

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. MARIANO LIM, DEFENDANT AND APPELLANT.*G.R. No. 11841. March 31, 1917*Read online (full-text search, related cases, audio case brief): <https://batas.org/library/g-r-no-11841/>**PER CURIAM:**

It is our opinion that the record demonstrates over-whelmingly the existence of a relation of trust and confidence between Pablo Monserrat and Mariano Lim, the defendant, such as is charged in the information, by virtue of which the latter was under an obligation to act for and on behalf of the former, to disclose the facts truthfully, to act fairly and justly, and to account faithfully. That relation was established upon Lim's own initiative. It was induced by false representations and pretense; it was continued by active deceit and by a failure to disclose truthfully the facts; and it was terminated without an accounting to Monserrat by reason of the continued misrepresentation, deceit, and failure truthfully to state the facts on the part of Lim.

We base this conclusion upon the oral and documentary evidence in the case and especially upon Exhibits 1, 2, 4-a, 4-b, 4-c, 4-d, 5, 7, and 9.

It is true, as counsel argue that Monserrat, the complaining witness and the person alleged to have been defrauded, made at times certain statements as a witness which, if taken literally and without regard to the context, might militate against the existence of the relation which we have held the evidence establishes. It should be noted, however, that Monserrat, almost in the same breath, stated facts and detailed circumstances which showed what the relation really was. The statements referred to are largely conclusions of law which Monserrat drew concerning the nature of the relation between him and Lim in response to questions put to him which required, in part at least, legal conclusions as answers.

Moreover, the actual relation between Monserrat and Lim in the transaction in question is not determined by the name which Monserrat puts upon it or which he might put upon it. One ignorant of law might readily declare that a certain state of facts created one relation when, as a matter of law, it created quite a different relation. While Monserrat may not have been able to give the legal name of the relation which was established between him and Lim he, nevertheless, contended, and now contends, that that relation was of such a character that Lim had no right to induce him, by fraud and deceit, to accept P2,492 for land for which Lim, by virtue of almost the same act, received P4,461.50.

We have read with great care and interest the printed argument of counsel for the appellant; and we listened with the same care and interest to their oral argument. In spite of these arguments, however, we do not believe that it can be legitimately drawn from the record that the defendant Lim was a purchaser of the land in question from Monserrat in his own name and that, in the negotiations between him and Monserrat, he occupied the position of one who purchased from Monserrat in his own name and on his own behalf to resell to the railroad company. Substantially none of the evidence in the case, either oral or documentary, except that of Lim himself, supports this theory. The evidence requires, on the contrary, a conclusion altogether different. Even the testimony of Lim himself, if taken as true, fails in material respects of fully and fairly explaining the case which the testimony and exhibits of the prosecution establish against him.

We do not believe that the court erred in excluding Exhibits N-1 to N-48, as they were offered in evidence by counsel for the defendant. We think they were properly excluded on the ground that they were immaterial and irrelevant. To give them even an appearance of bearing it would have been necessary to show that Monserrat knew of the transactions which those exhibits embody, and was familiar with the custom which it is claimed they establish. Moreover, the fact that the defendant did with others what he did with Monserrat is slight, if any evidence, of the correctness of the contention that his conduct with Monserrat was fair and legal.

We have carefully considered the argument of counsel based on that fact that Lim paid Monserrat the purchase price of the land out of his own funds by means of his personal check. It is true, as counsel contend, that this fact might, under proper circumstances, corroborate the claim of Lim that he purchased the land from Monserrat and took title thereto in his own name. It should not be overlooked, however, that it also supports the contention of the prosecution based upon the charge that Lim, throughout the transaction, deceived and misled Monserrat; and that one of the most artful conceptions in the scheme of deception was that very payment, as it rid Lim of the danger which would have followed an attempt of Monserrat alone, or of Monserrat and Lim together, to collect that sum from the railroad company. It may be admitted as true that, where a given fact may be construed either for or against the accused, he is entitled to have it construed in his favor. That rule, however, if it is a rule, is subject to the exception that a fact which is susceptible of being fitted into one or the other of two theories, should be fitted into that theory in which it will produce its natural and logical effect.

We have examined with care all of the assignments of error presented to us by counsel for the appellant. We do not consider it necessary to deal with each one in detail. All have been met with the statements which we have already made. Most of them are based upon the construction or interpretation which counsel believe we should give to the testimony and the exhibits. The trial court and this court believe that the application we have made of the testimony, both oral and documentary, is not only the natural and ordinary but the necessary application. However much the words and sentences of the evidence may be strained and twisted, the striking fact remains that Monserrat received P2,492 for a document transferring lands, for which very same document Lim, by a turn of his hand, received P4,461.50. There is no explanation in the record which even approaches sufficiency which discloses why Monserrat should deliver to Lim for P2,492 a document for which he could have received P4,461.50 if he had delivered it to the Railroad Company in whose favor it was already drawn and to which, to all intents and purposes, it already belonged.

Finally, we find little difficulty with the contention that the defendant was exempt from prosecution by virtue of the immunity conferred by section 28 of Act No. 2307. Even admitting, for the sake of the argument made by counsel for the appellant, that the defendant comes within the provisions of that Act, which is seriously doubted by the prosecution, we are of the opinion that he may waive the privilege; and we have no question whatever of the fact that he did waive it on the trial of this case.

The facts as we find them and as the lower court found them bring the case clearly within article 535 of the Penal Code.

The penalty imposed being within the provisions of law pertaining thereto, the judgment of conviction and the sentence imposed thereunder are hereby affirmed, with costs against the appellant. So ordered.

Arellano, C. J., Carson, Moreland, Trent, and Araullo, JJ.

RESOLUTION ON MOTION FOR REHEARING.

October 13, 1917

PER CURIAM:

This court having affirmed the judgment rendered by the Court of First Instance and appealed by the defendant (whereby he was sentenced to the penalty of one year, eight months, and twenty-one days' imprisonment, to indemnify Pablo Monserrat in the sum of P1,979.50, or, in case of insolvency, to suffer the corresponding subsidiary imprisonment, and to pay the costs of the trial), his counsel filed a written motion for a rehearing and requested his client's acquittal, and, in a contrary case, that the Supreme Court expressly decide the errors assigned to the judgment of the lower court and set forth a new statement of the facts in order that said counsel might know of the true nature of the crime for which the defendant was sentenced.

To show fully in what the criminal acts committed by the defendant consisted, herebelow we give a specific statement of the facts as disclosed by the record to have been duly proven.

In December, 1910, the defendant, Mariano Lim, having learned that between the pueblos of Calauang and Magdalena there were four parcels of land belonging to Pablo Monserrat which the railroad company needed in order to proceed with the laying of the railroad line, took steps with a view to obtaining the sale of these four parcels of land to the company; but, on taking up the matter verbally with the owner of the land, the latter told the defendant that he, the owner, had already begun preliminary negotiations of sale directly with the railroad company, through an engineer in its employ. For this reason Monserrat did not state to Lim the price for which he wished to sell his land, although later, about January, 1911, as Monserrat did not succeed in selling his land for P1 a meter, inasmuch as the railroad company would offer him only 7 centavos a meter, Monserrat, upon the previous invitation of Lim tendered him through an agent of Lim's in Laguna, came to Manila to confer with Lim, who after a few days stated to Monserrat that the company was willing to pay him more than it had paid the other land-owners and would give him P500 more than the price previously offered.

