

[G.R. No. 1002. July 25, 1903]

THE UNITED STATES, COMPLAINANT AND APPELLANT, VS. SEGUNDINO MENDEZONA Y MENDEZONA DEFENDANT AND APPELLEE.

D E C I S I O N

TORRES, J.:

On May 12, 1902, the Attorney-General filed the complaint appearing on page 1 of the record, and amended as shown on page 50, charging Don Secundino Mendezona y Mendezona with the crime of *estafa*, committed as follows:

That on September 10, 1900, in the city of Manila, capital of the Philippines, Mendezona, sole manager of the partnership of Mendezona & Co., willfully and knowingly made and executed before Don Enrique Barrera y Caldes, a duly authorized notary public, a certain contract of pledge in favor of the Compania General de Tabacos de Filipinas, by means of public document No. 724, in which the accused sets forth and agrees to the following: As security for the sums already advanced by the Compania General de Tabacos de Filipinas, as well as for those which may hereafter be advanced up to the sum of \$300,000, Mendezona & Co., represented by Don Secundino Mendezona, pledge, in favor of their said creditor, 20,000 bales of Sorsogon, Legaspi, Tabaco, and Lagonoy hemp, stored in their warehouses located at No. 48 Isla de Romero Street, solemnly affirming that the said 20,000 bales have been neither assigned, transferred, nor encumbered, and, in token of the delivery of the possession thereof, the said Mendezona thereupon surrendered to the representative of the said Compania General de Tabacos the keys of the said warehouses in which were stored the 20,000 bales of hemp pledged.

That on the said 10th day of September, 1900, the said Mendezona delivered, in the city of Manila, to the Compania General de Tabacos the possession of all the hemp that day contained in the warehouses situated at No. 48 Isla de Romero Street, by surrendering to the said company the keys thereof, in accordance with the terms of the said document No.

724.

That the facts thus set forth and affirmed by the said Mendezona in the said document were false and untrue in this particular, to wit: That the warehouses mentioned in the said document did not contain, at the time of the making and execution of the contract of pledge, 20,000 bales of hemp, but, on the contrary, their contents did not exceed 12,000 bales, as the said Mendezona well knew at the time.

That a considerable number of the bales specifically enumerated by marks and figures in the document referred to had no existence, but, as a matter of fact, such bales, purporting to be designated by marks and figures, were entirely imaginary, and that this was well known to the accused, Mendezona.

That at the time of the execution of the said document and the pledging of the hemp, the said bales of hemp contained in the Avarehouses at No. 48 Isla de Romero Street were not free from incumbrance, but, on the contrary, a large part of the same was pledged to the Spanish-Filipino Bank as security for the payment of a loan of 200,000 Mexican pesos, the said loan having been made on the 18th day of April, 1900, of which the said Secundino Mendezona was well aware.

That a part of the said bales of hemp was pledged to the Chartered Bank of India, Australia, and China as security for another loan of 250,000 Mexican pesos, made the 24th day of August, 1900, which was also well known to the said Secundino Mendezona.

That at the time of the execution of the said document No. 724, and the making of the said contract of pledge by the said Mendezona, the bales of hemp contained in the said Avarehouses were not all the property of Mendezona & Co., but, on the contrary, a part of the same was stored in the said, warehouses subject to the disposal of Don Angel Ortiz, Don Francisco Reyes, and the widow of the Chinaman Tan-Auco, the owners thereof, all of which was well known to the said Don Secundino Mendezona y Mendezona.

And that, by virtue and by means of the said false and fraudulent representations made by the said Secundino Mendezona y Mendezona, the latter fraudulently obtained for the partnership of Mendezona & Co., from the said Compania General de Tabacos, in consideration of the pledge falsely and fraudulently made, a credit of 300,000 pesos, of which amount there was delivered the sum of 207,814.01 pesos; that by this operation, thus fraudulently consummated, he defrauded the Compania General de Tabacos, inasmuch as the latter, instead of having been able to recover, long before the date of the complaint, the

entire sum advanced to Mendezona & Co., together with the interest stipulated (as would have been the case if the security given had been real and bona fide), owing to the falsity and consequent insufficiency of such security, the said Compania General has been compelled to forego the recovery of the stipulated interest which has accrued, and up to the date of the complaint was unable to recover the total amount actually delivered to Mendezona & Co., there still lacking for this purpose 50 per cent of such amount; this against the statute in the case made and provided. Upon filing the preceding complaint a preliminary investigation was had, and, notwithstanding the exception entered by the accused, the action was commenced, the latter's demurrer being overruled by an order of June 6, 1902, and the accused being commanded to answer the charge on the day fixed.

From the documentary and oral evidence introduced in this cause it appears that during the last days of August, 1900, Don Secundino Mendezona, in the name of the partnership of Mendezona & Co., induced the general manager of the Compania General de Tabacos de Filipinas to open an account-current with his firm, with credit up to the sum of 300,000 pesos, and that Don Secundino Mendezona commenced to make use of the credit granted on the 27th of the said month of August, drawing considerable sums in money and goods up to the 5th of September following, at which time his drafts from the vaults and storehouses of the Compania General amounted to the important sum of \$171,506.52. (Pp. 162-165, record—documentary evidence.)

