

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. CALIXTO D. BERBARI, DEFENDANT AND APPELLANT.*G. R. No. 16805. September 16, 1921*

Ponente: STREET, J.

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The appellant, Calixto D. Berbari, a native of Syria and Turkish subject resident in the Philippine Islands, was convicted in the Court of First Instance of Manila of the offense of estafa and was there sentenced to undergo imprisonment for one year, eight months and twenty-one days, presidio correccional, with corresponding accessories, to indemnify the complaining witness, Alfredo Chicote, in the sum of P18,750, with the appropriate subsidiary imprisonment in case of insolvency, and to pay the costs.

It appears in evidence that, prior to January of the year 1919, the accused, Calixto D. Berbari, and the complaining witness, Alfredo Chicote, had been associated together in more than one profitable commercial enterprise, among which may be mentioned the Oil Manufacturing Corporation, the Tayabas Land Company, and the "Compania de Aceites de Manila;" and apparently in view of the success that had attended these ventures, they decided in the latter part of the year 1918 to establish a plant for the production of coconut oil in the city of Lucena, Tayabas, to be conducted under the management of Berbari. One of the motives that led Chicote to embark on this project was the fact that he had an ice factory in Lucena, which it was thought could be profitably converted into a factory for the production of coconut oil.

In order successfully to promote the establishment of this enterprise, it was found necessary to enlist the cooperation of persons of means in the vicinity of Lucena; and accordingly after a few trips to that city, Berbari succeeded in laying the foundation for the organization of a company to be known as the Tayabas Oil Company, Inc. Among the individuals committed to the organization of said company, who were residents either of Lucena or the neighboring city of Sariaya, we note the names of Gregorio Marquez, Filemon Perez, Florencio Changco, Moises Gala, Daniel Marquez, Julian Gala, Maximo Rodriguez, Cayo Alzona, and Federico Unson. As Berbari was the chief promoter of the company and as it was understood that he would be manager, he subscribed, with the consent of Chicote, for 1,500 shares of the company of the par value of P150,000, all in his own name, with the understanding that the subscription was equally in the interest of both.

It further appears that Berbari, apart from the interest which he claims to have in the profits of the enterprises previously promoted by himself and Chicote, commands no independent resources; and inasmuch as Chicote at the time now under consideration had in his own hands or under his own control practically all of the remaining assets and profits pertaining to Berbari in said enterprises, it resulted that the money which Chicote and Berbari intended to use in the purchase of the 1,500 shares of the Tayabas Oil Company, Inc., necessarily had to come from the hands of Chicote; and so it was understood and agreed between them. Indeed, according to Berbari, Chicote had expressly promised to turn over to him the exact sum of P150,000, to be used in the new enterprise, which sum represented the profits which had been gained by them in the purchase and sale of certain lands and machinery in the district of Pandacan, Manila.

When the time approached for the first payment upon the subscription to the capital stock of the Tayabas Oil Company, Inc., Chicote delivered to Berbari a check upon the Bank of the Philippine Islands in the sum of P37,500, this being 25 per cent of the amount that would be due upon the subscription to the 1,500 shares taken in the name of Berbari. Contemporaneously with the delivery of this check, Berbari signed and delivered to Chicote a receipt (Exhibit E) conceived in the following terms:

"Received of D. Alfredo Chicote the sum of thirty-seven thousand five hundred pesos (P37,500) with which to pay the first installment of my subscription for stocks of the Tayabas Oil Co., Inc., that is, the 25% of the sum of P150,000 subscribed for by me. Said subscription shall be in the following proportion: 50% shall be for D. Alfredo Chicote and the other 50% shall be for Calixto Berbari. But all the shares shall be in my name.

"Manila, December 7, 1918.

(Sgd.) "CALIXTO BERBARI."