Monserrat being firmly convinced, through Lim's statements to him, that he could not obtain a better price than the one Lim had offered him, came to Manila to confer with the latter, and they finally reached an agreement whereby Monserrat sold his land to the company for P2,482, paid to him in advance by the defendant through means of a check, and Monserrat issued the receipt Exhibit 2, dated March 25, 1911. Thereupon Monserrat signed four deeds of sale of his four parcels of land, conveying this property to the railroad company. The spaces in these deeds intended for the insertion of the price were left in blank and the price was not fixed therein until several days after Monserrat had returned to and was in the pueblo of his residence. It then appeared that the company paid P4,461.50 for the four parcels of land sold to it. The defendant collected this sum, keeping the profit of P1,979.50, which was the difference between the said P4,461.50 and the P2,482 received by Monserrat.

In the negotiation above mentioned which culminated in the purchase by the railroad company of the four parcels of land sold by their owner Pablo Monserrat, the defendant Lim intervened as an agent and intermediary between the owner of the land, the vendor, and the railroad company, the purchaser, and officiously represented both parties in the arrangement of the matter. The nature of his intermediary intervention appears fully proven in the record, by both documentary and oral evidence.

If the record actually disclosed the slightest proof that the aggrieved party, Monserrat, sold to the defendant, Lim and not to the company, the said four parcels of land, it would be a great injustice to decide this case by convicting the defendant of having swindled the complainant out of the amount of the difference between the price of the sale and that of the resale.

The owner of the four parcels of land could have sold them to the defendant in the manner and for the price which he deemed proper to demand of the purchaser, and if the purchaser should subsequently have succeeded in reselling the land to the railroad company, as he states that he did, there would be nothing unlawful or censurable in these successive operations that could be any reproach upon the skillful and shrewd agent who succeeded in netting himself a profit of nearly P2,000.

But, notwithstanding the formation of a voluminous record and the defendant's introduction of a huge amount of evidence in support of his averment that the sale made by Monserrat of his four parcels of land was covenanted for the defendant's account and in his favor, and not in behalf of the company, the truth is that the alleged fact of the sale in the defendant's favor in nowise appears to be proven; on the contrary, the record shows conclusive proof, based chiefly on the very acts of the defendant himself toward, and his statements to, the vendor, all of which tend to show undeniably that while the defendant Lim was acting in the officious role of agent and intermediary, he made statements, performed and executed acts tending, all of them from the beginning, toward an agreement upon, and realization of, the sale on the part of Monserrat of his land and in favor of the railroad company, which needed it for the laying of its line.

It is to be noted that when the defendant invited Monserrat to confer with him in regard to the sale of said parcels of land, he already knew that the owner had tried to sell them to the company—a sale which was not effected on account of the excessive price that Monserrat asked for them.

The defendant Lim never stated, either by letter or verbally, that he desired to buy the land for himself, but, on different occasions, constantly and always gave it to be understood by the vendor that the sale would be made on behalf of the railroad company, which was in need of acquiring the property for the construction of its line. In endeavoring to persuade the vendor Monserrat to accept the price which, as Lim said, the railroad company had tendered, with the increase of P500, Lim stated to Monserrat, and by letter, that the latter could accept it as an advantageous price which the company was willing to pay for the land, and that indeed he ought to accept it, in order to avoid forcing the company to resort to the courts by bringing expropriation proceedings, and advised Monserrat that should it do so, the result might be unfavorable to him as regarded the price of his land.

Monserrat, to judge from his acts, relying upon Lim's statements constantly believed, and so repeatedly said in his testimony given at the trial, that Lim's intention and purpose were to sell Monserrat's land to the railroad company, and he never heard or knew that Lim desired to purchase it, nor, during his negotiations with the latter, had he any knowledge that he was selling it to Lim, or that Lim had bought it for himself. Such were the statements insistently made by Monserrat in his testimony. He positively declared that he believed that Lim was acting as an intermediary between the vendor and the company, and it is very likely, if not certain, that such was his belief, inasmuch as Monserrat, from the time that he and the defendant discussed the price, until the signing of the receipt of payment and the four deeds of sale on behalf of the company, did not even once see the head of the company, or any of its employees. Therefore, from all those transactions and happenings, the vendor very rightly concluded that Lim, with whom he closed the deal for the sale of his land and from whom he received the price thereof, acted at least in the capacity of an intermediary, as Monserrat stated in his testimony, or as an agent and broker who discharged his commission in representation of the company.

In the letter, Exhibit 1, addressed by the defendant Lim to the complaining witness Monserrat, the former announced to the latter that the writer had succeeded in getting an increase of P500 over the price of P1,609 for the four parcels of land and their improvements—an increase obtained, as recited in the letter, from the attorneys of the company by way of a compromise—and he warned Monserrat that if he did not reply definitely before March 25, 1911, said attorneys would resort to the courts and fix the price of the land at its assessed valuation for the purpose of its expropriation in accordance with law; and, finally, said letter further stated that Lim believed that

also Attorney Ordovesa would be of the same opinion, to wit, that they (writer and addressee) ought to accept the P2,109 as the reasonable price of the four parcels of land, because, were the matter taken into court, a judgment might be rendered fixing a price but a little higher than the assessed valuation, that is, equal to that assigned in the judgments given in the cases for the expropriation of the lands from Calamba to Bay, in which event only the sum of P1,600, without the said increase of P500, would be collected; therefore Lim expected an answer from Monserrat before said date of March 25th. This letter contains no word or phrase whatever tending to show that Lim bought for himself and Monserrat sold him the said land, but does show that the sale be made to the railroad company. The whole contents of the letter evidences that the defendant Lim, as Monserrat rightly asserts in his testimony, acted and negotiated as an intermediary, mediating with officious cunning between the owner of the land and the railroad company.

The document Exhibit 2—which attests that Monserrat received from Attorney Lim the sum of P2,482, as the net and covenanted value of Monserrat's lands, expropriated with their improvements by the railroad company, after deducting the expenses and Lim's professional fees for his management in the matter—does not prove that Lim purchased the lands from their owner, Monserrat.

The latter, being convinced by Lim's deceitful statements, that he could not obtain a better price for his land than that offered him by Lim, in representation of the railroad company, with the additional sum of P500, acquiesced in the offer, concluded the contract, and received the price which he, being deceived, believed was just, and immediately thereupon signed the four deeds of sale of his land in favor of the railroad company, and in affixing his signature to them did not notice that the lines or spaces therein reserved for the respective prices were in blank. Under the belief that he had no other recourse than to sell his land at the price communicated to him by the defendant Lim in behalf of the company, Monserrat had no objection in accepting that price from Lim and did not notice that it was not the company, or any of its employees, that paid him for his land, but that it was the agent and intermediary Lim, for which very reason the vendor readily believed the defendant's deceitful statements and accepted the price offered for his land as being the highest that the railroad company could pay, as he was told that it was by the agent and intermediary Lim.

The acts performed by the vendor in receiving the money and signing the document Exhibit 2, the negotiations and statements of the defendant, as well as the contents of this document, in no respect afford the slightest proof that the defendant was the purchaser of the properties in question, in face of the irrefutable evidence that the sale was made to the railroad company, as affirmed by the owner of the land, for this fact appears not only by the contents of the deeds signed on the same date as that of the receipt of the price, but also by other documents, statements and acts made and performed by the defendant Lim, who in fact did act as an agent and intermediary for the arrangement and realization of the sale between the owner of the land and the purchasing company.

We merely classify the acts that are the subject-matter of the present cause and weigh the evidence thereto pertaining, without holding that account should be taken of other similar acts performed by the defendant and recorded in other documents relative to similar operations. Therefore, the contents of these latter documents cannot justify as lawful the acts herein complained of.

