It would be dangerous and unwarrantable for a Court to grope for an intent, or make one from their own ideas of policy or morals. * * * Courts cannot put into a statute words which are not there, in order to carry out any ideas of policy or morals or expediency, which they may entertain. Over these subjects, so far as they affect, or may be affected by, legislation, the Legislature has exclusive control."

Miller, J., in Hawbecker vs. Hawbecker, 43 Md. 522.

"The Courts cannot correct mistakes or supply omissions. We are not at liberty to imagine an intent and bind the letter of the Act to the intent; much less can we indulge in the license of striking out and inserting and remodeling, with a view of making the letter express an intent which the statute in its native form does not evidence."

State vs. Kirkley, 29 Md. 103.
Alexander vs. Worthington, 5 Md. 485.
Collins vs. Carman, 5 Md. 530.
Young vs. Mackall, 3 Md. Ch. 406.

RULE 3. *No statutory offences by construction.*

"No man incurs a penalty unless the act which subjects him to it is clearly both within the spirit and letter of the statute. Things which do not come within the words are not to be brought within them by construction. The law does not allow of constructive offences or of arbitrary punishment. Statutes should be interpreted according to the most obvious and natural import of their language, without resorting to subtle or forced construction, for the purpose of either limiting or extending their operation."

Cearfoss vs. State, 42 Md. 407.

These principles of statutory construction have been set forth somewhat at length, because they, of themselves, answer much of the argument of the State as addressed to the Court below. From them it is evident that this Court has nothing to do with the policy of allowing large offenders to escape when small ones are punished, nor with the question as to what the Legislature should have done when they were making this law. Nor should this Court interpolate words into this statute for the purpose of having their ideas of justice carried out. Their only duty is to expound *the law as they find it.* The responsibility of any *casus omissus* or intentional exception of any person from the operation of the statute, rests with the Legislature. The simple question is, what has the Legislature said?

The following is the language of the statute:

"Any person holding office in this State, whether elected or appointed by the Governor, by the corporate authorities of Baltimore, or by any other authority legally authorized to make such appointments, who shall fraudulently embezzle or appropriate to his own use money, funds or evidences of debt, which he is by law

bound to pay over, account for, or deliver to the treasurer of this State, or to any other person by law authorized to receive the same, shall be guilty of a misdemeanor, and shall, upon conviction thereof, be sentenced to the penitentiary for not less than 18 months nor more than 10 years."

For the purpose of obtaining a clearer view of the statute, we shall eliminate all those parts of it which have nothing to do with this discussion.

Thus: The method of appointment, the character of the funds, i. e., whether money, funds or evidences of debt and the punishment, have nothing to do with the question before the Court. Nor has the phrase, "or to any other person by law authorized to receive the same," anything to do with this case; for it is evident that there is no person to whom the State Treasurer is bound to pay over the State funds whilst he is State Treasurer, and after his removal from office, he is bound by law to pay to no person but the State Treasurer, his successor in office. This is the theory of the indictment; for it alleges in all the counts—"which he, the said Stevenson Archer, was bound to account for and deliver to Edwin H. Brown, Treasurer of the State, to wit: The State of Maryland, duly appointed and qualified, his successor in office." There is therefore no other person except the Treasurer to whom the appellee, by any possible construction, could be obliged to account. The statute, with all the immaterial words eliminated, reads as follows:

ANY PERSON HOLDING OFFICE IN THIS STATE, * * WHO SHALL FRAUDULENTLY EMBEZZLE * * FUNDS * * WHICH HE IS BY LAW BOUND TO PAY OVER, ACCOUNT FOR OR DELIVER TO THE TREASURER OF THIS STATE * * SHALL BE GUILTY, &c.

I. *By the obvious and natural construction of this language the State Treasurer is not embraced by its provisions.*

a. The offence is to be committed by a *person holding office;* but it does not embrace all office holders. It ex-

pressly includes only those office holders who are obliged to pay over to the Treasurer. Now the Treasurer cannot be said to be obliged to pay over to himself; therefore he is not included by the terms of the statute.

b. The statute divides office holders into two classes: 1st. Those who are obliged to pay over, and 2d. Those whose duty it is to receive. The offence can be committed only by those obliged to pay over. The Treasurer is not one of those, for he is mentioned in the statute merely for the purpose of defining those who may embezzle. He cannot pay over to any one. The attempt to do so would be a violation of the duties of his office.