A few weeks later, to wit, on January 3, 1919, on the eve of the rupture of friendly relations that presently occurred, a document, prepared by Chicote for the purpose of further elucidating the arrangement between them, was signed by both parties, as follows:

"Be it known by these presents that we, Alfredo Chicote and Calixto Berbari, both being of age and residents of Manila, by this document, declare, execute and make known:

"1. That Mr. Calixto Berbari subscribed, by common consent, to the 'Tayabas Oil Co., Inc.' an incorporated association for the manufacture of coconut oil in Lucena, Tayabas, for the sum of one hundred fifty thousand pesos (P150,000)

"2. Said subscription is for both Chicote and Berbari in equal shares, that is, P75,5000, seventy-five thousand pesos for Mr. Chicote and the other seventy-five thousand pesos for Mr. Berbari.

"3. For the better running and management of the business, it was agreed that the shares should be in the name of Mr. Calixto Berbari.

"4. In case the board of directors of said corporation should make a call upon the unpaid subscription on the one hundred and fifty thousand pesos (P150,000) then Mr. Chicote shall pay what corresponds to him of his share only of seventy-five thousand pesos and Mr. Berbari shall also pay what corresponds to him of his part of seventy-five thousand pesos (P75,000)."

The check above-mentioned appears to have been delivered to Berbari after banking hours on Saturday, December 7, 1918; and on the Monday following he deposited the same to his own credit in the same bank, intending to use the money for the proposed payment on the capital stock of the Tayabas Oil Company. Owing, however, to some legal technicalities in the organization of the company, payment could not be immediately made; and in a meeting of the board of directors of the company, which occurred in Lucena on December 18, it was agreed that certain shareholders, among whom was Berbari, should pay into the treasury of the company 25 per centum of their subscription within the period of fifteen days thereafter, that is, on or before January 2, 1919. Immediately after the adoption of this resolution, Berbari informed Julian Gala, the treasurer of the company, that he was then prepared to pay the sum of P37,500, due from himself, and offered to deliver to the treasurer a check upon a bank in Manila for that amount. Gala replied that, having refused to receive checks from others, he could not accept Berbari's check, and that the latter would have to bring the money himself from Manila to Lucena in paper bills of large denomination. Berbari was therefore compelled to make provision to this end; and upon his return to Manila he withdrew the deposit of P37,500 from the Bank of the Philippine Islands and placed it in a safe in his office in order to have it immediately at his disposal. On December 28, 1918, a meeting of the board of directors of the Tayabas Oil Company was held at Lucena, which was attended by Berbari. On this occasion,

however, he did not take the money along and at the meeting contended himself with informing his associates as to certain measures taken by him in furtherance of the plans for the company. After returning to Manila from this trip to Lucena, he had a conference with Chicote, on December 26, and informed the latter that he had the money in his hands, and observed upon the great difficulty of obtaining money in large bills. Chicote thereupon said that such bills were scarce, but that they could probably be obtained at the Treasury of the Philippine Islands. Accordingly upon the same day Berbari took the money to the Philippine Treasury and caused it to be there changed into bills of the denomination of P500, for the more convenient transportation of the same to Lucena. At this time Berbari contemplated returning to Lucena on January 1, 1919, in order to be present at the meeting of the board which was to be held on the next day.

Chicote says that for sometime after the delivery by him of the check for P37,500 to Berbari, he supposed that the latter had made immediate payment of said amount to the Tayabas Oil Company, and he claims that Berbari had on one or more occasions during the month of December intimated to him that payment had in fact been made when such was not the case. Upon evidence before us it is doubtful whether any such false impression was made, or intended to be made, by Berbari on the mind of Chicote; but if in this respect there was any lack of candor on the part of Berbari, it was probably due to an uneasiness in his mind as to the situation between him and Chicote, which is readily understandable in the light of subsequent developments.

As already stated, Berbari and Chicote had been associated together in more than one profitable venture before the project of the Tayabas Oil Company was undertaken, and there is a dispute between the two as to the extent of their respective interests in those previous adventures. Upon this point it is not necessary here to state any settled conclusion, more especially in view of the fact that the trial judge excluded important evidence directed precisely to this point. It is, however, necessary to define clearly the respective contentions of the two parties. Berbari says that they were joint adventurers throughout, and that both were equally entitled to share in the profits. Chicote on the other hand declares that apart from the ownership of certain shares which Berbari admittedly held in one or more of the corporate enterprises already alluded to, Berbari had no defined interest, and especially that he had no interest in the profits of the deal in the Pandacan land and machinery, except such as the generosity of Chicote might bestow.