It is indeed remarkable what efforts have been displayed by the defendant's counsel to produce the conviction that the land was sold by Monserrat to the defendant; but notwithstanding all those efforts, certainly worthier of a better cause, this court unfortunately has not found the slightest proof of the truth of the alleged sale of the land to the defendant; on the contrary, we have found that all the acts performed by the defendant were in representation and on behalf of the railroad company. For this reason we deem it unnecessary to enter upon a discussion of particulars and details which perhaps might cast more darkness than light on the facts involved in this case.

If Monserrat did not sell his four parcels of land to Lim, as it so appears to have been fully proven at the trial, notwithstanding the lengthy allegations made by the latter in his defense, and if these parcels were expressly sold by their owner to the railroad company through means of negotiations conducted by the defendant himself, it must be recognized that the sum of P1,979.50 (which is the difference between the P2,482 received by Monserrat as the supposed price of his land sold to the company, and the P4,461.50 which it actually paid for the land), was, with deceit and bad faith, unlawfully appropriated by the agent and intermediary, in fraud and to the prejudice of the vendor Monserrat.

When Lim hastened to pay Monserrat the sum of P2,482 the very moment he succeeded in convincing the latter that it was the best price Monserrat could get by the sale of his land, inasmuch as, with the exception of the additional sum that the agent and intermediary claimed to have gotten, the railroad company was not willing to pay more, it cannot be doubted that the defendant acted in agreement with some of the employees or attorneys of the company,' and the sum of P4,461.50, which the company was to pay for Monserrat's land, surely had already been fixed and agreed upon between them and the defendant; so that, under these circumstances, the defendant had no objection in advancing to the vendor the price agreed upon between himself and the complaining witness, for Lim well and positively knew that he would recover the sum advanced by him to the owner of the land immediately upon the latter's signing, as he did, the deeds of sale, and, for the purpose of concealing the true price and consummating the acts that constitute estafa, the lines reserved for the insertion of the selling price were left in blank.

Between Monserrat and Lim there was no covenant or agreement whatever authorizing the agent and intermediary to keep for himself the extra sum that he got from the railroad company; on the contrary, from the commencement of the negotiations he carefully tried to conceal all knowledge of the price that the company would pay and he employed all the fraudulent means conducive to convince Monserrat that he could not possibly obtain a better price than that offered him by the defendant, with the additional sum which Lim assured him that he, the defendant, had succeeded in obtaining from the vendee company in behalf of the vendor.

It is to be noted that after Monserrat had attempted to sell his land directly to the railroad company and had hopelessly failed in the attempt, he never sought to confer with the director of the company or with any of its employees or attorneys, but with absolute confidence relied upon the discretion and management of the defendant and accepted as true all that the latter told him, until he received the sum agreed upon between them both and had signed the receipt therefor and the deeds of sale in behalf of the company, on which occasion the defendant acted as an agent and intermediary in representation of the purchaser, for the purpose of keeping for himself the amount embezzled.

The facts that occurred relative to the sale of the land, and in which there was fraud and deceit on the part of the defendant intermediary, were established at the trial and were founded, not only on the testimony of the complaining witness and the defendant Lim, but also on the precedents, details and other particulars connected with the negotiations between them both. Had the intermediary Lim not been sure that the railroad company would pay him the amount that it subsequently did, he would not have advanced to the vendor the lesser price, out of his own funds. But he made that advance without the slightest objection because he was sure that Monserrat already signed the deeds of sale with the spaces intended for the insertion of the price, left in blank, and the vendor returned to his pueblo in Laguna on the same date that he received the money.

The record, then, shows conclusive proof that the defendant appropriated to himself nearly P2,000 without the knowledge and consent of Monserrat, who had a perfect right to collect this sum as a part of the price of his land acquired by the railroad company; and, as the defendant succeeded in wrongful profiting by such a large sum through means of his false statements to the deceived party, Monserrat, who believed him to be an agent acting in

representation of the company—a belief affirmed by the receipt of the money as the price of his land—it is evident that the defendant committed the crime of estafa, inasmuch as, craftly and deceitfully, he defrauded Monserrat and kept for himself the sum of P1,979.50, to the latter's prejudice. Had the defendant acted in good faith, he would have given Monserrat an account of this sum. Therefore, under the provisions of article 534, paragraph 3, and article 535, paragraph 5, of the Penal Code, the defendant incurred liability and the corresponding penalty. Paragraph 5 of said article 535 prescribes:

"The penalties prescribed by the next preceding article shall be imposed upon:

* * * * *

"(5) Any person who, to the prejudice of another, shall convert or misappropriate any money, goods, or other personal property received by such person for safekeeping, or on commission, or for administration, or under any other circumstances giving rise to the obligation to make delivery of or to return the same, or shall deny having received such money, goods, or other property."

The clause contained in the paragraph just above quoted: "or under any other circumstances giving rise to the obligation to make, delivery of or return the same (money, goods, or other property)" refers to a civil obligation, and, in the instant case, upon the defendant Lim becoming the agent, representative, and intermediary in the specific business deal of the purchase by the railroad company of four parcels of land belonging to the complaining witness Monserrat, it was his duty to make delivery of all the sum paid by the company and which he had received as the integral price of said four parcels of land by reason of his intervention and negotiations as an intermediary in the business transaction of the purchase and sale of Monserrat's land—a business which was not the defendant's own and which solely interested the owner of the land and the railroad company.

The nonfulfillment of the obligation to deliver to Monserrat the P1,979.50, part of the price of the land sold, and the appropriation to himself of this sum by means of craft and deceit constitutes the crime of estafa, for the very reason that the agent and mediator, Lim, had absolutely no right to take that money for himself to the prejudice of its owner.

It is true that between Lim and Monserrat no stipulation whatever had been made as to how and in what manner Lim should fulfill his trust, or as to what remuneration he should collect for his work; nor does the record show what agreement there was between Lim and the railroad company, or between him and some of the latter's employees. It is, however, unquestionable that both parties accepted the mediatory transactions of the officious agent, Lim, whose negotiations were subsequently duly ratified by the company, which accepted the deeds of sale and paid the price of the land, and Monserrat also ratified them by consenting to the sale of his land to the railroad company and by his acceptance of the supposed price of the sale, which mutual ratification produced the effects of an express authorization on the part of the vendor and on that of the purchaser, the contract of sale being carried into execution and consummated through means of the agent and Attorney Lim who, consequently, contracted the inculdible obligation to deliver to the owner of the property the whole amount of the price of the sale received by him from the purchaser company. The defendant, on his part, cannot rightly allege any ground or valid reason to warrant and justify his appropriation of the sum embezzled, as there was not even so much as an agreement authorizing him to keep said amount for himself, nor was any such agreement pleaded, nor could it have been pleaded, for the very reason that the defendant tried from the beginning to conceal his special dealing with the employees of the railroad company, in regard to the sale in question.

It is true that in the beginning of the negotiations no reciprocal, consensual obligation was established between Monserrat and the defendant Lim; but Monserrat having ratified the negotiations and mediatory acts of Lim in respect to the sale of Monserrat's land, from that express ratification pursuant to article 1892 of the Civil Code,

there arose an authorization, and the obligation on Lim's part to deliver to the vendor all the money received. This obligation is mentioned in paragraph 5 of article 535 of the Penal Code, aforesaid, and originated from the quasi contract between the manager and the owner of the business that was the subject of the intermediation.

