Lopez, Solomon Cohen vs State of Missouri 1853 St. Louis Co 328/3
alias S. Cohen Lopez

569/36 embezzlement

Gamble-Reversed L-Clerk for North, Wm & Scott, Wm
embezzled 108

Indictment
didn't include
against the peace &
dignity of the state

Chk Lig Free 1 pH 8.5
600-684-6982

1

The State of Missouri, Ss.

At a term of the Saint Louis Criminal Court begun and held at the City of Saint Louis within and for the County of Saint Louis, on the first Monday of January, being the third day of said month, and in the year of our Lord, one thousand eight hundred and fifty three, were present the Honorable James B. Bolt, Judge, Henry A. Clover Esq. Circuit Attorney, David Bayles Esq. Marshal of Saint Louis County, and Richard I. Howard, Clerk of said Court.

Grand Jury

The Marshal returns here into Court the Venire facias to him directed, with a panel of Grand Jurors thereon endorsed, who being called come as follows, to-wit: John H. Lightner, who is by the Court appointed foreman, Oliver D. Filley, Enoch Price, Edward Milligan, John W. Dill, Francis Watkins, Christian Ott, Henry Pilkington, Thomas Harbaut, Patrick Deegan, Stewart M'Kee, Louis Bach, Samuel Conway, Robert G. Coleman, Frederick Schulenburg, and George Mehl, sixteen good and lawful men who being duly empannelled and sworn, and having received their charge from the Court, retire to consider of their presentments.

Saturday 22d January

The Grand Jurors return to the bar and deliver the following indictment as a true bill, to-wit:

Indictment

County of Saint Louis, Ss.

State of Missouri. Saint Louis Criminal Court January term 1853. The Grand Jury of the State of Missouri within and for the body of the County of Saint Louis now here in Court duly empannelled sworn and charged upon their oath present that Solomon Cohen Lopez alias S. Cohen

2 Lopez late of Saint Louis in Saint Louis County afore=
said on the tenth day of July in the year one thousand
eight hundred and fifty two at Saint Louis in Saint
Louis County aforesaid with force and arms was em=
ployed in the capacity of clerk and servant to William
North and William P. Scott then and there doing business
together in copartnership under the name style and firm
of North and Scott and as such clerk and servant
was entrusted to receive and did then and there
receive various sums of money from various persons
for the use and benefit of said William North and
William P. Scott doing business together as aforesaid
and being so employed and entrusted as aforesaid the
said Solomon Cohen Lopez alias S. Cohen Lopez by
virtue of said employment then and there did receive
and take into his possession certain promissory notes
commonly called bank notes to a large amount to wit.
one hundred and and eight Dollars. and certain money
to a large amount to wit one hundred and Eight Dollars
for and on account of the said William North and
William P. Scott his said masters and employers in
that behalf. and that the said Solomon Cohen Lopez
alias S. Cohen Lopez on the day and year and at the
place last aforesaid while he was clerk and ser=
vant as aforesaid fraudulently and feloniously did take
make way with and secrete and did then and there felo=
niously Embezzle and convert to his own use without the
assent of the said William North and William P Scott
or either of them his said masters and employers
in that behalf. the said one hundred and eight Dollars
in promissory notes commonly called bank notes and
the said one hundred and eight Dollars in money of

3

the property notes and effects and money of the said William North and William P. Scott doing business together as copartners as aforesaid which said property notes effects and money had then and there come into the possession of the said Solomon Cohen Lopez alias S. Cohen Lopez and under his care by virtue of his being such Clerk and servant as aforesaid. he the said Solomon Cohen Lopez alias S. Cohen Lopez being then and there a person above the age of sixteen years to wit of the age of thirty years. against the peace of the State. and the Statute in such case made and provided. W. A. Glover Circuit Atty.

"Endorsed" "A true bill. J. H. Lightner Foreman."

"Witnesses

26th January 1853

The following Capias was issued to-wit:

County of Saint Louis Ss.

The State of Missouri,

Capias

To the Marshal of St. Louis County, Greeting: We command you to take S. Cohen Lopez alias Solomon Cohen Lopez if he be found in your bailiwick, and him safely keep. so that you have his body before the Honorable Judge of the Saint Louis Criminal Court now in session at the City of Saint Louis. within and for the County of Saint Louis. forthwith. to answer an indictment found against him by the Grand Inquest of the State of Missouri. for the body of the County of Saint Louis for Embezzlement contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State: and have you then there this writ, with your return thereon how you exe=

4 -cute the same. S. E. A. L. Witness. Richard I. Howard, Clerk of our said Court, with the seal thereof hereto affixed at office in the City of St. Louis: this 26th day of January in the year of our Lord eighteen hundred and fifty three. R. I. Howard Clerk

Marshal's Return

Executed this Copias and have the within named S. Cohen Lopez in the custody of the Gaoler of St. Louis County this 26th of Jany 1853

D. Bayles Marshal

Saturday 26th February 1853.

Now at this day comes the said defendant and by leave of Court here, waives the reading of the said indictment and pleads not guilty to the same, and for his trial puts himself upon the Country, and the Circuit Attorney doth the like: and it is ordered that this cause be continued till the next term.

Monday 14th March 1853.

Now at this day comes the said defendant, and by leave of Court withdraws his plea of not guilty heretofore pleaded by him, and files a special plea in bar and plea of not guilty to the said indictment, and also the pardon of the said defendant in former causes against him, which plea together with the Governors Pardon are as follows, to-wit

State
vs
Lopez

St Louis Criminal Court.
March term 1853

Special Plea in bar

Now at this day comes the deft and defends and says the State ought not to have or maintain her said prosecution against him because he says he is not guilty of the said felony described in said indictment in manner & form as therein charged &

5

of this he puts himself upon the Country,

Second Plea

2 And the said S. Cohen Lopez defendant for a further plea in this behalf by him secondly pleaded herein comes in his own proper person here into Court having heard the said indictment read saith that the State of Missouri ought not further to prosecute the said indictment against him the said S. Cohen Lopez in respect of the offence in said indictment mentioned because he saith — that heretofore to wit on the thirty first day of July in the year of our Lord one thousand eight hundred and fifty two at the County of Saint Louis the Grand Jurors of the State of Missouri in & for the body of the County of Saint Louis duly ~~found and~~ returned into this Court at the July term thereof for the year last aforesaid ~~two~~ separate and distinct indictments against him the said S. Cohen Lopez. (being numbered 48. 49 50. 51. 52. 53. 54. 55. 56. 57. of said term of this Court) That in said indictments numbered 48. 53 and 56 the said S. Cohen Lopez is charged with having stolen and embezzled the money and promissory notes commonly called bank notes and property and effects of a certain merchantile firm composed of William North and William Scott. which said money effects. bank notes and property is alleged in said indictments to have been received by said S. Cohen Lopez as the servant of said North and Scott of various persons and that in said indictments numbered 49. 50. 51. 52. 55 and 57. it is charged that ~~said~~ S. Cohen Lopez stole and embezzled the money promissory notes commonly called bank notes effects ~~and~~ and property of William North to a large amount all which said indictments are of the records of this

6 Court and are made part of this plea—

This defendant S. Cohen Lopez further saith that afterwards to wit on the fourth day of October in the year of our Lord one thousand eight hundred and fifty two. by an agreement made by him the said S. Cohen Lopez acting by and through his Counsel and the Circuit Attorney acting for the State by and with the advice and consent of the Court this defendant S. Cohen Lopez then and there did enter his plea of guilty to and submit to judgment and sentence upon the Counts for embezzlement contained in said indictments aforesaid numbered 53. 54. 55 and 56. upon the express condition understanding and agreement that the State would discontinue. Nol pros and discharge him from the alleged offences contained in said indictments numbered 48. 49. 50. 51. 52 and 57 all which said agreement was known to acquiesced in and ratified by this Court, and in pursuance thereof this Court on the day and year last aforesaid adjudged and sentenced this defendant to two years imprisonment in the Penitentiary of the State of Missouri upon each one of said indictments numbered 53. 54. 55 and 56. amounting in all to eight years and that in pursuance of said agreement and understanding the State by and with the advice and consent of the Court discontinued & Nol prossed the said indictments 48. 49. 50. 51. 52 and 57 and thereby discharged this defendant so far as relates to the alleged offences contained therein, all which said proceedings last aforesaid are of record in this Court and is made a part of this plea

This defendant further saith that afterwards to wit on the twenty second day of November in the year of our

7 Lord one thousand eight hundred and fifty two His Ex=
cellency Austin A. King then Governor of the State of Missou
=ri under his hand and the seal of the state aforesaid grant
him this defendant a full complete and unconditional
pardon so far as relates to the judgments and sentences
herein above mentioned which said pardon is filed in
this Court & makes part of this plea.

This defendant further saith that he is the same
S. Cohen Lopez against whom the ten indictments herein
above mentioned were preferred the numbers of which
are above recited. and against whom the said judg=
ments were rendered and sentences pronounced and to
whom the said pardon was granted and this defendant
further saith that one of the offences to which he plead
guilty and for which he received judgment and sentence
and for which he was pardoned as aforesaid is the same
offence charged against him in the indictment in this
cause and not another and different offence.

This defendant therefore saith that as to the offences
contained in the four indictments aforesaid to which
he plead guilty & for which he received judgment and
pardon he has fully answered the ends of justice and
satisfied the law. and that as to the offences charged
in the six indictments ~~which~~ which were nol prossed he
has been discharged by the agreement aforesaid and now
says that he cannot be further prosecuted for any offence
for which he might have been prosecuted in the four
indictments to which he plead guilty. because the pardon
is a clear discharge. and cannot be further prosecuted
for any offence for which he might have been con=
victed under any one of the six indictments which

were not proved without doing violence to the to the integrity and good faith of the State. which he asks this Court to preserve and compel the State to stand up to its agreement with him. All which he the said S. Cohen Lopez is ready to verify. wherefore he prays judgment of the State of Missouri ought further to prosecute the said indictment against him the said S. Cohen Lopez in respect of the said offence in the said indictment mentioned and that he the said S. Cohen Lopez may be discharged and dismissed from the same.

And for a further plea in this behalf by the said S. Cohen Lopez thirdly herein pleaded the said S. Cohen Lopez in his own proper person cometh into Court here and having heard the said indictment read to him saith that the State of Missouri ought not further to prosecute the said indictment against him the said S. Cohen Lopez in respect of the offence in the said indictment mentioned, because he saith that heretofore to wit on the thirty first day of July in the year of our Lord one thousand eight hundred and fifty two the Grand Jurors of the State of Missouri within and for the body of the County of Saint Louis found and returned into this Court an indictment charging this defendant in the first count of said indictment with larceny, in that he said S. Cohen Lopez at St. Louis County on the thirteenth day of July in the year of our Lord one thousand eight hundred and fifty two did feloniously take & carried away bank notes money property & effects of William North & William Scott of the firm trading under the style of North & Scott. and charging this defendant in the second Count of said indictment with having at the County of Saint Louis on the thirteenth day of July in the year of our Lord one thousand eight

Withdrawn

9

hundred and fifty two embezzled the bank notes property & effects of said said Copartnership composed of said William North & William Scott, the said indictment being numbered 54 of the July term for the year 1852 of said Criminal Court And this defendant further saith that afterwards to wit on the fourth day of October in the eighteen hundred and fifty two in pursuance of an understanding and agreement made with the State by and with the advice & consent of the Court this defendant plead guilty to the second Count in said indictment number 54. and that in pursuance of said agreement and plea of guilty a nol pros was entered as to the first count in said indictment and judgment and sentence was rendered & pronounced against this defendant upon the said second Count. of imprisonment the penitentiary of the state of Missouri for the space of two years. And this defendant further saith that afterwards to wit on the twenty second day of November in the year of our Lord one thousand eight hundred and fifty two His Excellency Austin A King then Governor of the State of Missouri granted this defendant S. Cohen Lopez a full complete and unconditional pardon so far as relates to the offence mentioned in said indictment Number 54 as well as other offences and judgments mentioned in said pardon. which said pardon is filed in this Court & makes part of this plea. All which said defendant S. Cohen Lopez is ready to verify. wherefore he prays judgment if the said State of Missouri ought further to prosecute the said indictment against him the said S. Cohen Lopez in respect of the said offence in the said indictment mentioned and that he the said S.

