TORTS UNDER THE SPANISH LAW

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CHAPTER I.

INTRODUCTION.

Under the English and American jurisprudence the law of torts is well developed and satisfactorily defined. The English Common Law Procedure Act of 1852 gives a definition of a tort (Cooley on Torts, p. 1). Standard text-books in England and America written on the subject, give various other definitions (Burdick on Torts, p. 3; Pollock on Torts, Ch. I: Jaggard on Torts, pp. 1-6).

But it seems that under the Spanish law we do not find such a well developed system of jurisprudence. We do not find the word *tort* as understood by men of the legal profession in England and America, in the whole field of Spanish law. There are no works that the author knows of, written in Spanish, dealing separately with this particular branch of the law. The law courses given in Spanish Universities provide for no such subject as Torts. Consequently, there exists no exact translation in Spanish of the word *tort* with all its legal significance in English. The nearest translation that we can give is "culpa extra-contractual." But in this we are not giving the translation but its equivalent.

It is strange that in a country like Spain and the Philippines, where the substantive law is fairly complete (20 Juridical Review, pp. 97, 98), there exists no branch which is equivalent to what in the English and American law is designated by the word *tort*. Judge Lobingier in an article entitled: "Blending Legal System in the Philippines," said: "The Spanish Law, it may be remarked, has no department corresponding exactly to what in the English law is designated by the word *torts*, that is, wrongs independent of contract and redressed by civil action as opposed to criminal prosecution." (American Monthly Review of Reviews for September, 1905, p. 337; 6 Michigan Law Review, p. 138.)

But it by no means follows that because there exists no distinct and separate department for torts under the Spanish law, wrongs of this character can have no redress in court. Tort actions under the Spanish law are instituted under the guise of another name. Spanish courts afford just perhaps as ample a remedy in this regard as any American or English court (Cases decided January 15, 1902; October 19, 1909, and June 27, 1894), but in a different way and under a different system and condition. We shall speak of this more in detail when we come to the proper place. However, it is a pleasure to find at this stage of the discussion that laws

describing the nature and character of a tort are not wanting in this jurisdiction. The Civil Code principally and the other Codes now in force in these Islands contain various provisions relating to the law of torts. For instance, Article 1902 of the Civil Code provides that "any person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done." This article says nothing about tort, yet in effect, gives us an exact description of a tort. Mr. Justice Carson of the Supreme Court of the Philippine Islands, in a conversation between him and the writer, after reading the above article said, "Isn't that exactly a tort?"

Thus the law of torts, although not classified as a separate branch, is there, scattered through the different departments of the Spanish law. The former Attorney-General for the Philippine Islands, L. R. Wilfley, speaking of the merits of Spanish jurisprudence, has truly said, "It is all there; if you don't find the principle you are searching for the first time, look again; a closer reading will disclose it." (American Monthly Review of Reviews for September, 1905, p. 337.)

This lack of classification and arrangement does not in any way impair the remedy offered by the courts to all parties litigant. It, however, sometimes works hardship upon the members of the legal profession, not trained under the Civil Law system. "Doubtless the deficiences of the Spanish law in this regard will require a considerable similar legislation in the future. But the existing Codes of substantive law, so far as they go, remain, meanwhile, practically unimpaired." (American Monthly Review of Reviews for September, 1905, p. 337.)

CHAPTER II.

CLASSIFICATION OF OBLIGATIONS UNDER THE CIVIL CODE.

Private wrongs or torts under the Spanish system may arise, first, out of crimes or misdemeanors; and, second, out of acts or omissions, not punished by law, in which any kind of fault or negligence intervenes. This classification of private wrongs is apparent in Chapter I of Title I of Book IV of the Civil Code. This chapter treats of the different classes of obligations, and according to the view taken by the Spanish legislators, Tort is classed as one of these obligations. The chapter reads as follows:

> Article 1088. Every obligation consists in giving, doing, or not doing something.
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> Article 1089. Obligations are created by law, by contracts, by quasi-contracts, and by illicit acts and omissions or by those in which any kind of fault or negligence occurs.
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> Article 1090. Obligations arising from law are not presumed. Those expressly determined in this Code or in special laws are the only demandable ones, and they shall be governed by the provisions of the laws which may have established them and by those of this book in regard to what has not been prescribed by said laws.

Article 1091. Obligations arising from contracts have legal force between the contracting parties, and must be fulfilled in accordance with their stipulations.

Article 1092. Civil obligations, arising from crimes or misdemeanors, shall be governed by the provisions of the Penal Code.

Article 1093. Those arising from acts and omissions in which faults or negligence, not punished by law, occur, shall be subject to the provisions of chapter second of title sixteen of this book.

CHAPTER III.

SOURCES OUT OF WHICH PRIVATE WRONGS OR TORTS ARISE.