As customarily occurs in crimes of estafa, the agent's guilt supervenes from an unlawful contract or act that assumes the nature of a crime because of the craft or deceit which, on the occasion of such contract, its author performs in fraud and prejudice of the other contracting party or of a third party, and for this reason article 1092 of the Civil Code provides that civil obligations, arising from crimes or misdemeanors, shall be governed by the provisions of the Penal Code.

The defendant Lim, in the mediatory management he conducted for the arrangement of the sale of Monserrat's land to the railroad company, performed or carried out acts that were perfectly lawful and accordant with law; but he committed a punishable offense from the moment that he concealed and appropriated to himself a part of the price of the land without accounting for or delivering it to the owner of the property, since he had no right to keep the P1,979.50 for himself.; it was his ineludible obligation—originated from his officious management that produced the mandatory obligation—to deliver said sum to the owner of the land sold; and, because he appropriated this sum to himself by means of deceit and to Monserrat's prejudice, he is guilty of the crime of estafa.

It is not at all strange that, with regard to certain crimes, there should be cross-references between the civil and the penal statutes, because both these branches form a part of the general laws in force in this country. Acts of a civil nature are governed by the Civil Code, but from the very moment that a human action assumes the nature of a crime, it of course comes within the purview of the penal laws. If the defendant, in spite of his having concealed from Monserrat the higher price he obtained from the railroad company, had returned by the path of good faith, if he had reported the facts to the owner of the land and had delivered to him the amount he received in excess, he would not have committed any violation of law whatever and the prosecution instituted against him would not have prospered.

In corroboration of what we have stated above in respect to the nature of the crime under prosecution and to the liability contracted by its perpetrator, we shall cite two decisions of the supreme court of Spain, rendered on appeals in error, and in which will be found a discussion in regard to the application of article 548, paragraph 5, of the penal code in force in that country and which is the same as article 535, paragraph 5, of the penal code in force in these Islands. In the first of these decisions, that of December 18, 1871, the following legal doctrine is laid down:

"When a person constitutes himself a voluntary agent (gestor) for the collection of a sum of money and, after collecting it, does not deliver it to the persons by him recognized to be authorized and entitled to collect it, he commits the crime of estafa, provided for in said paragraph 5, for he incurs criminal liability by retaining in his possession the amount collected, and even in a case where there be doubt, it is his ineludible duty to deposit such collection with the court."

In the other decision, rendered on April 7, 1904, the following principle is enunciated:

"When a person engages himself to serve as an intermediary between a manufacturer of a town and the merchants of a capital, taking it upon himself to receive the goods, deliver them to the purchasers, collect the price thereof and remit it to the manufacturer, charging for himself a 2 1/2 per cent commission, if he appropriates to himself all or part of the sums collected, besides the 2 1/2 per cent commission, he commits the crime of estafa."

In one of the findings on which this last-cited decision is grounded the court says:

"The acts performed contain the characteristic elements of the crime of estafa, which bears with it criminal liabilities born of the deceitful purpose of misappropriation and diversion, and cannot be confused with the civil liabilities which have their origin in the contract itself."

The defendant Lim, in closing the contract of sale of the land with the owner thereof, Monserrat, at a price fixed by himself and accepted by the latter, implicitly obligated himself to collect from the purchaser company and to deliver to Monserrat the whole sum he should receive as the price of the sale, and from the very moment that he concealed, deceitfully and fraudulently, a part of the price and appropriated it to himself, he committed the crime of estafa provided for and punished in the aforecited article of the Penal Code.

The liability contracted by the defendant is so clear and evident that, after a careful examination of his voluminous brief and the twenty errors assigned to the judgment rendered by the Court of First Instance, and after duly weighing the facts alleged and argued at the trial, as well as all the evidence therein produced, irremissibly the conclusion is reached that the defendant, by means of craft and deceit, did appropriate to himself and did defraud the complaining witness Monserrat out of, the said sum of P1,979.50.

This court deems it unnecessary to spare the time that would be required separately to refute each one of the twenty errors assigned to the judgment of the lower court, for the reason that, by the statement of facts and the legal considerations set forth herein and in our previous decision, those errors have all been completely refuted, with the exception of the twelfth, which, though it were true and though we should hold it to be a positive inaccuracy noted in the judgment appealed from, that judgment would not, on that account, be null and void and unjust, nor would the grounds set forth be weakened.

If this court, in the examination of a simple, uncomplicated fact, should, in addition to the reasonings given in its decision, devote its time to a special refutation of every one of the errors alleged, following the method selected by the defense, we should fail; to obey the law of procedure, which prescribes that decisions and judgments, without being excessively short and inexpressive, shall contain a concrete statement of the facts pleaded and the evidence adduced in their support, and of the legal grounds, conducive to a decision of the matter, and that care shall be taken to avoid setting forth therein immaterial and unnecessary allegations which, far from producing clearness in the issues discussed, might give rise to involutions and confusions which might render it difficult to arrive at a just and proper determination of the points at issue. When, in the course of the pleadings, expression is given to contradictory judgments and opinions, directly opposed to each other, it is quite natural that each party should find error in the enunciation of ideas and the expression of opinion of the contrary party. The court complies with the law by impartially forming its judgment in the case or proceeding, and deciding the same in accordance with the pleadings and proof.

For the foregoing reasons, and those set out in the previous decision, the rehearing and the acquittal asked for in the preceding petition by the defendant's counsel is denied, and the findings of said previous decision of this court, promulgated on March 31, last, shall be abided by. So ordered.

Arellano, C. J., Torres, Araullo, and Malcolm, JJ.

CARSON, J., concurring:

The arguments of counsel in support of this motion for a rehearing are substantially identical with those decided adversely to his contentions in our original decision on this appeal, and nothing has been said which would justify the setting aside of the former decision and the reopening of the case. The motion for a rehearing should, therefore, be denied.

STREET, J., dissenting:

On March 25, 1911, the defendant, Mariano Lim, induced one Pablo Monserrat to execute and deliver to him four deeds to as many pieces of property theretofore owned by Monserrat and situated in the municipality of Nagcarlan, in the Province of Laguna. The transaction was in the form of a sale and the price agreed upon was P2,492, which was paid by the defendant Lim. The grantee named in the deeds was not Lim, who negotiated the purchase and paid the price, but the Manila Railroad Company. Within a short period after Lim acquired these deeds he reached an agreement with the officials of the railroad company by which they paid him the sum of P4,461.50 for the property.

The deeds were delivered to the company in March 30, 1911, and the price was paid April 21, thereafter. The defendant now stands convicted of the offense of estafa, under subsection 5 of article 535 of the Penal Code; in failing to account to Monserrat for the difference between what was paid to the latter and what was finally received by the defendant from the railroad company, to wit, the sum of P1,979.50.

The information proceeds upon the idea that in this transaction Lim was Monserrat's broker, agent, and attorney; that he fraudulently misrepresented the price which the railroad company was paying, or intended to pay, for the property; and that he was bound by the obligation of law to pay over to Monserrat the excess received. The defendant, on the other hand, asserts that in this transaction with Monserrat he was in nowise the broker, agent, or attorney of the latter; that he was on the contrary an independent purchaser upon his own responsibility; and that he was therefore under no duty to account to Monserrat for any part of the money received by him from the railroad company.

The four parcels of land in question were situated upon the right of way of a projected line of railway located by the Manila Railway Company and known as the Calamba-Santa Cruz line. The railroad company was, for this reason, confronted with the necessity of acquiring said property either through purchase or condemnation proceedings. By experience the officers of the company had found that the acquisition of property through condemnation proceedings was costly; and by experience they had also found that it was frequently difficult to deal directly with the various owners. The land occupied by a projected right of way would often consist of a great number of exceedingly small parcels with no other title than that of possession and verbal agreements of partitions and in many cases held in common by a number of persons between whom existed disputes.