10 Cohen Lopez may be dismissed and discharged from the same. S. Cohen Lopez.

S. Cohen Lopez makes oath and says that the matters and facts as stated in his foregoing plea are true as therein stated S. Cohen Lopez.

Sworn to in open Court this 14th March 1853.

R. I. Howard Clk

Pardon } The State of Missouri, To all who shall see these presents, Greeting: Know Ye, that, By virtue of authority in me vested by law, and for good and sufficient reasons appearing, I, Austin A. King, Governor of the State of Missouri, do hereby pardon S. Cohen Lopez, who was, on the — day of — A.D. 1852, by a judgment of the Criminal Court of Saint Louis County, committed to the Penitentiary of said State, for the space of Eight years, for the crime of Embezzlement, sentenced under four judgments, for two years, each. And I do hereby restore and entitle the said S. Cohen Lopez to all the rights, privileges, and immunities which, by law, attach and result from the operation of these presents. SEAL In testimony whereof, I have hereunto set my hand, and caused to be affixed the Great Seal of the State of Missouri: Done at the City of Jeffersson, this twenty second day of November in the year of our Lord one thousand eight hundred and fifty two of the Independence of the United States the seventy seventh, and of the State of Missouri the thirty third.

By the Governor: Austin A King.

Ephraim B. Ewing Secretary of State.

Thursday 17th March 1853

Additional plea in bar filed by defendant, as follows to wit:

11
4th plea

State
vs
Lopez

Additional Plea in Bar

In Criminal Court of St. Louis County
March term 1853

And for a further plea in this behalf by the said S. Cohen Lopez fourthly, herein pleaded, the said S. Cohen Lopez in his own proper person cometh into Court here, and having heard the said indictment read to him, saith that the State of Missouri ought not further to prosecute the said indictment against him the said S. Cohen Lopez in respect of the offence in the said indictment mentioned because he saith that heretofore to wit, on the thirty first day of July in the year of our Lord one thousand eight hundred and fifty two the Grand Jurors of the State of Missouri within and for the body of the County of St. Louis found and returned into this Court an indictment charging this defendant in the first Count of said indictment with larceny in that the said S. Cohen Lopez at St. Louis County on the thirteenth day of July in the year of our Lord one thousand eight hundred and fifty two did feloniously take & carried away bank Notes, money, property & effects of William North & William Scott of the firm trading under the style of ~~North~~ North & Scott. And charging this defendant in the second Count of said indictment with having at the County of St. Louis on the thirteenth day of July in the year of our Lord one thousand eight hundred and fifty two embezzled the bank Notes, property & effects of said Copartnership composed of said William North & William Scott the said indictment being numbered 54 of the July term for the year 1852 of said Criminal Court. And this defendant further saith that afterwards to wit: on the fourth day of October in the

year of our Lord eighteen hundred and fifty two (in pursuance of an understanding and agreement made with the State) by and with the advice & consent of the Court this defendant plead guilty to the second count in said indictment number 54. And that (in pursuance of said agreement and plea of guilty) a Nol pros was entered as to the first Count in said indictment. and judgment & sentence was rendered & pronounced against this defendant upon the said second Count of imprisonment in the penitentiary of the State of Miponi for the space of two years. And this defendant further saith that afterwards to wit on the twenty second day of November in the year of our Lord one thousand eight hundred and fifty two. His Excellency Austin A. King then Governor of the state of Miponi granted this defendant S. Cohen Lopez a full complete and unconditional pardon so far as relates to the offence mentioned in said indictment number 54. (as well as other offences and judgments mentioned in said pardon) which said pardon is filed in this Court & makes part of this plea. which said Judgment and sentence has never been reversed or annulled but the same has been fully answered and the force thereof discharged satisfied and spent as aforesaid by the pardon of the Governor of the said State of Miponi and ~~in~~ not otherwise. this defendant S. Cohen Lopez says he. and the S. Cohen Lopez named in said indictment number fifty four sentence and pardon aforesaid are one and the same person and S. Cohen Lopez mentioned and charged in this indictment and not another and different. And that the offence and felony contained and charged in the said indictment number fifty four and the offence and felony charged and contained in the indictment in this cause are one and the same offence and

13 felony and not another and different offence and felony all which this Defendant S. Cohen Lopez is ready to verify, wherefore he prays judgment of the State of ~~Mis-~~ ~~souri~~ the State of Missouri ought further to prosecute the said indictment in this cause against him the said S. Cohen Lopez in respect of the said offence in the said indictment mentioned and that he the said S. Cohen Lopez may be dismissed and discharged from the same.

S. Cohen Lopez.

Sworn to & subscribed before me 17th March 1853.

R. A. Howard Clk

Saturday 19th March 1853.

Now at this day come the parties aforesaid by their Attorneys thereupon the Circuit Attorney files a Similiter to the first plea of the said defendant, and two seperate motions to have the second plea of the said defendant stricken out, and also a demurrer to the said second plea: thereupon the said defendant files his rejoinder to the said demurrer ~~to the said~~ and withdraws his third special plea: thereupon the said motions to strike out, and the said demurrer to the said second plea, being argued, and submitted to the Court, but the Court here not being fully advised what judgment to render in the premises, takes time to consider thereof. Which Similiter to the first plea together with the two separate motions to strike out the second plea, and demurrer to second plea, and the defendants rejoinder to the said demurrer are as follows, to-wit:

Similiter

The State vs S. Cohen Lopez

In Criminal Court, No 124

And the state of Missouri by her Attorney as to the plea of the

14 said defendant by him firstly above pleaded and whereof he puts himself upon the Country doth the like.

Clover Atty for State

Motion to Strike out

The State vs S. Cohen Lopez — Case 124

The State by her Attorney moves the Court to strike out the second plea filed by the defendant herein for the reason that the said defendant has filed a fourth plea which states the same defence as stated in the 2nd special plea filed by him herein for the reason that the allowing the same to remain on the record encumbers the pleading and tends to create the same issue by the defendant as made by said 4th plea.

H. A. Clover

Motion to strike out

The State vs S. Cohen Lopez — Cases Nos 124 & 125

Demurrer

And the Circuit Attorney who prosecutes for the State in this behalf as to the said plea of the said S. Cohen Lopez by him secondly above pleaded saith that the same and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law to bar or preclude the State from prosecuting the said indictment against him the said S. Cohen Lopez, and that the State is not bound by the law to answer the same and his the Circuit Attorney is ready to verify — wherefore for want of a sufficient plea in this behalf he the said Circuit Attorney for the State prays judgment, and that the said S. Cohen Lopez may be convicted of the premises in the said indictment specified.

H. A. Clover for Circuit Attorney.

15 The State of Mo. } Case No 124
vs } Case No 125
S. Cohen Lopez

Motion to Strike out

The State by its Attorney moves the Court to strike out the second special plea in bar filed by the defendant in the case for the reason that the same contains irrelevant improper and redundant matter, that said plea is intricate involved and obscure. and states matters which cannot be properly stated in said plea and the State cannot and ought not to be compelled to take issue as to such matter. Clover for State.

Rejoinder to Demurrer

State } St. Louis Criminal Court
vs } March term 1853
Lopez

And the said S. Cohen Lopez saith that his said secondly plea by him above pleaded and the matters therein contained in manner and form as the same are above pleaded set forth are sufficient in law to bar & preclude the said State from prosecuting the said indictment against him the said S. Cohen Lopez. and the said S. Cohen Lopez is ready to verify and prove the same as the said Court here shall direct and award. wherefore inasmuch as the said Circuit Attorney for the said State hath not answered the said plea nor hitherto in any manner denied the same the said S. Cohen Lopez prays judgment and that by the Court here he may be dismissed and discharged from the said premises in the said indictment specified.

Geo. W. Cline
Lackland & Jamison

Saturday 2d April 1853

16 Now at this day come again the parties aforesaid and the Court here being now fully advised of and concerning the premises. therefore it is considered by the Court that the two motions filed herein by the Circuit Attorney to have the second plea of the said defendant stricken out be overruled, and that the demurrer to the said second plea be sustained.

Thursday 7th April 1853.

Now at this day comes the Circuit Attorney who prosecutes for the State, and the said defendant being brought into Court: thereupon come A. D. Pomeroy and Stephen Polite two good and lawful men who being duly elected tried and sworn the traverse between the parties aforesaid well and truly to try: thereupon the Circuit Attorney files a replication to the fourth special plea of the said defendant, and for the trial thereof puts himself upon the Country, and the said defendant doth the like: Whereupon the two Jurors aforesaid are by order of Court re-sworn well and truly to try the traverse between the parties aforesaid, and thereupon come also the following named Jurors to-wit: C. L. Palmer, Jonas Brown, Julius Morifse, John J. Bergoff, John H. Evers, Wm. Stonps, Francis Bechler, Nicholas Lebrum, Bernard Egbers and Chas. Mantz, ten good and lawful men, who being duly elected tried and sworn the traverse between the parties aforesaid well and truly to try, are added to the panel of two Jurors sworn as aforesaid making twelve good and lawful men: thereupon the trial progressed as well on the general issue, as on the issue joined on the fourth plea as aforesaid, but not being concluded at the hour of adjournment, further proceedings herein are laid over until to morrow morning

Jury

17

which replication filed by Circuit Attorney is as follows. to-wit:

Replication to 2th plea

The State of Missouri } In the St. Louis Criminal Court
March term 1853.
vs } Embezzlement 2 Cases
S. Cohen Lopez

And the Circuit Attorney who for the said State prosecutes in this behalf says that the said State ought not to be barred from prosecuting the said indictment because he saith that the said offences named in the indictment is not the one and the same embezzlement for which the said defendant was heretofore indicted, and plead guilty as stated in the said plea of the said defendant, but is another and different embezzlement from that for which the said defendant was heretofore indicted and plead guilty, in manner and form as the said S. Cohen Lopez hath above in his said plea alleged. and this the said Attorney prays may be enquired of by the Country.

K. A. Clover Circuit Attorney

Friday 8th April 1853.

Now again come the parties as aforesaid and also the Jurors as aforesaid. and after some further progress in the trial of the cause. the Court adjourned till nine o'clock to-morrow morning.

Saturday 9th April 1853

Now again come the parties as aforesaid and also the Jurors as aforesaid, and after hearing all the evidence in the cause. and the arguments of Counsel the Jurors aforesaid return the following Verdict "We the Jurors find

(Verdict.)

"that indictment No. 124 is not the same and identical
"charged in indictment No. 54. Chas L. Palmer foreman
"St. Louis April 9th 1853. We the Jurors find the defend
"-ant guilty of the embezzlement of the sum of Eight Dol=
"lars and twelve cents in money and assess punishment
"to imprisonment in County Jail for the full term of one
"year. Chas L. Palmer foreman. St. Louis April 9th.
"1853." — thereupon the said defendant is remanded to Jail.

Monday 11th April 1853

Motions for a new trial and in arrest of judgment. filed.
Which are as follows. to-wit:

State vs Lopez — St. Louis Criminal Court
March term 1853

Motion for a New trial

Defendant moves the Court to set aside the verdict rendered in this cause & grant a new trial for the following reasons.

1 Because the Court erred in allowing the States Attorney to file his replication to the 4th plea after two of the Jurors had been sworn in the cause, thus altering the issue after a part of the Jury had been emphanelled.

2 Because the Court erred in allowing the said two Jurors to be resworn after the filing of the replication by the State.

3. Because the Court erred in deciding that defend=ant should commence with his evidence first and prove the matter in bar as set up in his 4th plea, before the State had shown him guilty of any offence or had introduced any ~~evidence~~ testimony at all against him.

4 Because the Court admitted improper and illegal testimony for the State, and rejected proper and legal testimony offered for Deft.

17

which replication filed by Circuit Attorney is as follows. to-wit:

Replication to 2d plea

The State of Missouri } In the St. Louis Criminal Court
March term 1853.
vs } Embezzlement 2 Cases
S. Cohen Lopez

And the Circuit Attorney who for the said State prosecutes in this behalf says that the said State ought not to be barred from prosecuting the said indictment because he saith that the said offences named in the indictment is not the one and the same embezzlement for which the said defendant was heretofore indicted, and plead guilty as stated in the said plea of the said defendant, but is another and different embezzlement from that for which the said defendant was heretofore indicted and plead guilty, in manner and form as the said S. Cohen Lopez hath above in his said plea alleged. and this the said Attorney prays may be enquired of by the Country.