c. It is impossible to conceive that the Legislature intended to include the Treasurer within the terms of this law. He is the most important financial officer of the government. To him are intrusted larger sums of money than to any other officers. If the Legislature had intended to include him within the terms of this penal law, would they not have done so, by plain and unambiguous words? Why is the expression—"who are bound to pay over to the Treasurer" placed in the law? What meaning has it? Does it not evidently mean that a certain class of officers only are amenable to the punishment prescribed? And is not the Treasurer mentioned in the law not as one of that class, but as being the person to whom that class must account? If the intention had been to include the Treasurer, he would have been mentioned in express terms; or general language would have been used about which there would have been no ambiguity. For example, if the law had read, "any public officer who shall embezzle any public funds intrusted to his charge, or of which he comes into possession by virtue of his office, shall be guilty, &c," there would be no doubt of the liability of the State Treasurer.

d. This view is strengthened by an examination of the title of the law. The title reads: "An Act to punish the fraudulent embezzlement or appropriation of money,

funds or evidences of debt by persons elected to any office or holding office under the Governor of this State, or under the corporate authorities of Baltimore or under any other authority legally authorized to appoint to said office."

Act 1854, chapter 196.

If the law had been drawn in accordance with the tenor of this title, the Treasurer would have been included within its provisions. Yet with the attention of the Legislature specifically drawn to the Treasurer, they depart from the title of the law, and exclude the Treasurer by making the law applicable only to those who are bound to pay over to him. The law is well settled, that if there is any conflict between the enacting clause of a law and the title, the enacting clause is to prevail. The title may contract, but never expand the meaning of the enacting clause.

Lucas vs. McBlair, 12 G. & J. 17–18.
Hays vs. Richardson, 1 G. & J. 380.
Canal Co. vs. R. R. Co., 4 G. & J. 91.
Davidson vs. Clayland, 1 H. & J. 550.

e. It is suggested that the obligation of the traverser to pay over to his successor gratifies the terms of the law. This construction is manifestly erroneous, for the obligation to pay over is an obligation which must exist as *one of the duties of the office.* The statute is directed against persons holding office, and not against private persons. The obligation of the traverser to pay to his successor could not possibly arise until he had ceased to be a person holding office. This will more clearly appear by the following analysis of the statute:

II. *An analysis of the provisions of this statute makes it evident that the State Treasurer was not intended to be included by its terms.*

Every crime is made up of certain elements which must co-exist, or the crime cannot be said to have been committed. Take the crimes of larceny and burglary as illustrations. In larceny there are four elements:

1. The taking and carrying away.

2. By trespass.

3. Of the personal goods of another.

4. With intent to deprive the owner permanently of his property therein.

The crime of larceny cannot be committed with any one of these elements lacking.

So as to burglary, which consists in—

1. A breaking and entering.

2. In the night time.

3. Into the dwelling-house of another.

4. With intent to commit felony therein.

These illustrations show that when a crime is analyzed, it is composed of certain elements, all of which must co-exist, or the crime is not committed.

In the rough analysis of this statutory crime heretofore made, the appellee has attached the obligation to pay over, to the person, and not to the funds, and this is made the subject of special assignment of error.

See assignment 4, page 4 of Record.

The appellee thinks it makes no difference whether the obligation to pay is attached to the person, or impressed on the funds; and, in order to make this clear, will, in the following analysis, treat it as impressed on the fund. Analysing the statute in this way, the statutory crime created by Code, Article 27, section 80, is composed of three elements:

1st. *Any person holding office*

2d, *who shall fraudulently embezzle*

3d, *funds which he is obliged by law to pay over, account for or deliver to the Treasurer of the State.*

As we have seen, the crime cannot be committed unless these elements concur or co-exist. Two of these elements will not make the crime. Now, it is evident that these three elements, which constitute the crime, cannot co-exist in the case of the State Treasurer. The crime must have some *punctum temporis*. If the crime is said to have been committed before the appellee was dismissed from office, then the third element of the crime is wanting, to wit: there were no funds which he was obliged to pay over, account for or deliver to the Treasurer of the State, he being then the Treasurer himself. If the crime is said to have been committed after he was discharged from office, then the first element of the crime is lacking, to wit: he was not then a person holding office. It is evident, therefore, that no *punctum temporis* can be suggested at which the State Treasurer, or one who has been State Treasurer, can be brought within the analytic definition of this statutory crime. The State has exposed this difficulty in the very frame work of the indictment, which contains a legal contradiction; nor can any indictment be framed which will not contain the same contradiction. The indictment charges that on January 2, 1890, Stevenson Archer *was holding the office of Treasurer* of the State, and that he then and there fraudulently embezzled funds which he was bound to account for and deliver to Edwin H. Brown, *Treasurer of the State*, his successor in office. Now, on January 2, 1890, Edwin H. Brown was not Treasurer of the State, but a private citizen, and at that time, Stevenson Archer was not bound to pay him anything. Mr. Archer was arrested on April 10, 1890, and was not removed from office until April 15th, 1890. If the crime had been alleged, instead of on January 2, 1890, at any date anterior to April 15th, 1890, the same contradiction would exist, for in the nature of things, two persons cannot hold the same office at the same time, nor can a person

have a successor in office until after he has ceased to occupy that office himself. See 72 Indiana, 364. If the State places the crime after April 15th, 1890, then it cannot allege, as is necessary, that at that time Stevenson Archer was holding office.