About September 7, 1900, at the request of the head manager of the Compania General, it was agreed between the said company and the accused Mendezona that the latter should execute, as security for the said credit, a contract of pledge on the 20,000 bales of hemp stored in the warehouses at No. 48 Isla de Romero Street, and the document No. 724 was accordingly executed on September 10, 1900, before the notary public Senor Barrera, signed on the one hand in the name of the firm of Mendezona & Co., by Don Secundino Mendezona y Mendezona, the manager thereof, and on the other by Don Antonio Correa y Pomar, as general manager of the Conipania General de Tabacos de Filipinas, there appearing in the said document, among others, the following stipulations: That Mendezona & Co., represented by Don Secundino Mendezona, bound themselves to the payment, to the Compania General de Tabacos, of interest at the rate of 8 per cent per annum on the outstanding balance of the account-current opened with them, the said interest to begin from the date of the first draft made, the debtors affirming that they had already received from the Campania General, on account of the credit allowed them, the sum of \$171,500.52. The date for the termination of the contract was fixed at December 31, 1900, when the account opened with the said Mendezona & Co, would be wholly liquidated, the said

Mendezona & Co. binding themselves to return to the Compania General, on the date referred to, any balance that might exist in favor of the latter; and that, as security for the sums already advanced by the said Compania General, as well as for any that might thereafter be advanced up to the said \$300,000, Don Secundino Mendezona, in the name of Mendezona & Co., pledged, in favor of their said creditor, 20,000 bales of Sorsogon, Legaspi, Tabaco, and Lagonoy hemp, then stored in their warehouses at No. 48 Ma de Romero Street, declaring that the said 20,000 bales had not been assigned, transferred, or in any way encumbered. In token of the delivery of the possession thereof, the said Mendezona thereupon delivered to the representative of the Compania General the keys of the warehouses in which were stored the 20,000 bales of hemp pledged, the marks and classes of which are fully enumerated in the said instrument or document (record, documentary evidence, pp. 50-62), it being admitted between the parties (record, p. 387) that the delivery of the said keys was actually accomplished, as set forth in the instrument referred to.

Some days after the execution of the above-mentioned document No. 724, dated September 10, 1900, owing to a It is to be noted that after the execution of the contract of pledge, by the instrument dated September 10, the firm of Mendezona & Co. continued to draw goods and money from the 11th to the 20th of the said month of September, the value of the goods and money thus received reaching the sum of \$1,24,704.89, as appears from the running account (pp. 162, 163), which sum, added to those drawn at various times between the 31st of August and .the 5th of September, makes a total of \$296,211.41, without reckoning accrued interest.

In the said instrument of September 26, 1900, No. 779, it was agreed between the parties thereto, Don Secundino Mendezona, as manager of the firm of Mendezona & Co., and Don Antonio Correa y Pomar, as manager of the Compania Tabacalera, among other things, to exchange for the 20,000 bales of hemp pledged in the instrument No. 724 another 20,000 bales, the classes and marks of which were to be recorded in detail as the said bales should be counted, and that, once the recount should be confirmed and the classes and marks of the said 20,000 bales determined, the said 20,000 bales should immediately become subject to pledge in favor of the Compania General de Tabacos. as security for the credit mentioned in the said instrument of September 10 of that year, in place of the 20,000 bales previously pledged; that, in order that the correctness of the said inventory might be unquestionable, they agreed that the said notary public should be installed in the warehouse in which were stored the said bales of hemp, and should record, in notarial acts, the number, classes, and marks of the bales delivered, and that the said notarial acts, as well as the said instrument,

were to be considered as additional to the document No. 724, and dated September 10, 1900; and that the said notary public thus installed in the warehouses of Mendezona & Co., located at No. 48 Isla de Romero Street, accordingly proceeded, in the presence of the parties interested, to recount the said bales of hemp delivered by Mendezona to the Compañia General de Tabacos, duly recording in the instrument the classes and marks of each bale; and it furthermore appears that the said notary also recounted a certain lot of bales of hemp stored in the warehouses of the Compañia General de Tabacos, which had been delivered to the latter by Mendezona, recording the classes and marks of the said bales in the instrument shown on pages 128 to 139 of the record of documentary evidence.

The notarial act No. 782, executed September 27, 1900, by the said notary Barrera, gives the result of the continuation of the inventory of the said bales pledged by Mendezona & Co. in favor of the Compañia General de Tabacos, as stipulated in the instrument executed the day before by the accused, Mendezona, and the general manager of the said Compañia General. Both Mendezona and the said general manager of the Compañia General were present, as above stated, at the counting of the bales of hemp whose classes and marks are recorded in the said notarial act. It also appears from the latter that an inventory was made of the bales contained on the lighters and boats mentioned in the said act (pp. 140-150).

The record discloses the fact that some time between the 19th and 21st of September, 1900, some ten or eleven days after the execution of the instrument of the 10th above referred to, and the pledge of the 20,000 bales of hemp, upon an examination being made of the warehouse in which the hemp was deposited, and after a careful calculation made by the engineer and two of the company's warehousemen, it was found that there were only 10,900 bales of hemp there, more or less. This result appears to be confirmed by the books showing the receipt and discharge of hemp in Mendezona & Co.'s warehouse on Isla de Romero Street. It is also confirmed by the testimony of Don Ramon Caro, Mendezona's warehouseman, who examined the books and who, in view of the result, drew up the statement of the stock of hemp which the firm of Mendezona & Co. at that time had, which statement forms part of the record. Furthermore, Sefior Garriz, one of the members of the firm, testified in the case that on the 10th of September, 1900 (p. 101), there were not 20,000 bales of hemp in the Isla de Romero Street warehouse, and that on this account Mr. Correa, being alarmed at the insufficiency of the security, and the defendant Mendezona having been informed thereof, the latter undertook to complete the 20,000 bales pledged. It is also worthy of note that when Fradua, the warehouseman, was required by Fernandez, one of the clerks of the Tabacalera Company, to show the warehouse books for the purpose of the recount which they were about to make, the former replied that he had no book.