The necessities and the difficulties of the railroad company in these matters had given an opportunity to Lim, as a real estate speculator, to engage in the business of acquiring these holdings in some way or other and selling them to the company. His activities in this respect had been extensive, and the railroad officials in charge of the matter of acquiring property for their right of way seem to have been complaisant in their dealings with him, as they usually took the property off his hands at figures which afforded him handsome profits.

In December of 1910, the defendant learned that Monserrat owned four parcels required by the company, and he then attempted to buy the property, but was informed by Monserrat that the latter hoped to sell the property directly to the company. However, Monserrat was unable to come to terms with the company, and Lim learning of this in the latter part of January, 1911, directed his agent in Laguna to see Monserrat and ask him to come to Manila to see Lim, at the latter's expense. This message reached Monserrat duly, but no action was immediately taken by him. A little later Lim casually learned at the office of the railroad company that Monserrat was the only proprietor whose lands had not been acquired and that the company in order to close up the matter would probably pay for this property some P500 more than they had previously offered to Monserrat. Upon this information Lim wrote a letter to Monserrat under date of March 17, 1911, as follows:

"MR. PABLO MONSERRAT, Sta. Cruz, Laguna.

Esteemed Friend: I take the liberty to inform you that all the owners of the lands expropriated by the Manila Railroad Company, from Calawang to Magdalena, including Diego Pleto, have already been paid, with the sole exception of the four parcels that are in your name.

"In consideration of the sales which I made to the company, of all the parcels from Calamba to Magdalena, all of which sales were made by way of compromise, that is, in a friendly manner, I have also gotten the company to grant me an increase of P500 on the price of P1,609 that was the appraised value of the four parcels of land with improvements which will be expropriated from you; so that, with this increase, the amount that you will be able to collect will be P2,109.

"The appraisal of P1,609 is in accordance with the decision of the court in the case [concerning the lands] from Calamba to Bay, fixing the price at P700 per hectare of land, P10 for each bearing coconut tree and P5 for each tree not yet in bearing.

"With the increase that I have now gotten, the price for the improvements amounts to P15 for each bearing coconut tree, P10 (each) for those of the 2nd class, P6 for those of the 3d, P5 those of the 4th, and more than P700 for each hectare of land, as set forth in the statement of appraisal made here by Attorney Ordoveza and myself, a copy of which was sent to you by this gentleman, in a letter of the 16th of last February.

"The provincial treasurer has issued certified copies of the valuations of those 4 parcels as they were declared by you and appraised by the Government, and according to their assessment they appear to be worth, on an average, only P100 per hectare, including the coconut trees and other improvements.

"The attorneys for -the company grant me said increase of P500 by way of compromise, because it is the approximate amount which they calculate would be spent in the lawsuit, including assessors' and attorneys' fees, and they have notified me that if I do not answer before the 25th of this month of March, they will file expropriation proceedings against you and will deposit in court only the amount of the value declared by you and appraised by the Government, so that they may occupy the land in accordance with the expropriation law.

"I myself believe, and I think that my colleague Ordoveza agrees with me, that we ought to accept the P2,109 as a reasonable price for those four parcels of yours; for, even if this case were brought to court, we would be liable to obtain judgment fixing a price which might be but a trifle higher than that of the assessed valuation, or, at most, a price equal to that assigned in the decision in the expropriation cases [relative to the lands] from Calamaba to Bay, in which event we would collect only P1,600, for we would not even have the right to introduce in evidence at the trial of the case the [offer of the] increase of P500 which it [now] tenders us by way of compromise, for the reason that all references to a compromise are inadmissible in evidence.

"Hoping to receive your reply before the end of the period granted me by the company, I greet you and remain,

"Your attentive, faithful servant and friend."

This letter reached Monserrat in due time through Lim's local agent, and when read by Monserrat was returned with the remark that he would make no written reply as he was going to Manila to see Lim personally. This circumstance is mentioned for the purpose of indicating that Monserrat could not have obtained more than a general impression from the letter. In our opinion the importance of the letter considered in its effect upon Monserrat's determination in the matter of the sale of this property has been much exaggerated. We have no doubt that many of the subtleties which the lawyers have discovered in this letter were lost upon him.

On March 25, 1911, Monserrat came to Manila to see Lim, being induced to come, so he says, "on account of this P500 that he (Lim) offered me over and above the estimated value by the company on these parcels of land." In the interview that occurred on this occasion Monserrat held out for a higher price; and after talking with somebody over the telephone Lim raised the offer by something like P200 more, making P2,492 in all; and the bargain was closed at that figure.

The principal question in this case is whether or not by intervening in the transaction between Monserrat and the railroad company Lim constituted himself the "broker, agent, or attorney" of Monserrat. It clearly appears that the parties made no definite agreement creating either of these relations. All that passed between the parties, so far as can now be known, is revealed in their testimony; and it is plainly shown that no discussion took place about the capacity in which Lim was acting. The prosecution, however, insists that Lim became Monserrat's broker as a result of certain fraudulent misrepresentations, suggestions, and concealments whereby Monserrat was led to believe that Lim was acting for him in the sale. Assuming for the sake of argument that the legal relation of broker and client could be thus established for the purposes of this prosecution let us proceed to examine the testimony in order to see if the case is made out.

In this connection much stress has been placed by the prosecution upon the contents of the letter of March 17, 1911. In this letter Lim states that he has obtained a concession from the company in favor of Monserrat by which the company would pay P500 more than it had previously offered; and he inferentially states that Monserrat will get all of this payment to be made by the company, in the event he should accept Lim's offer. Again, in a paragraph near the end of the letter, Lim makes a transition to the first person plural, by which he appears to constitute himself a friendly monitor to Monserrat. Other things in the letter are criticised by the prosecution as false or misleading, but we do not find anything else in the letter of importance upon the question now under consideration. Giving the letter its most unfavorable interpretation, it might be claimed with some plausibility that it is an offer on the part of Lim to assist Monserrat in the matter of disposing of his property to the railroad company, and that Lim thereby in effect said: "Let me manage this business for you."

In our opinion this version of the letter in no wise represents the truth of the transaction in question. To discover this it is only necessary to examine the testimony. In his original examination Monserrat testifies that he did not employ him as his attorney; and in three different places he states that he understood that Lim was acting as an intermediary between himself and the company. Nor were these observations inadvertently made; for the following question was directly put:

"Q. In what capacity was Mr. Lim acting in this transaction?—A. I don't know in what capacity he was acting, but I believe he was acting as intermediary between the company and myself."

The term intermediary is not a technical term; and a person who acts as intermediary may become legally liable to either the one or the other of the two parties between whom he officiates, or to both, according to the nature of the particular engagements or relations to them; but the deliberate use of this word by Monserrat undoubtedly proves that he did not look upon Lim as his own peculiar and special protector. Throughout the course of this transaction Monserrat believed or suspected that Lim was acting for the railroad company and that he would get his pay for his services in this transaction out of the company.

In testifying in rebuttal Monserrat gave the following testimony:

"Q. Did you think that Mr. Lim would transfer to the company these four parcels of land for the same price he paid you?—A. No sir, because I understood that Mr. Lim acted as intermediary between the railroad company and myself, and I thought that he received a commission for that work from the company.

