6 Phil. 680

[G.R. No. 2101. November 15, 1906]

ELEANOR ERICA STRONG AND RICHARD P. STRONG, PLAINTIFFS AND APPELLEES, VS. FRANCISCO GUTIERREZ REPIDE, DEFENDANT AND APPELLANT.[1]

D E C I S I O N

TRACEY, J.:

This action was brought to recover 800 shares of the capital stock of the Philippine Sugar Estates Development Company, Limited, an anonymous society formed to hold the Dominican friar lands.

The shares were the property of one of the plaintiffs, Mrs. Strong, as part of the estate of her first husband, and we shall for clearness hereinafter apply the word plaintiff to her alone. They were purchased by the defendant through a broker who dealt with her agent, one Jones, who had the script in his possession and who made the sale without the knowledge of the plaintiff. The defendant was a director, was the managing agent, and was in his own right the majority stockholder of the society.

The plaintiff proceeds on two theories:

First. That her agent had no power to sell or deliver her stock in the Philippine Sugar Estates Development Company, Limited; and

Second. That its sale, through her agent, was procured by fraud on the part of the defendant.

The script was payable to bearer and had, ever since its issue, been in the possession of Jones, who was acting gratuitously as agent for the plaintiff, not only under a written power special in terms to collect money but also as general agent managing all her business under a parol employment, the precise terms of which are not in evidence. He held other securities for the plaintiff and had on one prior occasion, at least, without special instruction, sold

other of her stocks, understanding that the act was within the scope of his general agency.

By article 1712 of the Civil Code the nature of general and special powers is defined. Article 1713 reads:

> "An agency stated in general terms only includes acts of administration. In order to compromise, alienate, mortgage, or to execute any other act of strict ownership an express mandate is required."

Such a mandate may be either oral or written, may stand by itself or may be included in the general power, the one vital thing being that the right to sell shall be express or shall be a necessary ingredient of the power that is expressed. (Fuzier-Herman *Repertoire*, Title "Mandat," arts. 153, 166, 167, 175, 176.) The only express commission in evidence to dispose of this or any stock is found in an interview between the plaintiff and Jones on the Luneta, in Manila, before this negotiation, in which she told him, speaking of her shares, "not to part with them until I got their face value." This bald statement is the only evidence on this point. If in its negative form it is sufficient to constitute an express or special power to sell, it can not be severed from the limitation as to price bound up in the same sentence with it; the limitation is as much a parcel of the grant as if both had been found in one written instrument, and one part can not be given effect without the other, unless one part only was brought to the knowledge of the defendant. There is no claim that he ever heard of this conversation. The sale was, in fact, made at a price much under par. While, however, thus in themselves barred from operating as constating terms of a grant of power, yet the words have their effect as evidence of a preexisting power understood between the parties, to which they plainly refer. In our judgment, however, even when taken in connection with the other facts in the case, they do not sufficiently define the power. The sale by Jones of other stock at another time, his possession of the shares, and the reference of the broker to him by the plaintiff's husband add force to those words. But all these things fail to reveal the terms of the preexisting power; it may have been general or special, it may have been express, but on the other hand it may have been, as indicated by the evidence, merely assumed by the plaintiff and Jones to follow as a matter of course, from his general power of administration. This would lead to the very assumption prohibited by article 1713. It is also apparent that the general management of the plaintiff's property did not necessitate incidentally the sale of stock. We fail to find, therefore, proof of an effective power given Jones to dispose of this stock. The difficulty with this branch of the case is the scantiness of

the evidence; the documents have been destroyed and the declarations of the parties are brief, and it would be impossible to imply an express power from them without assuming facts of which no sufficient evidence exists.

These principles are established in the civil law of Europe, as well as the common law of America, that acts of agents, beyond the limitation of their power, are null; that third persons deal with them at their peril and are bound to inquire as to the extent of the power of the agent with whom they contract; that where neither the actual power nor the appearance of it, for which the principal is responsible, exists, a third party is not protected without such inquiry. In this case the defendant is not shown to have made any inquiry whatever, but apparently relied unquestioningly upon Jones's assumption of authority and took his risk in so doing.

It is urged, however, that we should apply the doctrine known in American jurisprudence as "estoppel," whereby a party creating an appearance of fact which is not true is held bound by that appearance as against another person who has acted on the faith of it. A similar doctrine finds place in the civil law. By article 1989 of the French Code, corresponding with article 1719 of our Civil Code, it is provided that an agent can not do anything beyond the limit of his power. In commenting upon this law, Dalloz, after laying down the admitted proposition that the acts of an agent beyond his limited powers are null, states three qualifications whereby the principal is held bound:

First. Where his acts have contributed to deceive a third person in good faith;

Second. Where the limitations upon the power created by him could not have been known by a third person; and

Third. Where he has placed in the hands of the agent instruments signed by him in blank. (*Jurisprudence Generale*, vol. 10, title "Mandat," art. 142.)

The negotiation for this stock was opened with a written inquiry from defendant's agent, through a broker named Sloane, whether the shares were for sale. In reply, in a letter written by plaintiff's husband, he was referred to Jones, with whom he was directed to consult "as he had the shares in his possession." The letters were not produced and it is not clear whether the inquiry was addressed to the plaintiff or to her husband. The latter testified that it was made known to her, but not so the fact of the reference to Jones.

In all this there is nothing at variance with either theory; while the reference may have been

made with a view to a sale, it was not inconsistent with the office of Jones as the general administrator and the adviser of the plaintiff, and is by the plaintiff's husband stated to have been a direction to consult and not to negotiate. Had the defendant made inquiry, as was incumbent on him, as to the extent of the agent's powers, he might not have been enlightened by Jones, who understood that his general administrative authority covered a sale; had he, however, required the production of the existing written power of attorney from the plaintiff, that, upon inspection, would have been sufficient to send him for further assurance to the grantor of the power and no misunderstanding could have arisen. The defendant knew who the principal in the case was, as he commissioned his agent to buy this particular stock for him, and the broker thereupon applied to the plaintiffs. For these reasons we can not find in the proofs either acts contributing to deceive the defendant or limitations upon the power of the attorney which could not have been made known to him. Nor do we discover the third qualification of the general rule stated by Dalloz. In the commentators and jurisprudence of the civil law it is uniformly required that to bring this doctrine into operation the instrument to be negotiated shall be signed in blank by the owner. (Fuzier-Herman, title "Mandat," 712.)

In this instance the securities, although payable to bearer and negotiable, were not signed in blank; the distinction is obvious, the reason for the rule resting in the fact of the signature expressing an affirmative intention on the part of the owner that the agent shall have the disposition of the securities. Where the instrument is by its terms at the outset payable to bearer there is no such expression of intention and the possession of such an instrument is consistent with the mere power of management. Moreover, the defendant was aware that Jones had long had these shares of stock in his possession for the purpose of voting at meetings of shareholders, consequently the defense of estoppel fails.

It is also contended that the defendant was protected in his purchase by the provisions of the Code of Commerce. This stock was, pursuant to the charter of the company, payable to bearer and was therefore transferable by delivery. (Code of Commerce, arts. 165 and 545). The third subdivision of article 545 provides in relation to such securities:

> "They are not subject to restitution if negotiated on exchange, with the intervention of a licensed agent, and, where there is no such agent, with the intervention of a notary public or a person discharging his duties, or a commercial broker."

The effect of this provision is to confirm the title and transfer of even lost or stolen securities, except where the owner protects himself by the procedure provided in a subsequent article of the code.

We may take judicial notice of the fact that there is no “exchange” in the Philippine Islands, as indeed is plain from the various articles of the Spanish Code of Commerce, specifically made applicable to these Islands. There is high authority, as well as cogent reason for the construction of this article which enables a commercial broker to act wherever there is no exchange. (See opinion of the supreme court of justice, May 30, 1895, Gaceta de Madrid, September 10, 1895.)

Sloane, through whom this sale was made, testified that he was a general broker and kept books under the Code of Commerce. There is no proof that he had ever held a commercial license, or that there was in Manila or in the Islands any association of commercial brokers that could have licensed him as such. The office is a technical one of special power and privilege created under Title VI of Book First of the Code of Commerce, calling for strict proof of the conditions of its existence. Even if the character of this broker had been given him by a proper license under the Spanish system, the evidence fails to show it. There is nothing before us requiring us to declare the present effect of this article of the code.

Although our conclusion on this branch of the case entitles the plaintiffs to recover, we deem it opportune to consider the second cause of action, based upon the affirmative conduct of the defendant, alleged to be fraudulent. The Civil Code provides that consent gained by deceit shall be void (art. 1265) and that there is deceit when by “insidious machinations” a person is induced to execute a contract (art. 1269).

The machinations with which the defendant is charged consist in the suppression of his identity while negotiating for the stock and when paying for it and also of his intention as majority stockholder in the company to close the negotiation then pending with the Government for the sale of the friar lands owned by the company. The prospect of such a sale would have materially affected the price of the stock. This negotiation and the defendant’s management of it in behalf of the vendors was known to Jones and had been for some time a matter of public notoriety and newspaper comment in the Islands.

Neither the plaintiff nor her agent applied to the defendant for information or communicated with him in any way. Nor is the defendant shown to have put forth statements, either in public or in private, for the purpose of influencing the sale.