H. A. Clover Circuit Attorney

Friday 8th April 1853.

Now again come the parties as aforesaid and also the Jurors as aforesaid. and after some further progress in the trial of the cause. the Court adjourned till nine o'clock to-morrow morning.

Saturday 9th April 1853

Now again come the parties as aforesaid and also the Jurors as aforesaid. and after hearing all the evidence in the cause. and the arguments of Counsel the Jurors aforesaid return the following Verdict "We the Jurors find

Verdict.

"that indictment No. 124 is not the same and identical
"charged in indictment No. 54. Chas L. Palmer foreman
"St. Louis April 9th 1853. We the Jurors find the defend-
"-ant guilty of the embezzlement of the sum of Eight Dol-
"lars and twelve cents in money and assess punishment
"to imprisonment in County Jail for the full term of one
"year. Chas L. Palmer foreman. St. Louis April 9th.
"1853." – thereupon the said defendant is remanded to Jail.

Monday 11th April 1853

Motions for a new trial and in arrest of judgment. filed. Which are as follows. to-wit:

State vs Lopez — St. Louis Criminal Court
March term 1853

Motion for a New trial

Defendant moves the Court to set aside the verdict rendered in this cause & grant a new trial for the following reasons.

1 Because the Court erred in allowing the States Attorney to file his replication to the 4th plea after two of the Jurors had been sworn in the cause, thus altering the issue after a part of the Jury had been empannuled.

2 Because the Court erred in allowing the said two Jurors to be resworn after the filing of the replication by the State.

3. Because the Court erred in deciding that Defendant should commence with his evidence first and prove the matter in bar as set up in his 4th plea, before the State had shown him guilty of any offence or had introduced any ~~[illegible]~~ testimony at all. against him.

4 Because the Court admitted improper and illegal testimony for the State, and rejected proper and legal testimony offered for Deft.

19

5 Because the Court gave erroneous and illegal instructions for the State and on the Courts own motion calculated to prejudice the defendant & mislead the Jury. and refused legal and proper instructions asked for by defendant.

6 Because the verdict of the Jury is informal insufficient and void - in that from the verdict rendered. the Court cannot certainly tell how the jury found the material issues submitted to them.

7 Because the verdict is against the law.

8 Because the verdict is against the evidence.

9 Because the verdict is against the law and the evidence. and against the weight of evidence.

Lockland and Cline Attys for Deft.

Motin in Arrest of Judgt. State vs Lopez } Criminal Court, March term 1853.

Defendant moves the Court to arrest the judgment in this cause for the following reasons.

1 Because the indictment is so insufficient by reason of its vague and general allegations that it does not inform the defendant of the charge therein contained so as to enable him properly to prepare his defence.

2 Because the discription of the things alleged in the indictment to have been embezzled: (ie) "Money and promissory notes commonly bank notes) is insufficient.

3 Because the offence of embezzlement is a statutory larceny. and the promissory notes and money or coin ought to have been specifically described as in larceny.

4 Because the indictment fails to allege that

that the promissory notes and money were of any value.

5 Because the indictment fails to allege from whom the money & promissory notes were collected by defendant

6 Because the indictment does not conclude with the words "against the peace and dignity of the state" as required by the Constitution of this State

7th Because the Indictment is otherwise insufficient, informal and void.

Lackland & Lane Attys for Dft.

Thursday 14th April 1853

The defendants motions for a new trial and in arrest of Judgment being submitted to the Court and by the Court fully understood, therefore it is considered by the Court that both said motions be overruled.

Friday, 15th april, 1853

Judgment

Now at this day the said defendant being brought into Court to receive his sentence in pursuance of the verdict rendered against him, therefore it is considered by the Court that the said defendant for his offence of Embezzlement aforesaid be confined in the Jail of St. Louis County for the space of One year, that he pay the costs of this prosecution, and stand committed till this sentence be complied with: thereupon the said defendant files his Bill of Exceptions and prays an appeal to the Supreme Court, from the judgment herein rendered, and the Court here being of opinion that there is probable cause for said appeal grants the same and

221

orders that it operates as a stay of the proceedings herein. Which Bill of Exceptions is as follows, to-wit:

+

Bill of Exceptions

State
vs
Lopez

Be it remembered that on the — day of March, 1853 the Court sustained the demurrer to the second plea of Deft. the same having been previously argued & held under advisement to which judgment of the Court in sustaining the demurrer to said 2nd plea the Deft then and there excepted.

And afterwards to-wit on the 7 day of April 1853 this Cause was called for trial by the Court. when the State & Deft. announced that they were ready, whereupon the Court ordered a jury to be called. In pursuance to which order the County Marshal called four Jurors two of which four were challenged and the remaining two taken and sworn to try the issue in the Cause. at this point of time the Circuit attorney handed to the Clerk a paper, which upon inspection by deft was found to be the replication to the 4th plea. The deft objected to the Courts allowing the replication to be filed upon the grounds that it altered the issue to be tried after a part of the jury had been empanneled and that said replication was not filed in time. that it came too late, after the State had announced itself ready for trial and a part of the jury had been empanneled. but the Court overruled the objections and allowed the replication to be filed, to which deft then and there excepted. The Court then ordered that the two jurors which had been empanneled to be resworn to try the issues as made by the replication and the plea of not guilty (to all which deft then objected) but the Court overruled his his objection and

22 the said two jurors were reworn to try said issues to all which Deft then and there excepted.

After the jury was empanneled the state moved the Court to order the Deft to proceed with his defence to which deft objected and the Court sustained the objection and decided that the state should commence and prove the charges alleged in the indictment to which the state then and there excepted. The state then in pursuance of said decision called to the stand as a witness Wm North. The Deft here moved the Court to instruct the witness North that it was incompetent for him to speak of any matter of embezzlement prior to 31 July 1852 and while this motion was pending the Court adjourned to the 8 apl 1853. And on the said 8 apl after Court was opened. His Honor the Judge announced that he would not hold to the decision made by the Court last above mentioned on the previous day. and then decided the law to be that the Deft should first commence and prove the matter set up as a defence in his said 4th plea. before the State proved the allegations in the indictment to which the deft then excepted. The deft then read in evidence the Indictment No 54. Copias and entries showing deft arrangement plea of guilty and sentence as follows.

State of Missouri. } ss.
Saint Louis County } Saint Louis Criminal Court.
July term, 1852

The Grand Jurors of the State of Missouri within and for the body of the County of Saint Louis. now here in Court. duly empanneled, sworn and charged upon their oath. present - That Solomon Cohen Lopez, alias S. Cohen Lopez, late of Saint Louis in Saint Louis County

23 aforesaid, on the thirteenth day of July in the year of our Lord one thousand eight hundred and fifty two at the City of Saint Louis in Saint Louis County aforesaid. with force and arms certain promissory notes called bank notes, to a large amount to wit, fifty, ten dollar notes, each of the value of ten dollars; twenty five, twenty dollar notes each of the value of twenty dollars; ten, fifty dollar notes, each of the value of fifty dollars; & five, hundred dollar ~~notes~~ bills, each of the value of one hundred dollars; & certain money to a large amount to wit: five hundred dollars, all of the property of William North & William P. Scott of the firm trading under the style of North & Scott: then & there being found feloniously did steal take & carry away, against the peace & dignity of the State.

And the Grand Jurors aforesaid upon their oath aforesaid do further present that Solomon Cohen Lopez alias S. Cohen Lopez late of Saint Louis County, being above the age of sixteen years, on the thirteenth day of July one thousand eight hundred and fifty two, at the City of St. Louis in said County of Saint Louis, was employed in the capacity of clerk and servant of William North and William P. Scott members composing the firm of North & Scott, and as such clerk & servant was entrusted to receive & did receive moneys, promissory notes, checks, & promissory notes commonly called bank notes from various persons & copartnerships indebted unto the said William North & William P. Scott, forming the firm of North & Scott, upon various accounts and demands: and being so employed and entrusted as aforesaid, he the said Solomon Cohen Lopez alias S. Cohen

24 Lopez, by virtue of said employment did then and there receive and take into his possession, as such clerk & servant of William North & William P. Scott forming the said copartnership & firm of North & Scott, certain promissory notes commonly called bank notes to a large amount to wit five hundred dollars, and certain money to a large amount to wit five hundred dollars, for & on account of said William North and William P. Scott, composing the firm of North & Scott as aforesaid his said masters and employers, and the said Solomon Cohen Lopez alias S. Cohen Lopez, on the day & year & at the place last aforesaid, did feloniously take, make away & secrete, and feloniously did embezzle & convert to his own use, the said promissory notes commonly called bank notes, and the said money, to the amounts aforesaid without the assent of the said William North & William P. Scott, composing the said firm of North & Scott and without the assent of either of the said members of said firm of North & Scott, his said masters & employers which said promissory notes commonly called bank notes money & effects & property, had then & there come into the possession of the said Solomon Cohen Lopez alias S. Cohen Lopez, by virtue of his said employment as clerk & servant of said William North & William P. Scott composing said firm of North & Scott, to the great damage of the said William North & William P. Scott: and against the peace & dignity of the State.

Dal. R. Lackland Circuit Attorney

"Endorsed" "A true Bill, Hiram Shaw Foreman".
"Witnesses" "North & Scott, Tooley, Farrington"

County of Saint Louis, SS.

The State of Missouri. To the Marshal of St. Louis County

25 Greeting; We command you to take Solomon Cohen Lopez if he be found in your bailiwick, and safely keep. So that you have his body before the Honorable Judge of the Saint Louis Criminal Court now in session at the City of Saint Louis, within and for the County of Saint Louis, forthwith, to answer an indictment found against him by the Grand Inquest of the State of Missouri, for the body of the County of Saint Louis for Larceny & Embezzlement contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State: and have you then and there this Writ, with your return thereon how you execute the same (S. E. & L.) Witness, Richard J. Howard, Clerk of our said Court, with the seal thereof hereto affixed, at office, in the City of St. Louis, this 31st day of July in the year of our Lord, eighteen hundred and fifty two. R. J. Howard Clerk

Executed by having the within named person in St. Louis County Jail. D. J. McCullough Marshal

Thursday 5th August 1852

Now at this day comes as well the Circuit Attorney who prosecutes for the State as the said defendant in his own proper person, who waives the reading of the indictment in this cause and files his plea of not guilty to the same and for trial puts himself upon the Country and the Circuit Attorney doth the like.

Friday 13th August 1852

It is ordered by the Court that this cause be continued till the next term of this Court

Monday 4th October 1852

Now at this day comes the said defendant in custody of the

Marshal and by leave of Court here withdraws his plea of not guilty heretofore pleaded by him, and says he is guilty of Embezzlement as charged in the indictment. and submits his sentence to the Court. therefore it is considered by the Court that the said defendant for his offence of Embezzlement aforesaid be imprisoned in the Penitentiary of this State for the term of two years. that he pay the costs of this prosecution. and stand committed till this sentence be complied with.

The deft then offered to read in evidence the following pardon to which State objected on the ground of irrelevancy but the Court overruled the objection and allowed the pardon to be read in evidence

The State of Missouri: To all who shall see these Presents. Greeting: Know Ye. that. By virtue of authority in me vested by law. and for good and sufficient reasons appearing. I, Austin A. King, Governor of the State of Missouri. do hereby pardon S. Cohen Lopez who was. on the — day of — A. D. 1852, by a judgment of the Criminal Court of Saint Louis County committed to the Penitentiary of said State, for the space of Eight years, for the crime of Embezzlement sentenced under four Indictments. for two years. each And I do hereby restore and entitle the said S. Cohen Lopez to all the rights. privileges. and immunities. which. by law. attach and result from the operation of these presents. (L. S.) In testimony whereof, I have hereunto set my hand, and caused to be affixed the Great Seal of the State of Missouri: Done at the City of Jefferson. this twenty second day of November in the year of our Lord one thousand Eight Hundred and fifty two. of the Independence of the United States

the seventy seventh and of the State of Missouri the thirty third.
By the Governor: Austin A. King.
Ephraim B. Ewing, Secretary of State.
to which state then and there excepted. Deft swore Mr Eager Deputy clk of this court. who stated deft was the same ~~person~~ man that was arraigned on said ten indictments. plead guilty to the four & recd judgt thereon And the state admitted that deft was the same man named in the pardon. The deft here rested.

