

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. C.J. KOSEL, DEFENDANT AND APPELLANT.

G.R. No. 8290. March 29, 1913

Ponente: TRENT, J.

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TRENT, J.:

This is an appeal from a judgment of the Court of First Instance of Manila sentencing C. J. Kosel to five months of arresto mayor and to the payment of the costs of the cause, for the crime of estafa.

From the record it appears that one Paul M. Filmer, employed in the United States Federal Service and stationed at Manila, departed for the United States on April 14, 1911, to take up his work at a new station in that country. At the time he left Manila, he owed several business firms for merchandise and services rendered. An arrangement was made by him, evidenced by Exhibit A of the defense, which reads as follows:

"I, the undersigned, hereby agree to pay to the Dunn Mercantile Agency of Manila, P. I., the sum of twenty-five dollars U. S. currency monthly, commencing end of May, 1911, until such time that all my obligations in the sum of \$189.71 in the Philippines have been paid.

"This agreement has been made by me voluntary and no undue influences have been brought to bear upon me.

(Sgd.) "Paul M. Filmer,

"A, G. Employee, ordered to Fort Russell, Wyoming."

This document is dated April 10, 1911, or only a few days before Filmer left the Islands.

R. E. McGrath testified that he was manager of the American Shoe Store; that Filmer owed that firm P15; that he had talked with the defendant, during which conversation he referred to a letter from Filmer which stated that he had remitted \$100 to the Dunn Mercantile Agency and thought his account with the shoe company had been paid. Kosel said something about paying a board bill or a hotel bill which the said Filmer had instructed him to pay. As witness remembered, Kosel said that he had paid the board bill, which was due at the Hotel Palma de Mallorca.

Paul A. Weems testified that he was assistant manager of E; C. McCullough & Co. and president of John R. Edgar & Co.; that Filmer owed the first-named company P32.75 and the last named P14.75; that these bills had not been paid. Witness testified that he wrote to Kosel on August 29 in regard to the debt owing to E. C. McCullough & Co.; that in response to his letter Kosel came to his office and stated that he had been receiving money from Filmer and that the account of McCullough & Co. would be liquidated in the course of time. He stated that he could not pay anything on that account at the time, as he wanted to pay the board bill of Mr. Filmer first, and that he had already made a payment on that account. Witness told him to go ahead and leave McCullough & Co.'s account until he was better able to pay it. Later on Kosel called at witness's office and offered to make a payment of about P5 on account, saying that he had that much left. Witness asked if he did not have other accounts to pay, to which Kosel replied in the affirmative, and witness thereupon told him to go ahead and pay them first.

Juan Galmes testified that he was the proprietor of the Hotel Palma de Mallorca; that Filmer owed him about P150 for board and lodging; that nothing had ever been paid on the amount due since Filmer left the Philippine Islands for the United States.

B.F. Rahmeyer testified that he was a liveryman; that Filmer owed him an account of P30; and that none of it had ever been paid.

Lakkimal Dayaoan testified that he was manager of Pohoomul Brothers; that Filmer owed his firm P18.

John T. Golt testified that he was senior partner and three-fourths owner of the Iris Skating Rink; that Filmer owed his firm P15.

Jose Oliver testified that he was a merchant; that Filmer had had an account with his firm for a number of years; that there was a balance due his firm of P10.70. He testified that he went to see Kosel once about collecting another amount; that Kosel told him about Mr. Filmer and that he had received a small amount from Filmer for him, but did not say how much; that Kosel had never paid him anything.

R.W. Squires testified that he was a merchant; that Filmer owed his firm P33.07.

H.V. Bamberger testified that he had been very intimate with Mr. Filmer for four or five months prior to the latter's departure for the United States; that he had had a conversation with Kosel about Christmas of the year 1912. At this point witness testified as follows:

"I asked Mr. Kosel whether he had received remittances from Mr. Filmer and told him before he gave an answer that I had received a letter from Mr. Filmer to the effect that he had not received any answer whatever to acknowledgment of these remittances. Then I said: 'The remittances that he speaks of are through money orders and a check for \$25 each' No; I did not give the amount, Mr. Kosel said: 'Yes, I received \$100 from him I said: 'Then you have received these four remittances referred to in this letter?' He said: 'Well, he has sent me P50 per month,' and he said, 'I have \$100 and I wrote a letter in every case acknowledging receipt of this money.' I then asked him if he would have any objection to telling me what disposition was made of these funds, and he said no, that he would bring the papers to my office. He was then in the office on some business, and he promised to bring the papers to my office in a day or two. I did not say any more about it at that time. Mr. Kosel remarked: 'Filmer is one of the few men that has gone back to the States promising to send money back to pay his debts who has tried to carry out his agreement.' A week or ten days passed and I reminded Mr. Kosel of the papers again, and he told me he had been very busy and would bring them over. I said no more about the matter to Mr. Kosel at that time."