In the action of the defendant we find nothing not permissible as against a holder of stock for sale, unless a peculiar duty on his part arose by reason of his office in the association, which was an anonymous society formed in the year 1900 under the Code of Commerce. He was its managing director and conducted these transactions without formal authorization by his society but after informal discussion at the director's meeting. He was also in person the holder of a large majority of the stock, thus not only controlling the negotiations with the Government through all its stages but also its ultimate result by his own vote in the shareholders' meeting.

Did his knowledge of what was being done and what would be done incapacitate him in dealing with a fellow-stockholder not so enlightened? Was he in duty bound to disclose either his information or his intentions or even his identity?

On this point counsel have discussed quite fully the American cases on corporation law. The question has been answered in conflicting senses in the United States. In two decisions cited by the appellee it has been held that a director and majority stockholder must disclose his information to another stockholder before buying stock from him; that such information is an asset of the company and that the relation of a director to a member of the company is that of trustee, not only in respect of corporate property directly under his control but also of the individual stock in the hands of the member. (Oliver *vs*. Oliver, 118 Ga., 362; 45 S. E. Reporter, 232; Stewart *vs*. Harris, supreme court of Kansas, 77 Pacific Reporter, 277.)

Such does not appear to be the older doctrine, which is quite to the contrary. The cases are collected in Deaderick *vs*. Wilson (55 Tenn., 108), and in Commissioners *vs*. Tippicanoe Co. (44 Ind., 509).

In Smith *vs*. Hurd (12 Metcalf, 371) the Massachusetts court denied the legal privity of directors with shareholders.

In Slee *vs*. Bloom (20 Johns (N. Y.), 669) it was ruled that they are not trustees for the individual stockholders.

In Rothmiller *vs*. Stein (143 N. Y., 581) directors were held liable for false information as to solvency furnished inquirers who, in reliance on it, had foreborne to sell their stock to advantage. The duty of a director and the qualification of the rule "*caveat emptor*" are laid down in the opinion of Judge Peckham.

In Ritchie *vs*. McMullen (79 Fed. Rep., 522), northern Ohio circuit, Judge Taft rested the

liability of a director to a shareholder, not upon his general duty as director but upon the special relation, on the facts before him, as pledgee of the stock, creating a privity between them. In reviewing an English decision where the company managers had conspired to conceal facts in order to effect the purchase of the plaintiff's stock, Judge Taft says:

> "In the case cited the liability arose because of the relation between the corporate managers and stockholders of vendees and vendor of the stock. In the case at bar it arises because of the relation between the corporate managers and the stockholders of pledgee and pledgor of the stock."

These American cases are instructive as throwing light on the controversy over the duty of corporate managers to members, but the litigation before us must be controlled by the principles of our own civil jurisprudence. While up to a recent date we have had no private corporations, so termed in our statutes, we have their likeness in anonymous societies or partnerships. The essential concept of a corporation is a legal entity endowed with succession of membership and merging in itself the primary individual liability and right of the associates. All of these qualities are possessed by anonymous societies. Individual liability is completely extinguished; the membership is determined by ownership of stock and the managers, are chosen by stockholders. They are declared to be mandatories of the society (Code of Commerce, 156), and they are also responsible to the individual stockholders (Dalloz, *Societe*, arts. 1499 and 1539). But nowhere do we find their responsibility extended beyond the corporate property actually under their control. It is not suggested that they owe any duty to the members in respect to their individual stock, which is fully recognized as separate property, whose character and transmission is provided for in laws peculiar to it. This appears to be the limit of their responsibility under the law governing this case. Article 1459 of the Civil Code reads:

> "The following persons can not acquire by purchase, even at public or judicial auction, neither in person nor by an agent:
>
> "1. The tutor or protutor, the goods of the person or persons who are under his tutelage.
>
> "2. Mandatories, the property with the administration or alienation of which they have been charged." (See Manresa's Commentary on this article, vol. 10, p. 100.)

Their accountability is thus expressly confined to property “with the administration or alienation of which they are charged.” They are not charged with the administration or alienation of the shares in the hands of members and in respect to them they are not mandatories and hold no trust relation to the owners.

The members have no title to the corporate property as such, which, on the contrary, is distinct from the shares held by them. The right of the associate in a society is only in effect the right to an interest remaining after liquidation and not an actual and active ownership in the objects which compose the social property. (Fuizier-Herman *Societe*, art. 502; see also arts. 475 and 505.)

Consequently the defendant violated no duty in not communicating to the plaintiff his purpose in buying her shares and has been shown guilty of no fraud.

It is not entirely clear from the evidence whether the claim of the defendant that he bought the plaintiff’s stock not in his own right but in behalf of his brother in Spain, to whom it was forwarded, has been abandoned or not. It appears to be assumed and was conceded by counsel on argument that the purchase was made for himself and it has been so treated in this opinion. If, however, the purchase was for the benefit of his brother, that might affect any obligation that he might have been under arising out of the office of administrator of the society, but it could not avoid the failure of title to the stock by reason of a lack of power in the agent who undertook to sell it. Knowledge on the part of the defendant would have bound his principal under such a general commission.

The judgment of the Court of First Instance is affirmed on the first ground stated, although not on the second. After the expiration of twenty days let judgment be entered in accordance herewith. So ordered.

Torres and *Willard, JJ.,* concur.
Johnson, J., concurs in the result.
Carson, J., disqualified.

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[1] The date of the original hearing of this case in the Supreme Court was April 28, 1906. The original case and the rehearing of November 15, 1906, are here reported together as a matter of convenience.

DISSENTING

ARELLANO, C. J., and **MAPA, J.:**

We regret that we are constrained to dissent from the brilliant and well-reasoned decision of the majority. It is beyond a doubt conclusive from the principal point of view from which the question has been considered. A contract executed by an agent without the previous authorization or subsequent ratification of the principal is unquestionably void. An act of conveyance by an agent without the express authority of the principal is prohibited by our law.

But the essence of the question appears to us to be different. It appears to us that the first purchaser did not deal with the vendor as though the latter were an agent, or, if he was under this impression, it is not clear that the previous authorization of the principal was not given to the agent.

Kauffman, the first purchaser, addressed himself, to the broker, Sloan. The latter, in turn, applied to Strong, the second husband of Mrs. Eleanor Erica, formerly the wife of Andrews, the original owner of 800 shares of the Sugar Estates Development Company, Limited. Strong referred Sloan to Jones, so that he might deal with the latter. Sloan and Jones had the matter under consideration for some three weeks. Sloan made several proposals to Jones, until finally, after this not inconsiderable lapse of time, a price was agreed upon, and the contract was perfected in the office of the broker, Sloan, and consummated by the delivery by Jones and Kauffman, respectively, of the stock and of the price. This was on the 10th of October, 1903. The remaining days of October, and all of November and December, passed. All the parties were present in this city—Mr. and Mrs. Strong, Messrs. Jones, Sloan, and Kauffman. During this period Kauffman had sold the stock to Francisco Gutierrez, the second purchaser.

The complaint was not presented until the 12th of January, 1904, and then not by the vendor, Jones, against the purchaser, Kauffman, but by Mr. and Mrs. Strong, who allege that their relations with Jones were those of bailor and bailee, and agent and principal; but against whom, nevertheless, they have not brought their action, but against a third person, who has had no relations whatsoever with Mr. and Mrs. Strong. And this action is brought by them against a stranger—not against the only person who would be responsible to them for damages, if any from which an action concerning the stock alleged to be the object of

the bailment and agency might arise—and they allege as to this third person, who is Gutierrez instead of Kauffman, that he acted fraudulently, thereby, as they allege, vitiating the sale; and it is upon this aspect of the case principally that the judge below entered his decision, which is in part as follows:

> "Therefore, the court declares: That the purchase of these shares by the defendant was fraudulent and void, and the court orders that the same be annulled and considered void. The present value of each share of the 'Philippine Sugar Estates Development Co.' appears to be one hundred and ninety pesos and sixty-four centavos, Philippine currency. By that calculation the following is arrived at: The lands of the 'Sugar Estates Co.' were sold for the sum of eight million six hundred and seventy-one thousand six hundred and fifty-seven dollars. The other companies paid to the 'Sugar Estates Co.' the sum of three hundred and thirty-five thousand dollars, making a total of four million six hundred thousand six hundred and fifty-seven dollars, United States currency, received by the 'Sugar Estates Co.' for the sale of these lands. The liabilities of the company seem to be undetermined, but it appears that they are completely covered by the *hacienda* excluded from the sale. Therefore the court will consider the liabilities covered by this parcel of land in dictating its judgment. There were issued forty-two thousand and thirty shares of the 'Sugar Estates Co.' and therefore each share would have a value of ninety-five dollars and thirty-two cents, United States currency. Therefore the 800 shares referred to amount to seventy-six thousand two hundred and fifty-six dollars, United States currency, or one hundred and fifty-two thousand five hundred and twelve pesos, Philippine currency. From this sum there must be deducted the amount of sixteen thousand pesos, Mexican currency, which the defendant paid to Jones, and which Jones deposited to the credit of the plaintiff. No proof was presented on the trial as to the value of Mexican currency, as the law requires, and the court must take judicial notice of the rate of exchange fixed by authority of the Government, which at the present date is 1.13. Therefore sixteen thousand pesos, Mexican currency, will amount to fourteen thousand one hundred and fifty-nine pesos and twenty-nine centavos, Philippine currency. Deducting this amount from the value of the 800 shares, there will remain one hundred and thirty-eight thousand three hundred and fifty-two pesos and seventy-one centavos, Philippine currency.
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> "Therefore, the court orders that the plaintiff recover of the defendant said sum

> of one hundred and thirty-eight thousand three hundred and fifty-two pesos and seventyone centavos, Philippine currency, and the costs of this suit. The court orders further that the foregoing judgment may be satisfied by the delivery to the plaintiff, Eleanor Erica Strong, of her said 800 shares within forty days from this date, in which case the plaintiff shall pay to the defendant 16,000 pesos, Mexican currency, or its equivalent in Philippine currency. It further appears to the court that 800 shares, the property of the defendant in this cause, were attached and are now in the hands of the sheriff of the city of Manila. The court therefore orders that, in case the judgment rendered in this case is not satisfied at or before the termination of the forty days from this date, said sheriff of said city of Manila, P. I., sell said 800 shares thus attached after publication as is required by law, and that he apply the product to the payment of the foregoing judgment and of all the costs.
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> "Manila, April 29, 1904.
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> "BEEKMAN WINTHROP, *Judge*."