In this connection it is well to state that for some time prior to the transaction which gave rise to this prosecution Chicote and Berbari occupied towards each other not only a relation of business intimacy but also a confidential relation like that between attorney and client; and Berbari asserts that Chicote prevailed upon him in April, 1918, to transfer to Chicote, upon a simulated consideration, 280 shares in the corporation "Compania de Aceites de Manila," for the purpose of hiding the ownership of said shares in case the Government of the United States should take steps to sequester the property of Turkish subjects as had been done in the case of the subjects of other enemy powers. The transfer in question was, in fact, made, but Chicote denies that the consideration was simulated and that the purpose of the transaction was to hide Berbari's property from the alien property custodian.

Whatever the truth may be upon this and other points of contention between the two, there can be no dispute that Chicote held the assets and that the position of Berbari with reference to the protection of his interests,—supposing the same to be such as he claims—was sufficiently delicate and dangerous.

Accordingly in the later autumn of 1918, after the Ottoman power had been crushed by the Allies and the Armistice had been concluded, Berbari began to exhibit signs of restiveness, and he more than once asked Chicote to liquidate the accounts of their previous transactions and in particular to pay the value of Berbari's shares in the "Compania de Aceites de Manila." These insistencies of Berbari were met by evasions and procrastinations, and it was precisely in the latter half of December, 1918, that Berbari apparently began to sense danger in his relations with Chicote. For this reason he determined, if possible, to get Chicote to liquidate their accounts before he

himself should finally go to Lucena on January 1, 1919, where he expected to take charge of the affairs of the Tayabas Oil Company, Inc., as manager.

As Berbari is now the man at the bar, it is but fair to him to give his account of the efforts made by him at this time to get Chicote to account for the shares which Berbari claims to have placed in Chicote's name on the books of the "Compaiiia de Aceites de Manila** as well as for the profits gained in the deal in the Pandacan property and machinery, which deal had been effected by means of a credit for P200,000 obtained at the Bank of the Philippine Islands with the assistance of the corporation of the Dominican Fathers.

At the interview between Chicote and Berbari which occurred on December 26, 1918, the former, instead of rendering an account along the lines insisted upon by Berbari, presented to the latter certain partial written statements (Exhibits 17, 18, 19, and 20), relating to business matters between them, and promised that not later than December 31, he would finish the intended liquidation and deliver the same to Berbari. But on that date the promised statement was not forthcoming; and Chicote suggested that he would send it later to Berbari in Lucena by mail. To this Berbari strenuously objected, insisting upon a settlement before leaving for Tayabas, and in view of this insistence a telegram was sent to Lucena, requesting a postponement of the corporate meeting until January 6, 1919, which was arranged.

On the morning of January 2, 1919, Berbari again sought out Chicote at the latter's home, and was there told that the statement of the accounts between them was already finished in he rough, and ready to be put into final form. Berbari asked to be shown the rough draft, which Chicote then held in his hands, but the latter refused to exhibit it to Berbari. The two then went to Chicote's office for the purpose of having the papers put in final form; and Berbari was directed by Chicote to call again at noon when the papers would be finished. Berbari, however, stimulated by anxiety, returned at 11.30 a. m., and though the statements of account were not ready Chicote assured him that they would be handed to him if he would call again in the afternoon. Upon again returning between 3 and 4 p. m. Berbari found Chicote absent, and the statements of account unfinished. Nevertheless Berbari prevailed upon the clerk in Chicote's office, after the latter had interposed some objections, to deliver to Berbari the papers in the handwriting of Chicote from which the final statement of account should have been made. With these papers in his possession Berbari at once withdrew from the office and caused photographs of the same to be taken. The reason for the taking of this step was that Berbari admittedly had no written document signed by Chicote by which he could prove the existence of the alleged partnership; and, being in a state of uncertainty as to what disposition Chicote might make of these papers, Berbari wished to secure the evidence supplied by the memoranda here stated in Chicote's handwriting. Having thus procured the photographs to be made, Berbari returned the papers to the clerk to be replaced on Chicote's desk. Presently Chicote arrived; and in response to Berbari's inquiry, Chicote said, "My boy, I have forgotten it for the second time," and promised to have the statement ready by the next forenoon without fail. Again, at 11 a. m. of the next day (Jan. 3, 1919) Berbari returned to Chicote's office but still the statement was not ready. Instead, Chicote asked Berbari to sign the document Exhibit F, already copied in this opinion, at the same time promising that he would pay Berbari what he owed him. Upon this assurance Berbari affixed his signature to that paper. At the same time Chicote said he would find out the state of his account at the bank and that by the next day (January 4) everything would be settled.