The only witness introduced by the defense was Kosel himself. He admitted the arrangement whereby Filmer was to send him money to pay his Manila creditors and further stated that Filmer had furnished him a list of his creditors. He further stated that he had never paid any of the creditors whose names were on the list furnished him, but in explanation of this he produced Exhibit A, which, in addition to the signed statement of Filmer quoted above, bears the following indorsement dated April 12, 1911:

"In addition to the above, I further agree to settle the personal note of mine held by Mr. Kosel first of all other claims.

(Sgd.) "PAUL M. FILMER."

The personal note referred to was introduced as Exhibit B and reads as follows:

"Manila, P. I., April 12, 1911.

"For value received, I promise to pay to Mr. C.J. Kosel, the sum of two hundred and twenty-five pesos

Philippine currency, in monthly installments of fifty pesos until paid.

(Sgd.) "PAUL M. FILMER."

Four credits of P50 each and one of P10 appear on the back of this note, dated June 12, August 3, September 4, and October 1, 1911, and February 5, 1912, respectively.

In explanation of this additional indorsement on Exhibit A, and the promissory note, Exhibit B, defendant stated:

"This entry on April 12 was made when Mr. Filmer made the first arrangement, he came back stating that he was being retained in the Islands, and that he was very hard pressed for money; that he wanted to know if we could not facilitate him through our different parties with a loan of the money, of P225, which money we loaned him, with the express understanding that this claim would be paid first of all."

Defendant further testified that the list of creditors furnished by Filmer "was supposed to be a bona fide, honest list of all the debts which he owed, which it was not." Another promissory note, Exhibit Gt was introduced, which reads as follows:

"Manila, P. L, May 3, 1910.

"For value received, we jointly and severally promise to pay to P. I. Kidd the sum of one hundred and seventy-two pesos and fifty centavos Philippine currency, in the following manner, to wit:

On July 3, 1910.....

P65.00

On August 8, 1910.....

P55.00

On September 3, 1910.....

P52.60

(Sgd.) "G. W. ALEXANDER.

"D. J. BELL.

"PAUL M. FILMER."

A credit of P38.50 without date appears on the back of this note, and underneath it are two credits of P50 each dated December 4, 1911, and January 6, 1911 (1912 ?), respectively, and one of P20 dated February 6, 1912.

During the examination of Kosel, the defense also introduced letters from Filmer, Exhibits C, D, E, F, H, and I, dated May 15, July 3, August 1, August 31, October 9, and December 1, 1911, respectively, all addressed to the defendant's agency.

Exhibit E, dated August 1, 1911, reads in part as follows:

"No receipt for the payment made by postal money order No. 596441 dated San Francisco, California, May 15, 1911, for twenty-five dollars, has yet been received, though I have had newspapers from Manila dated June 24th. Kindly attend to same."

Exhibit H, dated October 9, 1911, reads as follows:

"Referring to my letter of the 3d instant, I have to inform you that this morning's mail brought me another letter from E. C. McCullough & Co., of Manila, informing me that you had called on them explaining the delay in making payment on my account with that firm. Under the circumstances payment by me of the \$25 per month will be resumed with this month, i.e., on October 31, 1911. This will only make me one payment short, that for September 30, 1911.

"You will kindly send me receipts for all moneys received from me to date. My last letter was probably a little strongly worded, but I believe that any person has a right to a receipt for money paid, which you have not yet given me."

The defendant testified that the envelopes of his agency were stamped with its name and bore instructions to return to sender if not called for within five days; that he had acknowledged the first four remittances sent by Filmer by letter, and showed carbon copies of such acknowledgments, but these were not offered in evidence. He stated that he was certain these letters were mailed, as he was in the habit of taking all the mail to the post office himself. He testified that in one of these letters acknowledging a remittance he had referred to the promissory note held by him. As to the Kidd note, before crediting payments upon it he stated that he wrote to Mr. Filmer notifying him of his (witness's) intention of applying further remittances to that note. He stated that he had no authority from Filmer to apply any of his remittances on the Kidd note, but that he had made ample demand on Filmer prior to such application, informing him that any further remittances sent to the agency would be so applied; that he so notified Filmer some time in October of 1911; that this letter was mailed in one of the official envelopes of his agency; that he had one letter from Filmer remitting P30 which had become mislaid and which he was unable to find on the day he testified, which seemed to bear out all his actions in the matter of the Kidd note. Subsequently, witness testified that he could not say without looking at his letters whether Filmer had ever mentioned the Kidd note in any letter he had received. He admitted that the total sum received from Filmer was