It also appears that a part of the hemp contained in the Isla de Romero Street warehouse - that is, 2,238 bales of the hemp - was not the property of Mendezona & Co., but that 700 bales belonged to Don Angel Ortiz, 1,081 bales to Don Francisco Reyes, and 457 to the widow of the Chinaman Tan-Auco, this hemp having been stored in this warehouse subject to the disposal of the owners. This fact is fully established in the record by authentic documents which show the amount of hemp received at the warehouse and also by tire receipts given for the hemp belonging to the persons who had stored it there, as well as by the testimony of the accused, Mendezona, that of Don Angel Ortiz, and that of the representatives of Don Francisco Reyes and the widow of Tan-Auco. The same fact is established by the testimony of Don Ramon Caro, who at that time was a clerk of Mendezona & Co. He identified the warehouse receipts given for the hemp stored in the Isla de Romero Street warehouse, and which was on hand therein on September 10, 1900. The same fact is shown by the entries in the books showing the receipts at and shipments of hemp from the warehouse. The letters, one dated on the 7th and the other on the 19th of December, 1900 (pp. 10-12), written by Mendezona to the general manager of the Tabacalera Company, asking for authority to withdraw from the warehouse certain bales of hemp belonging to the widow of Tan-Auco and to Messrs. Ortiz and Reyes, also clearly established this fact, the letter dated the 7th stating that the 32 bales which had been pledged to the company and which should be delivered to Don Francisco Reyes would be replaced by 32 other bales.

It is to be observed that the hemp belonging to Francisco Reyes and Angel Ortiz and to the widow of Tan-Auco was included in the recount of the bales recorded in the instruments of the 26th and 27th of September. If, on the 27th of September, the hemp belonging to these persons was in the Isla de Romero Street warehouse, and after a careful recount, effected between September 26 and October 2, 1900, all the hemp in the Isla de Romero Street warehouse and at other places was turned over to the Tabacalera Company and the authority of the company was required for the return of this hemp to its owners, it is unquestionable that these bales were included in the instruments found on pages 128 and 140 of the documentary evidence and were also included in the subsequent recount made up to the 2d of October, in the course of which up to 20,414 bales of hemp were counted, which number was not recorded in these public instruments, which show only 18,413 counted during the 26th and 27th of September, all of which appears from the testimony of Don Baldomero Fernandez (p. 107).

It is also a fact fully proven that Don Secundino Mendezona, by a private document dated the 18th of April, 1900, for the purpose of securing a loan of \$200,000, pledged to the

Spanish-Filipino Bank 10,000 bales of hemp which' he asserted were stored at his warehouses on Isla de Romero and Anloague Streets, binding himself to hold this hemp as a deposit. This fact appears from a document shown on page (59 of the record, the authenticity of which has been admitted by the defendant (p. 325). It is also corroborated by the testimony of Don Ramon Caro, who states that there were 2,255 bales of hemp in the Isla de Romero Street warehouse which formed part of the 10,000 bales pledged to the Spanish-Filipino Bank, this fact appearing from the books which he had examined.

It is also a fact, proven by the evidence, that, for the purpose of securing a loan of f250,000 the defendant Mendezona, by a public instrument of August 24, 1900, pledged to the Chartered Bank 10,002 bales of hemp, which he asserted were on deposit at the warehouse located at No. 48 Isla de Romero Street, He delivered to the agent of the bank the keys of this warehouse, and placed the hemp so pledged at the disposal of the creditor, in conformity with the fourth clause of the contract, appearing on page (53 of the record, the authenticity of which has also been admitted by Mendezona (p. 324). The fact that the keys were actually delivered is also confirmed by the testimony of Don Baldomero Fernandez, who stated that on the morning of the 25th of September, 1900, while engaged in recounting the hemp at the Isla de Romero Street warehouse, an Englishman came and asked the warehouseman, Fradua, which was the lock corresponding to the key he had with him, and tried this key on the new padlocks, and, not having succeeded in opening them, went away; that between 5 and 6 in the afternoon of that day another Englishman came in and demanded the delivery of the keys of the warehouse, to which demand the witness refused to accede; that he reported the matter to Mr. Correa, the general manager of the Tabacalera Company, who sent his son, who spoke English, to make inquiry; that after some conversation between Correa's son and the Englishman the latter went away, the witness adding that he subsequently learned that this man was one of the managers of the Chartered Bank. The witness Ramon Caro, the clerk of Mendezona & Co., testified (record, pp. 130, 219) that on the 10th of September, 1900, according to the books of the warehouse located at No. 48 Isla de Romero Street, there were at the warehouse 4,251 bales which were part of the 10,002 pledged to the Chartered Bank. It is also a proven fact that on August 24, 1900, Don Secundino Mendezona, as manager of Mendezona & Co., pledged to the Hongkong-Shanghai Banking Corporation, by a public instrument, 16,699 bales of hemp, which he stated were on deposit in the warehouses of Dona Cornelia Laochangco at Tanduary. This pledge was to secure a loan of \$400,000, and the keys of the Tanduary warehouse were accordingly delivered to Mr. Jones, the agent of the bank, and the hemp pledged placed at his disposal, in accordance with clause 4 of the contract^ which appears

on page 70 of the documentary evidence. The defendant Mendezona and the witness Venancio de Jesus corroborated this statement as to the delivery of the keys to the agent of the bank.

Notwithstanding the context of this instrument of September 26, the record contains sufficient evidence to show unquestionably that there was no substitution or exchange of the 20,000 bales of hemp for 20,000 other bales which were formerly stored in the Isla de Romero Street warehouse. What was done in the presence of the notary Bar- rera, in accordance with the agreement between Mendezona, the defendant herein, and Senior Correa, the general manager of the Tabacalera Company, was to have a recount made of the hemp in Mendezona & Co.'s warehouses, for the purpose' of dissipating the doubt or belief on the part of the creditor corporation that the warehouses did not contain the 20,000 bales of hemp pledged by the contract of September 10; and to complete the 20,000 bales so given as security, according to the statement of Don Florencio Garriz, a member of the firm of Mendezona & Co. (record, p. 81), in the course of making the inventory several thousand bales of hemp, part of which arrived by the steamer *San Nicolas*, and part being taken from the Tanduary, Anloague, and Barraca warehouses, were taken to the Isla de Romero warehouse, apart from the 1,700 bales which arrived on the steamer Union, and the 21 bales which Avere taken from a casco. All these bales of hemp, added to the 10,900, which, according to the calculation made and according to the books of the firm, were the total amount in the warehouse September 10, 1900, the date of the pledge, made a total of 20,414 bales, after making the recount. The fact that the hemp was taken into the Isla de Romero warehouse is shown by entries in the books corresponding to the Tanduary, Anloague, and Barraca warehouses, and by other documents in the record, some of which have been identified by Venancio de Jesus, a clerk of Mendezona & Co. The fact that the hemp was so taken into the warehouse was also shown by the testimony of Don Baldomero Fernandez, a representative of the Tabacalera Company, who took charge of the warehouses after September 10, and also by the witness Don Ramon Caro, a clerk of Mendezona & Co.