The state then introduced again the Witness North and deft renewed his motion for the Court to instruct the wit. that it was incompetent for him to speak of any act of embezzlement of money checks promissory notes or promissory notes commonly called bank notes committed prior to 31 July 1852 the date on which the ten previous indictments against deft were returned in this Court. For the following reason that the State entered into an agreement with deft that if the deft would plead guilty to four of said ten indictments the state would nol pros the remaining six indictments & not further prosecute him ~~further~~ for said other embezzlements. that deft had stood up to & carried out his portion of the agreement and that the state by reason of her said agreement was precluded & could not further prosecute him for any embezzlement committed prior to 31 July 1852 of which he could have been legally convicted under any one of the ten indictments returned into this Court on that date but the Court decided against defts motion and allowed the Witness North to testify to matters tending to show

28 an embezzlement on the 10 July 1852 to all which deft then and there excepted.

The Witness North then stated that he was a merchant doing business on main st in the City & County of St Louis prior to 1 Decer 51 - and that at this date he entered into copartnership with Wm P. Scott who was still his partner. That Deft was his book Keeper before the partnership and was the book Keeper after the formation of the copartnership until his arrest some time between the 10 & 31 July 1852 as such book Keeper it was Defts duty - receive & pay out money for the firm and make the proper entries thereof in the books of the firm kept by him.

The Wit. was here shown the receipted acount marked "A". Mess O. Bennett & Co

1852 To North & Scott.

April	14	For Mdse		16.00
	26	" "		16.00
	29	" "		16.00
May	19	" "		4.50
	20	" "		10.00
	25	" "		46.25
	27	" "		46.25
		Cr.		$155.00
May	24	By Mdse	30.00	
June	7	" "	16.88	46.88
		July 10/52 Recd Payment		$108.12

North & Scott

"A" Jas S. Cohen Lopez

& stated this account is for goods for goods sold by North & Scott to Bennett & Co. the balance in favor of North & Scott as shown by it is 108 dollars it is receipted.

29 The account and receipt thereon written are in the hand writing of deft his signature is signed to the recipt. No entry was made by deft on any book or books in our house showing he had received this money And that he had never given his assent to deft to con=vert this money to his own use if he had done so. That he did not know the bill shown had been paid until to=wards the last of August and that he was not before the grand Jury which found the ten inments. It was admitted by deft that he was over 16 yrs of age. When I first became acquainted with the existence of this receipt deft had been arrested and was in jail. I learned the account had been paid from Mr Fisk of the firm of O. Bennett & Co in a conversation after he had been arrested. I was absent from the City at the time Lopez was arrested. and did not know of this receipt having passed until after my return and until the latter part of August 1852. Cross Examined.

Stated the Gover had committed a great outrage in parding deft. That if he had stated. if he had been at home at the time the embezzlement was ascertained he would not have troubled the law with defts case- I dont know what amount of money the firm of North & Scott paid for his rearrest after his pardon. Deft. had never denied the receipt of the amount of this bill nor_ he been called upon to account for the same. An officer was sent to St. Charles to arrest him. one of our clerks accompanied the officer. I never made any offer to intercede in defts behalf on condition that defts friend_ would refund the money taken.

The State then introduced William P. Scott who testified that he was a member of the firm of North & Scott and that deft was the book Keeper, cashier &c of their firm from its date & that it dated from 1st Decer 1851. and on being shown the the account & receipt above set out stated it was all in the hand writing of deft that he never assented to the defendants converting the same to his own use. That That he was before the grand Jury at the July term and testified. did not testify in regard the bill collected by Deft of Barnett because at that time he did not know the fact the fact became known to him about the last of August 1852. as to all inquiries and evidence touching the proceedings and the testimony of the Wit in grand Jury at July term 52 deft objected the court overruled the objection & deft excepted at the time. My first name is Wm. Merchant. wholesale dealer in boots & shoes my partner's Wm North, Co partnership style is North and Scott. I know the deft. he has been in our employ. his commencement of employ took place in 1st December 1851. He was there until the 24 of July 1852 one or two days earlier or later, his principal business was that of a book Keeper & Cashier his duties were those of a book Keeper. Correct account of the books. Correct account of the Cash. receipts and disbursements. the collections of bills was sometimes done by one sometimes by another, the Cashier has the general superintendance of the collections also.- about the 24 July 1852 Mr North was East. he left sometime between 10 or 15 June previous early part of June, he returned early in the month of August. He was discharged

31

from our employ, he was arrested. he was arrested in the Counting Room of North & Scott. —

This acct stood on our books against the firm of Oliver Bennett & Co; it was about the time of the expiration of the Xmas, that we usually present our semi Annual accts against our customers. They were indebted to us in the neighborhood of $110 — $108 12 some cents, the acct had been made out and received by the deft, and never entered on our books. Some time afterwards Mr North had returned from the East about the middle of August, that I first learned that this account had been presented to Ol. Bennett & Co. & that a receipt. I never received the money which is here receipted for seeing the receipt. The books do not show the receipt. The Cash book should have shown the receipt and the Ledger should have shown a balance against the firm. I have examined the Cash book, and it does not show in any place the receipt of this money. What was the duty of the Deft being in your employ with reference to monies received by him on account of the firm? His duty was to receive moneys due from the firm and to place it on the books crediting the parties who had paid it with the receipt. As a member of the firm I never apprehended any conversion by the deft of the check or of the money received by Lopez in part of the account against O Bennett & Co. I had no knowledge of this claim of Bennett & Co having been paid until between the 10 & 20 August when it was ascertained that the

account had been settled — As well as I recollect Lopez was arrested on the 26 July, 1852. It is admitted that Deft was in jail from before the 31 July until — I did not testify before any grand jury prior to the finding of the present indictment respecting the present embezzlement of which I testified. Mr North was in Boston or New York at the time of the finding of the present indictment. It was about 10 or 15 days (2 weeks after I had testified before the Grand jury which found the first indictment that I discovered this other Embezzlement. After I had discovered the payment of the Acct of O. Bennett & Co and the payment received by the Deft. I did not go again go before that grand jury to testify respecting this transaction I here testify to.

Cross Exd

Wit refused to state how much his firm had paid for the rearrest of deft after the pardon. whereupon the State admitted the amt was one thousand dollars which admission was accepted by deft. The wit. then stated he would give the amount if the Court decided he must whereupon the counsel for the Deft stated the amount was admitted which admission — accepted by deft. Witness stated he did not know how many acts of embezzlement he testified to before the grand jury at the July term. nor could he tell how many indictments were found, that Mr Lackland had told him there ten found. he was then shown the ten indictments & asked if they contained the charges testified to by him. Wit answered he supposed so. Deft then offered to read all ten of the indictments to the Jury

and all entries in the records of the Court showing the disposition made thereof to which deft. objected on ground of irrelevance. but the Court overruled the objection & State excepted at the time.

State of Missouri. } SS. Saint Louis Criminal
Saint Louis County } Court. — term 18. —

No 56

The Grand Jurors of the State of Missouri within and for the body of the County of Saint Louis. now here in Court. duly empanneled, sworn and charged upon their oath, present that Solomon Cohen Lopez, alias S Cohen Lopez late of Saint Louis in Saint Louis County aforesaid, on the twenty fourth day of July in the year of our Lord one thousand eight hundred and fifty two at the City of St. Louis in Saint Louis County aforesaid, with force and arms certain promissory notes called bank notes to a large amount to-wit; thirty, ten dollar notes, each of value of ten dollars, fifteen, twenty dollar notes, each, of the value of twenty dollars, & ten, fifty dollar notes, each, of the value of fifty dollars, and certain money to a large amount to-wit, three hundred dollars, all of the property of William North and William P. Scott of the firm trading under the style of North and Scott, then and there being found feloniously did steal take and carry away against the peace and dignity of the State.

And the Grand Jurors aforesaid upon their oaths aforesaid do further present that Solomon Cohen Lopez alias S. Cohen Lopez late of St. Louis County being above the age of sixteen years, on the twenty fourth day of July One thousand Eight hundred and fifty two at the City of St Louis in said County of Saint Louis was employed in the capacity of clerk and servant of William North and William P. Scott and as such clerk & servant was entrusted to receive and did receive moneys, promissory

notes, checks and promissory notes commonly called bank notes from various persons and copartnerships indebted unto the said William North and William P. Scott forming the firm of North & Scott upon various accounts and demands, and being so employed and intrusted as aforesaid, he the said Solomon Cohen Lopez, by virtue of said employment did then and there receive and take into his possession as such clerk and servant of William North and William P. Scott forming the said copartnership and firm of North and Scott, certain promissory notes commonly called bank notes to a large amount to wit, three hundred dollars, and certain money to a large amount, to wit three hundred dollars for and on account of said William North and William P. Scott composing the firm of North and Scott as aforesaid his said Masters and Employers, And the said Solomon Cohen Lopez alias S. Cohen Lopez on the day and year and at the place aforesaid, did feloniously take make away with and secrete and feloniously did embezzle and convert to his own use the said promissory notes commonly called bank notes and the said money to the amounts aforesaid, without the assent of said William North and William P. Scott composing the said firm of North and Scott, and without the assent of either of the said members of said firm of North and Scott, his said Masters and Employers which said promissory notes commonly called bank notes money and effects and property had then and there come into the possession of the said Solomon Cohen Lopez alias S. Cohen Lopez by virtue of his said employment as clerk and servant of said William North William P. Scott composing said firm of North and Scott to the great damage of the said William North and William P. Scott, and against ~~the peace and dignity of the State~~

35 the peace and dignity of the State

James R. Lackland Circuit Attorney

"Endorsed" A true Bill. Hiram Shaw Foreman. *

Witnesses. North & Scott. Tooley, Farrington

And it is hereby agreed that for the purpose of saving expence, labor & time that all the indictments are the same as the one set out except the following mentioned differences, The amounts of money, chicks promissory notes alleged to have been embezzled are not the same in all. The dates alleged in the body of the indictments are not the same, and in some two or three the money &c alleged to have been embezzled is discribed as the property of Wm North. And it is agreed that deft pleaded guilty to four of said ten indictments Nos. 53. 54. 55. 56. & received sentence thereon of two years imprisonment on each in the State Penitentiary and that a nol pros was entered on the remaining six, and it agreed that either pary may produce and read as a part of the record in this cause any of the indictments & proceeding, which by reason of this agreement are not copied herein Wit said Deft have never denied the receipt of the amount of this bill nor had he been called upon to account for the amount as he knew.

The State the introduced Mr — Curry who testified that he was a clerk for North & S & knew deft. that after deft pleaded guilty to the indictments mentioned he had a conversation with him in the jail in regard to the bill collected by him of Bennett & Co & other bills — The State then proposed to go into the conversation or confession of the deft. but deft objected on the ground that this conversation was had under the belief that the state would not & could not further prosecute him for any other embezzlements from North & Scott. That he was under the hope that by reason of the agreement of the State

that the State was precluded – and to prove that the defendant was under this influence the deft examined the said Wit Dunn. who testified that deft said at that conversation he would tell all about it now as the state could not further prosecute him as the whole matter was at an end – And at this point of time the Deft. by his Counsel called upon His Honor the Judge of this Court to state his Knowledge touching the agreement aforesaid. Whereupon his Honor stated that it was agreed by & between the state & deft that if Deft. would plead guilty to four of the ten indictments found at said July term the State would not further prosecute him upon the rest. and that the deft had stood up to his portion of the agreement & pleaded guilty to the said four. and the rest had been nol prossed. and that the Court had acquiesced in and consented to said agreement That the Court was no party to the agreement. That one of the reasons why this Court had sustained the demurrer to defts 2nd plea was because it was alleged in said plea that the Court was a party to the agreement. That the Court only acquiesced in the agreement and permitted it & rec'd the defts plea of guilty & permitted the state to nol pros the rest – upon this showing Deft. moved the Court to exclude the conversation on the ground that it was not a voluntary confession in the law. The Court sustained the objection & state excepted.