It will be noted that the defendant accounts for every cent of the remittances made by Filmer. Two hundred and ten pesos of the total amount of P330 remitted were applied upon the Kosel note, and the balance on the Kidd note. The guilt or innocence of the accused depends (1) upon whether Filmer executed these notes and the indorsement on Exhibit A directing that the Kosel note be paid first; and (2) upon whether he directed the defendant to apply any of the amounts remitted to the Kidd note. The defendant explained the execution by Filmer of the indorsement on Exhibit A and of the note in favor of himself by saying that Filmer came to his office, two days after the execution of Exhibit A with the statement that he was being retained in the Islands and was hard pressed for money and requested a loan. It is admitted that Mr. Filmer was not retained in the Islands and that he actually did go to the United States as he intended. Underneath his signature to Exhibit A are the words "A. G. Employee, ordered to Fort Russell, Wyoming." This was written on April 10. Were the orders directing him to go to the United States for duty at another station canceled between April 10 and April 12, and between April 12 and April 14, when Mr. Filmer actually departed for the United States, reissued; or did Mr. Filmer tell a deliberate falsehood to the defendant in order to get the money which it is claimed he borrowed; or did Filmer ever execute this indorsement and this note? There is no evidence, and in the absence of any, we cannot presume that the orders for his transfer to a station in America were withdrawn and then reissued within a week of the time he departed. The deceit he must have employed to obtain the money otherwise is negated as is best stated in the words of the defendant himself: "Filmer is one of the few men that has gone back to the States promising to pay his debts who has tried to carry out his agreements." Would the defendant have made this statement if Filmer had obtained the money by fraudulent representations? To impute to Mr. Filmer such a disreputable method for securing funds is to forget that he faithfully kept his promise to remit funds for the payment of his debts in Manila. And the defendant does not even claim that Filmer deceived him in this manner.

Again, it will be noted that in speaking of this loan, the defendant stated that the amount loaned was P225, while later on in his testimony he stated that the amount actually loaned to Mr. Filmer was P200.

The existence of this note seems to have been utterly ignored by Kosel in his conversations with the various creditors of Filmer, several months after the latter had left the Philippines. While the indorsement on Exhibit A requires that the Kosel note be given preference in the payment of Filmer's Manila debts, and while the note does as a matter of fact show that all the remittances for the first several months were applied to it, nevertheless, in none of his conversations with the merchants to whom Filmer was owing money did Kosel make any mention of the existence of such a note. On the contrary, in his conversations with McGrath and Weems, at least, he spoke of a board bill taking precedence over all other items, and that he had in fact made a payment upon that board bill. On the witness stand the defendant stated that he had paid none of the Manila creditors of Filmer. Not only were defendant's statements to McGrath and Weems inconsistent with his statements on the witness stand, but they were inconsistent with his conduct at the time they were made. At the very time he told these merchants that he had paid a part of the board bill, he was, according to the Kosel and Kidd notes, promptly crediting every cent remitted to one or the other of these notes.

Again, in his conversation with Bamberger, who had been delegated by Filmer to make an investigation of his accounts with Kosel, when, if ever, it would be expected that he would court the fullest inquiry, although he stated offhand the total amount he had received from Filmer, he again failed to mention either of these notes. The defendant testified that he had accumulated several thousand letters in the course of his business operations. We may assume, therefore, that he had a number of clients and was doing more or less business. If he could remember without reference to his records how much one of these clients had sent him over a period of several months, it is strange that he should find it necessary to say to one who was inquiring about how these remittances had been distributed that he would bring the papers around in a day or two, when he had applied all of such remittances to a personal note due himself. The only papers necessary to show the disposition Kosel had made of the first four remittances was the Kosel note itself. Kosel could not have been without the simple explanation of the manner in which these remittances had been applied when this conversation took place. Yet he evaded the issue and promised to bring the papers around in a day or two. He did this twice within a couple of weeks.

This note shows credits amounting to P210, leaving only P15 due. The first four remittances of Filmer were credited on this note and it was then held by Kosel, and further remittances received in December and January of fifty pesos each were credited to the Kidd note. In February a further credit of ten pesos was entered on the Kosel note, although enough was received in this month to more than liquidate it. This procedure is not consistent with the indorsement on Exhibit A, which provides that the Kosel note shall be paid first of all. According to this arrangement, the remainder of the Kosel note should have been more than paid by the remittance received in December and the note returned to Filmer. It would also have been more reasonable to expect Kosel to secure his own personal note first instead of one in his hands for collection only.