This judgment can not possibly be affirmed.

All the acts which have given rise to this litigation having been effected under the laws of the Philippine Islands, in accordance with these laws must the case be determined.

Even supposing that a judgment might be rendered against the defendant, we can not see how, in a revindicatory action, which presupposes the obligation to deliver a specific thing, a judgment for the payment of a certain sum of money—which is peculiar to obligations which consists in the performance of some act—can be entered primarily. The revindicatory action, the subject of which must be some specific and determinate thing in this case, should be limited to the 800 shares which, in their series and according to the stub book, were issued, although payable to bearer, in favor of Mrs. Eleanor Erica Strong's first husband. These shares should be specified in the complaint, as everything not generic should be specified. To this end the Code of Commerce prescribes that shares of mercantile companies shall be enumerated and extended in stub books (art. 163), and to the same end it is prescribed by the same code that in case of loss "the owner should indicate the name, the nature, the nominal value, the number, if any, and the series of the certificates." (Art. 549.)

In a revindicatory action the first thing to be determined is the thing which should be delivered up in case of a judgment against the defendant, and only subsidiarily and in defect of such delivery can judgment be entered for the value of the thing which is considered as standing in its stead. Furthermore, even supposing that that which stands first in the judgment were that which should, according to law, stand first and not merely optionally, as would appear from the terms of the judgment, it is impossible to affirm the first conclusion of the judgment, to the effect that the plaintiff recover from the defendant the sum of P138,352.71, Philippine currency, as there is no allegation in the complaint, nor has any evidence been offered at the trial, upon which to base such a finding. Nor is it possible to accept as a basis of a final decision the assertion that "the actual value of each share of the Philippine Sugar Estates Development Company *appears* to be P190.64, Philippine currency," followed by calculations which are neither alleged by the plaintiffs in the complaint nor during the course of the trial have been agreed to or even proven.

But disregarding this feature of the judgment, it is of importance to examine the reasons upon which the decision is based.

(1) Fraud or deceit and the lack of an express authority on the part of the selling agent, are the two legal grounds established in the judgment appealed.

(*a*) *Fraud*.—In the decision we find no other reasoning than this:

> "Article 1265 of the Civil Code provides: 'Consent given by reason of error, violence, intimidation, or fraud shall be void.' Article 1269; 'Deceit exists when, by means of insidious words or machinations on the part of one of the contracting parties, the other is induced to, enter into a contract which, without them, he would not have made.' The court believes that the acts of the defendant in concealing what he was under an obligation to reveal, and in adopting the measures which he did adopt to carry the concealment into effect, are equivalent to insidious machinations." (Bill of exceptions, p. 14.)

It is absolutely impossible for this court, in reason and justice, to subscribe to this reasoning. In the first place, deceit, according to the article cited, No. 1269, must be some positive act, *insidious words or machinations*, "which include false promises, the exaggeration of hopes or benefits, the abuse of confidence, the use of pretended names, qualities, or powers, the thousand forms, in fine, of deceit, by which one may be misled and

a vitiated consent obtained, without its being necessary that such proceedings constitute *estafa* or otherwise fall within the domain of the Penal Code." (Manresa, vol. 8, p. 623.)

Throughout the course of this trial no evidence has been offered of any fact tending to show that the vendor, Jones, was in any way misled for the purpose of obtaining from him consent which he would not otherwise have given. This appears from the decision itself; the supposed deceit consisted in refraining from revealing facts which should have been revealed. In the second place, the judge's decision does not state who was the deceiver and who was the deceived. The contracting parties were Kauffman and Jones. Even if we take it for granted that Kauffman contracted as a go-between for Gutierrez, between Kauffman or Gutierrez as purchaser, and Jones as vendor, there was a perfect meeting of minds as to the purchase of the 800 shares in consideration of the sum of 16,000 pesos through the mediation of the broker, Sloan, in whose office the contract was entered into and executed. Against the consent so given no allegation has been made by Jones or any one else that it was vitiated by deceit, for no one attempted to deceive him by means of insidious words or machinations, nor does it appear that any one was deceived by such words or machinations. It is absolutely impossible to adopt the conclusion that Kauffman or Gutierrez or Sloan had made use of insidious words or machinations of such character that they influenced Jones's mind so as to obtain from him a consent which without them would not have been given. It is absolutely erroneous to consider as consent obtained by deceit consent given upon insufficient information. It is still more erroneous to regard the consent of one of the parties as vitiated by reason of the lack of sufficient information on the part of some third person, no matter how much interested the latter may have been in the contract.

The fraud or deceit which the judge concludes existed consisted in "the defendant having concealed what he was under obligation to reveal." This is alleged in paragraph VI of the complaint as follows:

> "VI. The defendant deliberately, knowingly, willfully, and with intent to defraud and deceive the plaintiffs (Mr. and Mrs. Strong) concealed from them the value of the said shares, and deliberately, willfully, and intentionally deprived the plaintiffs of the means by which they might have investigated the value of the said shares, for the purpose of obtaining them for a very inadequate consideration, and by reason of the facts alleged the defendant thereby defrauded the plaintiffs." (Bill of exceptions, p. 2.)

The fact that a shareholder at any particular time is unaware of the value of his shares is imputable to him alone. This is the general rule of law, which does not excuse one's ignorance concerning matters which affect his own rights. And when some other person, as manager or representative, is under the obligation of informing the shareholders of a company concerning the value of their shares at any given time, the failure to perform this duty might give rise to rights within the company for the enforcement of any liability arising by reason thereof, but the consequences of such an omission can not be extended, beyond the liabilities peculiar to the contract by which the company was created, to other acts which may have been effected by the shareholder as a result of the ignorance of his own rights, whatever may have been the causes of his ignorance.

If Mr. and Mrs. Strong themselves, instead of Jones, had made the sale now under consideration for the sum of 16,000 pesos, they could not have alleged that they were deceived by Gutierrez because the latter did not perform his duty toward them resulting from the contract by which the company was created. Whether they were the ones whose duty it was to know what was the value of their property, or whether it was Gutierrez who should have acquired this information and informed them of the actual value of the shares, is a matter which is entirely foreign to a contract of sale in which consent was freely given, without any deceit, and without any information—good, bad, or indifferent—on the part of the purchaser, the result perhaps of an error on the part of the vendor by reason of the lack of this previous knowledge which is suggested and advised by even the slightest degree of care in the protection of one's own interests. It can never be said that the consent given was vitiated by deceit; even though it may have been by error, whether imputable or not to the contracting parties themselves, which latter consideration is not at present involved.

However this may be, the deceit which, according to the decision, was practiced, is that which, according to article 1269, exists when, "by insidious words or machinations on the part of *one* of the contracting parties the *other is induced* to enter into a contract which, without them, he would not have made." Jones, *one* of the contracting parties, was not *induced* by the *other*—whether Kauffman or Gutierrez—to enter into the contract of sale under consideration by any other means than that of a simple offer and acceptance, as testified to by both, and also by the intermediary, Sloan. It was not preceded by insidious words or machinations of any kind whatever, for as to such there is not the slightest proof, nor even an allegation, in the record. We do not see, therefore, how into an examination into the validity and efficacy of a contract of sale between Kauffman or Gutierrez and Jones there can be injected deficiencies or omissions which might be imputed to Gutierrez by reason of obligations on the part of the latter with respect to Mr. and Mrs. Strong in the company in

which they were interested.

Nor do we see upon this point any way by which the consent of the plaintiffs may be regarded as vitiated, when they themselves say they did not give their consent nor authorized Jones nor have any dealings whatsoever with Kauffman or Gutierrez. But we shall again revert, from another point of view, to this important sixth allegation of the complaint.

On the other hand, the facts found by the decision as constituting fraud on the part of the defendant are: (1) That his office, being near that of Jones, Gutierrez, instead of addressing himself directly to Jones, employed Kauffman to deal with Sloan with respect to the purchase of the shares; (2) that, instead of paying for the shares with a check of his own, he used one of Rueda Hermanos' checks and paid Kauffman 1,800 pesos for his services; and (3) that after the shares were purchased he sent them to Spain, so as to place them beyond the jurisdiction of the court. The mere statement of these facts is sufficient to enable one to see that consent given prior to the occurrence of the last two facts mentioned—the payment by another's check and the sending of the shares abroad—could not have been affected by them, more especially when it is considered that the consent was given in absolute ignorance as to whether Kauffman was acting on his own behalf or for the account of some other person who, after the transaction was completed, may have paid him for his services. Neither of these facts can have had any influence whatever upon the mind of the vendor, Jones, and influence of this kind it is which must be considered for the purpose of determining whether the consent expressed in the making of the contract was given knowingly, freely, and spontaneously.