"Q. So that you were aware of the fact that Mr Lim intervened in this matter not to protect your own interests,

but rather to protect the interests of the company?—A. Yes sir, as a broker.

"Q. As a broker for the company?—A. Yes, sir.

"Q. And that is the reason he received a commission besides?—A. Yes, sir.

This testimony shows clearly that Monserrat did not consider that Lim was acting- for him, and that if Lim had used any wiles to induce Monserrat to repose undue confidence in him, he failed in his purpose. As Monserrat believed that Lim was the representative of the railroad company, he necessarily knew that he was not his own. Our conclusion is that there was no relation of principal and agent, or other confidential relation, created between the parties and that they were dealing with each other at arm's length. It may also be said that if Lim was an expert in his way, Monserrat was not lacking in intelligence or understanding; and the impression which we draw from the evidence is that if Lim came out the gainer, it was rather because he was able to impose upon the railroad company than on this individual Monserrat. One of the curious feature of this complex case is that Monserrat was wrong in his belief that Lim was acting as broker for the company. But this is immaterial. The question is: What was Monserrat's belief as to the relation of Lim to himself? While the fact that he thought Lim was the company's broker is conclusive that he did not accept him as his own, the grounds on which that opinion was held are of no importance.

This testimony given by Monserrat takes out of the case the only factor upon which in any aspect of the case the law could predicate an obligation on the part of Lim to account to Monserrat for the specific money actually received from the railroad company; and it is therefore a fatal impediment to the conviction of the defendant under subsection 5 of article 535 of the Penal Code. This factor being eliminated all that is really left is a simple case in which it is alleged that Lim fraudulently secured from Monserrat four deeds to certain pieces of real property.

But there is another problem in the case which has been a source of perplexity and which seems to have been treated as if it were determinative of the case on the question of agency, and in this respect it has apparently so far exerted a controlling influence over the course of this litigation. The character and bearing of this factor will now be discussed.

The information alleges that the transaction in question was a sale of the property from Monserrat to the railroad company; and the case as presented by the prosecution proceeds on the idea that Lim, after having effected a sale from Monserrat to the company, unlawfully intercepted a great part of the proceeds. The prosecution urges with great persistence that there is no evidence of any sale from Monserrat to Lim at all; and that the only sale proved is a sale from Monserrat to the company. This view of the case lays, we think, undue stress on the fact that the deeds were drawn directly to the railroad company. If the deeds were the only evidence on the subject, or if the form of the deeds should be considered conclusive, this phase of the case might prove serious. We believe, however, that nobody will question the right of a man who negotiates a purchase and pays the price of real property to direct that the deed shall be made out to some other person than himself, as is constantly done among family relations and not infrequently in commercial transactions. And if the vendor makes no objection no one else can fairly complain. Under the circumstances surrounding the transaction in question it would have occurred to anybody that by naming the railroad company as grantee the formality and expense of another transfer would be saved; and the form of the deed must have been wholly indifferent to Monserrat who knew that the company was going to get the property any way. The only question discussed in the interview between Lim and Monserrat was the price which the latter was to get, and from his point of view that question was the only material thing.

The record, however, supplies another adequate explanation of the reason why the deeds were drawn so as to name the company as grantee. That explanation is this. These right of way transactions had been quite numerous,

and the railroad officials had for some time been impressing upon Lim the importance of keeping his name out of the title papers. They knew they were paying him profits which might in certain aspects be considered exorbitant, and they might have thought that the less frequently his name appeared in the deeds the less danger there would be of troublesome investigations, such as afterwards in fact supervened. They accordingly told him that they would not accept deeds directly from him except in rare cases. This naturally forced him into the course which, with the approval of the railroad officials, he thereafter pretty consistently followed, which was to take the deeds from the owners directly in the name of the company. The testimony showing this practice we consider to be relevant and important. A knowledge of the relations between Lim and the railroad company is of the utmost value in arriving at a just conception of Lim's relation to Monserrat and of the character of this particular transaction. In the light of this explanation, we believe that the mere form of the deeds is of little or no value upon the question as to who was the actual purchaser.

Lim testifies that he himself was the purchaser and that Monserrat understood very well that he (Lim) was buying the property himself with a view to reselling it immediately to the company, and that naturally any price received over and above what he was then paying would accrue to himself. Monserrat states that he understood he was selling the property to the company, for in one place he speaks of "the four parcels of land I have sold to the company," and says again that he "understood that it was to be for the company." The testimony of Monserrat on this point is, in our opinion, infected with the results of the erroneous opinion into which he had fallen to the effect that Lim was the broker of the railroad company; and it naturally seemed to him that in dealing with Lim he was dealing with the company. We also believe that Monserrat's testimony is here colored in some degree by fresh knowledge of the fact that the deeds named the railroad company as grantee, for whereas we find that while his opening testimony on this point is somewhat ambiguous, the testimony given later, after his memory had been refreshed by seeing the deeds, is more explicit and uncompromising. It also appears that Monserrat had been advised by the Government attorneys of the nature of the case against Lim; and that he expected to recover in this action the excess which Lim received from the company, and this on the theory that he had sold his land to the company and that Lim had improperly withheld a part of the proceeds. There were certainly circumstances in the transaction which should have admonished Monserrat that Lim wanted to acquire the property or get control of it for money-making purposes; and in the light of all the testimony it cannot be stated with any certainty that Monserrat honestly believed he was selling directly to the company, in the sense that the company was the actual purchaser in the transaction with him, though he did believe, as is clearly shown, that Lim was an intermediary in some sense or a broker for the company. Therefore if the case turned on the question as to who was understood to be the purchaser of this property when Monserrat decided to sell, and Lim was to be condemned or absolved by the answer to that question, we would find that the case of the prosecution is not made out. But supposing that Monserrat fully believed that the company was the real purchaser from him and that Lim was acting exclusively for the company throughout the transaction, it is nevertheless established that such was not the fact. The title did not pass to the company until the deeds were delivered to it, and the company was not the immediate purchaser from Monserrat in any sense. If Monserrat had any such erroneous belief, what would be its legal bearing on this case? The answer is that this circumstance would merely indicate that Lim had falsely represented himself as having a qualification or agency that he did not possess. If such a misrepresentation were material and really operative, it would tend to make out a case under the first subsection of article 535 of the Penal Code, and it would not in any wise assist the case of the prosecution under the fifth subsection of the same article. However, a fraud of this character is completely at variance with the case stated in the information.

It should be noted that Monserrat was not brought into contact with the railroad officials at any time during this transaction. Hence the theory that there was a sale effected directly from Monserrat to the company necessarily presupposes that Lim was acting as agent for one or the other of the parties. If it is supposed that a sale from

Monserrat to the company was made on March 25, Lim must be assumed to have been the agent of the company, but it is clearly shown that he had no authority to act for it, and the company was not bound to accept the deeds and take over the property. Furthermore, the assumption that Lim was the agent for the company contradicts the whole case of the prosecution which goes on the theory that Lim was the agent of Monserrat. If, on the other hand, it is supposed that a sale from Monserrat to the company was effected when Lim delivered the deeds to the company, it must be assumed that Lim was the agent of Monserrat, a supposition which is consistent with the case of the prosecution but which, as we have seen, is untenable in view of the proof. The theory that there was a sale directly from Monserrat to the railroad company is therefore shattered by contact with the proven or admitted facts.

