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[G.R. No. 1227. May 13, 1903]

THE UNITED STATUS, COMPLAINANT AND APPELLEE, VS. HOWARD D. TERRELL, DEFENDANT AND APPELLANT.

D E C I S I O N

MCDONOUGH, J.:

The defendant and appellant, Howard D. Terrell, was convicted, in the Court of First Instance, city of Manila, of *estafa*, under article 535 of the Penal Code, on the charge of having on the 1st day of December, 1902, in the city of Manila, received and obtained of William Turtherly a valuable consideration, to wit, the dissolution of the partnership of Terrell & Tutherly, consisting of Howard D. Terrell and William Tutherly, by selling and transferring to said William Tutherly a certain law library, then in the office of said Terrell, together with other property, and by willfully, knowingly, falsely, and fraudulently representing to said William Tutherly that the said law library wan then the unencumbered property of the said partnership of Terrell & Tutherly, and that the interest of said Terrell therein was unencumbered; and by willfully, knowingly, falsely, and fraudulently concealing the fact that he, the said Terrell, had heretofore, to wit, on the 28th day of December, 1901, sold said library, together with other personal property, to Jacinto Lim Jap; and the fact that said Terrell had, on the 16th day of April, 1902, sold and transferred the said law library, with other property, to A. S. Stevens, contrary to the statute in such case made and provided.

The proof does not show that any testimony was taken regarding the alleged sale to A. S. Stevens, and that part of the complaint seems to have been abandoned.

The fact was established that the defendant, desiring to borrow from Jacinto Lim Jap 1,000 pesos in .Mexican currency, wrote a letter to him on the 28th of December, 1901, asking for a loan of that amount, for thirty days, and with the letter inclosed the promissory note of the defendant for that sum and also a bill of sale, absolute in form, of his law library, carriage

and team of horses, and book accounts, stating in the letter that the bill of sale was sent *as security for the loan*.

On the 29th day of December, 1901, Jacinto Lim Jap delivered to the defendant the 1,000 pesos, and retained the note and bill of sale; but he did not take possession of the law library or other personal property at that time, or at any subsequent time; nor did he demand possession of the same, or take any legal steps at any time to obtain possession or control of this property.

The law library remained in the possession of the defendant; and on the 14th of August, 1902, on the formation of a partnership with William Tutherly for the practice of law, the defendant sold to William Tutherly a half interest in the law library; and on the 1st day of December, 1902, on a dissolution of said partnership, he sold his remaining half interest in said library to William Tutherly.

There is no charge in the complaint that the defendant, by these sales, defrauded Jacinto Lim Jap. There is, however, a charge that he defrauded William Tutherly by falsely and fraudulently representing to him that the property was unencumbered, and by fraudulently concealing from him the fact that the property had been sold to Jacinto Lim Jap.

In order to sustain a criminal charge of fraud or cheating, it is necessary to specify the person defrauded, and to prove that the design was successfully accomplished, at least so far as to expose the person to danger of loss.

At the time of the sale of the books to William Tutherly they were not encumbered, because Jacinto Lim Jap had not complied with the requirements of the law to make his security good. Mr. Tutherly, therefore, acquired a good title to the library, and was not, therefore, wronged, deceived, or defrauded; hence the prosecution failed to make proof of the offense charged in the complaint.

The learned judge before whom the cause was heard reached the conclusion, however, that although the proof showed that no fraud had been committed on Mr. Tutherly, it did show that the defendant practiced a fraud upon Jacinto Lim Jap in actually reselling and delivering the books to Mr. Tutherly, because Lim Jap "had a right to *assume* that the defendant would stand ready upon demand to comply with the terms of said contract," and by the reselling of the property Lim Jap "lost his right to recover the said property or enforce his lien, if lien it may be called, against the described property."

It may be that Lim Jap had a right to "assume" that the defendant would comply with the terms of his contract, that he would pay the debt when due and deliver the personal property if demanded, but it does not follow that a failure on the; part of the defendant to fulfill his promises, express or implied, constitutes a crime—the crime of estafa. Fraud is not to be presumed or assumed; it is to be proved; and it might as well be said that a failure to pay the 1,000 pesos, when due, constituted a fraud on Lim Jap, as to say that a failure to hold the library for him amounted to fraud.