On that day Chicote submitted to Berbari a document (Exhibit 22) by which shares of the Oil Manufacturing Corporation to the amount of P85,800 were conceded to Berbari, on condition that the latter would be responsible jointly with Chicote for the loan of P200,000 obtained from the Bank of the Philippine Islands for the purchase of the land in Pandacan and machinery, as heretofore stated. Berbari refused to sign this document, believing that "it stripped him of everything;" and he stated to Chicote that he could not accept as a gift a thing that was his own,

reminding him at the same time that two days previously Chicote had told him (Berbari) that the profits of the latter in the deal last above-mentioned were P58,900 and not P48,900 as now claimed. Chicote thereupon somewhat ambiguously observed that Berbari should give his conformity to that document, otherwise he would have to wait for a better opportunity. The next day (January 5) Chicote confessed to Berbari that he did not have the money to meet the latter's claims and asked him to wait for better times. From this point of time dates the final rupture of their relations and the commencement of the hostilities of which this criminal action is the leading feature.

In view of the developments narrated above, Berbari saw clearly that in subscribing for P150,000, par value of the shares of the Tayabas Oil Company, he had assumed an obligation which he now could not reasonably hope to fulfill, for it was easily perceptible that Chicote had in some way become involved to such an extent that he was then unable to supply the promised capital and in all probability would withhold it altogether. Indeed, the last conversation between the two clearly amounts to a notification from Chicote to Berbari that anything the latter might thereafter get out of Chicote could be obtained only by litigation, which might be of lengthy duration and doubtful issue. Moreover, it was obvious to Berbari that, if he should deliver to the Tayabas Oil Company the money then held by him for application to the payment of the first installment of 25 per cent due upon his subscription of P150,000, the natural, if not inevitable, result would be that this money would be totally lost, for his shares could be put up and sold for nonpayment of the subsequent calls.

Berbari therefore at once decided to withhold payment to the Tayabas Oil Company of the amount of P37,500, which he had received from Chicote on December 7, 1918, until some satisfactory adjustment should be effected of the contention between himself and Chicote; and he was supported in this resolution by the concurrent advice of at least five able lawyers of the Manila Bar to the effect that he could properly hold this money in suspense under the conditions above set forth.

Accordingly on January 11, 1919, Berbari wrote a letter to Chicote in which his position was explicitly denned in the following language:

"MT DEAR SIR :

"In conformity with what was agreed upon in the document of sale of the business of the 'Compania de Aceites de Manila,' acquired by you, and in conformity with what was decided in the special general meetings of said corporation, I hereby demand of you the payment of forty-six thousand four hundred and eighty pesos, Philippine currency (P46,480), which belong to me for the two hundred and eighty (280) shares remaining of the three hundred and thirty-five (335) shares which I had the account of which is as follows:

"Nominal value of the 280 shares.....

P28,000

"50% of the declared dividend.....

14,000

"Distributable sum, P16 per share.....

4,480

"Total.....