The State then introduced Mr William B. Garritt who stated he was a member of the firm of Bennett & Co that he knew deft. on being shown the above bill said I paid the amt of the balance say 108$ to deft on 10 July 1852 in St. Louis County. gave him a check on Page & Bacon for 100$. Deft objected to witt speaking

37 in regard to any check upon the ground that he was not charged with embezzling checks, but the Court over=ruled the objection & deft then excepted & the wit proceed and gave him the 8$ in money cant say whether the 8$ were paid in coin or bank notes, they were paid in one or the other. I settled with Mr Lopez as the clerk of North & Scott. I knew him as as the book keeper of North & Scott. I paid the money on a/c of O Bennett & Co for North & Scott.

Cross Exd

I think I can find the check that I gave deft will try to do so & will send it to the Court. State here rested.

The deft introduced as a wit Mr McAdams who testified, I am book keeper for Tevis Lyon & Tevis I know deft, on the 5 day of July 1852 I loaned deft for the house of North & Scott 40$, and on the eighth of same month I loaned him for North & S. 60$. both amounts in currency on the 10 day of the same month deft paid me for North & S. 100$ in currency but cant tell whether it was in a currency check or in bank notes. when I loaned the money I acted for our firm, and loaned it to North & S and rec'd the 100$ as coming from North & S. our house is on the same street & block with North & S. and we were in the habit of loaning each o ther money. I acting for our firm had frequently loaned money to ~~the~~ North & Scott acting through Deft. our house at the date 10 July 52 had an a/c at Page Bacons they were our bankers. our house made a deposit on that day of currency & specie funds. but have no means of telling whether a currency check for one hundred dol=lars was deposited by our firm on that day - I got these dates from my private memorandum book in which I enter loans to our neighboring houses and times when returned.

Cross Ex by state

The figure 5. before the 40¢ shews the time it was loaned & the figure 8 before the 60¢ shows the day of July that the amt was loaned & the figures 10 after these amts show the date they were returned.

The Deft then introduced Mr Isaac Wyman who testified I am paying teller at banking house of Page & Bacon. and was such on 10 July 1852. Deft hen produced the following check

100.00 cy St. Louis July 10. 1852

Banking House of Page & Bacon pay to North & Scott or bearer one hundred dollars.

Oliver Bennett & Co

Which was admitted by the state to be the same one which was given to Deft by Bennett & Co in payment of said balance on the above account. which said check deft then read in evidence. Mr Wyman further testified that Judging from their general way of doing business that no money had been paid across the Counter upon that check. He could not say positively that the check had not been paid. when he paid checks he placed them on a file for that purpose. that this check had not been pierced with the file as checked are pierced that are paid. from this fact he beleived the check here shown had never been paid but had been deposited. That Tevis Sons & Tevis had at that time an account & deposited with Page & Bacon and that he did not believe deft had. And this was all the evidence in the cause.

The Court then gave the following instructions of its own motion.

Instructions given by Court

No 1. If the jury believe from the evidence that the grand jury found the indictment No 54 against the deft

39
of its own motion

and returned the same into this Court on the 31 July 1852 alleging that defendant as clerk or servant of William North and William O. Scott composing the firm of North & Scott. embezzled and converted to his own use money checks and promisory notes. and promisory notes commonly called bank notes received of various persons & Copartnerships for Con account of said North & Scott. then the defendant could have been convicted under said Indictment No 54 by proof of the same facts which would authorize a conviction under the indictment in this cause and in such case the law which is in favor of innocence presumes that the offences are one and the same. and if the jury believe Deft. pleaded guilty to and received sentence and pardon for the offence contained in the indictment No 54 you ought to acquit: But if the jury believe from the evidence that the offence charged in the Indict No 54 is not one and the same offence charged in the indictment upon which the Deft is being tried and that the state has by affirmative proof established the fact beyond a reasonably doubt in that case you will find for the state upon the issue upon the plea in Bar.

No 2 If you find the Deft Guilty as charged in the Ind and find that money embezzled was in amount under that of ten Dollars you will affix the punishment to imprisonment in the County Jail for a term not more than one year or by a fine not more than five hundred Dollars, or by both such fine & imprisonment

No 3 Proof that Deft embezzled a check for the payment of currency does not support the allegation for embezzlement of money or promissory notes.

to the giving of all which deft then and there

Instructions given by Court at instance of the State

excepted. — The Court then gave the following instructions asked for by State:

1. The Jury are instructed that they have two issues to pass upon. the first is upon the traverse to the special plea of the defendant and this the jury will first consider because if they decide such issue in favor of the defendant then it will be unnecessary for them to pass upon the issue joined by the general plea of not guilty. if however they find such issue in favor of the State they will proceed ~~further~~ further to decide whether the defendant is guilty or not guilty of the offence charged in the indictment.

No 2. The issue joined upon the special plea filed by the defendant and replication made by the State is whether the offences charged in the indictment, and the offences charged in the indictment stated in the plea of the defendant and designated as being numbered 54, is one and the same offence and felony or another and different offence and felony, and if the jury believe from the evidence that the offences are one and the same. then the Jury will find the issue in favor of the defendant. but if the jury believe from the evidence that the offence named in the indictment is another and different offence from that charged in indictment No 54 they will find the issue in favor of the State.

No 3. If the Jury should find the last issue in favor of the State. they will proceed to consider the other issue and if they believe from the evidence that the defendant was the Clerk of the copartnership firm of North and Scott, and that he was over the age of sixteen years, and further that while he was and

41 clerk, and at a time within three years next previous to the finding of the present indictment he did receive money or effects belonging to the firm of Worth and Scott for and on their account, and that he received the same by virtue of his employment as such clerk, and that by virtue of his employment as such clerk it became his duty to enter the receipt of such money on the books of the concern, and if the Jury further believe that the defendant wilfully omitted to make such entry of the receipt of the money and that he never accounted with his employers for such money then these facts are presumptive evidence of his having embezzled the money.— to the giving of all which deft excepted at the time. The State then offered the following instructions.

No 4 Instruction asked by state & refused

And if the jury believe that the defendant did embezzle or convert to his own use money or effects of the value of ten dollars or upwards and you find him guilty of the offence as charged in the indictment then you will assess the punishment at imprisonment in the penitentiary for a term not less than two years or more than five years.— which the Court refused and the state excepted.

Rejected

The Court then gave the following instructions for the deft.

Instructions asked for by deft and given

1. The jury must be satisfied beyond a rational doubt that defendant received money of Bennett & Co and embezzled the same money received before they can find him guilty in this cause.

2. If there be any material fact in this case which the State has endeavored to prove by circumstantial evidence. the evidence to warrant a conviction must exclude every other hypotheses than that which leads to the guilt of the prisoner.— To the giving

of which the State excepted. The Deft offered the following instructions which were refused.

Instructions asked for by deft and refused

Rejected

No 1 Although the jury may believe that Deft received money from Bennett & C and omitted to enter the same upon the books of North & Scott. this fact alone is not sufficient to authorize the jury to find Deft. guilty of embezzling the money so omitted to be entered.

Rejected

No 2 If the jury believe that Deft collected money or checks from Bennett & Co for North & Scott and that he paid debts due by North & Scott to Tevis Sons & Tevis for borrowed money with any portion of the money or checks so collected. in such case the law presumes that none of the money so collected of Bennett & Co. was embezzled by Deft and the jury ought to acquit.

Refused

No 3 If the jury believe from the evidence that the grand jury found the indictment No 54 against the Deft and returned the same into this Court on the 31 July 1852. alleging that defendant as clerk or servant of William North and William P. Scott composing the firm of North & Scott embezzled and converted to his own use money checks and promissory notes. and promissory notes commonly called bank notes received of various persons & copartnerships for & on account of said North & Scott. then the defendant could have been convicted under said Indictment No 54 by proof of the same facts which would authorize a conviction under the indictment in this cause. and in such case the law which is in favor of innocence presumes that the offences are one and the same. and if the jury believe deft pleaded guilty to and received sentence and pardon for the offence contained in the

43 indictment No 54 you ought to acquit.

No 4 If the evidence in this cause only shows that Defendant collected one hundred and eight dollars from Bennett & Co for North & Scott and that he omitted or failed to enter the same upon the books of North & Scott and that the deft. never denied the receipt of the money so collected and that he never was called upon to account for the same, these facts do not constitute embezzlement in the law and the jury ought to acquit.

Rejected

No 5 The question as to what particular acts of embezzlement witnesses testified to before the grand Jury is immaterial but the question is what acts of embezzlement did the defendant plead guilty to under the four indictments to which he pleaded guilty. and unless the state has proven to the satisfaction of the jury that the Deft. has not pleaded guilty to the offence in this indictment charged they ought to acquit.—

Rejected

to the refusal of which deft then and there excepted.

The jury then retired and returned the following verdict: We the Jurors find that indictment No 124 is not the same and identical charged in indictment No 54. Chas. L. Palmer

St. Louis April 9th 1853 foreman

We the Jurors find the defendant guilty of the embezzlement of the sum of Eight Dollars and twelve cents in money. and assess punishment to imprisonment in County Jail for the full term of one year. Chas. L. Palmer

St. Louis April 9th 1853. foreman

Afterwards on the — day of April 1853 the deft filed his motion for a new trial:

44 State vs Lopez } St. Louis Criminal Court March term 1853

Defendant moves the Court to set aside the verdict rendered in this cause & grant a new trial for the following reasons.

1 Because the Court erred in allowing the States Attorney to file his replication to the 4th plea after two of the Jurors had been sworn in the cause. thus altering the issue after a part of the Jury had been empanneled.

2. Because the court erred in allowing the said two Jurors to be resworn after the filing of the replication by the state.

3. Because the Court erred in deciding that Defendant should commence with his evidence & first and prove the matter in bar as set up in his 4th plea before the state had shown him guilty of any offence. or had introduced any testimony at all against him.

4 Because the Court admitted improper and illegal testimony for the state and rejected proper and legal testimony offered for Deft.

5 Because the Court gave erroneous and illegal instructions for the state and on the Courts own motion calculated to prejudice the defendant & mislead the jury. and refused legal and proper instructions asked for by defendant.

6 Because the verdict of the jury is informal insufficient and void. - in that from the verdict rendered the court cannot certainly tell how the jury found the material issues submitted to them.

7. Because the verdict is against the law.

8. Because the verdict is against the evidence.

9 Because the verdict is against the law and the evidence and against the weight of evidence.

Lackland and Cline
Attys for Dft.

The Court ~~on the~~ ~~4th~~ day of April 1853. the Court overruled the motion to set aside the verdict & grant a new trial & deft. then and there excepted –

The deft filed his motion in arrest of Judgt which is as follows:

State (Criminal Court
vs) March term 1853.
Lopez)

Defendant moves the Court to arrest the judgment in this cause for the following reasons.

1 Because the indictment is so insufficient by reason of its vague and general allegations that it does not informs the defendant of the charge therein contained so as to enable him properly to prepare his defence.

2 Because the description of the things alleged in the indictment to have been embezzled: (ie) money and promissory notes commonly called bank notes) is insufficient.

3 Because the offence of embezzlement is a Statutory larceny. and the promissory notes and money or coins ought to have been specifically described as in larceny

4 Because the indictment fails to allege that the promissory notes and money were of any value.

5 Because the indictment fails to allege from whom the money & promissory notes were collected by Defendant.

6. Because the indictment does not conclude with the words "against the peace and dignity of the State. as required by the Constitution of this state.

7th Because the Indictment is otherwise insuffi=

cient, informal and void.

Lackland & Cline Attys for Deft.

Which motion the Court on the — day of April 1853 overruled to which deft then & there excepted. The — passed sentence & judgt upon Deft from which deft. prayed an appeal which was granted and — prays the Court to sign and seal this his bill of exceptions which is done this — day of April 1853.

J. B. Colt. (Seal)

State of Missouri } ss.
County of St. Louis }

I, Richard A. Howard Clerk of the St. Louis Criminal Court, in and for said County, Certify the foregoing to be a full and complete Transcript of the Record and proceedings in the case of the State of Missouri against Solomon Cohen Lopez alias S. Cohen Lopez as the same remains in my office.

In testimony whereof, I hereto set my hand and affix the seal of said Court at office in the City of St. Louis this 22d day of June. A. D. 1853.