According to the documents dated the 23d of July and the 30th of June, 1900 (record, pp. 76, 84), Mendezona & Co., to secure two loans, one of. \$250,000 and another of \$425,000, from the Chartered Bank, pledged a warehouse receipt issued by Messrs. Stevenson & Co, for 505 bales of hemp, and several warehouse receipts issued by Mr. J. Sloan for 22,311 bales stored in the Tanduary warehouses.

On September 20, 1900, Mendezona & Co. indorsed to the Chartered Bank several

warehouse receipts signed by Mr. Sloan, representing 2,745 bales of hemp, as security for a loan of \$200,000.

On April 18, 1900, Mendezona & Co. pledged to the Spanish-Filipino Bank, as security for a loan of \$200,000, 10,000 bales of hemp stored in the Anloague and Isla de Romero warehouses; and on June 21 of the same year they pledged another 10,000 bales of hemp stored in the Tanduary warehouses, as security for another loan of \$200,000. These facts are shown by documentary evidence in the record (pp. 69, 92, 93).

From the testimony of the defendant Don Secundino Mendezona and that of his partner, Don Florencio Garriz, it appears that on account of the heavy fall in the price of hemp in the market of this city and of heavy losses suffered the firm of Mendezona & Co. found itself heavily indebted and unable to meet its obligations, for which reason the manager of the company, Don Secundino Mendezona, the defendant herein, after having consulted his partners concerning the situation, on September 28, 1900, found himself compelled to suspend payments, and went to Senor Barrera, a notary public, and informed the latter of this situation, asking him to make out the necessary statement required by the Code of Commerce. But the notary Barrera, instead of doing so, told the defendant that he would undertake to see the managers of the banks and try to make arrangements to enable the firm to continue, and that Barrera, in view of the defendant's determination to suspend payments, assured him that he could arrange matters.

As a result of the conferences held between the principal creditors and some of the members of the firm of Mendezona & Co., an agreement was entered into, which was recorded in a public instrument dated October 7, 1900, in which it was stated that, in consideration of the heavy losses which had been suffered by the firm and other special circumstances which had compelled it to suspend payments, the principal creditors, among them the Tabacalera Company, represented by Don Antonio Correa, had decided to give their support in order that the firm of Mendezona & Co. might be able to meet its obligations, and among other things it was determined to modify the firm of Mendezona & Co., Messrs. Juan Ormaechea and Florencio Garriz entering the firm as partners and becoming the managers of the new firm, which was to be organized for a period of three years, to run from the 1st day of October, 1900; that these managers were to be subject to the resolutions of a board of inspection, composed of the managers of the Chartered Bank, the Hongkong-Shanghai Banking Corporation, and the Spanish-Filipino Bank, the general manager of the Tabacalera Company, some person to be appointed by the Community of Augustinian Fathers, and Don Isidro Arizaleta or Don Fabian Artadi, whenever the latter

should be in this city, the conditions under which the business was to be carried on being expressed in the contract. The three banks, the Tabacalera Company, and the Community of Augustinian Fathers opened with the firm of Mendezona & Co. a credit in account-current up to the sum of \$250,000, which was subsequently extended to \$800,000 at 6 per cent per annum, this amount to be paid back in equal proportions (p. 185). Eighty per cent of the indebtedness of the firm to the Chartered Bank, the Hongkong-Shanghai Banking Corporation, the Spanish-Filipino Bank, the Tabacalera Company, and the Community of Augustinian Fathers was to be paid off, these creditors then to share with the other creditors as to the remaining 20 per cent of their claims. By virtue of the preference granted in favor of the three banks, the Tabacalera Company, and the Community of Augustinian Fathers, the representatives of these creditor corporations solemnly bound themselves not to make use of the special securities held by each one of them, provided that the agreements established in this contract were enforceable and were carried out, but, on the contrary, if for any reason the agreements were not carried out, then the preferred creditors were entitled to avail themselves of their securities, and the waiver established in this case of the contract was to be rescinded. Mendezona & Co., in turn, undertook to give new security to the five preferred creditors as to 80 per cent of their claims by executing in their favor a mortgage upon all their real property, vessels, etc., the same to be regularly recorded in the property register, and also by pledging to their said creditors all the hemp belonging to the firm in Manila and the provinces, by means of the necessary instruments.

By an instrument dated December 12, 1900, the managing partners of the firm of Mendezona & Co., Don Juani Ormaechea and Don Florencio Oarriz, acting in accordance with the authority conferred upon them by the instrument of October 13 of that year, and the creditors of the said firm, among them the Tabacalera Company, represented by its general manager, Don Antonio Correa y Pomar, declared that, owing to heavy losses suffered by the firm of Mendezona & Co., of which Don Secundino Mendezona was the sole managing partner, the firm was unable to meet its obligations at their respective maturities, and that ; therefore the said creditors, among them the representative of the Tabacalera Company, had agreed upon the conditions subject to which the firm might continue its business, which conditions were expressed in a notarial act of October 7, 1900, which was made a part of the contract now referred to; that the conditions stipulated in that act having been complied with, the agreement was to be carried into effect, and that therefore the representative of the Tabacalera Company canceled and annulled the security given by Mendezona & Co. in favor of the Tabacalera Company, by a pledge of 20,000 bales of hemp, as security for a credit in account-current for \$300,000, in accordance with the instrument

of September 10, 1900, and modified by another instrument of the 26th of the same month, in which, as well as in the notarial act of the following date, appeared a statement of the bales pledged; that the managers Ormaechea and Garriz acknowledged to have received from the five principal creditors, among them the Tabacalera Company, the sum of f 800,000, and to secure this sum, as well as 80 per cent of the indebtedness of the firm to tin; said five principal creditors, which said 80 per cent amounted to the sum of \$3,109,344.28, they pledged to the said five creditors the bales of hemp described in the contract by marks and classes, as also the vessels of the firm, and executed a special mortgage upon the real property described therein, as well as an interest in the business and other property therein mentioned.