46,480

"I also demand that you send me as soon as possible a detailed account of the profits obtained by the sum withdrawn by you from the credit of P200,000 taken from the Bank of the Philippine Islands and guaranteed by the Dominican Friars, in relation to the organization of the Oil Manufacturing Co., as per agreement.

"As to the certificate of title No. 64 for two hundred and eleven shares of the Oil Manufacturing Co., Inc., which a few moments after their issue in my favor I insisted in returning to you but which you have refused to receive, I hereby return to you as president of said corporation 'Oil Manufacturing Co., Inc., for, as I have already stated to you, the value of the shares which I had in the 'Compania de Aceites de Manila' placed in your name should be paid me in cash by you as purchaser and depositary of said price, just as you yourself promised to me.

"With respect to the P37,500 which you furnished me in order to pay the 25% of my subscription to the capital stock of the Tayabas Oil Co., Inc., I must tell you that for reasons imputable to yourself alone, the contribution could not be made on time and I have determined to hold this account in suspense until the final settlement, of our accounts, with respect to which the balance in my favor is very much greater than said amount."

After the preceding letter was written Berbari brought an ordinary civil action in the Court of First Instance of the city of Manila against Chicote for the recovery of the value of his shares in the "Compania de Aceites de Manila" and for the liquidation of the partnership with P200,000 capital formed between them for the purchase of lands in Pandacan and machinery for the Oil Manufacturing Co.; and Chicote, on his part, caused the present prosecution for estafa to be instituted against Berbari. The latter thereupon in turn caused a criminal action to be instituted against Chicote for perjury; and Chicote apparently in reprisal instituted against Berbari and the Tayabas Land Company other civil actions.

From the facts above stated, in connection with other matters in evidence before us, the following conclusions are deduced by us pertinent to the determination of this case:

- By the agreement between Chicote and Berbari with reference to the organization of the Tayabas Oil Company, the two became equally interested in the 1,500 shares of capital stock for which Berbari subscribed; and a relation between them was thus created such as exists between the participants in a joint account under articles 239 et seq. of the Code of Commerce. The managing partner of this joint account was intended to be Berbari, and in his personal name accordingly the subscription was entered.
- It was understood and agreed that the money necessary to pay for these shares would be supplied by Chicote out of the proceeds of certain profitable transactions in the past in which he and Berbari were interested, and in this connection it is unnecessary to determine whether they were equally interested in those profits or not.
- The sum of P37,500 was delivered by Chicote to Berbari in December, 1918, for the express purpose of being applied to the first payment of 25 per centum on the subscription referred to.
- Early in the month of January, 1919, Berbari learned that Chicote could not, or would not, place at Berbari's disposal the means necessary to enable the latter to comply with his engagement to the Tayabas Oil Company, and he further learned that Chicote did not recognize his claim to share equally in the profits of the former venture, or ventures, from which the capital for the new enterprise should have been derived.
- In view of these developments Berbari determined not to apply the money which he had received, as above stated, to the purpose for which it was destined; and he also afterwards refused upon demand to return the same to Chicote, retaining it under his control, subject to the adjustment of his contention with Chicote.
- This position was assumed by Berbari in good faith not only with a view to saving this capital, which otherwise would have been exposed to the danger of loss from the inability of Berbari to pay the future installments of his

subscription, but also with a view to his protection in the impending controversy over his alleged interest in the profits of former ventures.

In the light of these findings, which we believe to be incontrovertible, the offense of estafa has not been committed. It is undoubtedly true that upon receiving the money in question (P37,500), Berbari became obligated to apply it to the purpose for which it was destined, and if that obligation be viewed as an isolated thing, it might appear that his failure to apply the money as agreed, coupled with his refusal to return it to Chicote, makes out a case under subsection 5 of article 535 of the Penal Code. But the engagement of Berbari to apply the money to the purpose agreed cannot be properly viewed as an isolated fact; for that obligation was intimately connected with the obligation which Berbari had assumed to pay for the whole 1,500 shares; and when it became evident that Chicote could not, or did not, intend to supply the means which alone would have made possible the fulfillment of Berbari's entire obligation, the latter was necessarily released from the obligation to apply the money in question to the payment of the first installment of the shares. In other words the specific obligation to apply the money to the destined purpose have been arrested by the threatened default of Chicote with respect to the subscription as a whole. It was not without reason; therefore, that Berbari asserted in his letter of January 11, 1919, to Chicote, that the failure to apply the money as agreed was due to causes imputable to the latter.