The fundamental and inherent fallacy of the State's case is shown by the fact that it cannot draw an indictment which is not self-contradictory. This contradiction may be taken advantage of by demurrer.

"When an allegation in an indictment is contradicted by a statute of which the Court takes judicial notice, the allegation fails."

U. S. vs. Smith, 8 Sup. Ct. Rep. 595.

In order to support an indictment before April 15, 1890, the State must interpolate in the statute the future for the present tense, and if after April 15, 1891, the past for the present tense. This may be the better perceived by placing the statute and the interpolations in parallel columns.

STATUTE.	INTERPOLATIONS.
	Before April 15, 1890.
Any person holding office in this State * * * who shall fraudulently embezzle * * funds * * * which he is by law bound to pay over, account for or deliver to the Treasurer of this State * * *	Any person holding office in this State * * who shall fraudulently embezzle * * funds * * which is, by law, *or which he will, after his term of office expires be,* bound to pay over, account for or deliver to the Treasurer of the State.
	After April 15, 1890.
	Any person holding office in this State, * * *or who has held office in this State,* * who shall fraudulently embezzle * * funds * * which he is by law bound to pay over, account for or deliver to the Treasurer of the State * * *

The cases cited by the Attorney General to show that the refusal or failure to pay over by a retiring officer to his successor in office, is part of the crime of embezzlement, do not so decide; and even if they did, they were decided upon statutes which materially differ in their terms from the statute under consideration. For example, the case of State vs. Leonard, 6 Caldwell, 309, merely affirms the doctrine of the common law as stated in Stephen's Digest of Criminal Law, 248, that failure to pay over to a successor in office is *evidence* of an antecedent embezzlement. The distinction between the failure to pay over to a successor in office, being *evidence* of an antecedent crime, and *not a part of the crime itself*, is fully shown in—

State vs. Munch, 22 Minn., 67.
People vs. McKinney, 10 Mich., 80.

There is no case deciding that failure to pay over to a successor is any part of the crime of official embezzlement. On the contrary, whenever it is desired to punish for such a failure, it is made a crime by a separate and distinct statute.

State vs. Ring, 29 Minn. 78.
State vs. Munch, 22 Minn. 67.
State vs. Hammond, 34 Ark. 562.
Hollingsworth vs. State, 111 Ind. 294.
State vs. Leonard, 6 Caldwell, 309.
People vs. McKinney, 10 Mich. 80.
Howell's Annotated Statutes, sections 9149, 9150.

"No man is punishable criminally for what was not criminal when done, even though he afterwards adds either the act or the intent, and yet not the two together."

1 Bishop's Cr. Law, section 208.

"The criminal character of an act cannot be determined by subsequent proceedings, which at the time the act was done, may not have been within his contemplation, and may be instituted against his will by another. The criminal intent essential to the commission of a public

offence must exist when the act complained of is done. It cannot be imputed to the party from a subsequent independent transaction."

U. S. vs. Fox, 95 U. S. 670.

The subsequent failure or refusal to pay over to his successor, by the Treasurer, is therefore no part of the crime of embezzlement, but only a matter of evidence; and even if it were, it could not be tacked on to what took place while he was an officer, so as to make a crime under this statute.

BERNARD CARTER,
GANS & HAMAN,
Attorneys for Appellee.

No. —.

[Filed March 17th, 1890.]

WM. WALSH,

vs.

M. V. McBRIDE & al.

IN THE

Court of Appeals of Maryland

JANUARY TERM, 1890.

MOTION FOR RE-ARGUMENT.

To the Honorable Judges of the Court of Appeals:

We respectfully ask the Court for a re-argument in this case. It is the first time either of us has felt obliged to do this. But the decision in this case seems to us so irreconcilable with the scope and spirit of our own decisions, and those of other Courts in like cases, that we think it our duty to request a reconsideration of the case. The amount is not very large, but the effect of the decision in practical business affairs would not fail to have an important influence.

Below we give our reasons briefly as we can.

Very respectfully,
FERD. WILLIAMS,
WM. WALSH,
Solicitors for Appellant.

1st. At the argument we gave no heed to such cases as Schwarz vs. Stein, 29 Md., 113; McGonigle vs. Plummer, 30 Md., 442, and