From the above enumeration we find the different classes of obligations and our authority for the assertion that private wrongs or torts under the Spanish law may arise, first, from crimes or misdemeanors (Article 1092, Civil Code); and, second, from acts or omissions not punished by law in which any kind of fault or negligence intervenes (Article 1093, Civil Code). Article 1089 divides obligations into three classes: (a) those arising from law, (b) those arising from contracts or quasi-contracts, and (c) those arising from illicit acts and omissions or from acts and omissions not punished by law in which any kind of fault or negligence intervenes. The first two of these obligations form no part of the present treatise, but the third is most important because it is the very subject of our investigation and inquiry. From it we derived our specific authority for the classification of private wrongs or Torts under the Spanish law. Scaevola and Falcón in their commentaries confirmed this to be the true classification of private wrongs.

Scaevola in his commentaries on Article 1089 said: "Apparently, the Code considers synonymous the expression *illicit* and the phrase *in which any* fault or negligence intervenes. But Article 1090 treats of obligations arising from law; Article 1091 treats of those arising from contracts; Article 1092 treats of those arising from crimes and misdemeanors; and Article 1093 treats of those acts and omissions in which any kind of fault or negligence intervenes. It is, therefore, to be supposed that where Article 1089 speaks of illicit acts, it refers to crimes and misdemeanors of which Article 1092 treats. A distinction is here made between acts and omissions which are illicit and acts and omissions in which any kind of fault or negligence intervenes. As we have seen the Code compares the phrase *acts and omissions which are illicit* with the phrase *crimes and misdemeanors* treated of in Article 1092. But do they mean one and the same thing? Are there no acts and omissions which are illicit besides crimes and misdemeanors? Are not the acts and omissions in which any kind of fault or negligence intervenes the same? There is no doubt about this, nor could it be supposed that the law-maker would think otherwise. It is to be understood that the expression *acts and omissions which are illicit* is not used in a general sense but in a particular one, referring to penal acts. The expres-

sion *acts and omissions in which any kind of fault or negligence intervenes* in Article 1089 has a reference to the phrase *acts and omissions not punished by law* in Article 1093, and they mean one and the same thing."

From these Articles of the Civil Code, and from what the commentators have said on the subject, we are forced to arrive at the conclusion that private wrongs or torts under the Spanish law are of two classes, namely: first, those that arise from acts and omissions which are wrongful, in which the author is criminally liable; and, second, those that arise from acts and omissions in which any kind of fault or negligence intervenes, or acts and omissions not punished by law, in which the author is not criminally liable. This classification of private wrongs or torts is in accordance with the views held by Scaevola and Falcón.

The Supreme Court of the Philippine Islands comments on Article 1092 and 1093 of the Civil Code as follows: "The difficulty in construing the Articles of the Code above cited in this case appears from the briefs before us to have arisen from the interpretation of the words of Article 1093, fault or *negligence not punished by law* as applied to the comprehensive definition of offences in Articles 568 and 590 of the Penal Code. It has been shown that the liability of an employer arising out of his relation to his employee, who is the offender, is not to be regarded as derived from negligence punished by the law, within the meaning of Articles 1092 and 1093. More than this, however, it cannot be said to fall within the class of acts unpunished by the law, the consequences of which are regulated by Articles 1092 and 1093 of the Civil Code. The acts to which these Articles are applicable are understood to be those not growing out of pre-existing duties of the parties to one another. But where relations already formed give rise to duties, whether springing from contract or quasi-contract, then breaches of those duties are subject to Articles 1101, 1103 and 1104 of the same code. A typical application of this distinction may be found in the consequences of a railway accident due to defective machinery supplied by the employer. His liability to his employee would arise out of contract of employment, that to passengers out of the contract of passage, while that to the injured bystander would originate in the negligent act itself. This distinction is clearly set forth by Manresa in his commentary on Article 1093:

"We see with reference to such obligations, that *culpa*, or negligence, may be understood in two different senses: either as *culpa*, *substantive* and *independent*, which on account of its origin arises in an obligation between persons not formerly bound by any other obligation; or as an incident in the performance of an obligation which already existed, which cannot be presumed to exist without the other, and which increases the liability from the already existing obligation.

"Of these two species of *culpa* the first one mentioned, existing by itself, may be also considered as a real source of an independent obligation, and, as chapter 2, title 16 of this book (Book IV) of the Civil Code is devoted to it, it is logical to suppose that the reference contained in Article 1093 is limited thereto and that it

does not extend to those provisions relating to the other species of *culpa* (negligence), the nature of which we will discuss later.' " (Rakes vs. The Atlantic, Gulf and Pacific Company, 7 Phil. Rep., p. 359.)

In an interesting discussion of Mr. Clyde A. DeWitt of the Philippine Bar, relating to this same subject, he said, "In order to get at the matter systematically it seems necessary to follow the classification which the Spanish codifiers have adopted, and to treat first of those wrongful acts which do not involve the wrongdoer in criminal responsibility, and, second, of those wrongful acts which render their authors criminally liable, in accordance with the provisions of the Penal Code, That private wrongs are divided into these two great classes seems clear from the manner in which the general subject of obligation is treated in Chapter I of Title I of Book IV of the Civil Code.