To sum up, we are of the opinion that articles 1265 and 1269 of the Civil Code are not applicable to the case.

(*b*) Lack of express authority on the part of the agent.

We examine the question from this point of view merely hypothetically. It is one thing that after a sale of shares, transferable by delivery, it be alleged, proven, and demonstrated beyond a doubt that the vendor was merely an agent, and entirely another thing that the purchaser of such shares is under any obligation to inquire beforehand whether the vendor is an owner or an agent, and, in the latter case, what kind of an agency he has, unless some limitation appears either upon the face of the stock certificates themselves or a restricted or qualified possession appears from the Mercantile Registry, where the stub books of the

certificates should be filed. (Art. 21, Code of Commerce.)

The danger which the contrary theory offers is that in transactions concerning shares or mercantile paper transferable by delivery a revindicatory action might be allowed, in addition to cases of concealment of the transfer, theft, or loss of such paper, upon the simple allegation that the vendor was a mere agent, and more especially when, as in the present case, the vendor, by whom the contract was effected, does not appear as a party to the suit to defend his acts as one of the defendants. A stranger to the transaction, who did not take part in the contract, now demands its annullment against one only of the contracting parties, and makes use of the other contracting party—the only one who could have damaged the plaintiffs by his acts—as a witness in support of the action, when, had he been made a defendant by reason of the loss which in such a case he would have inflicted upon his supposed principal, he, the one who has violated the terms of the supposed bailment, might have defended his conduct as no one else would be able to do.

F. Stewart Jones, the vendor and one of the witnesses in the case, is one of the principal members of the firm of Smith, Bell & Co., "one of the most important firms of this city;" he was for some time "a patient of Dr. Strong." Both Jones and Wood, another one of the principal members of the firm, held shares of the Philippine Sugar Estates Development Company, Limited. Both he and Wood voted in stockholders' meetings of the firm as such stockholders. One day in the month of December, 1903, Sloan, the broker, approached Strong with a view to getting shares in the company. Dr. Strong referred him, as stated, to Jones. Sloan went to see the latter in the course of the week; during the following week Sloan was visited by Jones, who made his first offer, which was not accepted by Sloan. Negotiations were then commenced which continued some three weeks, at the end of which the price was agreed upon and fixed at 16,000 Mexican pesos. Immediately thereupon Knowles, an employee of the firm of Smith, Bell & Co. went to Sloan's office, the stock certificates were counted and delivered to Kauffman, from whom a check for the agreed amount was received. It has already been stated that the contract was thus executed on the 10th day of October, 1903. On the 11th Jones deposited the price received for the shares with the Hongkong and Shanghai Banking Corporation, in the account which he and Wood carried there, as representatives of Strong. A few days later Jones and Wood used this same money to purchase shares of the Chartered Bank of India, Australia, and China, Jones considering himself authorized to make this purchase, as well as to effect the sale in question.

Mrs. Strong herself as early as July, 1903, had heard a great deal of talk about the sale of

the friar lands. “One afternoon about half past 6,” Strong testifies (it subsequently appeared that this was on the afternoon of the 1st of December, 1903), “Mr. Jones came to the house and entered into conversation with my wife and myself. I had a newspaper—the Manila Times—and I said, ‘I see that the Government is going to buy the friar-land shares.’ Mr. Jones said, ‘What about it?’ I said, ‘My wife should make a good deal out of those shares.’ He thought a minute or two and then he said, ‘Your wife has no shares.’ Of course, we were somewhat surprised, but nothing more was said about the matter at the time.”

Referring to Sloan’s proposal, Strong says that he communicated to Mrs. Strong the fact that he had received Sloan’s letter asking whether she wished to sell her shares; that after receiving Sloan’s letter he replied, saying that he desired to consult Jones, in whose possession the shares then were, and that within a week he spoke to Jones, telling him he had received a letter in which Sloan spoke of the purchase of the shares, and that Jones told him that he, Jones, would probably hear from Sloan on the subject. It is alleged in the complaint that the contract made by Jones should be set aside for two reasons—on account of the lack of express authority for the latter to sell, and on account of the deceit practiced on the plaintiffs, because Gutierrez concealed from them the value of the shares and deprived them of means for discovering their value. (Complaint, pars. 4 and 6.)

From this it clearly appears that Mr. and Mrs. Strong were fully aware that Sloan desired to buy the shares. Strong himself had told Sloan to address himself to Jones, who had the shares in his possession. The very thing which was expected occurred. It was expected that Sloan and Jones would enter into negotiations concerning the purchase of the shares. This was *expressly* understood, and this was exactly what Jones and Sloan did, and they did it just as Strong and Jones had expected. After his conversation with Strong it would appear that the idea did not occur to Jones without suggestion “that if he could get a good price it would be good business to sell them;” and “that his reason for selling them was that these shares had been on hand for years, and that nothing had been done; that he had heard of negotiations and sales, but nothing had come of it, and his idea was to sell them for cash and use the money for the purchase of something which would bring an income; * * * he knew that there was an agrarian and political question pending which directly affected the value of the lands of the Philippine Sugar Estates Development Company, and that the corporations holding them demanded a sum much greater than that which the Government had said it would pay for these lands, and this was one of the reasons why he sold, because the demands of the owners of the lands were so extravagant that he thought that a long time would go by before anything definite would be done and that these shares would be unproductive for perhaps two, three, or four years more.”

All this came into Jones's mind after he had been told the week before by Dr. Strong that Sloan would approach him concerning the purchase of the shares—information which was given by Strong to Jones after he had informed his wife, Mrs. Strong, of Sloan's purpose of buying the shares in Jones's possession. Jones continues, explaining his attitude by saying that "he considered himself at that time absolutely free to sell these shares for Mrs. Strong upon what he considered to be the most advantageous terms possible; that he thought that he was empowered to sell these shares to Mr. Sloan because he acted for Mrs. Strong in her business affairs; that this lady had never given him authority for each individual transaction, acting as he did for her in *all* her business affairs as her agent; these shares were only part of her property and he considered himself to be empowered to sell any of her property."

When it is the principal himself who speaks to the agent concerning a contract which some third person is about to make with the latter; when it is the principal himself who refers this third person to the agent to deal with him, and the third person and the agent come to an understanding after negotiations which have continued for some three weeks, these facts, examined in the light of sound discretion, show that it can not be successfully maintained that the principal had no knowledge of such contract. The principal might complain that the agent went beyond the scope of his authority, if such was the case; but that *express* authority was given for the performance of the act can not reasonably be denied by the principal. So great was the weight of the common consent which existed between principal and agent for the making of that contract that its influence is reflected in the complaint itself, and this accounts for paragraph 6, which implies *consent* on the part of the principals. If it were not so it could not be alleged with respect to this contract that it was vitiated by *fraud* or *deceit* on the part of the defendant, if the plaintiffs had not given *consent* which could be affected by such fraud or deceit. Such is the force of truth.

We may then conclude upon the evidence of these facts that there was an agreement between the principal and the agent for the sale of the shares upon the terms on which the sale was made—that is to say, that there was an express authority and that the consent given as stated was given knowingly, freely, and spontaneously, and was absolutely perfect and sufficient to support the validity and efficacy of the contract; but that, as frequently happens, especially in business transactions, the purchaser got the best of the bargain because the owners did not exercise the care necessary to find out what such shares were worth then or might be worth later. And this is the *deception* which, subsequent to the execution of the contract, nearly two months after, they discovered that they had suffered—a deception which consists, as Jones stated to Sloan, in "*having made a bad bargain*, as he had no idea that the Government was going to buy the lands so soon" and on

account of which he was going to make an arrangement to increase *somewhat* the price and not to nullify the contract—deception, in fine, which can not, under the Civil Code, be considered as fraud, either principal or incidental.

(2) But abandoning the hypothetical discussion, and conforming strictly to the law, our view of the case may be expressed in the following terms:

The Code of Commerce is preceded by an introduction which constitutes the most authoritative source of its interpretation. The first paragraph of this introduction refers to article 1 of title 3, book 2, of the code, and is as follows:

> "In dealing with the subject of agency, the drafters of the bill could not disregard the great increase which has occurred in our times in the volume of business conducted through agents, and which in turn has greatly influenced the manner in which mercantile agencies are carried out, and the transactions effected thereby. Thus it is that while at the time when the code of 1829 was enacted mercantile agencies were only accepted by persons habitually engaged as commission agents, and solely concerned the purchase and sale of merchandise, at the present time all merchants, without distinction, including the great business corporations, act as agents, extending their operations to placing large State, provincial, and municipal loans, the negotiation of industrial or mercantile stocks and shares, and the purchase of the same for their own account."

Upon this basis articles 244, 245, and 246 of the new Code of Commerce of 1885 were drafted—the same code which is now in force in the Philippines. These articles read as follows:

> "ART. 244. As a commercial commission shall be considered that which involves a commercial act or transaction and in which the principal or the agent is a merchant or commercial broker.
>
> "ART. 245. The commission agent may discharge the commission, acting in his own name or in that of the principal.
>
> "ART. 246. When the agent transacts business in his own name, it shall not be necessary for him to state who is the principal and he shall be directly liable, as if

> the business were for his own account, to the persons with whom he transacts the same, said persons not having any right of action against the principal, nor the later against the former, the liabilities of the principal and of the agent to each other always being reserved."