By a notarial act of the 1st of April, 1901, the managers and the several creditors of Mendezona & Co, agreed, among other things, to declare the firm of Mendezona & Co. dissolved, and their business was thrown into liquidation, the terms upon which the liquidation was to be conducted being expressed in the contract; that the liquidators were to be one or three; and in case the latter number should be decided upon, then two of them should be appointed by the creditors representing two-thirds of the capital, and one by the other creditors; that on and after that date no credit should draw interest, with the exception of the account-current of the Spanish-Filipino Bank, and it was unanimously resolved to release Messrs. Florencio Oarriss, Juan Ormaechea, Secundino Mendezona, Roman Echevarria, and Antonio Elizalde from all liability as managers and as partners.

In view of the facts established at the trial, as shown in the preceding statement thereof, can it be said that the crime of *estafa*, denned and punished by article 534, paragraph 3, and article 535, paragraph 1, of the Penal Code, has been committed, as charged in the information, and as alleged in the brief of the Solicitor-General? Our answer is in the affirmative.

Notwithstanding the fact that the defendant Secundino Mendezona plead not guilty to the charge of *estafa* brought against him, the record contains evidence of the existence of this crime, and more than sufficient proof to fully convince the mind of the guilt of the defendant of the *estafa* of a large sum of money, because, when the demand was made upon the defendant, by the general manager of the Tabacalera Company to give security for the return or payment of the credit of \$300,000, upon which he had already drawn \$171,506.52, he executed public instrument No. 724, dated September 10, 1900, by which he pledged to the creditor company 20,000 bales of hemp which he pretended to have in his warehouse at No. 48 Isla de Romero Street, the fact being that there were only 10,900 bales there, as

shown by an expert calculation and by the stock books of this warehouse, which number of bales has been confirmed by the testimony of the witness Don Ramon Caro, a clerk at that time of Mendezona & Co., who carefully examined these books; and this apart from the fact that there were in the warehouse at that time on storage 2,238 bales of hemp, 700 of which were the property of Don Angel Ortiz, 1,081 of Don Francisco Reyes, and 457 of the widow of Tan-Auco, which said bales so stored should have been deducted from the 10,900 bales of hemp which alone were in the warehouse at that time.

The existence of the crime is furthermore established by the proven facts that, on September 10, 1900, there were in the warehouse at No. 48 Isla de Romero Street, some 2,255 bales which were part of the 10,000 bales pledged to the Spanish-Filipino Bank as security for a loan evidenced by an authentic document adduced in evidence (record, p. 69); 4,251 bales, which were part of the 10,002 bales of hemp pledged to the Chartered Bank, as security for a loan evidenced by a public instrument produced in evidence, in which instrument it appears that the keys of the said warehouse were delivered over as a symbol of the possession of the bales pledged; and that some 5,213 bales of said hemp had been pledged to the Chartered Bank as security for another loan, evidenced by the document shown on page 126 of the record, the authenticity of which has been admitted by the defendant.

It is therefore unquestionable that there were at least 13,957 bales of hemp in that warehouse pledged to other creditors or belonging to other persons, as this fact is fully established by authentic documents, of which the first two documents of pledge indicate a greater number of bales pledged, the sum total of which show, first, the truth of the statement of the witness Don Ramon Caro after an examination of the books of the firm, to the effect that of the 10,000 bales of hemp in stock September 10, 1900, in the warehouse at No. 48 Isla de Romero Street, only 505 bales corresponded to the marks and countermarks of the bales pledged in the instrument of that date; and, second, that of the bales pledged to the two banks, the greater part of the hemp supposed to be in stock at the Isla de Romero warehouse was not there as stipulated, as there should have been at least 13,957 bales, the fact being that there were only 10,900, as stated.

It is sufficient for us to say that we neither affirm nor deny the validity and legal sufficiency of the pledges made on the 18th of April and the 20th of September, 1900, to the Spanish-Filipino Bank and the Chartered Bank. We have referred to them solely for the purpose of showing the fraudulent conduct of the accused when pledging 20,000 bales of hemp as security for indebtedness to the Tabacalera Company, there not being, as shown at the trial,

any such number of bales of hemp in the Isla de Romero warehouse. For the purpose of defining the crime and weighing the evidence taken, it is a matter of indifference that in December, 1900, the firm of Mendezona & Co. had 73,722 bales of hemp, because, as against these figures, we find others representing a larger amount of indebtedness and pledges, as security for the considerable sums borrowed. The question in issue is whether, on September 10, 1900, there were or were not 20,000 bales of hemp in the warehouse at No. 48 Isla de Romero Street. The defendant has not proved that this amount was there, but, on the contrary, it has been demonstrated that there were scarcely 10,900 bales on hand, the greater part of which were either the property of third persons or had already been pledged to other creditors.