While the bill of sale delivered by the defendant to Lim Jap appears on its face to be an absolute sale of the books, etc., the letter of the defendant accompanying it states in effect that it was a transfer of the. property as security for the loan, and both parties treated it, throughout the trial, as security or an offer to pledge the property for the payment of the debt,

It has been frequently held that an instrument in the form of a bill of sale may be construed as a pledge. (Denis on Contract of Pledge, 93.)

If it should be assumed that lim Jap had a valid lien; on these books, even then the defendant had ownership in them, which he had a right to sell. On the question of pledges the civil law and the common law are alike; and at common law it has been held that a pledgor is still the general owner of the property, and may transfer it upon good consideration and by proper contract, subject to the rights of the pledgee. (Whitaker vs. Summer, 20 Pickering, Mass., 405.) Hut the answer to the finding of the court below that Jacinto Lim Jap, because of the sale of the books to Mr. Tutherly, lost his right to enforce his lien against the property, is simply this: He never had a lien upon the books; he never took steps to acquire a lien; he never complied with the requirements of the law.

Under the Civil Code (art. 1863) it is necessary, in order to constitute the contract of pledge, that the pledge should be placed in possession of the creditor, or of a third person, bv com in on consent. This is also the rule at common law. "It is of the essence of the contract," says Judge Story in his work on bailments,[1] "that there should be an actual delivery of the thing to the pledgee. Until the delivery of the thing, the whole rests in an executory contract, however strong may be the engagement to deliver it; and the *pledgee acquires no right of property in the thing.*"

The creditor acquires no right in or to the property until he takes it into his possession, because a pledge is merely a lien, and possession is indispensable to the right of a lien.

Jacinto Lhn Jap, through his failure or neglect to take this property into his possession, must be presumed to have waived the right given him by the contract to make good his lien, if he saw fit to do so.

It has been held that an abandonment of the custody of the articles over which the right extends necessarily frustrates any power to retain them, and operates as an absolute waiver of the lien.

The holder, in such a case, is deemed to yield up the security he has upon the goods, and trusts to the responsibility of the owner. (Walker us. Staples, 5 Allen, Mass., 34)

It follows that the element of possession failing, there can be no pawn or pledge, and that the possession of the defendant, with the consent of Jacinto Lim Jap, was absolute and unqualified, and not special or subordinate, and that lie committed no crime in selling the property. In two cases decided by this Court the principles of law involved in this case were passed upon, and in both cases it was hold that no crime had been committed.

In the case of the United States vs. Mendezona, decided February 10, 1903,[1] where the defendant sought and obtained a loan, and, in consideration of the loan, promised to secure1 the creditor by giving a mortgage on certain real property, but failed to execute and deliver the mortgage, and, in fact, sold the property to another party, it was held that the defendant did not by these acts commit the crime of *estafa*, because at the time the loan was made he possessed the title to the property and was the owner, and therefore in contracting the debt in his personal capacity he did not act in bad faith, nor did he employ deceit, since the mere failure to comply with the contract or obligation does not constitute the crime of *estafa*.

The other case is that of the United States vs. Apilo, decided October 9, 1900. In that case the defendant obtained a loan, pledging as security therefor horses, carriages, and other vehicles. In the document of pledge it was expressly stated that the debtor would not sell or encumber the pledged property, which was left in his possession. Notwithstanding this express promise not to sell the property, the defendant, in that case, shortly after obtaining the loan, sold the property and thereupon the creditor caused him to be prosecuted for *estafa*.

The facts in that case were more favorable to the prosecution than are the facts in this Terrell case, because of the express covenant on the part of Apilo not to sell the property. Terrell made no promise whatever to hold the library for his creditor, and yet this court held

that Apilo, in disposing of the property, did not defraud his creditor, and that his acts did not constitute the crime of *estafa*.

The court stated in the Apilo case that the contract of pledge was not legally consummated because "the objects of which the pledge was to consist were not placed in possession of the creditor, nor of a third person, but remained in the possession of the debtor, who, having the free disposition over those objects as if they were his own, committed no infraction of the penal law by transferring them."

In view of these decisions and of the authorities cited above, the court below erred in convicting the defendant of the crime of estafa. The judgment of the court below is reversed, and the defendant is acquitted, with the costs of both instances *de oficio*.

Arellano, C. J., Torres, Cooper, Willard, Mapa, and *Ladd, JJ.,* concur.

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[1] Story on Bailments, § 297.

[1] 1 Phil. Rep. 696.

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