Jones's agency, of which we have heard so much in this case, only after the sale of the shares was consummated, is a mercantile *commission* because its purpose or object was an *operation of commerce* and the agent is a *merchant*. According to paragraph 2 of article 2 of the Code of Commerce, all matters which that code deals with are declared to be *acts of commerce*. The rules of law which govern shares of stock transferable by delivery are to be found in the Code of Commerce, which places such shares with respect to their negotiation upon the same footing as Government paper, some mention of which had been made in the former code. The shares were issued by the Philippine Sugar Estates Development Company, which, as appears from its articles of incorporation and by-laws introduced in evidence by the plaintiff, is a mercantile corporation. That Jones is a merchant is a fact which has been admitted by all concerned in the trial. He himself replied affirmatively to these two questions which were addressed to him: "As a matter of fact, you are the head of the firm of Smith, Bell & Co. in these Islands?" "Is not this one of the two most important firms in the Philippine Islands?" Consequently he acted as a commission agent in the sale of the shares. And he acted as a commission agent who effected a sale in his own name, for in the course of negotiation he made no mention of the name of any other person, nor was he under obligation to do so. He acted as though the business were his own. Thus it is that neither Kauffman nor Gutierrez have a cause of action against the principals, Mr. and Mrs. Strong, nor Mr. and Mrs. Strong against Kauffman and Gutierrez. Consequently the complaint should have been dismissed as not stating facts constituting a cause of action, as is expressly provided by the law.

Inasmuch as this was not done and the case went to final judgment, with this we close our dissenting opinion, and hold that the judgment appealed from should be reversed *in toto*, the plaintiffs to pay the costs of the trial court.

This conclusion of ours refers to the first finding of the judgment appealed from, based upon the first cause of action set forth in the amended complaint.

In the original complaint, dated January 12, 1904, the plaintiffs merely asked that the court declare that the stock in question was the property of Eleanor Erica Strong and order the

same returned—a prayer in harmony with the revindicatory action brought against a defendant between whom and the plaintiffs no privity existed by reason of the acquisition of these shares. But their attention having been drawn to the legal doctrine, established by an unbroken line of precedents, that “where the action is based upon the nullity of an act or contract, the declaration of such nullity should be solicited either previously or simultaneously, and as a consequence thereof a recognition of the rights arising from such declaration of nullity,” on the 14th day of April of the same year they amended their complaint by adding thereto “or if the defendant acquired a title to the said shares by reason of the said transaction, then the plaintiffs are entitled to rescind and cancel the agreement by means of which this transaction was effected, and require the defendant to return the said shares of stock to the plaintiffs.” As against this allegation we hold that no right of action exists in favor of the plaintiffs, to set aside the sale effected by F. Stewart Jones, the commission agent, in his own name, and that therefore the said sale subsists and is valid and effective, not having been attacked by the only persons who might attack it. It follows that no decision can be made concerning the revindicatory action—that is, the prayer for the return or delivery of the shares which at the present time are held under valid title by a third person, to the lady who claims to be the owner thereof, until that title, in due form and by competent action, be declared void. We do not, therefore, consider it necessary to pass upon the revindicatory action, as it is not properly presented; but if it is before us, then, upon the legal grounds above expressed, we dismiss the action and, reversing the judgment appealed from, discharge the defendant of the complaint, the costs of the trial court to be paid by the plaintiff.

ON REHEARING NOVEMBER 15, 1906.

TRACEY, J.:

A motion by the defendant for a new trial of this action under subsection 2 of section 497 of the Code of Civil Procedure having been granted to the extent of allowing the submission of new evidence as to the nature of the authority delegated by the plaintiff to her agent, Jones, we have now to consider the effect of the additional proof.

Neither party took advantage of the provision of our order allowing oral testimony and the new proof before us consists solely of a second power of attorney, bearing date July 1, 1901, from the plaintiff, Eleanor Erica Strong, to Robert J. Wood and Francisco Stuart Jones.

From the two opinions heretofore rendered in this case, it is apparent that the division of the court arose upon the point of an express agency from the plaintiff to sell the stock which was transferred to the defendant by Jones. Notwithstanding the many indications of such a power, so clearly pointed out in the opinion of the learned Chief Justice, the majority of the court did not feel at liberty, on the proofs then before us as a whole, to infer its existence and its character as an express authority to sell, complying with article 1713 of the Civil Code. In the majority opinion it was said:

> "The difficulty with this branch of the case is the scantiness of the evidence; the documents have been destroyed, the declarations of the parties are brief, and it would be impossible to imply an express power from them without assuming facts of which no sufficient evidence exists."

The instrument now received in evidence contains the following clause:

> "That she hereby confers upon Messrs. Roberto H. Wood and Francisco Stuart Jones, both of whom are of legal age and resident merchants of this city, ample and sufficient power, and such as may be requisite or necessary to execute in her behalf, either jointly or separately, any of the following acts:
>
> "To administer, manage, and control all the property and revenues of the grantor of whatever nature and condition, collecting and holding the revenues, fruits, and products thereof; disposing of the same at such prices and under such terms as they may deem most convenient; receiving the proceeds of the sale thereof at the time of such sale or in installments, executing such public and private instruments as may be necessary; hypothecating or incumbering said property under such terms and conditions as they may deem advisable; securing the transfer, either to the grantor or to her said attorneys in fact for her benefit, of all shares which may be in the name of Ricardo H. Andrews, deceased, and to this end to do all that may be necessary for the transference of all such shares in the association known as The Manila Trading Company and the Oriente Hotel, and also the interest which her said deceased husband, Ricardo H. Andrews, has in a certain fund known as the 'Settlement,' which the grantor has heretofore agreed to transfer to Enrique J. Andrews by virtue of an instrument executed before the undersigned notary on March 12 of the present year, and to this end

> they shall execute such transfers as may be necessary to effect the conveyance of the said shares, demanding and receiving whatever sums may be due her from any person, corporation, or association whatsoever, by virtue of any title or right, executing such receipts and acknowledgments of payment or other documents as may be necessary, and to exercise such other acts as the grantor herself would exercise if she intervened directly and personally."

We entertain no doubt of the fair meaning of this language. It empowers either Jones or Wood to sell the general stocks of the plaintiff. A construction that would restrict the words "disposing of the same" to the revenues, fruits, and products rather than the property itself is inconsistent with the nature of such revenues, with the right of hypothecation of property expressly granted and with the general scope of the power, as well as with its interpretation by the simultaneous and subsequent acts of the parties.

It was clearly under this authority that the proceeds of the sale of other stocks made by either one of these attorneys were deposited and reinvested in their joint names, and we think they were justified in the construction of this instrument that induced them to adopt this course of business. It is also clear that the direction of the plaintiff to Jones, in the conversation on the Luneta, not to part with this stock until he got its face value, related to his action under this particular instrument and amounted to an express recognition of its character as a preexisting grant of a power of sale.

Nor can we sustain the contention of the plaintiff that the maxim *Expressio unius est exclusio alterius* is applicable to the shares affected by this power. The two stocks specified in the language heretofore quoted, those of The Manila Trading Company and the Oriente Hotel Company, differed from other investments in this respect, that they stood in the name of the plaintiff's deceased husband and, unlike the shares that are the subject of this action, were not payable to bearer. This peculiar condition called for a special direction for their transfer, while all other stocks fell naturally under the general terms of the power.

This document is also important as a test of the accuracy and credibility of several of the witnesses and of their good faith in endeavoring to explain away upon other hypotheses the facts that grew naturally out of its existence and its terms.

According to the theory of both opinions, this newly discovered evidence is absolutely decisive of the issues in this case. The order for judgment heretofore made by this court it set aside and the judgment of the lower court is reversed, the defendant is absolved, and the

action is dismissed upon its merits, with costs against the plaintiff in the Court of First Instance but without costs in this court. After the expiration of twenty days let judgment be entered accordingly and ten days thereafter the case be returned to the court from whence it came for proper procedure. So ordered.

Arellano, C. J., Torres, Mapa, and *Willard, JJ.,* concur.
Carson, J., disqualified.

DISSENTING

JOHNSON, J.:

I can not give my consent to the doctrine contained in the decision of the majority of the court. In the first decision in this case I prepared a concurring opinion, but for some reason it was lost and does not appear as a part of said decision. The first opinion prepared by the court discussed two questions:

First. That her agent had no power to sell or deliver her stock in the Philippine Sugar Estates Development Company, Limited; and

Second. That its sale through her agent was procured by fraud on the part of the defendant.

My concurring decision in the first instance was based upon the second ground, a ground repudiated by the majority opinion.

The evidence adduced during the trial of said cause in the court below justifies the following finding of facts:

First. That the plaintiff, Eleanor Erica Strong, is a married woman and the plaintiff, Richard P. Strong, is her husband.

Second. That on and before the 10th day of October, 1903, the plaintiff, Eleanor Erica Strong, was the owner of 800 shares of capital stock in the Philippine Sugar Estates Development Company, Limited.

Third. That the defendant, Francisco Gutierrez Repide, was the general manager of the said company.

Fourth. That the par value of the said shares was 100 pesos, Mexican currency.