It is true that, a suspicion having arisen as to whether there were or were not 20,000 bales of hemp in that warehouse, they proceeded to make a recount, according to an agreement between the parties, and that the result of this operation showed that there were some 20,414 bales there, but it is also true that during the making of this recount thousands of bales of hemp were taken into this warehouse which had been brought from the Tanduary, Anloague, and Barraca warehouses and included in this recount, as well as several thousand other bales of hemp which had arrived on the steamers *Union* and *San Nicolas*, and that other bales were included in the recount which were lying alongside in cascoes and lighters, these facts being evidenced by the books of the firm, authentic documents, and the testimony of credible witnesses. The total amount of hemp included in the recount was 20,414 bales, including the bales deposited and those pledged to other creditors. So that it is beyond question that on September 10, 1900; the 20,000 bales of hemp pledged to the Compañia General de Tabacos as free from all incumbrance were not in the warehouse at No. 48 Isla de Romero Street, and that consequently Avhen Mendezona so stated in the instrument of September 10, 1900, he made a false assertion, and pretended the existence of 20,000 bales, thereby deceiving the creditor corporation, and, by this abuse of the confidence reposed in him, defrauding the said corporation.

If the manager, Senor Correa, had demanded recount of the bales at the time of the pledge of the 20,000 bales of hemp so agreed upon by the instrument of September 10, before the delivery of the keys, and it had been discovered that there was no such number of bales in the Isla de Romero warehouse, but much less, and that part of the hemp stored there was the property of others, and that the greater part was pledged to two banks as security for large loans advanced, he would have been within his rights in demanding the completion of the number of bales agreed upon, or to suspend the delivery of the rest of the agreed credit to the debtor, which amounted to the considerable sum of \$124,704.89.

The manager of the Tabacalera Company, trusting to the security agreed upon in the instrument of September 10, and the apparent good faith of the accused, continued to advance the latter money and goods from the 11th to the 20th of that month on account of the credit of 300,000 pesos, up to the sum of \$296,211.41. Therefore the amount obtained by the estafa must be at least the sum mentioned of \$124,704.89, the sum total of the cash and goods delivered to Mendezona in consideration of the false security fraudulently offered by means of the instrument referred to, admitting that more than one-half of the credit, to wit, the sum of \$171,506.52, had been advanced up to the 5th of September without security, and before the agreement to pledge the 20,000 bales of hemp referred to.

The best evidence that the accused has committed the crime of *estafa* is the demonstration of the concurrence in the consummation of the crime of the deceit by which he proposed to commit the fraud and the damage suffered by the defrauded corporation. These two elements are indispensable for the existence of the crime of estafa, and in support of our assertion we refer to the doctrine established by the decisions of the supreme court of Spain, which are controlling, as they refer to the interpretation and application of the Code now in force, which is of Spanish origin.

The judgment of January 8, 1884, rendered in cassation, lays down the doctrine that the *estafa* denned in section 1 of article 548 of the Penal Code (535 of the Philippine Code) is composed of two essential elements, to wit, deceit and damage, or the intent to cause it, the former being employed for the purpose of producing the latter as a result. In another decision of November 17, 1886, the court says in effect: The essential elements of the crime of *estafa*, as this court has repeatedly held, are the deceit employed for the purpose of defrauding and the damage thereby occasioned, both of which are requisites essential to the existence of any of the cheats denned and punished in the various articles of section 2, chapter 4, title 13, of book 2 of the Penal Code (equivalent to the same section, title, and book, without the chapter, of the Philippine Code). This same doctrine is established in many other judgments of the highest court of Spain.

The deceit, the first element of *estafa*, is manifest. Mendezona, when executing the instrument of pledge of September 10, in bad faith and with criminal intent, induced the manager of the company, Senor Correa, to believe that he was in the possession, as owner, of the 20,000 bales of hemp, free from all incumbrance, and that in this capacity he pledged them to the creditor as security for the credit of \$300,000, it having been discovered some days afterwards that there were only 10,900 bales of hemp in the warehouse at No. 48 Isla de Romero Street, and as warehouse receipts showed that this amount included 2,238 bales

belonging to third persons, and other authentic documents show that there should have been in that warehouse at least 11,719 bales of hemp pledged to the Spanish-Filipino Bank and the Chartered Bank. It can be asserted conclusively that of the 10,900 bales of hemp in the warehouse, part were not the property of Mendezona & Co., and the greater part were already pledged as security for the large claims of the two banks mentioned. Therefore, the existence of the 20,000 bales of hemp pledged to the Tabacalera Company, being imaginary and fictitious, there was undoubtedly deceit in the execution of the instrument and the giving of the pledge.

Did the accused make any attempt to prove, in the course of the trial, that he had 20,000 bales of hemp free from incumbrance in his warehouse in Isla de Romero Street on the 10th of September, 1900? No; he did nothing more than to affirm this. Mendezona must have known that the burden was upon him to prove that he actually did have this number of bales of unencumbered hemp, as asserted in a public instrument. The mere assertion of the accused, unsupported by sufficient evidence, is not enough in law to overcome the overwhelming proof made by the prosecution.

The result of the recount stipulated in the instrument of September 26, 1900, although it shows 20,414 bales - a much greater number than that pledged by the instrument of the 10th - is, nevertheless, no evidence that there were 20,000 bales of hemp there on the date of the pledge. The proof does not show that 20,000 bales were substituted for others of equal number, but does show that during the entire operation of the recount of the bales in the warehouses, from the 26th of September to the 2d of October, inclusive, thousands of bales of hemp were taken into the warehouse, and that there were included in that recount several thousand bales more which had been on board two steamers and several other smaller vessels. All this shows that at that time the warehouses did not contain the 20,000 bales pledged, and that Mendezona, when so affirming in the public instrument executed by him, acted in bad faith and knowingly deceived his creditor. The instrument of September 26 and the notarial act of the 27th, with the recount of the hemp, have not served to exculpate Mendezona and demonstrate his innocence, but to show clearly his guilt.