Judging the transaction in all its bearings, the only conception of the case which fits in with the facts is that Lim was an independent operator, as he asserts, and not the agent of either of the other parties. During the period which elapsed after his transaction with Monserrat until he turned the deeds over to the company, Lim had in his possession the deeds which named the railroad company as grantee. The possession of these instruments gave him control over the property somewhat as if he had obtained an irrevocable power of attorney to transfer the property to the company. It seems not to be necessary to consider minutely the exact character of the civil rights which might have arisen from that transaction or from the receipt which was signed by Monserrat. Practically speaking, Monserrat knew that he was selling the property and divesting himself of ownership.

In the preceding discussion we have assumed for the sake of argument that the theory of the case presented by the prosecution as regards the liability of the defendant under subsection 5 of article 535 of the Penal Code is technically sound; that is, we have assumed that the relation of broker and client between these parties might be established for the purposes of this prosecution by proof showing that Lim fraudulently represented himself to be Monserrat's broker. We now propose to examine the grounds of this assumption in order to discover whether the proposition in question is tenable.

The section of the Penal Code under which the defendant was condemned, so far as applicable to the facts of this case, imposes a penalty on those who "to the prejudice of another appropriate or withhold, money, effects, or other personal property which they may have received upon deposit, commission, or for administration, or in any other character (titulo) giving rise to the obligation to deliver or return the same." The supreme court of Spain, in commenting upon- the preceding provision, has said:

"It is necessary that the sum supposed to have been appropriated or diverted should have been delivered by virtue of a title that produces the obligation to deliver or return the same thing. (Viada, Penal Code, 1 Suppl., p. 292.) Viada, commenting on the same provision, observes:

"The third element of this crime consists in that the things mentioned (money, goods or any other chattel) shall have been received as a deposit, on commission or for administration, or under any other title from which arises the obligation to deliver them or return them, that is, to deliver or return the same thing received (not another of the same kind and quality) as occurs in the case of the deposit, commission and administration of which this article particularly treats, and also, for example, in the contract of comodato where the borrower is obliged to make restitution of or return the very same thing which he received for a specific use." (Viada, Codigo Penal, amended, vol. 3, p. 515.)

It will be observed that this article, of which subsection 5 is only a part, makes provision for a great variety of offenses characterized by fraud or deceit in some form or other, but subsection 5 is the only provision which presupposes and requires the existence of a specific obligation to return or deliver the very money, goods, or other personal property received. Primarily this subsection is intended for the case of embezzlement by a bailee. Here the obligation to return or deliver is born of the contract re. It has been held that this provision does not apply to

the case of a debtor who merely refuses to pay a money debt, since the debt does not contemplate the return of the same thing received. (U. S. vs. Ibañez, 19 Phil. Rep., 559; U. S. vs. Camara, 28 Phil. Rep., 238; U. S. vs. Figueroa, 22 Phil. Rep., 269.) It is also evident that this provision would not, in this jurisdiction at least, cover the case of a person who refuses to return or deliver personal property consummable in use which he may have obtained upon a loan (*mutuum*).

From what is said above it is obvious that the obligation contemplated in subsection 5 of article 535 of the Penal Code can originate only in consent and must be derived from some known and nominate title (*titulo*) or category of obligation, similar to those mentioned in that subsection (*deposito*, *comision*, *admimstracion*). The salient feature of this obligation is that it originates in the consent, express or implied, of the parties; and it is evident that the word "obligation" is here used in the sense that it bears in the civil law of contract. The passage cited from Viada rightly supposes that the obligation here contemplated might originate in the commodate (*comodato*); and we may add that there can be no doubt that such obligation may originate in relations like that of principal and agent, as is assumed in this prosecution.

It is, however, obvious that this obligation cannot originate in a simple act of fraud. The various phases of fraud and deceit, considered as a subject of penal regulation, are fully dealt with in other provisions of the Penal Code, and especially in the eight other subsections of this article 535. It is reserved to subsection 5 to deal with the subject of constructive fraud, that is, with that form of fraud which consists solely in the violation of a contractual obligation. Evidently the obligation or duty which the law imposes upon wrongdoers in general to repair the damages resulting from crime or other civil injury is not such an obligation as is contemplated here. The thief and the robber cannot be held guilty of *estafa* under subsection 5 for failure to return the property which may have been stolen or robbed by them. The same applies in all cases of actual fraud. We believe that no passage can be cited from Spanish jurisprudence which lends countenance to the idea that the obligation contemplated in this subsection can originate in any other source than the consent, express or implied, of the parties.

Another conclusion to which we arrive is that the obligation contemplated in subsection 5 cannot originate in a relation imposed upon one of the parties by what is known in English jurisprudence as the equitable estoppel. This conclusion is supported by the general principle, already developed, that the obligation can only originate in consent; but its validity is supported by other considerations. The case of the Government proceeds, it will be remembered, upon the idea that inasmuch as Lim represented to Monserrat that he would act for him in selling the property to the railroad company, and inasmuch as Monserrat proceeded in the transaction under this belief, Lim is thereby estopped to deny that he was Monserrat's broker. To support this idea that the relation of broker may be here created by estoppel, section 333 of the Code of Civil Procedure is cited. It may be observed that this provision is contained in a code of civil procedure and not in a code of criminal procedure; and we do not think that this provision is applicable in a criminal action at all. It is obvious that said section 333 is a mere statement of a rule of civil jurisprudence which had been developed by the courts of common law and which has never, in any jurisdiction, been extended into the field of criminal law. There is a saying in the common law, as old as the doctrine of estoppel itself, to the effect that the estoppel is odious, the reason being that it stops a person from speaking the truth. The doctrine of estoppel has its proper place in the solution of problems relating to civil rights, but it cannot be applied in our opinion for the purpose of artificially creating a relation on which to found a judgment against a man in a criminal case.

In order that the true nature of the equitable estoppel may be better understood we will say that it is an obligation which, in English jurisprudence, might properly be classed as a quasi-contract. It may be defined as an obligation imposed by law whereby a man who makes a particular statement or representation by which he induces another to act in a certain way is subsequently precluded from denying the truth of such statement or representation in

every case where the assertion of the contrary would in effect lead to the consummation of a fraud. Something like this is stated as a rule of evidence, under the form of a conclusive presumption, in section 333 of the Code of Civil Procedure. It will be noted that the obligation is imposed by law, regardless of the intention of the person who is estopped and really against his will.

That the conception of obligation embodied in our American doctrine of equitable estoppel is not recognized in the Spanish law is readily demonstrated, for it is not defined in the Civil Code and it is in fact excluded by the enumeration and definition therein of other recognized sources of contractual obligation.

The twenty sixth article of Ley de Bases contains the following:

"The forms, requisites and conditions of each contract in particular shall be developed and defined subject to the general schedule of obligations and their effects, with due regard towards maintaining as a base the legislation in force and the developments added thereto by jurisprudence. * * *"

Article 1710 of the Civil Code recognizes that the mandate may be express or tacit; but it is not to be understood that a tacit mandate can actually be created against the consent of the parties. A tacit mandate is, we apprehend, a mandate proved to the satisfaction of the court by acts and circumstances which indicate the consent of the parties to the existence of that relation.

In treating of quasi-contract, the Civil Code devotes a few articles to the individual who officiously takes upon himself the management of another man's business (gestor officioso). Supposing the theory of the prosecution to be tenable, we should expect to find in this part of the Code some recognition of the idea that a man may be held to the obligation of agent (gestor) by estoppel. But a perusal of article 1888 will clearly show that the law here contemplates the situation where the gestor voluntarily intervenes in the business of another, fully recognizing that he is acting for that person.