Fifth. That on the said 10th day of October, 1903, one F. Stuart Jones had in his possession the said 800 shares of stock and on the said day transferred the same to the defendant in consideration of 16,000 pesos, Mexican currency, without the knowledge of the plaintiff.

Sixth. That on the said 10th day of October the defendant well knew that the said shares were the property of the plaintiff.

Seventh. That the said plaintiff, Eleanor Erica Strong, had not, on the said 10th day of October, neither has she since said day, confirmed or ratified said sale, but upon the contrary, as soon as she became aware of the sale of said stock, she immediately repudiated said sale upon the ground, among other things, that her alleged agent, Jones, had no authority to sell said stock, and instituted an action in the Court of First Instance for the purpose of having said sale set aside and at the same time prayed for an injunction against the defendant to prevent him from disposing of said shares until further order of the court.

Eighth. That there had been issued 42,030 shares of the Philippine Sugar Estates Development Company, of which the defendant, Gutierrez, owned 30,040.

Ninth. That Gutierrez was a director and the administrator of the said Philippine Sugar Estates Development Company.

Tenth. That during the months of July, August, September, and October, 1903, the defendant was negotiating with Governor Taft, as the representative of the Philippine Government, for the sale of the lands known as the "Dominican lands," which represented the lands of the Philippine Sugar Estates Development Company.

Eleventh. That on the 5th day of July, 1903, Governor Taft, as said representative, offered to the defendant for said lands the sum of $2,736,899.57, gold, the equivalent value of which in Mexican currency at that time was 6,842,248.92 pesos. (See Executive Order No. 17 of May 1, 1903, for the value of Mexican currency in the Philippine Islands July 5, 1903.)

Twelfth. That the par value of the 42,030 shares which had been issued by the Philippine Sugar Estates Development Company was 4,203,000 pesos, Mexican currency.

Thirteenth. That of the said 42,030 shares, the defendant, Gutierrez, and Eleanor Erica Strong owned 30,840.

Fourteenth. That the above offer for the purchase of the lands of said company *remained open for acceptance by the defendant until sometime before the end of October of the year 1903*, when Governor Taft, as said representative, offered to the defendant, as administrator of said estate, a sum equal to about 25 per cent of an increase over and above the said offer of July 5.

Fifteenth. That after some negotiations between the defendant and other Catholic Church organizations which were attempting to dispose of their lands to the Government, and after the defendant had made certain reservations of the lands of the company which he represented from the offer which he first made, and after securing from the other said organizations which were desiring to sell their lands the sum of $335,000, he sold to Governor Taft, as said representative, the lands which remained of the said Philippine Sugar Estates Development Company for the sum of $3,671,657, gold, adding to which the sum of $335,000, which he received from the other church organizations, the sum would be $4,006,657, gold, which the defendant received for his company, the equivalent value of which in Mexican currency was 9,535,843.66 pesos. (See Executive Order No. 55, July 18, 1903.)

Sixteenth. The value of the 42,030 shares of said stock, under the offer of Governor Taft made on the 5th day of July, was $2,736,899.57, gold, or 6,842,248.92 pesos, Mexican currency. Under this offer one share of the stock was worth $65 plus, gold, or 162 pesos, plus, Mexican currency. This offer, which the defendant might have accepted at any time up to the time he purchased the said stock of the plaintiff, made the 800 shares of the plaintiff worth the sum of 129,664 pesos, Mexican currency, for which he paid the plaintiff the sum of 16,000 pesos, Mexican currency, making a profit to the defendant, had he accepted the offer of Governor Taft, which he had authority to do, of 113,664 pesos, Mexican currency.

Seventeenth. That the value of the stock based upon the cash actually received by the defendant from the Government, without reference to the land which the said company retained, would be 226.88 pesos, Mexican currency, making the 800 shares of the plaintiff worth 181,504 pesos, Mexican currency, or 165,504 pesos, Mexican currency, more than the defendant had paid to the plaintiff for her said shares.

Eighteenth. That the office of the defendant, Gutierrez, was in the same building and next door to the office of Jones and that, notwithstanding this fact, the defendant employed one Kauffman, whose place of business was some distance from the office of both the defendant and Jones, to buy the said stock of the said plaintiff through still another third person called

Sloan, and paid to the said Kauffman the sum of $1,800 for his services.

Nineteenth. That Kauffman, as the agent of the defendant for the purchase of said stock, in order to keep secret the identity of the real purchaser, represented to the said Sloan that he, Kauffman, desired to purchase the said stock for a member of his wife's family.

Twentieth. That the defendant, in order to further keep secret the fact that he was purchasing the stock, paid for said stock by a check not in his own name but in the name of Rueda Hermanos.

Twenty-first. That the evidence does not disclose that the plaintiff, Eleanor Erica Strong, had any knowledge whatever of the negotiations which the defendant was carrying on for the sale of the property of said company.

Twenty-second. That while the defendant had negotiated for many months for the sale of all the property of the said association, he failed absolutely to call the attention of the plaintiff, who was a large stockholder in the said company, to the said fact.

Twenty-third. That the defendant was its manager and director and conducted the transactions for the sale of the property of said corporation, without any formal authorization by the said corporation.

Twenty-fourth. That the defendant was also in person the holder of a large majority of the stock, thus not only controlling the process of the negotiations with the Government in all its stages but also its ultimate result by his own vote in the shareholders' meeting.

From the foregoing facts adduced from the evidence given in the court below, the conclusion of facts by the lower court, to wit: That the defendant while acting as general manager of the Philippine Sugar Estates Development Company, holding and owning nearly three-fourths of all the stock of said company, carried on negotiations, without the knowledge of the stockholders or the board of directors of said company, for the sale of all of the property of said company, and while having it within his power, by simply consenting to terms already offered, to sell such property at a price which would more than double the stock of said company, did secretly and clandestinely purchase said stock of the plaintiff at a very low price, not equaling one-tenth of the value of the stock, based upon the price which he had already been offered, without acquainting her with all or any of such facts, and thereby violating the fiduciary relation which existed between him as general manager and one of the principal directors, and the plaintiff who was one of the large stockholders of

such company.

When the stockholders of a corporation elect a board of directors for the purpose of managing the business affairs of said corporation and such stockholders accept this responsibility, they thereby become the agents and stand in a fiduciary relation with the stockholders in the management of such corporation and will not be permitted thereafter, during the continuance of such relation, to deal with the property of said corporation in a way which will result to their individual benefit as against the rights and interests of said stockholders. If they do, such special advantage will be for the benefit of the particular stockholders injured. This, however, does not mean that a director may not openly and above board deal in the stock of the corporation, buy and sell the same at his pleasure. It simply means that when the general manager of a corporation or a director of the same has it within his peculiar power to greatly enhance the value of the stock of the corporation, that he can not secretly buy the stock of the stockholders of said corporation at a shockingly reduced price without giving them full information concerning the present and prospective value of said stock. If any other rule is permitted a general manager of a corporation might ruin the value of the stock of the stockholders of said corporation while he was thus becoming immensely wealthy while acting in a fiduciary relation with such stockholders.

I maintain that whatever financial gain the general manager, the board of directors, or any member of the same may secure in this way shall result to the benefit of the stockholders or to any one of them so injured.

This theory was entirely repudiated on the part of the majority in the first opinion written in this cause.

I maintain that the general manager, directors, or trustees, by whatever name called, of a corporation are the agents selected by the stockholders or members to manage the ordinary affairs of the corporation in the exercise of their best discretion, subject to the charter of said corporation and the by-laws, rules, or regulations prescribed by the stockholders; that they occupy a fiduciary relation toward the stockholders and should be treated by the courts as trustees for them. (Thompson's Commentaries on the Law of Corporations, sec. 4009.)

Chancellor Walworth, very early in the history of the jurisprudence of the State of New York, in the case of Robinson *vs*. Smith (3 Page (N. Y.), 222, 24 American Decisions, 212), said:

> "Directors are trustees or managing partners and the stockholders are *cestui que trust* and have a joint interest in all the property and effects of the corporation, and no injury to the stockholders sustained by a fundamental breach of this trust can, upon the general principles of equity, be suffered to pass without a remedy.
>
> "The general manager or the directors of a corporation will not be allowed to deal with the corporate funds or property for their private gain. They have no right to deal for themselves and for the corporation at the same time. If they do they must account for the profits made by the use of the company's assets and for the moneys made by a breach of trust. (Ward *vs*. Davidson, 89 Mo., 445 and 458; Wardell *vs*. Railroad Company, 103 U. S., 651.)"

In this latter case, after the statement of facts which showed clearly the intention of certain directors to enter into negotiations which would result to their individual profit as against the interests of the corporation, Mr. Justice Field in deciding the case said:

> "It hardly requires argument to show that a scheme thus designed to enable the directors who authorized the contract to divide with the directors large sums which should have been saved to the company was utterly indefensible and illegal. Those directors constituting the executive committee of the board were clothed with power to manage the affairs of the company for the benefit of its stockholders and creditors. *Their character as agents forbade the exercise of their powers for their own personal ends against the interest of the company*. They were thereby precluded from deriving any advantage from contracts, made by their authority as directors, except through the company for which they acted. Their position was one of great trust, and to engage in any matter for their personal advantage inconsistent with it was to violate their duty and to commit a fraud upon the company."