Again, the letters of Filmer introduced by the defense show that he never received receipts (see Exhibit H, quoted above) for at least the first three remittances he sent to Kosel. As these letters were introduced by the defense, there can be no objection to accepting their contents as true. Yet Kosel stated positively on the witness stand that he had sent acknowledgments for every remittance as received, and produced carbon copies of the letters he claimed to have sent. He stated that these letters were placed in official envelopes of his agency, bearing its name, with directions to return to sender within five days if not called for, and that he was certain these letters had been mailed, as he was in the habit of taking all the mail to the post office himself. The only way in which the statements in Filmer's letters can be reconciled with the testimony of Kosel is by concluding that all of these acknowledgments were lost in the mail.

Moore on Facts (vol. 1, sec. 551), in speaking of the presumption of receipt of a letter sent by mail, says:

"Where the envelope bears the name and address of the sender, with a request to return to him if not delivered, the presumption of due receipt 'becomes well-nigh conclusive.'"

In the present case it must be remembered that not only one but several such letters were lost. There was no money or other thing of value inclosed, and the addressee was stationed at one place all the time. That such letters, plainly directed, should fail to reach the addressee, if sent, cannot be believed. The fact that the letters or at least some of them would have been received by Filmer and that his statements in Exhibits E and H are not only hot questioned by the defense, but that there could not have been the slightest motive for him to make them falsely, inevitably leads to the conclusion that these letters were never, mailed by the defendant, and that his testimony in this respect is false.

The prosecution introduced Chauncey McGovern as a handwriting expert, who testified to the effect that both the signature to the indorsement on Exhibit A and to the Kosel note were false. On this appeal we are requested to disregard this testimony because of alleged inconsistencies in his testimony. Before discussing his testimony it is well to note that it is not contended that he did not qualify as a handwriting expert. His opinion appears to have been formed after an unbiased examination of a number of Filmer's signatures, among which were the two in question, and from his own description of his qualifications, the veracity of which is not disputed, it appears that his opinion was entitled to consideration. (U. S. vs. Gil, 13 Phil. Rep., 530.) The value of the opinion of a handwriting expert depends not upon his mere statement of whether a writing is genuine or false, but upon the assistance he may afford in pointing out distinguishing marks, characteristics, and discrepancies in and between genuine and false specimens of writings which would ordinarily escape notice or detection from an unpracticed observer. There is no doubt that superior skill along these lines will often serve to direct the attention of the court to facts, assent to which is yielded not because of persuasion or argument on the part of the expert, but by their own intrinsic merit and reasonableness. It is a well-known fact, and was stated by the witness in this case, that very, rarely, if ever, will any two specimens of a person's signature be exactly alike. For this reason, arguments based upon minute similarities or dissimilarities find little favor and have very little weight in the courts. But glaring inconsistencies between a disputed signature and a number of genuine signatures are not in the same class. We have before us at least ten genuine signatures of Paul M. Filmer, besides the two in dispute. The expert in this case has pointed out several dissimilarities between the disputed signatures and the genuine signatures which we believe are entitled to attention. The top of the letter "a" in "Paul" in the disputed signatures is absolutely closed and the stroke which starts the back of this letter drops below the line which connects the capital "P" with the point where the letter "a" starts. In nearly all of the genuine signatures the same "a" is open at the top, and in the one or two instances where it is closed, the back stroke has no tendency at all to drop below the stroke connecting it with the capital "P." The letter "I" in "Filmer" in both of the disputed signatures has a broken-back appearance which is not true of the same letter in any of the genuine signatures. The final stroke of the "r" in "Filmer" in the disputed signatures has a backward tendency which is also lacking in all the genuine signatures. "Filmer" in both of the disputed signatures and the capital "M" in the signature to the indorsement on Exhibit A show unmistakable signs of "painting," while no retouching is discernible in any of the genuine signatures. And finally, there is a noticeable slurring of the "m" in "Filmer" in the disputed signatures which is wholly lacking in the genuine signatures. Over and above these similarities between the two disputed signatures and their variance with all of the genuine signatures is the fact, visible to all, that there is a dash and swing to the genuine signatures wholly lacking in the disputed ones. The pen strokes of the latter present a labored and lifeless appearance, as though carefully and slowly written. We are of the opinion that these arguments clearly indicate that the two disputed signatures are not genuine. Taken in connection with what we have already observed in regard to this transaction, the conclusion is irresistible that Kosel forged Filmer's signature to the indorsement on. Exhibit A and the

promissory note to cover his own misappropriation of the remittances made to him by Filmer.