In applying subsection 5 of article 535 of the Penal Code, it must not be forgotten that this provision annexes a penalty to the infringement of a certain class of civil obligation; and in considering whether a civil obligation supposedly infringed has been nullified or arrested, reference must be had to the conceptions of obligation which inform the civil law. In the case before us Chicote was bound to supply the capital for the joint adventure, and when it became evident that he would default in the performance of that obligation, Berbari was necessarily released from the obligation to pay the P37,500 upon the subscribed shares.

Viewed in the light of this probable eventuality, the act of Berbari in refusing to apply the money must be considered legitimate, as a discreet exercise of the power vested in him as manager (gestor) of the joint account, and for the protection of both participants; for, be it noted, by defaulting in the making of this first payment, the joint account would indeed become civilly liable to the Tayabas Oil Company; but the responsibility thus incurred could hardly in any event have been anything like as great as the total loss of the money here involved. Under these circumstances it is doubtful whether a civil court would have made a decree compelling Berbari to apply the money to the payment as agreed, and certainly under the circumstances stated no criminal responsibility under subsection 5 of article 535 of the Penal Code can attach for failure to comply with that obligation.

We note that in paragraph 4 of the document prepared by Chicote and signed by both parties on January 3, 1919 (Exhibit F), it is agreed that in case of future calls upon Berbari's subscription of P150,000 to the capital stock of the Tayabas Oil Company, each party shall pay the part proportional to his own half-interest in that subscription. The purpose in framing this paragraph evidently was to indicate thereby a severance of the obligations of the parties for the future; but in view of the circumstance that the entire subscription was in the name of Berbari and that Berbari had no other means than those to be supplied by Chicote to meet that obligation; the paragraph referred to is of no significance.

It will be observed that in the case now under consideration the accused has in his favor not only the circumstance that, as manager, he had actual and lawful control of the joint account with respect to the 1,500 shares subscribed by him, but the further circumstance that independent accounts are pending unsettled between the two; and his refusal to apply or surrender the money in question is in our opinion justified by these circumstances.

The discussion in cases of this kind must always revolve more or less around the question of the good or bad faith with which the accused has acted; and it is fundamental here that, to be characterized as estafa, the reprobated act

must have been done with fraudulent intent. The authorities upon this point are entirely clear. (III Viada, 4th ed., pp. 515, et seq., especially Questions XIII, XV, XXIII, XXX, and XXXV.) And no case can be cited where a person believed by the court to have acted honestly, under reasonable necessity for self-protection, has ever been condemned under the provision of law (art. 535, subs. 5, Penal Code) which supplies the basis of this prosecution.

In considering the application of that provision both judges and lawyers are prone to proceed upon the assumption that the mere detention of property by one who has received it under the conditions there defined makes out a *prima facie* case of estafa; but as pointed out in *United States vs. Bleibel* (34 Phil., 227), this is not absolutely correct. It is the fraudulent misapplication, appropriation, or conversion of the property which really constitutes the crime of estafa. The mere delay in the fulfillment of the trust, without a fraudulent conversion, involves only a civil liability. In this class of cases perhaps more than any other is applicable the maxim *non est reus nisi mens sit rea*.

In the case of *United States vs. Santiago* (27 Phil., 408), the accused was an insurance agent who had collected premiums with the obligation to remit them intact to the company. While acting in this capacity he collected a certain sum which he failed to turn over to the company.