It is one of the fundamental principles of law that a person acting as an agent or in a fiduciary relation can not act for himself and at the same time as agent for another whose interests are conflicting. Thus a person can not be a purchaser of property and at the same time agent of the vendor. The law will always condemn the transactions of such a party in his own behalf or in respect to matters concerning him as agent of others and will give relief against such acts whenever their enforcement is seasonably resisted. Directors and general

managers of corporations and all other persons who sustain any fiduciary relation to other parties and are clothed with power to act for them are subject to this rule. (Great Luxembourg Railway Company *vs*. Maquay, 25 Beav. (English), 586.)

In the case of Flint & Pierre Marquette Railway Company *vs*. Dewey (14 Mich., 477) it appeared that the secretary and a director of the plaintiff company entered into a contract on behalf of said company by virtue of which they were to receive financial profit. A suit was brought to compel the said director and secretary to turn over to the stockholders the fruits of said contract, and in deciding the case the Supreme Court said:

> "It is possible there may have been no actual fraud and that the contract could not have been let on better terms, but the principle of law applicable to such a contract renders it immaterial, under the circumstances in this case, whether there has been any fraud in fact, or any injury to the company. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal, and if such contracts were held valid until shown to be fraudulent and corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud and corruption. From the evidence in the case we think all of the eleven bonds (so acquired by the defendants) in question were, as between the corporation and the defendant, the property of the corporation. (People *vs*. Township Board, etc., 11 Mich., 225.)"

In the present case the defendant, Gutierrez, in all of his negotiations with Governor Taft in his effort to sell the property of the Philippine Sugar Estates Development Company, acted as the representative of said corporation and the said stockholders, without consulting them, knowing full well that after he had reached a satisfactory result with Governor Taft that he could dispose of the said property by reason of the fact that he held in his own hands a majority of the votes and could make such disposition as he saw fit without reference to their wishes and against their express desires. At the time of the purchase of the shares of the plaintiff, the defendant well knew that the said stocks had a value far in excess of that which he paid. He thereby, by his own acts, made it possible for him to receive a large sum of money for his own benefit to the detriment of the plaintiff. A director or a general manager of a corporation can not make profits out of his principal, for whom he has undertaken to act, in the business of his agency. If he does make a profit while acting as

such agent or in such fiduciary relation, the principal may apply to the courts and have such profit declared to be his. (Simons *vs*. Vulcan Oil and Mining Co., 61 Pa. State, 202, 100 American Decisions, 628.)

In this latter case Thompson, chief justice, said:

> "Directors [of a corporation] are but the agents and trustees of the company; they have power only to act for the interest of the company and not against it."

In the case of Bliss *vs*. Matteson (45 N. Y., 22) the supreme court of New York said:

> "The directors of a corporation are the trustees of the stockholders [etc.]. Any agreement to influence their action for the benefit of others and to the prejudice of the company is fraudulent and void."

The question of the liability of the directors of a corporation to the stockholders was squarely presented to the supreme court of New York in the case of Rothmiller *vs*. Stein (143 N. Y., 581). In that case the plaintiff held a large number of stocks in the corporation of which the defendant was the president. Certain persons offered to buy some of the stocks held by the plaintiff, offering to pay for them $80 in cash per share or $50 in cash per share and $50 additional upon a day subsequent, providing a dividend of 10 per cent should be declared on or before such subsequent day. The plaintiff, before accepting such offers, made inquiry of the defendant concerning the status of the business of the corporation and received from the defendant the information that the business of said corporation was prospering and had increased enormously and that much larger dividends than 10 per cent would be declared at the annual meeting. Upon this information received from the defendant, the president of the company, he accepted the second offer, to wit, $50 in cash and $50 more per share to be paid at a subsequent day if the annual dividends amounted to 10 per cent.

At the time the defendant made these representations to the plaintiff the fact was that the company was largely in debt and actually insolvent and consequently the dividend of 10 per cent upon which the plaintiff was to receive the additional $50 per share for his stock was never declared, and as a consequence of which the plaintiff lost the $50 per share which he would have received had the representations of the defendant been true. The plaintiff

brought action against the defendant, the said president, to recover from him the difference between what he actually received for his stock and the amount which he would have received had the statements of the defendant been true. To the complaint of the plaintiff the defendant filed a general demurrer. In passing upon the demurrer Justice Peckham, now of the Supreme Court of the United States, said—

> "We are therefore of the opinion that the complaint contains allegations sufficient to show the commission of actual fraud—"

And overruled the demurrer of the defendant.

In the majority opinion in the present case it is said that Justice Peckham stated in the case of Rothmiller *vs*. Stein that the rule of "*caveat emptor*" applied to the duty of a director of a corporation. A careful reading of the case fails to disclose any statement of that kind. Justice Peckham, however, does discuss the effect of the rule of "*caveat emptor*" in the purchase and sale of stocks as well as of other rights and obligations, but nowhere in the decision does he apply the doctrine to the case then presented to the court.

In the case of Oliver *vs*. Oliver et al. (45 S. E. Reporter, 232), decided by the supreme court of Georgia on the 11th day of August, 1903, a case very similar to the one which has been presented to this court was decided. In that case the defendant was president and director of the Gate City Oil Company. He obtained an option upon stock held by the plaintiff at $110 per share. This option was renewed from time to time. The option was procured in pursuance of a contemplated sale of the oil company's plant for $304,500, the company retaining other assets above the liability which made the stock actually worth $185 per share. The defendant failed to disclose to the plaintiff this contemplated sale of the company's plant. Immediately after the defendant had secured from the plaintiff 658 shares of the said stock he sold the company's plant, realizing a profit upon the shares purchased from the plaintiff equaling $49,250. The plaintiff instituted an action against the defendant for the purpose of recovering this amount. The defendant demurred to the petition of the plaintiff. The demurrer was overruled. Justice Lamar, in discussing the rights of the plaintiff and the relation which a director of a corporation bears to the stockholders, said:

> "This brings us to a consideration of the relation which a director bears to an individual stockholder. All the authorities agree that he is a trustee for the

> company and in his capacity as such he serves the interests of the entire body of stockholders, as well as those of the individual shareholder, who usually can not sue in his own name for the wrongs done the company by the officer; but the fact that he is trustee for all is not to be perverted into holding that he is under no obligation to each. The fact that he must serve the company does not warrant him in becoming an active and successful opponent of an individual stockholder with reference to the latter's undivided interest in the other property committed to the directors' care. That he is primarily trustee for the corporation is not intended to make the artificial entity a fetich to be worshiped in the sacrifice of those who in the last analysis are the real parties at interest. No process of reasoning and no amount of argument can destroy the fact that the director is, in the most important and legitimate sense, trustee for the stockholder." (Citing Jackson *vs*. Ludeling, 21 Wallace (U. S.), 616.)

The same judge, continuing, discusses the duty of a director to disclose to the shareholders all information concerning the condition of the corporation and adds the following statement:

> "If, however, the fact within the knowledge of the director is of a character calculated to affect the selling price and can, without detriment to the interests of the company, be imparted to the shareholder, the director, before he buys, is bound to make a full disclosure.
>
> "In a certain sense the information is a *quasi* asset of the company and the shareholder is as much entitled to the advantage of that sort of an asset as to any other regularly entered upon the list of the company's holdings. If the officer should purposely conceal from the stockholder information as to the existence of valuable property belonging to the company and take advantage of this concealment, the sale would necessarily be set aside."

Mr. Pomeroy, in his valuable work on Equity Jurisprudence (2d ed., sec. 1090), says:

> "Directors are not only trustees of the corporation but also *quasi* or *sub modo* trustees of the stockholders, with respect to their shares of stock."

If then, any sort of trustees, they are necessarily subject to the obligations and restrictions which inhere in that relation as to property intrusted to them. The shares are mere evidence of property or of the interest which the stockholder has in the property of the corporation under the control of the directors. In their sale the stockholder disposes not only of the paper which represents his interest but his actual holdings in such property, and when the director deals with the stockholder for the purchase of shares he is not buying paper merely but in effect is buying an undivided and substantial interest in property which has been committed to his care, custody, and management, and when the stockholders elect a director for the purpose of managing the business of the corporation, the said director, when he accepts the position, thereby puts himself into the position of an agent of the said stockholders and occupies a fiduciary relation or position which is not altogether unlike the relation which attorneys, bailees, partners, trustees, or any other fiduciaries occupy, and must exercise the highest degree of good faith as to all matters connected with the property committed to his care.

In many instances a stockholder of a corporation who happens to own a majority of the stock elects himself as a director of the same and thereby, by virtue of such majority stock, controls the policy of the corporation, decides what may or may not be done in the management of the corporation, and cases are not infrequent where such director so mismanages the affairs of the corporation that the stock of such corporation becomes absolutely worthless. If such mismanagement is due to misjudgment, the stockholders are simply unfortunate in being related in business affairs with a man of such business ability. If, however, the conduct of such a director is fraudulent in his relation to the other stockholders and by virtue of such fraud he derives benefit to the detriment of the interest of the other stockholders, he must respond to them in damages to whatever amount such fraudulent conduct has injured them. (2d Pomeroy's Equity Jurisprudence, 2d ed., sec. 963; Stubinger *vs*. Frey, 116 Ga., 396, 42 S. E. Reporter, 713.)

> "The suppression of the truth by one whose duty it is to speak may amount to a suggestion of falsehood; and if such suppression is made with intent to deceive or to gain advantage when he is bound in good faith to disclose, this is evidence of, and equivalent to, a false representation. (Stuart *vs*. Wyoming Ranch Co., 128 U. S., 388; Coulton *vs*. Leland Stanford, 82 Cal., 351, 23 Pacific Reporter, 316, 16 American State Reports, 137.)"