The other element of *estafa*, the damage, was present because the manager, Senor Correa, being deceived by the concession of an apparent security, permitted Mendezona to continue to draw in money and goods upon the credit opened to him up to the amount of \$124,704.89, in addition to the considerable amount already received by him. This would not have occurred if the accused Mendezona had not executed the instrument of September 10, 1900, pretending to be the owner of 20,000 bales of unencumbered hemp, and pledging

this amount by the delivery of the keys of the warehouses, notwithstanding the fact that no such amount of hemp was actually in stock. If the accused had not succeeded in deceiving the manager of the Tabacalera Company and the latter had discovered that Mendezona & Co. did not have 20,000 bales of hemp in the Isla de Romero warehouse¹ on the date mentioned, and was therefore unable to give security for the credit of 300,000 pesos, he would have at once suspended the payments of money and the deliveries of goods effected from the 11th to the 20th of that month, and which amounted to the sum total of \$124,704.89, in which amount the capital of the Tabacalera Company was diminished, and the debt of Mendezona's firm would have been limited to \$171,506.50.

It appears, then, that the damage suffered by the Tabacalera Company by reason of the fraudulent conduct of Mendezona is demonstrated by the irrefutable logic of numbers. Had it not been for the pledge of the 20,000 bales of hemp which the accused pretended to have in his warehouse, he would not have succeeded in fraudulently obtaining money and goods to the amount of \$124,704.89, which sum was not really secured, as believed by the defrauded creditor at the time the pledge was made.

Irrefutable proof having demonstrated the existence of the crime of *estafa*, committed by fraudulent means, and to the prejudice of the Compania General de Tabacos, in the large sum mentioned above, the conclusion follows, from the evidence of the prosecution above related, that the accused, Secundino Mendezona, manager of the firm of Mendezona & Co., is guilty as principal, by direct participation, of the crime charged. Notwithstanding his denial and exculpatory allegations, the record contains conclusive evidence that when demand was made upon him by the manager of the Tabacalera Company for security for the large credit granted him, and in order that he might continue to draw money and goods from the coffers and storehouses of the company, he pretended to have 20,000 bales of unencumbered hemp in his warehouse at No. 48 Isla de Romero Street, and pledged said bales by public writing in legal form under date of September 10, 1900, thus succeeding in obtaining the large sum of \$124,704.89, in addition to the considerable amount already received by him.

The defendant, Secundino Mendezona, in his capacity of manager of Mendezona & Co., directed the business of the firm, and he alone made all contracts concerning the purchase and sale of hemp, and its receipt and discharge from the warehouses; he alone it was who borrowed large sums from several creditors, and stipulated all the pledges made in the name of the firm in favor of the various creditors. This fact appears of record. Therefore, he must have known that in his warehouse at No. 48 Isla de Romero Street there were 2,238

bales of hemp which belonged to others, and some 11,719 bales which he had already pledged to two banks, because all this appears from documents signed by him and duly acknowledged. He also it was who sought Seilor Correa's authority for the return to their owners of the bales of hemp stored in those warehouses. The record shows that on September 10 those warehouses contained much less than 13,957 bales (only some 10,900), and consequently there could not have been 20,000 there, and the defendant certainly has not proved that there were.

The allegations of the defense with respect to the informality in the manner of keeping the books of the warehouses of the firm in question can not be considered, because if there were any errors in the bookkeeping Mendezona would certainly be chargeable therewith. But the fact is that with the aid of these books they succeeded in drawing a general statement of Mendezona & Co.'s stock of hemp; and the defense during the trial did not prove in what the errors complained of consisted, or what were the defects in the books. Article 48, section 1, of the Code of Commerce in force provides that the books of merchants are conclusive evidence against their owners, and that no evidence contradictory thereof will be admitted.

The agreements entered into subsequent to the instrument of September 10, 1900, dated September 28, October 7, and December 12, 1900, the waiver made by the representative of the Tabacalera Company, among others, of his rights to the pledge of the 20,000 bales of hemp, the cancellation of the first two instruments of September 10 and 28, 1900, in no way affect or eliminate the characteristic elements of the crime of *estafa* committed at the time of the fraudulent pledge recorded in the original instrument of September 10. The contracts or compromises entered into between the parties for the purpose of determining civil liabilities, produce no effect within the domain of the criminal law, and can not blot out a consummated crime. Moreover, *estafa* is a public offense, to be prosecuted and punished by the Government on its own motion, even though complete reparation should have been made for the damage suffered by the party injured. Criminality is not affected by compromise or novation of contract. Such stipulations produce effect only with respect to the civil rights of the parties. Such is the constant doctrine of the supreme court of Spain as laid down by its judgments of June 12, 1882, February 19, 1879, February 15, 1884, and February 9, 1885, and many others which it is not necessary to cite.

Furthermore, article 1813 of the Civil Code provides that a civil action arising from a crime may be compromised, but the public action for the imposition of the legal penalty shall not be extinguished thereby; and article 897 of the Code of Commerce establishes that the fact

that a bankruptcy has been declared by a final judgment to be fortuitous is not a bar to a criminal prosecution, when, from the actions pending concerning agreements between creditors, the acknowledgment of credits or any other incident *indicia* appear of the commission of acts falling within the sphere of the Penal Code, which acts, at the instance of the department of public prosecution, will be submitted to the decision of a competent court.

With the exception of crimes of a private character, the repression and punishment of public offenses such as *estafa* is a matter of interest to society and one of public policy. For this reason, in the case in question the agreements and compromises entered into by the instruments of October 7 and December 12, 1900, between the defendant and his creditors, among them the representative of the Tabacalera Company, can not change or affect the essence or character of the crime committed, or the penal action for enforcing the penalty; nor is the penal action extinguished by the waiver of the party injured, and although he may expressly waive his right to an indemnification, nevertheless the department of public prosecution will prosecute the case and maintain the public penal action for the punishment of the delinquent. (Arts. 17, 23, and 133 of the Penal Code; 234, 239, 240 et seq. of the Reformed Compilation of 1880, and 100, 106, 107, 108 et seq. of the Law of Criminal Procedure of 1882.) The latter two procedural laws are cited as legal doctrines not opposed to the present law of criminal procedure in force.