The justification for this retention of the money was based on the ground that the company had failed to give him credit on certain policies written by him. This court held that no estafa had been committed, saying:

"The real question for determination in this case is, therefore whether the accused, in good faith believed the company to be indebted to him in the amount which it is charged and admitted he collected and failed to turn over. Upon this point we are of opinion that the evidence is not sufficiently conclusive to sustain a finding beyond a reasonable doubt. It is quite evident that there were differences between the accused and the company's local and general agents as to whom the commissions on various policies should be paid; and giving the accused the benefit of the doubt, we do not think that the evidence of record is sufficient to maintain a finding that his claim of indebtedness against the company was not made in good faith, in the honest belief that he was entitled to the commissions claimed by him."

A court of last resort naturally hesitates to announce any hard and fast rule that might tend to impair the efficacy of article 535, subsection 5, as a deterrent to dishonesty. Each case must be decided on its own particular facts. All that can be here safely stated is that a conviction for estafa under that provision cannot be sustained against any person—be he agent, partner or what not—who has in good faith retained the property committed to his care for the purposes of reasonable self-protection against his principal in the same or related matters.

In the case before us it appears that the accused has not in fact misappropriated the money in question, in the sense of squandering it or applying it to his own personal use, though it does appear that he has remitted it, subject to recall, to a foreign country—evidently for the purpose of placing it beyond the reach of attachment at the instance of Chicote. The adoption of this precautionary measure, whether justifiable in law or not, does not in our opinion vitiate the *bona fides* of his position in general.

It should not escape attention that the estafa supposedly committed in this case consists primarily of the failure of the accused to deliver the money in question to the Tayabas Oil Company; but, as has been shown, this offense was not committed. Equally illusory is the idea that the same offense has been committed by the failure of the accused to return the money on demand to Chicote; for the express undertaking of the accused was to apply the money to the purpose agreed upon, and if the situation is such as to destroy the penal consequences that might ordinarily have followed from the nonperformance of that obligation, the subsequent failure to return the money cannot be followed by penal consequences. Upon this point the article referred to must be interpreted to mean that where a person is obligated to deliver or make specific application of money or property committed to his care, the unjustified failure to make such delivery or application constitutes estafa; and likewise where a person is

obligated to return money or property committed to his care the unjustified failure to return the same will constitute estafa. But this provision cannot be construed to mean that a person who has obligated himself to make specific application of property, but is justified in refusing to make such application, can be held liable for estafa in refusing to return the same on demand. In other words, the estafa contemplated in the law consists, in either alternative, of the breach of the primary civil obligation to which the person supposedly guilty is subject, not in the breach of a secondary obligation like that of returning property on demand after breach of the original obligation. If the failure to apply the property as agreed creates only a civil obligation, the obligation to return is also exclusively of a civil nature.

In the course of the argument attention has been directed to the case of *United States vs. Clarin* (17 Phil., 84), where this court held that the failure of an industrial partner to return to the capitalist partner the capital brought into the partnership by the latter is not an act constituting the crime of estafa under the article cited. Evidently so, because the estafa contemplated in that provision contemplates the breach of the duty to deliver or return the specific money or property received by the person to whom it is entrusted; and as between partners there is a mere duty to account, not a duty to return the very money received. In the case before us there was an express undertaking on the part of Berbari to pass on to the Tayabas Oil Company the money which he had received from Chicote, and we would hesitate to hold that this express obligation was affected by the circumstance that they were partners. Justification must therefore be sought in other incidents of the case than the mere fact that the parties were partners in a joint account.

In conclusion we have merely to add that the trial judge erred in excluding evidence offered by the attorneys of the accused for the purpose of showing that he was joint owner with Chicote of the profits resulting from their previous commercial ventures as well as other evidence showing that he acted under the advice of competent attorneys in retaining the money that had been committed to his hands. This matter was entirely competent as tending to show the good faith of the accused, and as such we have considered it. But, as already suggested, we must not be understood as having made any pronouncement upon the disputed question whether or not the accused really has the interest claimed by him in the profits of the enterprises mentioned.

From what has been said it follows that the judgment must be reversed and the appellant will be absolved from the complaint. It is so ordered with costs of both instances *de officio*.

Johnson, Araullo, Avancena, and Villamor, JJ., concur.

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