In the cause of Stewart *vs*. Harris (77 Pacific Reporter, 277), decided June 11, 1904, there was presented to the supreme court of Kansas a question very similar to the one which we are now deciding. That was an action by a stockholder of the Wellington National Bank to recover of the president of said corporation the difference between the amount which the plaintiff had received for his stock in the said corporation and the actual value of said stock at the time he sold the same to the said president. The plaintiff, for his cause of action, alleged that the defendant had withheld from him at the time of the purchase of the stock certain information which it was his duty as president of said corporation to disclose; in other words, the plaintiff claimed that the president withheld certain information concerning the real financial condition of the corporation which it was his duty to disclose to the stockholders when he, the president, was attempting to buy their stock. In deciding that question, the court said:

> "The managing officers of a corporation are not only trustees in relation to the corporate entity and the corporate property, but they are also, to some extent, and in many respects, trustees of the corporate stockholders. That they are trustees for the corporation and the corporate property all the authorities are agreed. It would be difficult to lay down a general rule comprehensive of the extent of all instances in which their trusteeship exists as to the stockholders of the corporation."

The relation between the directors of a corporation and its stockholders is that of trustee and *cestui que trust*. Directors are persons selected to manage the business of the company for the benefit of the shareholders. It is an office of trust which if they undertake it is their duty to perform fully and entirely. No director of a corporation or company can use his position to secure personal advantage to himself. (Sargeant *vs*. Railroad Company, 48 Kansas, 672, 29 Pacific Reporter, 1063.)

If, then, this is the relation between the managing directors of a corporation and the stockholders of said corporation, the general rule applicable to the purchase and sale between parties who sustain to each other a financial or fiduciary relation is applicable. That rule is, in order for a purchaser or a director who purchases stock from the stockholders to be able to sustain the purchase, he must show affirmatively that the transaction was conducted in perfect good faith, without pressure of influence on his part and with express knowledge of the circumstances and entire freedom of action on the part

of the stockholder. (Dunn *vs*. Dunn, 42 N. J. Equity, 431; 7 Atlantic Reporter, 842.)

In the case of Goodin *vs*. Cincinnati et al. Canal Co. (18 Ohio State, 169) the supreme court of Ohio said:

> "A director of a corporation represents the stockholders and their interests as such; he is trustee for the company and whenever he acts against their interest, no matter how much he thereby benefits foreign interests of individual stockholders or how many individual stockholders act with him, he is guilty of a breach of trust, and a court of equity will set aside his acts at the instance of the stockholders or creditors who are damnified thereby. Any act of directors by which they intentionally diminish the value of the stock or property of the company is a breach of trust for which any of the stockholders or creditors may justly complain." (U. S. Rolling Stock Company *vs*. Atlantic et al. Railroad Company, 34 Ohio State, 461; Hodges *vs*. New England Screw Company, 53 American Decisions, 646.)

In the case of Janney et al. *vs*. Minneapolis Industrial Exposition et al. (50 L. R. A., 273), decided by the supreme court of Minnesota, May 25, 1900, the court said:

> "The relation between the corporation and its directors is that of principal and managing agents. They are not trustees in the sense of holding legal title to any of its property for its benefit or that of its stockholders or its creditors. Still the relation is essentially a fiduciary one, and upon sound principles of public policy, directors are inhibited, as a general rule, from purchasing for their own benefit the property of the corporation, very much as a trustee is disqualified from purchasing for his own advantage the property of his *cestui que trust*. This proposition upon principle and authority is unquestionably the law.
>
> "In all cases where a director purchases stock of a stockholder he must act in the utmost good faith, for the transaction will be jealously scrutinized. (1 Marowitz Private Corporations, sec. 527; 3 Commentaries on the Law of Corporations by Thompson, secs. 4068 and 4074; Barber *vs*. Bowen, 47 Minn., 118; Lusk's Appeal, 108 Pa., 152.)"

In the case of Twin-Lick Oil Company *vs*. Marburg (91 U. S., 587) Justice Miller, of the Supreme Court of the United States, said:

> "That a director of a corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency and with the beneficiary or party whose interest is confided to his care is viewed with jealousy by the courts and may be set aside on slight grounds is a doctrine founded on the soundest morality and which has received the clearest recognition in this court and in others. (Koehler *vs*. Black River Falls Iron Co., 2 Black (U. S.), 715; Drury *vs*. Cross, 74 U. S., 299; Luxembourg Railroad Co. *vs*. Maquay, 25 Beav. (English), 586; Cumberland Company *vs*. Sherman, 30 Barber (N. Y.), 553.)"

In the case of Walsham *vs*. Stainton (1 De. Gex. J. and S., 678), cited by Judge Taft in the case of Ritchie *vs*. McMullen (79 Fed. Rep., 522, 534), the facts alleged by the plaintiff were as follows:

Joseph Stainton was the manager and Henry Stainton the London agent of the Carron Company, a corporation. The Staintons entered into a conspiracy to secure to themselves the whole benefit of the company, etc., keeping the accounts of the company fraudulently, so as to conceal from the shareholders the real value of the shares, in order that they themselves might buy up, at an under value, such shares as were offered for sale, and at the same time make themselves a majority of the votes at the meetings of the company. To carry out this plan the Staintons retained in their hands large funds belonging to the company, which never appeared in the earnings and so reduced the dividends. By these means the market value of the shares of stock was kept much below their real value. As a result Henry Stainton purchased forty shares and one of his coconspirators fifteen shares at a price much below a fair value. When these facts were discovered the company compelled the Staintons, or their representatives, to account for the large amount of money retained by them; the representatives of the sellers of the stock filed a petition to compel the return of the stock still held by Henry Stainton's representatives and to compel the estate of Joseph and Henry Stainton to make good the difference between the price at which the fifteen shares of stock now in the hands of an innocent purchaser had been sold to Joseph Stainton and its real value and to compel an accounting for all dividends received on the stock since the sale. To this petition the defendants filed a demurrer which was sustained in the lower court, but on appeal the House of Lords reversed the ruling of the lower court and held that the appeal

constituted a good ground for relief and that each wrongdoer might be compelled to make good to the defrauded owners of shares the loss, without regard to his having profited by the fraud. Judge Taft, in commenting upon this decision, stated:

> "This case illustrates, in quite a satisfactory way, how managers of corporations may so conduct the affairs of the corporation as to incur a direct liability to the stockholders in respect to their particular stock."

In the case of Jackson *vs*. Ludeling (88 U. S., 616) the Supreme Court of the United States said in substance:

> "The managing officers of a company or corporation where capital is contributed in shares are in a very legitimate sense trustees alike for its stockholders and its creditors, though they may not be trustees technically and in form. They accordingly have no right to enter into or participate in any combination the object of which is to divest the company of its property and obtain it for themselves at a sacrifice; they have no right to seek their own profit at the expense of the company and its stockholders or even its bondholders."

Cases from almost every State in the Union might be cited to support the doctrine herein contended for, that the director, and especially the manager, of a corporation, in his dealings with the stockholders of such corporation, acts in a fiduciary relation and is bound to act with the utmost good faith. He can not secretly bring about conditions by which he himself will receive large benefits at the expense of the stockholders. If he does, he is liable to respond to them for whatever injury his secret and fraudulent acts have done them. He is not prohibited from dealing in the stock of the corporation, but if he does he must do so honestly and above board. (McClure *vs*. Law, 161 N. Y., 78, 76 Am. Reps., 262; Goodhue Farmers' Warehouse Co. *vs*. Davis, 81 Minn., 210, 83 N. W. Rep., 531; Briggs *vs*. Spaulding, 141 U. S., 146; The North Hudson Building Co., etc., *vs*. Childs et al., 82 Wis., 460, 33 Am. State Reps., 57; Killen *vs*. State Bank, 106 Wis., 546, 82 N. W. Rep., 536; Marshall *vs*. Farmers, etc., Bank, 85 Va., 676, 17 Am. State Reps., 84; Ellis et al. *vs*. Ward et al., 137 Ill., 509.)

It is not contended that the directors or manager of a corporation are liable to the stockholders when they exercise ordinary care, skill, and diligence in the management of

the affairs of the corporation and loss occurs. They are not liable for errors of judgment and mistakes of fact or of law when they act in good faith and with proper care. They are liable, however, when by their secret connivance or by fraudulent conduct they have made great profits at the expense of the stockholders. (Farmers Trust & Loan Co. *vs*. The New York & Northern Ry. Co., 150 N. Y., 410; Deadrick *vs*. Wilson, 55 Tenn., 8th Baxter, 108.)

The court has voted to reverse its first decision in this case upon the ground that the new evidence presented shows that Jones had full authority to dispose of the said stock of the plaintiff. Under the view which I take of the case it is of no importance whether the defendant purchased the stock of the plaintiff or of her agent. The defendant owed the same fidelity to the agent of the plaintiff that he owed to the plaintiff. The defendant well knew that Jones was attempting to act as the agent of the plaintiff.

If, however, the question here presented is to be decided upon the fact that Jones had or had not *express* authority to *sell* the said stock of the plaintiff, then I contend that the document introduced as evidence in the rehearing does not give Jones *express* authority to *sell* the stocks in question here.

The judgment of the lower court should be affirmed with costs.

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