The representative of the Compania General de Tabacos was obliged to enter into the agreements recorded in the instruments of October 7 and December 12, 1900, together with other creditors, with the accused because he became convinced that the pledge or security given him by Mendezona was illusory and worthless, a recount of the bales of hemp having showed that part of them were not the property of the debtor firm, and that the greater part were already encumbered or pledged in favor of other creditors.

In consequence of the agreements before referred to, this court can not enter any judgment with respect to the indemnification of the amount obtained by the *estafa* in favor of the injured party, because, although there has been no waiver of the right to demand a restitution of the \$124,704.89 fraudulently obtained, from the context of the instruments executed in October and December it is to be inferred that the manager of the company reserves his right to enforce his claim upon the terms therein stipulated.

This decision, therefore, is limited to the imposition of the adequate penalty prescribed by section 3 of article 534, and in the medium grade, no generic mitigating or aggravating

circumstances having concurred in the commission of the crime, as abuse of confidence is inherent in the crime of *estafa*.

Upon these grounds, therefore, we hold (1) that the act which is the object of this prosecution constitutes the crime of *estafa* in an amount superior to 6,250 pesetas, defined and punished by articles 534, paragraph 3, and 535, paragraph 1, of the Penal Code, without the concurrence of any mitigating or aggravating circumstances; (2) that the defendant Mendezona is the sole guilty principal by direct participation; (3) that the defendant is liable to the penalty of *presidio correccional* in its minimum and medium degrees, and to the accessories prescribed by article 58 of the Code, without right to any reduction of the penalty, he not having been a detention prisoner; and (4) that the court will not make any declaration concerning the indemnification of the amount obtained by the *estafa* in favor of the Tabacalera Company, by reason of the agreements entered into between the latter and other creditors and the accused. The defendant is, however, condemned to the payment of costs.

Therefore the judgment appealed is reversed and Don Secundino Mendezona y Mendezona is convicted and condemned to two years eleven months and ten days of *presidio correccional*, with suspension from all public office, profession, trade, or right of suffrage, and to the payment of the costs of both instances.

Arellano, C. J., Cooper and Mapa, JJ., concur.

McDonough, J., did not sit in this case.

CONCURRING

WILLARD, J.:

I base my concurrence in the judgment of conviction upon the following considerations:

1. That there were in the warehouse No. 48 on September 10, 1900, no more than 12,000 bales of hemp was proved.
2. That 20,000 bales were not in this warehouse on the 27th day of September was also proved. The total number of bales counted by the notary on September 26 and 27 was 18,413. But of this number 2,006 were in cascoes and lorchas.

The claim of the defendant that warehouse No. 48 Isla de Romero was so extended as to include cascoes and lorchas lying at the dock can not be sustained. From the said 18,413 must be subtracted the said 2,006 bales which were not in the warehouse and upon which no valid lien was created by the agreement of September 26.

3. It was also proved that of the hemp in the warehouse on September 10 and September 27, 2,238 bales did not belong to Mendezona & Co., but did belong to Don Angel Ortiz, Don Francisco Reyes, and the widow of Tan-Auco.. These bales were afterwards, on demand of said owners, delivered to them by the Tobacco Company.
4. Taking from 18,413 bales the said two sums of 2,006 and 2,238, there remain 14,169 bales. Upon this amount, and upon no greater amount, did the Tobacco Company in any event secure a valid lien by the agreement of September 26. It therefore appears that there is no foundation in fact for the claim of the defendant that, even if the warehouse did not contain 20,000 bales on September 10, it did on September 27; that said 20,000 bales then became subject to a valid lien in favor of the Tobacco Company, and consequently it has not been damaged.
5. The facts that the Tobacco Company by the contract of October 7, 1900, agreed upon certain conditions to release the lien which it held, and that by the agreement of December 12, 1900, it did in fact release this lien, are not important. It agreed to release and did release only the lien which it in fact had - that is, a lien, at most, on 15,000 bales. As to the property thus released it can make no claim. But that release does not debar it from pursuing its remedies against Mendezona because he did not give it, as he agreed to, a lien on 5,000 bales more. If the warehouse No. 48 had on September 10, 1900, contained 20,000 bales, the property of Mendezona & Co., the Tobacco Company would have secured a valid lien on property more than sufficient to have paid its claim of 300,000 pesos. It appears that it at once took possession of the warehouse and changed the locks on the doors. If it had been in this situation with its claim fully protected on September 28, when Mendezona announced that he must suspend, it is doubtful if it would have gone into the arrangement of October 7.

ON MOTION FOR REHEARING.

TORRES, J.:

The attorneys for the accused, Secundino Mendezona, ask for a rehearing of the cause in which he was charged with and found guilty of the crime of *estafa*, on the ground that, under the laws in force in these Islands, neither the United States nor a private prosecutor

has in any case the right to interpose an appeal against a judgment of acquittal rendered by a judge of the Court of First Instance. It is contended that such an appeal would be in violation of the organic act of the Archipelago, which declares that no person shall twice be placed in jeopardy for the same offense; and it is further alleged that the appeal in question denies to the accused the equal protection of the laws guaranteed him by the Constitution of the United States.

Apart from the question as to whether or not an appeal can be taken against a judgment of acquittal rendered by a judge of the Court of First Instance—this question not having been raised or argued either in the first instance or in this court during the perfection of the appeal allowed the Attorney-General from the judgment of acquittal rendered by Judge Rohde—the contention of the accused, together with the principles on which that contention rests, has already been finally passed upon in the case of the United States vs. Kepner (1 Off. Gaz., 353^[1]), in which a petition similar to that in the present case and based upon identically the same principles was presented. The motion is denied, with costs.

Arellano, C. J., Cooper, Willard, Mapa, and McDonough, JJ., concur.

^[1] 1 Phil. Rep., 397.