R. A. Howard
Clerk

47

Index

	Page
Grand Jury. Indictment.	1 to 3
Capias	3
Marshals Return. Plea in Bar	4 " 10
Pardon	10
Additional Plea in Bar	11 " 13
Similiter to 1st Plea	13
Motion to strike out, Demurrer.	14
Motion to strike out, Rejoinder to do	15
Jury	16
Replication to 4th Plea. Verdict.	17
Motion for a New Trial	18
Motion in arrest of Judgt	19
Judgment	20
Bill of Exceptions	21 " 46

36

36

October. T. 1853

State

vs

S. Cohen Lopez

Transcript

Filed 14th July 1853.
Wm. S. Glannin
Clerk.

Transcript $15.35
Certificate .50
$15.85

4

In the Supreme Court
October Term 1853.
Saturday November 5th 1853.

Now at this day comes Henry A Clover an Attorney of this Court, and as amicus curiae moves the Court to strike from the record and refuse permission to be filed of a certain paper filed in this Court purporting to be a brief in the case of The State of Missouri against S Cohen Lopez, being a case on the docket of this Court on appeal from the Criminal Court of Saint Louis County and which is endorsed "Cline and Thompson "and Lackland and Jamison Attorneys "for defendant," for the reason that said brief contains matter impertinent and irrelevant, reflective on the character and motives of Counsel, derogatory to the character and dignity of the Courts of the land, and disrespectful thereby to this Court and improper to be therein contained

H. A Clover
Amicus Curiae

36

The State of Mo.

vs.

J. Cohen Lopez.

Motion of Cir. Atty. to strike from file the Brief of appellants Counsel.

Filed 5th November 1853.
Wm S. Glanville
Clerk

State } Supreme Court Oct Term 1853
vs } Statement of the case.
Lopez }

At the January Term 1853 of the St Louis Criminal Court the defendant was indicted for the crime of embezzlement by the grand jury in and for the body of the County of St Louis The indictment preferred against him is is as follows

County of Saint Louis } Criminal Court January Term 1853
State of Missouri } The grand of the state of Missouri within and for the body of the County of Saint Louis now here in court duly impannelled sworn and charged upon their oath present that Solomon Cohen Lopez alias S Cohen Lopez late of Saint Louis in Saint Louis County aforesaid on the tenth day of July in the year one thousand eight hundred and fifty two at Saint Louis County aforesaid with force and arms was employed in the capacity of clerk and servant to William North and William P Scott then and there doing business together in copartnership under the name style and firm of North & Scott and as such clerk and servant was intrusted to receive and did then and there receive various sums of money from various persons for the use and benefit of said William North and William P Scott doing business together as aforesaid and being so employed and intrusted as aforesaid, the said Solomon Cohen Lopez alias S Cohen Lopez by virtue of said employment then and there did receive and take into his possession certain promissory notes commonly called bank notes to a large amount to wit one hundred and eight dollars and certain money to a large amount to wit one hundred and eight dollars for and on account of the said William North and William P Scott his said Masters and employers in that behalf, and that the said Solomon Cohen Lopez alias S Cohen Lopez on the day and year and at the place last aforesaid while he was clerk and servant as aforesaid fraudulently and

feloniously did take make way with and secrete and did then and there feloniously embezzle and convert to his own use without the assent of the said William Orth and William P Scott or either of them his said masters and employers in that behalf the said one hundred and eight dollars in promissory notes commonly called bank notes and the said one hundred and eight dollars in money of the property notes and effects and money of the said William Orth and William P Scott doing business together as copartners as aforesaid which said property notes effects and money then and there came into the possession of the said Solomon Cohen Lopez alias S. Cohen and under his care by virtue of his being such clerk and servant as aforesaid he the said Solomon Cohen Lopez alias S Cohen Lopez being then and there a person above the age of sixteen years to wit of the age of thirty years against the peace of the Statute and the statute in such case made and provided.

H A Clover Cr atty

On 26 July 1853 being brought into Court waived the reading of the indictment and entered his oral plea of not guilty.

On 14 March 1853 Deft by leave of the Court first had and obtained withdrew his oral plea of not guilty aforesaid and filed his plea of not guilty in writing and two special pleas in bar.

The second plea in bar sets up the following defence to wit that on the July Term of the Criminal Court for the year 1852 to wit on the 31 July 1852 the Grand Jurors of Saint Louis County duly found against the deft and returned into said Criminal Court ten indictments being numbered 48. 49. 50. 51. 52. 53 54 55 56 and 57. of said July Term

That in said indictments numbered 48. 53 and 56 the Deft was charged with having stolen and embezzled the money and promissory notes commonly called bank notes and property

and effects of a certain merchantile firm composed of Wm North & William P Scott which said money effects bank notes and property is alleged in said indictments to have been received by deft as the servant of said North & Scott of various persons and that in said indictments numbered 49. 50. 51. 52. 55. and 57 it was charged ~~in said~~ that deft state and embezzled the money promissory notes commonly called bank notes effects and property of William North to a large amount. That all said indictments are a part of the records of criminal and to taken as a part of said plea

That deft on 4 October 1852 made an agreement with the state to plead guilty to four ~~and~~ of said indictments upon condition that the state would nol pros ~~and dis~~ the remaining six and discharge him from the charges therein contained which agreement was accepted by ~~deft~~ the state and that deft accordingly pleaded guilty to said four indictments to wit Nos. 53, 54, 55 & 56 and the state ~~entered a~~ nol prosed the remaining six to wit Nos 48. 49. 50. 51. 52. & 57. all which was done by the state and deft by and with the advice and consent and acquiescence of the Court. and sentenced the deft to years imprisonment in the penitentiary for two years on each indictment making in all eight years.

That the governor of the state of Missouri had granted deft a full & unconditional pardon from the pedgments and sentences rendered upon the pleas of guilty of ersaid which pardon makes part of the said plea

That deft is the same person mentioned in said ten indictments pedgments and pardon and that one the offences ~~described~~ to which he pleaded guilty and for which he received pedgt and pardon is the same offence charged in the indictment in this case.

That ~~deft~~ as to the offences contained in the four indictments of ersaid to which he pleaded guilty & for which he received pedgment & pardon he has fully answered the

demands of the law. And that as to the offences charged charged in the six indictments not prossed he has been discharged by the agreement aforesaid and by reason thereof he could not be further prosecuted for any offence for which he might have be prosecuted upon any of said indictments without rendering the pardon nugatory or by disregarding the agreement aforesaid by which the state is precluded.

Which plea concluded with a prayer that the Court would compel the state to stand up to. and carry out in good faith said agreement and preserve the integrity of the state.

The 3rd plea was withdrawn.

On 17 March 1853 Deft by leave of the Court filed an ~~other~~ additional plea in bar which is denominated on the record as the 4th plea. This 4th plea is in the ordinary form of ~~a~~ former acquittal, or conviction. And states that said indictment No 54 of July Term 1852 contains and is for the same offence as the indictment in this case. And to said indictment No 54 he pleaded guilty & received pedgment and pardon makes the ~~pardon~~ indict pedgt & pardon part of the plea ~~as~~ with averments of identity of person and offence

On 19 March 1853 State filed a similiter to the first plea and two motions to have the second plea ~~stricken out~~ stricken out. ~~and also a demurrer to the second plea To which dem: deft filed a rejoinder~~ upon the ground ~~that~~ first that the same defence was set up in the 4th plea and second because it contains irrelevant improper and redundant matter.

And on same day last aforesaid ~~deft~~ State filed a demurrer to said 2nd plea. to which deft filed his rejoinder

On the 2 April 1853 the court overruled the motions to strike out but sustained the demurrer to

and to the judgment of the Court in sustaining the ~~dem~~ demurrer the deft then and then excepted.

16 p 7 Apl 1853 This cause was called by the Court and and the ~~deft~~ State & deft announced they were ready. Thereupon two jurors came to wit A D Pomeroy and Stephen Polite who were sworn to try the issues, Thereupon the Circuit files a replication to the 4th plea to which deft objected upon the grounds. 1st that it altered the issue after a portion of the jury had been impannelled. and second that it came to too late after the State had announced it was ready for trial. The Court overruled the objection and allowed the replication to be filed to which deft excepted at the time. After the filing of said replication the court ordered the said two jurors to reswom to try the issues ~~to which deft objected~~ made by the plea of not guilty and the replication. To all which deft objected but the Court over=ruled his objection to which deft objected

After the jury was impannelled the state moved the Court to compel deft to proceed with his defence by proving the facts alled in his 4th plea. To which deft objected and the Court sustained the objection & state excepted The state then called as a witness Wm North when the deft moved the court to instruct said that it was incompetent to speak of matter of embezzlement prior to 31 July 1852 the date of the finding of said ten indictments Pending this motion the Court adjourned to next day to wit Apl 8, 1853 when ~~his Honor~~ the ~~[illegible]~~ Court announced that he would not hold to the decision made by the Court the day previous and then decided the law to be that deft should first commence & prove the defence set up in the 4th plea before the state proved the allegations in the indict ment. To all which deft then and there excepted.

Deft then read in evidence said indictment No 54 and the entries on the record shewing the plea of guilty thereto and judgment sentence. ~~and~~ ~~[illegible]~~ the pardon of said offence

State objected to reading pardon for irrelevancy overruled & excepted

Deft then introduced as a wit Mr Saml Eager Deputy Clerk of the Criminal who proved that deft was the same person that was arraigned upon & pleaded guilty to said ten indictments including said No 54 and recd judgment therefor And the state admitted he was the person mentioned in the pardon.

Here deft rested his case

The state then introduced again the wit Wm North & deft renewed his motion for the Court to instruct that it was incompetent for him to speak of any matter of embezzlement of money checks promissory notes or promissory notes commonly called Bank notes committed prior to said 31 July 1852 Because the state was precluded by said agreement The Court overruled the objection & deft then & there excepted

See the testimony of the witnesses as preserved in the bill of exceptions

The wit Wm P Scott stated on cross examination that he was informed these ten indictments found upon his testimony before the grand Jury at July Term 1852. He was then shown the said ten indictments and asked if they ~~of~~ described the ~~def~~ offences about which he had testified ~~to~~ before grand Jury He replied he supposed so Deft offered to read all of said indictments and the entries & proceedings relating thereto. to which state objected but the Court overruled the objections and state excepted All which were then read to the jury.

The state endeavored to prove ~~the~~ confessions made to Witness Curray ~~made~~ some time subsequent to said 4 Oct 1852. To this deft objected on the grounds they were not voluntary but were seer repetitiously obtained. ~~The~~ To this point deft examined the said Wit Curray who stated

and to the judgment of the Court in sustaining the ~~dem~~ demurrer the deft then and there excepted.

16 p 7 Apl 1853 This cause was called by the Court and and the ~~deft~~ State & deft announced they were ready. Thereupon two persons came to wit A D Pomeroy and Stephen Polite who were sworn to try the issues, Thereupon the Circuit filed a replication to the 4th plea to which deft objected upon the grounds. 1st that it altered the issue after a portion of the jury had been impannelled. and second that it came too late after the State had announced it was ready for trial. The Court overruled the objection and allowed the replication to be filed to which deft excepted at the time. After the filing of said replication the court ordered the said two persons to be sworn to try the issues ~~to which deft objected~~ made by the plea of not guilty and the replication. To all which deft objected but the Court over=ruled his objection to which deft objected

After the jury was impannelled the state moved the Court to compel deft to proceed with his defence by proving the facts alled in his 4th plea. To which deft objected and the Court sustained the objection & state excepted The state then called as a witness Wm Stark when the deft moved the court to instruct said that it was incompetent to speak of matter of embezzlement prior to 31 July 1852 the date of the finding of said two indictments Pending this motion the Court adjourned to next day to wit Apl 8, 1853 when ~~his Honor~~ the ~~Judge~~ Court announced that he would not hold to the decision made by the Court the day previous and then decided the law to be that deft should first commence & prove the defence set up in the 4th plea before the state proved the allegations in the indict=ment. To all which deft then and there excepted.

