

ANSWER 6 - ACCOUNT OF THE OFFENSE

After living seven years in Austin, Texas, William Sydney Porter secured a job as teller with the *First National Bank* in 1891. In the summer of 1894, a bank examiner found a discrepancy in the books of the bank and the matter was referred to a grand jury. The result, however, was a “no bill.”

It is now known that the local federal prosecuting attorney, Robert U. Culberson, was very reluctant to pursue the case and Frank Hamilton, part owner of the bank, actually appeared before the grand jury to appeal on Porter’s behalf. Hamilton probably did so because Porter came to the bank with an excellent reputation (having worked four years in an office of the State’s government) and there had been no complaints about his work. In addition, banking practices were such, that the potential for error was fairly high (see further discussion below).

Later, bank examiner F.B. Gray found additional discrepancies and, contrary to the desire of Culberson, a second grand jury was called. In February of 1896, a “true bill” was returned. Porter, meanwhile, had resigned from *First National*, moved to Houston and began working for the *Houston Post*.

The trial was scheduled for July, but Porter took no steps to prepare for his defense. He did not consult with a lawyer, or discuss the case with anyone. As the trial approached, Porter boarded a train to Austin, but changed his mind along the way and got off in Hempstead, Texas (just to the northwest of Houston). He then took a different train to New Orleans and fled to Honduras, a fugitive from the law. However, when he received news that his wife, Athol, was dying, Porter returned to Austin (January, 1897).

Despite the fact that he had been a fugitive, Porter was allowed complete freedom until his trial in February of 1897. Examiner Gray alleged to have found many potential charges of embezzlement (up to 50), but only three counts (involving a total of \$1,153.68) were considered at trial after decisions regarding consolidation and disqualification:

October 10, 1894	\$554.48	Indictment No. 1174
November 12, 1894	\$299.60	Indictment No. 1148
November 12, 1895	\$299.60	Indictment No. 1175

Critics of the prosecution note that Porter was not even employed by *First National* in November of 1895, having resigned a full eleven months earlier.¹ But, once again, Porter did little or nothing to prepare a defense. His lawyers described him as “non-communicative.” The records of the trial are incomplete,² but the jury found Porter guilty on all three charges and Judge

¹ C. Alphonso Smith notes, “Nothing in O. Henry’s life is better substantiated than that on November 12, 1895, he was living in Houston and had resigned his position in the Austin bank early in December 1994.” C. ALPHONSO SMITH *O. HENRY*. 1916 at 144. Apparently, this glitch was addressed by the Judge, who instructed that the two cases involving \$299.60 should not be treated as separate cases. See discussion in LUTHER E. COURTNEY. *O. Henry’s Case Reconsidered*. 14 AMERICAN LITERATURE 361 (1943).

² COURTNEY *supra* note 1 at 364.

Thomas E. Maxey, Western District of Texas, sentenced him to five years in the penitentiary of Ohio – evidently a mandatory minimum sentence.³

Every individual who has reviewed this case – including those who doubt Porter's actual guilt and those who do not doubt it at all – agree that the standard operating rules and procedures for banks in this time period – and the practices of *First National* in particular- left a great deal to be desired. Luther W. Courtney, for example, has no doubt whatsoever about O. Henry's actual guilt, but noted:

Practices in banking circles in 1894 differed radically from those observed today; certainly, recorded incidents in the *First National Bank* of Austin [would] not be allowed at present. The lax system then in vogue resulted in frequent failures to balance the books at the end of the day's work. It seems that any official in the bank felt privileged to remove cash from the tills with no other notice than a slip of paper upon which a statement of amount removed was recorded. In fact there were instances in which cash was taken and not even the slip's being left to call attention to the removal. Sometimes it would be several days before the "borrower" would remember to make a record of his borrowings. During the lunch hour, someone other than the teller, who was responsible for the balancing of the books at the conclusion business for the day, would serve at the window. This was true in Porter's case ...⁴

C. Alphonso Smith, who is more skeptical of the validity of O. Henry's conviction, observed that, had O. Henry simply shown up for the trial, "he would have certainly been acquitted," in part, because:

A victim of circumstances" is the verdict of the people in Austin who followed the trial most closely. None of them, so far as I could learn from many interviews believed him guilty of wrong doing. It was notorious that the bank, long since defunct, was wretchedly managed. Its patrons, following an old custom, used to enter, go behind the counter, take out one hundred or two hundred, dollars, and say, a week later: "Porter, I took out two hundred dollars last week. See if I left a memorandum of it. I meant to." ... Long before the crash came, he had protested to his friends that it was impossible to make the books balance. "The affairs of the bank," says Mr. Hyde E. Rollins, of Austin, "were managed so loosely that Porter's predecessor was driven to retirement, his successor to suicide."⁵

Marrilyn McAdams Sibley's account of the history of *First National*⁶ suggested that *none* of this should have come as much of a surprise to anyone interested in investigating the bank in any

³ See note 24 in attachment "Answer 20" at 5.

⁴ COURTNEY *supra* note 1 at 367.

⁵ SMITH, *supra* note 1 at 136. Courtney also notes Porter "was often distressed about the conditions at the bank" and "frequently expressed the wish that a remedy might be found for the lax system in vogue" *supra* note 1 at 368.

⁶ MARILYN McADAMS. *Austin's First National and the Errant Teller*. 74 SOUTHWESTERN HISTORICAL QUARTERLY 478 (1971)

rigorous ways. Founded in 1874, its owner (George W. Brackenridge) considered liquidation within a few years. Over the years, "poor business methods" by family members of the owner resulted in blistering condemnation by bank examiners, who considered them "thoroughly incompetent" and consistent only in "sustained losses." Consequently, when the owner suspected a bookkeeper of embezzlement, there was keen interest in getting the money back, but not so much in prosecution in court. The owner was actually in the process of trying to sell the bank off while Sydney Porter was employed. It took five years to unload the beast on a buyer.

In sum, as Courtney (who does not doubt Porter's guilt) put it, Porter was not the "originator" of the "method of handling entries" that resulted in his conviction. He was merely "following a practice of long standing in a banking institution where the officers seemed to care little for proper business methods."⁷

The late Texas 3rd Court of Appeals Justice Trueman O'Quinn echoed that sentiment, stating in his co-authored book on Porter, *Time to Write*, that the prosecution "could never prove that Will Porter actually had possession of any monies taken from bank funds -- only that there were undisputed mixups and flaws in bookkeeping for which he was responsible." O'Quinn recorded that the prosecutor in the case, Duval West, who went on to be appointed federal judge in the Western District of Texas by Woodrow Wilson, later "told a reporter that he believed Will Porter was the victim of the banking practices of the day and innocent of intentional misappropriation of funds."⁸

C. Alphonso Smith recorded that others involved in Porter's trial later came to doubt his guilt:

The foreman of the grand jury and the foreman of the trial jury are reported to have regretted afterward that they voted to convict. "O. Henry was an innocent man," said the former, "and if I had known then what I know now, I never would have voted against him."⁹

These well after-the-fact doubts as to Porter's guilt are, however, best understood as notable evidence of the popularity, obvious rehabilitation and outstanding reputation Porter developed as an productive, law-abiding citizen in the aftermath of his prison sentence (see Section IV, "Reasons for Pardon"). In June of 2010, a *Wall Street Journal* article observed:

On his deathbed in 1910, Porter may have worried about his posthumous reputation. A century later, his imprisonment seems less a mark of shame than a colorful detail from an accomplished life. The author, always attracted to reversals of fortune, probably would have appreciated the fate of the Austin courthouse in which he was convicted. The site of his humiliation is now the administrative headquarters of the University of Texas system. They call it O. Henry Hall.¹⁰

⁷ COURTNEY, *supra* note 1 at 368.

⁸ TRUEMAN E. O'QUINN, JENNY LIND PORTER, *TIME TO WRITE*, 1986, at 18.

⁹ SMITH, *supra* note 1 at 144.

¹⁰ JOHN J. MILLER. "His Writers' Workshop: A Prison Cell." *Wall Street Journal*, June 8, 2010.