Notwithstanding these facts, however, a mere acknowledgement from Filmer that the Kosel note was genuine would doubtless have cleared the defendant on this score so far as any judicial inquiry was concerned.

After the evidence was all in, counsel for the defense asked for a continuance in order that the deposition of Mr. Filmer might be obtained. The court granted a continuance of ninety days for this purpose. A number of questions were prepared, the answers to which would require Filmer to either acknowledge the note or repudiate it as a forgery. The deposition was received and the case reopened. The following excerpt from the record is self-explanatory:

"Counsel for the defendant then stated in open court that the deposition, the taking of which on the part of the defendant was one of the reasons for formally continuing the trial, would not be offered in evidence."

The deposition of Filmer is therefore not before the court. We can only presume that Paul M. Filmer's deposition was unfavorable to the defendant, (U. S. vs. Schindler, 10 Fed. Rep., 547; State vs. McAllister, 24 Me., 139; People vs. Hovey, 92 N. Y., 554; People vs. McGarry, 136 Mich., 316; 99 N. W., 147; Gordon vs. People, 33 N. Y., 501; Underhill on Crim. Ev., § 68.) This presumption adds to the weight of the adverse testimony respecting the execution of the note, Exhibit B.

There is not, in the whole record, any direct evidence that Filmer did not sign the Kosel note. Even the denial of such a fact by Filmer himself is not before us. If we disregard the statement of the defendant that Filmer did sign the note in his presence, there is still the evidence of the signature itself to the indorsement on Exhibit A and to the note in question. But can these signatures overcome the formidable array of facts negating indirectly the genuineness of these documents? There is positive evidence before us of false statements made by the defendant in the execution of his agency. To hold that the second signature on Exhibit A and the signature on Exhibit B are genuine requires that Filmer obtained the money by fraudulent representations, which is neither in harmony with his subsequent actions in faithfully complying with his promises to make monthly remittances until his Manila creditors were paid, nor with defendant's unbroken silence on the subject. There is positive expert testimony in the record that the signatures are false. The defendant's dealings with his creditors belie the existence of this note. If the note was genuine, there was no reason for him to give them to understand that he was applying remittances as received to debts about town when in fact he was applying them to the payment of a personal loan made by himself to the absent debtor. The same duplicity was present in his dealings with Bamberger, who had been delegated to investigate the matter. If the note was genuine, why did he leave P25 unpaid and apply further remittances to another account instead of complying with the indorsement on Exhibit A by paying the said note first of all and then returning it to the maker? No explanation is furnished by the defendant on this point. Notwithstanding the defendant's assertion to the contrary, from all the reliable evidence at hand, the defendant never advised Filmer of the status of his accounts in this city. This continued silence on his part in the face of repeated inquiries from Filmer regarding his remittances does not indicate a proper regard for his duties as an agent. After securing the deposition of Filmer, who, if anybody could, was able to proclaim his innocence, the defendant refused to submit it to the court.

We are of the opinion that the indorsement on Exhibit A and the Kosel note were never seen by Filmer and had no existence at the time Filmer departed for the United States.

Many of the objections made in reference to the Kosel note are applicable also to the Kidd note. Its existence was likewise concealed from the various persons interested in the remittances which Filmer was making. It is admitted that it was not among the list of debts submitted to Kosel on April 10, 1911, with Exhibit A. Although defendant states that he notified Filmer of this note and that he was going to apply further remittances to it, and that in a

letter accompanying a remittance of P30 Filmer had made statements which seemed to bear out all his actions with reference to this note, he could not produce this letter, and subsequently he testified that he could not say without looking at his letters whether Filmer had ever mentioned the Kidd note. Among the questions prepared and which should have been answered in Filmer's deposition were a number which would have cleared up any doubt as to whether Filmer actually signed this note and as to whether he had agreed that it should be paid out of the remittances. But as this deposition was not produced in evidence, we can only assume that its contents would have been unfavorable to the defendant in these respects also. No authority was produced by the defendant for his action in applying remittances to this note. There is no question but that the P120 indorsement and payment as claimed by the defendant to have been made on the Kidd note was not in compliance with his obligation, and the defendant has in this respect unquestionably violated the provisions of article 535, subdivision 5 thereof, of the Penal Code also.

The judgment of the lower court is therefore affirmed, provided, however, that the defendant shall be further sentenced to indemnify Paul M. Filmer in the sum of P330, to suffer the corresponding subsidiary imprisonment in case of insolvency, and to the accessory penalties provided by law the costs of this instance shall also be taxed against the defendant. So ordered.

Arellano, C. J., Torres, Johnson, and Moreland, JJ., concur.

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