Deft then had in evidence said indictment No 54 and the entries on the record showing the plea of guilty thereto and judgment sentence. ~~and~~ ~~thereto~~ the pardon of said offence

State objected to reading pardon for relevancy overruled & excepted

Deft then introduced as a wit Mr Saml Eager Deputy Clerk of the Criminal who proved that deft was the same person that was arraigned upon & pleaded guilty to said two indictments including said No 54 and received judgment therefor And the state admitted he was the person mentioned in the pardon.

Here deft rested his case

The state then introduced again the wit Mr North & deft removed his motion for the Court to instruct that it was incompetent for him to speak of any matter of embezzlement of money checks promissory notes or promissory notes commonly called Bank notes committed prior to said 31 July 1852 Because the state was precluded by said agreement The Court overruled the objection & deft then & there excepted

See the testimony of the witnesses as preserved in the bill of exceptions

The wit Mr P Scott stated on cross examination that he was informed these two indictments found upon his testimony before the grand Jury at July Term 1852 He was then shewn the said two indictments and asked if they ~~of~~ described the ~~def~~ offences about which he had testified ~~to~~ before grand Jury He replied he supposed so Deft offered to read all of said indictments and the entries & proceedings relating thereto. to which state objected but the Court overruled the objections and state excepted All which were then read to the jury.

The state endeavored to prove ~~the~~ confessions made to Witness Curray ~~made~~ some time subsequent to said 4 Oct 1852. To this deft objected on the grounds they were not voluntary but were seer repetitiously obtained. ~~The~~ To this point deft examined the said Wit Curray who stated

that deft said he would talk fully about it now as the whole matter was at an end — as the state could do nothing more with him. ~~Deft~~ To prove this point more fully deft called upon ~~the judge~~ His Honor Judge Colt to state his knowledge touching the agreement. Whereupon his Hon stated it was agreed by and between the state and deft that if deft would plead guilty to four of the ten indictments found at said July Term the state would not further prosecute him upon the rest. and that had stood up to his portion of the agreement & pleaded guilty to the said four and the rest had been nol prossed and that the court had acquiesced in & consented to said agreement. That the court was no party to the agreement. That the reason why this court had sustained the demurrer to defts 2nd plea was because it ~~was~~ alleged in said plea that the court was a party to the agreement. The court only acquiesced in the agreement & permitted it & see defts pleas of guilty & permitted the state to nol pros the rest.

Upon this showing. deft moved the court to exclude the conversation upon the grounds aforesaid and the court sustained the objection & state excepted.

The Wit Gamit was proceeding ~~to testify in agreed~~ to state that he had given deft a check in the name of O Burnett & Co Deft objected to this testimony upon the ground that he was not charged with embezzling checks the court overruled the objection & deft excepted.

State then rested

Deft then proved that said check had been used by deft to pay a debt due by Arch & Scott to Tevis Sons & Tevis and that no money was ever paid across the counter upon said check

The evidence being concluded the defendant's counsel gave the following instructions.

If the jury believe from the evidence that the grand jury found the indictment No 54 against the deft and returned the same into this Court on the 31 July 1852 alleging that deft as the clerk or servant of Wm Orth & Wm P Scott composing the firm of Orth & Scott embezzled & converted to his own use money checks & promissory notes and promissory notes commonly called bank notes received of various persons & copartnerships for & on account of said Orth & Scott, then the deft could have been convicted under said indictment No 54 by proof of the same facts which would authorize a conviction under the indictment in this case & in such case the law which is in favor of innocence presumes that the offences are one and the same & if the jury believe deft pleaded guilty to & received sentence & pardon for the offence contained in the indictment No 54 you ought to acquit: But if the jury believe from the evidence that the offence charged in the indictment No 54 is not one & the same offence charged in the indictment upon which deft is being tried and that the state has by affirmative proof established the fact beyond a reasonable doubt in that case you will find for the state upon the issue upon the plea in ~~abatement~~ bar

If you find the deft guilty as charged in the indictment & find that money embezzled was in amount under that of ten dollars you will assess the punishment to the imprisonment in the County Jail for a term not more than one year or by fine not more than five hundred dollars or by both such fine & imprisonment

Proof that embezzled "checks" for the payment of ~~money~~ currency does not support the allegations for embezzlement of money or promissory notes to the giving of which instructions deft then and there excepted

The Court then gave the following instructions asked for by the state.

The jury are instructed that they have two issues to pass upon the first is the traverse to the special plea of the deft and then the jury will first consider because if they decide such issue in favor of the defendant then it will be unnecessary for them to pass upon the issue by the general plea of not guilty. If however they find such issue in favor of the state they will proceed further to decide whether the deft is guilty or not guilty of the offence charged in the indictment

The issue joined upon the special plea filed by the defendant and replication made by the state and the offences charged in the indictment stated in the plea of the deft & designated as being numbered 54 is one and the same offence and ~~and~~ felony or another and different offence & felony & if the jury believe from the evidence that the offences are one & the same then the jury will find the issue in favor of the deft but if the jury believe from the evidence that the offence named in the indictment is another and different offence ~~and felony~~ from that charged in indictment No 54 will find the issue in favor of the state

If the jury should find the last issue in favor of the state they will proceed to consider the other issue and if they believe from the evidence that the deft was the clerk of the copartnership firm of Storth & Scott and that he was over the age of sixteen years and further that while he was such clerk & at ~~the~~ a time ~~within~~ within three years next ~~preceding~~ previous to the finding of the present indictment he did receive money or effects belonging to the ~~firm~~ of Storth & Scott for and on their account & that he received the same by virtue of his employment as such clerk ~~& by~~ that by virtue of his employment as such clerk it became his duty to enter the receipt of such money on the books of the concern & if the jury further believe that the deft wilfully omitted to make such entry of the receipt of the money & that he never

accounted with his employers for such money then these facts are presumptive evidence of his having embezzled the money

To the giving of which instructions deft then and there excepted

The state then offered the following instruction which was refused And if the jury believe that the defendant did embezzle or convert to his own use money or effects of the value of ten dollars or upwards and you find him guilty of the offence as charged in the indictment then you will assess the punishment at imprisonment in the penitentiary for a term not less than two years ~~nor~~ or more than five years. To the refusal of which ~~deft~~ the state then and there excepted

The Court gave the following instructions for deft

The jury must be satisfied beyond a rational doubt that deft received money of Bennett & Co and embezzled the same money ere before they can find him guilty in this cause

2 If there be any material fact in this cause which the state has endeavored to prove by circumstantial evidence the evidence to warrant a conviction must exclude every other hypothesis than that which leads to the guilt of the prisoner

To the giving of which state excepted

The deft offered the following instructions which were refused

1 Although the jury may believe that deft received money from Bennett & Co and omitted to enter the same upon the books of Orth & Scott this fact alone is not sufficient to ~~authorize~~ the to find deft guilty of embezzling the money so omitted to be entered.

2 If the jury believe that deft collected money or checks from Bennett & Co for Orth & Scott & that he paid debts due by Orth & Scott to Tevis Sons & Tevis for borrowed money with any portion of the money or checks so collected in such case the law presumes that none of the money so collected of Bennett & Co was

embezzled by deft & the jury aught to acquit

If the jury believe from the evidence that the grand jury found the indictment No 54 against the deft and returned the same into this Court on 31. July 1852 alleging that defendant as clerk or servant of William Storth & William P Scott composing the firm of Storth & Scott embezzled and converted to his own use money checks & promissory notes & promissory notes commonly called bank notes received of various persons & copartnerships for and on account of said Storth & Scott, then the deft could have been convicted under said indictment No 54 by proof of the same facts which would authorize a conviction under the indictment in this cause and in such case the law which is in favor of innocence ~~the~~ presumes that the offences are one and the same & if the jury believe deft pleaded guilty to & received sentence and pardon for the offence contained in the indictment No 54 you aught to acquit.

If the evidence in this cause only shows that deft collected one hundred and eight dollars from Bennett & Co for Storth & Scott & that he omitted or failed to enter the same upon the books of Storth & Scott & that deft never denied the receipt of the money so collected & that he never was called upon to account for the same these facts do not constitute embezzlement in the law and the jury aught to acquit

The question as to what particular acts of embezzlement witnesses testified to before the grand jury is immaterial but the question is what acts of embezzlement did the deft plead guilty to under the four indictments to which he pleaded guilty and unless the state has proven to the satisfaction of the jury that the deft has not pleaded guilty to the offence in this indictment charged they aught to acquit

To the refusal of which instructions deft then and there excepted

The jury then retired and brought a verdict in the following form "We the jurors find that indictment No ~~54~~ 124 is not the same and identical charged in indictment No 54 We the jurors find the defendant guilty of the embezzlements of the sum of eight dollars and twelve cents in money and assess punishment to imprisonment in County jail for the full term of one year

On 11 april 1853 deft filed his motion for a new trial for the following reasons

1 Because the court erred in allowing the states atty to file his replication to the 4th plea after two of the jurors had been sworn in the cause, thus altering the issue after a part of the jury had been empannelled

2 Because the court erred in allowing the said two jurors to be sworn after the filing of the replication by the state.

3rd Because the court erred in decreeing that deft should commence with his evidence & first and first prove the matter in bar as set up in his 4th plea before the state had shown him guilty of any offence or had introduced any testimony at all against him—

4 Because the court admitted improper and illegal testimony for the state & rejected proper & legal testimony for the deft

5 Because the court gave illegal & erroneous instruction for the state & on the courts own motion calculated to prejudice the deft & misleed the jury & refused legal & proper instructions asked for by defendant

6 Because the verdict of the jury is informal insufficient & void — in that from the verdict rendered the court cannot certainly tell how the jury found the material issues submitted to them.

7 Because the verdict is against the law

8th Because the verdict is against the evidence

9 Because the verdict is against the law & the evidence and against the weight of evidence.

On 14. april 1853 the Court overruled the ~~the~~ aforesaid motion and deft then and there excepted

The deft on 14 april 1853 then moved the Court to arrest the judgt

1 Because the indictment is so insufficient by reason of its vague & general allegations that it does not inform the deft of the charge therein contained so as to enable him properly to prepare his defence

2 Because the description of the things alleged in the indictment to have been embezzled (ie) (money and promissory notes commonly called bank notes) is insufficient

3 Because the offence of embezzlement is a statutory larceny and the promissory notes and money or coins ought to have been specifically described as in larceny

4 Because the indictment fails to allege that the promissory notes & money were of any value

5 Because the indictment fails to allege from whom the money & promissory notes were collected by deft

6 Because the indictment does not conclude with the words "against the peace and dignity of the state as required by the Constitution of this state

7 Because the indictment is otherwise insufficient informal and void

Which motion the Court on the day of April 1853 overruled and deft then & there excepted. The Court then rendered judgment against & passed sentence upon the deft from which deft appeals and brings the cause into this Court to have the errors herein complained of corrected.

State
vs
Lopez

Statement of Case

Filed 5 November 1853
Wm S. Glanville
Clerk

The State
vs }
S Cohen Lopez

The indictment in this case does not conclude "against the peace and dignity of the State" as is required in the constitution. It concludes thus "against the peace of the State and the statute in such cases made and provided" The judgment for this cause must be reversed.

We have been asked to express an opinion on the plea in bar of the defendant, in which he sets up an agreement made by him with the circuit attorney at a term of the Criminal Court when there were ten indictments pending against him for embezzlement by which agreement it was stipulated that the defendant should plead guilty upon four of the indictments and that the State should enter a nolle prosequi on the other six and discharge him from all liability to answer them. Under this agreement he pleaded guilty on the four and was sentenced and pardoned and a nolle pros was entered in each of the other six. The plea alleges that the offence charged in the present indictment is the same with that charged in the four on which he pleaded guilty was sentenced and pardoned and alleges his identity. The State demurred to the plea and the demurrer was sustained

We recognize no authority in the circuit attorney to make an agreement by which any criminal shall be discharged from the claims of justice. The chief executive of the State alone can exercise the power of pardon. If a record was made in the criminal court which

would have the legal effect of discharging the defendant from responsibility for the six offences for which the indictments were found upon which a nolle pros was entered such record would have its effect here; as if there had been a plea of guilty and ~~a nominal~~ the smallest punishment allowed by law had been imposed; but if no entry of record has the effect of discharging the defendant, he cannot plead the agreement between himself and the circuit attorney as a discharge. If such agreement can be recognized any where, it must be by the executive on an application for pardon, and with the executive it might very properly in many cases have very great weight.