In resolving the question which we have been discussing it should not be forgotten that we are applying and interpreting a provision of the Spanish Penal Code; and it should be interpreted in harmony with the legal system of which it forms a part. To hold that the meaning of the word "obligation" in subsection 5 of article 535 has been modified and extended by the American doctrine of equitable estoppel, and as a consequence merely of the rule stated in section 333 of the Code of Civil Procedure would, in our opinion, be highly inexpedient and unreasonable; and not the least important of the evil consequences resulting from this would be that no man could thereafter know with any certainty at what point liability under this provision would begin or end.

Our conclusions on this branch of the case therefore are: (1) that the proof fails to show that Lim was Monserrat's broker, agent, or attorney, as alleged in the information; (2) that the proof also fails to show any such fraudulent representations, suggestions, and concealments as would be sufficient in a civil case to create an equitable estoppel; and (3) that even if proved the equitable estoppel would not suffice in this criminal case to make the defendant agent or broker for Monserrat in the sense necessary to create an obligation to deliver the proceeds received by Lim from the railroad company.

The next question for discussion is whether or not the defendant can be condemned under subsection 7 of article 535 which impose a penalty upon "any person who shall commit a fraud by inducing another, by means of deceit, to sign any document." In this connection it is necessary to ascertain whether the information charges any such offense, and in what terms. An examination of the information shows clearly that it is primarily founded upon the theory of the case which has already been examined; but the information incidentally, and as a part of its statement of the entire case, contains the charge that the defendant Lim induced Monserrat to execute the deeds of sale in favor of the railroad company for the sum of P2,492, upon the false representation that the said company would not pay more, when in truth and in fact the company, as Lim well knew, had offered P4,461.50 which

could be and had been obtained for said four parcels of land. The representation here alleged has not been proved, for the proof shows clearly enough that when Lim obtained the deeds in question no offer of the larger sum had been made by the railroad company. We are convinced that when Lim obtained the deeds he did not know exactly what he was going to get out of the railroad company, but knew that he was going to get a good profit and intended to take all that the company could be made to yield up.

In the same connection wherein the information makes the charge of the misrepresentation just noted, it is also charged that the defendant made "other similar representations," but we do not discover in the proof evidence of any material misrepresentation which could properly be considered to be included in these words.

The conclusions already reached make unnecessary the consideration of numerous features of the case which have been called to the attention of the court. But before closing this opinion we wish to direct attention to a few scattering points.

When the deeds were prepared for execution by Monserrat the consideration which had been paid to Monserrat was not inserted; but later when the price which the company was to pay to Lim had been agreed upon, the consideration represented by this larger sum was then inserted in the blank spaces. That certainly looks suspicious, but the circumstance is explained as follows: Lim in the first place did not wish to produce to the company an instrument showing the exact price he paid, and hence he omitted to write the consideration which he had paid to the vendor into the deed. On the other hand, it would have been embarrassing for the railroad officials to file among their records a deed executed to the company as grantee which should show a consideration different from that paid by themselves. For this reason the amount paid by them was inserted at the time of the delivery of the deeds to them. It is shown in evidence that this practice was uniformly pursued by Lim with the knowledge of the railroad company or its officials. It is therefore impossible to believe that the leaving of the consideration unstated when Monserrat executed the deed was a device of the defendant to defraud him.

Some effort had been made by the attorneys of both parties to draw inferences from the language of the receipt which was executed by Monserrat when he received the check from Mariano Lim. It appears that this receipt was written upon a printed form such as Lim had been accustomed to use in cases of a somewhat different character. We attach but little importance to this document in its bearing on this case. Its recitals are not apposite to the transaction, and Monserrat probably was not bound by any of its statements otherwise than in so far as it expressed a receipt for a sum of money.

Many of the circumstances which have been used in this case as a basis of criticism against Lim have their explanation in his peculiar relations to the railroad officials. Throughout the whole transaction it is obvious that Lim was merely following the well-worn trail leading to the exchequer of the railroad company. But the railroad company has made no complaint and the machinations directed against it are no part of this case, except in so far as they reveal the real direction of the defendant's designs.

There is no satisfactory proof in the record showing the actual value of the property which was sold by Monserrat. It appears, however, that this property had been assessed upon his sworn declaration at a valuation of P150. The fact that it had become necessary for the railroad to acquire it for right of way purposes of course increased the possibilities of the situation and made it more valuable. However, the fact that Mariano Lim was able to obtain over P4,400 for the same property does not prove that the latter figure, any more than the P150 for which it was previously assessed, represented its true value; and it is a safe conjecture that this value lay nearer to the amount which Monserrat received than to the amount which the railroad company paid out. However, the human imagination is easily captivated and the circumstance that Lim got much more than he paid out, has led to the assumption that Monserrat was defrauded of the entire excess. But it is disclosed in the evidence that after March

25, 1911, when Monserrat executed the deeds, he treated the transaction of the sale of the property as closed, and no complaint has ever been made by him that he was defrauded by the defendant in that transaction.

Something is said in the opinion of Moreland, J., in this case about a relation of confidence, or fiduciary relation, between Lim and Monserrat; but it should be remembered that a man cannot put himself in a confidential relation with another merely by perpetrating a fraud upon him. The term confidential relation, as used in the law, has reference to certain definable legal relations such as attorney and client, guardian and ward, agent and principal, etc., the existence of which must be established as facts before the legal rules applicable to those relations can have any application. There is no such thing as a confidential relation in the abstract upon which legal consequences can be predicated. In all cases where men are deceived and defrauded it will be found that there has been a misplaced confidence; but the mere fact that a defrauded person has reposed confidence in the deceiver does not create a fiduciary relation.

A few words must be added as explanatory of this opinion. The writer, as the record shows, did not participate in the deliberations which resulted in the original affirmance of the judgment of the court below; but being a member of this court when the motion for a rehearing came up for consideration, he was assigned by the court to examine the record and report thereon. After a careful examination of the whole case the conclusion was reached that the defendant had been improperly convicted. This view was not concurred in by the court; and as a result this opinion, which had been reduced to writing before the prevailing opinion was written, appears in the form of a dissent. This statement will serve to explain the apparent lack of connection between this opinion and the opinion of the court, as it will also serve to show that the writer has not unduly obtruded himself into this matter for the purpose of disturbing the settled resolves of the court.

Upon reading the opinion of the court upon this motion only one comment occurs to us at this moment, which is this: There is one paragraph in the opinion which brings out with entire clarity and precision the principal point of difference between the conclusion adopted in that opinion and that which is entertained by this writer. It is there said:

"If the record actually disclosed the slightest proof that the aggrieved party, Monserrat, sold to the defendant, Lim, and not to the company, the said four parcels of land, it would be a great injustice to decide this case by convicting the defendant of having swindled the complainant out of the amount of the difference between the price of the sale and that of the resale."

In the view of this writer, the record contains not only light but conclusive proof that Monserrat sold, and knew he was selling, this property to Mariano Lim when he signed the deeds which were executed upon March 25, 1911; and in the foregoing opinion we have stated the reasons for so believing. That the court has reached a different conclusion merely shows in our opinion that too much importance has been attached to the fact that the deeds named the railroad company as the vendee. The theory of the case adopted by the court is that Lim was a middleman acting as the secret agent of one party, the railroad company, and as an officious intermeddler (*oficioso gestor*) in the affairs of the other. We think that the simpler and more just conclusion is that the defendant was an independent operator, playing between two extremes and turning to his own account the necessities or desires of both parties. We very much doubt if the sensitized conscience of an English Chancellor ever sanctioned a decree upon a civil liability as doubtful as this; and we are clearly of the opinion that the situation is not such as to justify a criminal conviction.

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