It has been said that the nolle prosequi entered in these cases should be regarded as a retraxit. But we do not feel authorised to say that the entry on the record can have any greater legal effect in discharging the defendant from future prosecution because of the supposed agreement than it would have without such agreement. In other words the operation of the entry made on the record can only be determined by its own terms. In the present case the plea ~~shows~~ states nothing more than a nolle prosequi in the ordinary form.

The judgment because of the defect of the indictment is reversed with the concurrence of the other judges.

W K Gamble

36

The State
vs
S Cohen Lopez

Opinion
W R G

Z

Filed 15 December 1853
W. S. Glanville
Clerk

State
v
Lopez

Supreme Court
October Term 1853

Brief for Deft

The first error complained of upon the record is that committed by the court in sustaining to the demurrer to the Defts second Plea

When a Deft is indicted for an offence which he does not deny and to which he makes no defence, but comes ~~not~~ into Court admits the allegations in the in the indictment to be true, and submits to the judgment of the Court, receives sentence &c A special plea setting up these facts as a defence to a subsequent indictment for the same offence is not a Plea of former Conviction, and consequently the rules applicable to pleas of former acquittal or Conviction do not apply to such special plea
A plea of former acquittal must set forth, "a legal acquittal by a judgment upon a trial by a verdict of a petit jury"
1 Chitty's Crim Law p. 458 side p 2 Hale 243-246
Hawkins P.C, B 2, C 355.

A plea of former Conviction must set forth a conviction by a judgment legally rendered upon a verdict of a petit jury upon trial The principles of the pleas of former Conviction and acquittal are the same. They alike depend upon the principle that no man shall be put in jeopardy twice for the same offence 1 Chitty's Cr L side p 462 4 Co Rep 40, U S vs Ream 1 McLean 432

A party is in peril or jeopardy within the meaning of the Constitution as soon as he is put upon his defense Commonwealth vs Clue 3 Rawle 501

Acquittal is the only ~~thing~~ term that expresses a discharge upon trial, per pais Law vs Franks Chevs 9.

Acquittal is a technical term used to express an acquittal on a trial by a petit jury Hester vs Hagood 3 Hill S C R 195 Tigue vs Wilks 3 McCord 461

A verdict of a jury is essential to a plea of former acquital or Conviction U S. vs Rien 1 McLean 432

By parity of reasoning it would seem to follow Conclusively that there can be no Conviction in the legal sense of that term except by a judgment of a Court of Competent Jurisdiction, upon a verdict of a petit jury rendered upon trial;

It is therefore obvious that there can be no acquital or Conviction in a criminal case under the law as it is in this state to support a plea of former acquital or conviction without the intervention of a jury Where a deft comes into Court & pleads guilty there is no issue - no jury, no defense, but simply submission and judgment

It must be clear that while a special plea setting forth an indictment; plea of guilty and judgment is unquestionably a bar to a subsequent prosecution for the same offence, yet it has not the ingredients of, and consequently cannot

be a plea of former Conviction

The Court erred in sustaining the demurrer to the 2d plea, It sets up a good defense in law and as we have shown is not subject to the strict-ness and technical rules of pleas of former acquittal or Conviction, It sets up a defense consisting of the following facts, That on the 31st of July 1852, there was ten indictments found against Deft. Charging ~~him~~ that he was a clerk and servant of North & Scott above the age of 16 years, That N & S were merchants in Copartnership, and as such clerk and servant, it was his duty to receive & did receive of various persons and Copartnerships for and on account of said N & S, Checks & promissory notes Commonly called bank notes and money and while he was such servant & clerk embezzled and converted to his own use without the assent of said N & S. That there was an agreement made by and between him and the State by and with the advice Consent and agreement of the Court, that if he would plead guilty to four of the said ten the remaining six should be Nol prosed and he be discharged from further prosecution, for any other of said alledged acts of embezzlement Committed prior to said 31 of 1852 That this agreement had been carried out in good faith by him, In persuance thereof he did submit with the Consent of the Court on the 4th of Oct 1852, and plead guilty to and receive sentence and judgment upon said four and the remaining six were by leave of the Court Nol prosed, and from which said judgment he has been pardoned

It is Contended that this agreement and the proceedings had thereto bars the state from

defendant for any offence for which he might have been convicted under any one of said ten Indictments

We apprehend that a state can be barred by its acts done by its officers or agents as well as any other party to a suit or prosecution. Indeed the whole doctrine as to pleas of former conviction, acquittal & pardon as well as all other pleas in bar depend upon this principle

Suppose there had been two suits pending upon two promissory notes brought by state vs Deft and the agreement had been, that if he would allow judgment to go against him on one note the other should be concluded or cancelled. We are at a loss to see why such ~~an~~ agreement would not be a bar to a subsequent prosecution upon the note which was to have been cancelled. We think the principle is common to both cases. The authority hereinafter cited shows that the rule ought not be relaxed in criminal cases.

A defendant was indicted for stealing shoes he made an affidavit for a continuance because of an absent witness, and in his affidavit states what he expected to prove by said absent witness for the purposes of a speedy trial the state's atty admitted the affidavit in evidence to the jury Deft asked the Court to instruct that the affidavit should be positively taken as incontrovertible by other testimony. The Court refused and instructed the jury that they should take it as evidence subject to be contradicted by more faithworthy testimony deft was convicted and appealed

The Supreme Court say the state having admitted "in evidence admitted the truth of the statements

"therencontained and having done so was not at liberty
"to impeach or contradict them; by his voluntary act
"to prevent a continuance of the case to another term
"he (States atty) precluded himself from the exer-
"cise of this right. Such has been the decisions in
"Civil Cases and the rule ought not to be relaxed
"in a criminal one" Wallis vs People 1 Scammon 399

In the last case cited the Supreme Court of Illinois held that the state could be precluded by the acts of its officers and was precluded by an implied admission. The 2d plea sets up an express agreement and if it be not available by plea in the manner it was set up in the Cir Court it is not available at all There is no principle of policy perceived which would make such an agreement nugatory. The State makes the agreement because it is to its interest There are as many judgments obtained perhaps as the evidence in the possession of the state would warrant and time and expense are saved

It seems that an agreement entered into by defendant regarding pleas of guilty precludes him and we cannot see why the same principle is not applic-
-able to the state Sellers vs People 1 Gillman 183

Agreeably to Judg Catron in Crenshaw vs State the pardon is a bar to all felonies committed prior to its date Martin & Yerger 122

When we examine the effect of this agreement and the position of the parties by reason thereof the sufficiency of the 2d plea will be more apparent

Upon proof to warrant a conviction under the indictment in this case, the defendant could have been convicted under any of the ten He pleads to and is sentenced upon form. He is subsequen-

-Subsequently indicted for one of the same offences to which he pleaded guilty How is he to make this prior judgment available in the subsequent prosecution He cannot tell which one of the four offences it is for which the state is again prosecuting him, He cannot set-up the four judgments in separate pleas and swear that each and all of them is the identical offence for which he has been subsequently indicted as required in pleas in former conviction

Suppose in such case the defendant sets up one of said four indictments and the proceedings thereon & avers that the offence contained in that, and to which he pleaded guilty are one and the same offence for which he has been subsequently indicted He reads the former indictment and the proceedings thereon; then the rule is. that if the facts alledged in the second indictment if true would have warranted a conviction on the first.

This is the test Price vs State 19 Ohio 423
Whartons Crim Law p 138

Then the defendant has made a prima facie case and is entitled to an acquittal

People vs McGowen 17 Wend 351

If he can do no more than this, The Law does not presume that the defendant has committed two offences, but under such a showing suppose them one and the same The state cannot rebut the presumption. The indictments and proceedings thereon in these cases, by reason of their similar & general allegations afford no light upon the point of identity of offences in fact. In such cases the only way in which identity or nonidentity of offence in fact can be proven is by some one

on present during the investigation of at the trial There was in these cases no trial, no investigations of transactions or facts, no development of any matters in pais

In Brown vs King & Fisher this Court held a former recovery upon an open account apparently for the same cause of action, prima facie a bar to a subsequent suit. That the presumption must be repelled. The two transactions must be shown not to be the same before plaintiff can recover; 10 Mo 66 this rule is laid down in Civil Cases The principle is applicable with at least equal force to Criminal Cases

Therefore upon the state of case put if the onus of rebutting the presumption of identity rests upon the state by taking the pleas of guilty and not actually investigating the causes it has become impossible and if it be the duty of the defendant to go further and prove the offences identical, he has been thrown into a position which renders it impossible on his part It must under such circumstances be apparent that the agreement is binding upon the state and a bar to a subsequent prosecution, or else the state has secured an advantage whereby it can obtain two convictions against the defendant for the same felony

It is also contended that the facts matters and things set up in said 2d plea clearly amount to a retraxit in the law and therefore is a legal bar to any prosecution for a like or inferior offence

"A retraxit is where the pltff is present in Court (as regularly he is ever by intendment of law until a day be given over, unless it be when

a verdict is given then he is but demandable) and this either Private when the entry is. quod solemniter exactus non venit sed a secta sua in Contemptum Curiae retravit se or positive when the entry is. quod fatetur se sua Cognovit se ultimus nolle prosequi "It is called retravit because that is the effectual word "used in the entry and is a bar to all actions of the "like or inferior nature"

8th Bacons Ab p 781 top paging

When a party has been nonsuited he may pay costs and Commence again "but a retravit is an open and volun= "tary renunciation of his suit in Court and by this "he forever loses his action" 3 Black Coms by Wendel top paging 296

"If demandant or plaintiff acknowledges quod non vult alterius prosequi. this is a retravit."

6 Comyns Dig 275 top p

The essentials of a retravit seem to be 1st it must be entered after indictment forma or declaration filed. 2d it must be done in open Court 3d It must be a voluntary renunciation of his action by the plaintiff in his own proper person or in his presence

The agreement and proceedings had in pursuance thereof were made & had subsequent to the finding of the indictment

The pleas of guilty entered by Dft and the dismissals entered by the state were done and performed in open court

The plea sets forth a voluntary renunciation by the state of all other offences for which deft might have been Convicted under any one of said ten Indictments.

all the proceedings were done and had in the presence of the State. The state in contemplation of law is always present and upon this principle cannot be nonsuited

The King is always present in Court and cannot be nonsuited, the same upon principle is true of the State

6 Comyns Dig p 276.

A retraxit lies in Criminal Cases as well as Civil, It is spoken of in connection with the term Nolle prossequi which is only applicable to Criminal Cases. For instance Wharton says "Retraxit (he withdraws) a proceeding somewhat "similar to a nolle prossequi except that a retrax "it is a bar to any future action for the same "cause a nolle prossequi is not" &c

Whartons Law Lexicon word Retraxit

Lord Bacon says a retraxit is a "bar to all actions of a like or inferior nature"

5 Bacons Ab 781 top p

The word action used by Lord Bacon and others signifies criminal prosecution as well as civil suit. Actions are divided into Civil & Criminal

Bac ab. title action A.

A Criminal action is a prosecution in a competent Court of justice in the name of the Government against one or more individuals who are accused of committing a crime

Chitty's Crim Law 1 Bac Law dic word action

In judging of the sufficiency of the 2d plea we must regard the facts alledged therein as true. Supposing this in view is it not entirely clear from the plea that the State intended to do more, and did more, than simply to take his pleas of

guilty to four of the ten indictments and nol prose the remaining six; the plea sets forth that the deft plead guilty to said four indictments "upon the "express condition understanding & agreement "that the state would discontinue, nolle prose and "discharge him from the alledged offences contained in said six;" It also alledges "that by the said agree "ment deft cannot be further prosecuted for any "offence for which he might have been convicted under any one of the said ten"

The plea if true certainly shows an open and voluntary renunciation of the six criminal actions the cause of which were set forth in the six indictments spoken of in open Court in the presence of the Plaintiff and so amount in the law to retraxit and a bar; agreable to the authorities above cited

The same doctrine is held in the United States as to the effect of the plea of retraxit and what are its essential requisites

7 Smeads & M 28

Lowry vs McMillan 8 Barr 163

(as to errors committed upon the trial see the record)

State

vs

Lopez

Defts Brief of Points and authorities in support of his 2nd Plea

Lackland & Jameson
Aime & Thompson
for defendant