"It will be seen that Article 1089 divides obligations into three great classes. viz., those that are imposed by law, which are treated in Article 1090, those that arise from contractual or quasi-contractual relations, which are treated in Article 1091, and those that find their counterpart in our law of tort, which are treated in Articles 1092 and 1093. In its treatment of the latter class, Article 1089 suggests a distinction between those acts or omissions which are *unlawful* and those in which *fault or negligence intervenes*, and it seems clear from Article 1092 that the word *unlawful* in Article 1089 is used in the sense of criminal, because Article 1092 is that article in the chapter which amplifies and explains the expression *acts or omissions which are unlawful* found in Article 1089, and Article 1092 treats of crimes and misdemeanors. Furthermore that branch of the third class of obligations indicated by the expression *or in which any kind of fault or negligence intervenes* found in Article 1089, is amplified and explained by Article 1093 which relates to acts and omissions not punished by law, and so that expression must refer to acts and omissions not punished by law. Furthermore the opening Article of the chapter to which we are referred by Article 1093 as containing the law concerning acts or omissions not punished by law, contains the very language of Article 1089.

"It is also apparent that the expression *not punished by law* in Article 1093 has reference to criminal punishment inflicted by the State and not to the civil obligation to *repair the damage*, otherwise why should such an expression be used in an Article having for its very purpose the imposition of such a civil obligation?

"The very fact that the expression *not punished by law* in Article 1093 is set over against the expression *crimes and misdemeanors* in Article 1092, together with the juxtaposition of the articles themselves, indicates that the Spanish codifiers intended to so classify the law of private wrongs. Furthermore the comment which Falcón makes on the chapter to which we are referred in Article 1093, bears internal evidence that this learned commentator never doubted this to be the classification of private wrongs intended by the Spanish codifiers." (6 Michigan Law Review, p. 140.)

It will be seen from this that Mr. DeWitt concurs in the opinion heretofore expressed. No doubt his conclusion was the result of a careful study of the writings of the great commentators on the Civil Code. We think that independent of what the commentators say, our position is well supported by actual provisions of law. The terms of the Articles 1092 and 1093 of the Civil Code are positive and sufficiently clear to render our contention apparent. The first of these provides that civil obligations, arising from crimes and misdemeanors, shall be governed by the provisions of the Penal Code, and the second that those arising from acts and omissions, in which fault or negligence, not punished by law, occurs, shall be subject to the provisions of chapter second of title sixteen of book four of the Civil Code.

Having finally established with reasonable clearness, supported by actual provisions of law, and commentaries of the great civil law jurists, the sources out of which private wrongs or torts under the Spanish law arise, let us now take up the discussion of those belonging to the first class, namely, civil liability arising from crimes and misdemeanors. That such a liability exists is clear from the provisions of Articles 17 and 18 of the Penal Code and Article 100 of the law of Criminal Procedure. Article 17 provides that every person criminally liable for a felony or misdemeanor is also civilly liable. Article 18 says that the exemption from criminal liability created in paragraphs one, two, three, seven and ten of Article 8 does not include exemption from civil liability. Article 100 of the Code of Criminal Procedure provides that a criminal action arises from every crime or misdemeanor for the punishment of the offender, and a civil action may also arise for the restitution of the thing, the repair of the injury and the indemnity for losses occasioned by the punishable act.

Scaevola's and Manresa's commentaries on this point confirm the conclusion of Falcón when he says that "Many of these obligations proceed from crimes and misdemeanors, for it is common learning and unnecessary to repeat that all penal acts involve two kinds of responsibility: the penal or public, and the civil or private. It is well known that all persons criminally responsible as authors, accomplices and accessories after the fact of a penal act, are also responsible civilly for the injury caused to third persons thereby." (6 Michigan Law Review, p. 144.)

CHAPTER IV.

GENERAL DISCUSSION OF PRIVATE WRONGS OR TORTS ARISING OUT OF CRIMES OR MISDEMEANORS.

Now, then, how is this civil obligation arising from crimes or misdemeanors enforced? Is the manner of enforcing such claim under the Spanish law the same as it is under the common law? Are the remedies afforded by the English and American courts essentially different from those afforded by Spanish courts? The first of these is a most perplexing question. It has occupied the minds of the bench and bar for years.

I. *Three different views* have been advanced by the members of the legal profession, namely: first, that there is only one way of enforcing civil liability arising from crimes or misdemeanors, and, that is enforcement by merging the civil action in the criminal prosecution; second, enforcement by bringing a separate civil action in special cases only, when the civil liability arises from any of the following crimes: *adulterio, estupro, rapto, violación, calumnia, amancebamiento* and *injuria*; and third, by instituting an entirely independent civil action in all cases irrespective of whether the civil liability arises from private or public wrongs. Many a legal battle, to maintain these different views, has been fought in the Supreme Court of Spain and elsewhere. The same question has presented itself before the Supreme Court of Spain in a number of cases among which were the cases decided on March 23, 1882 (48 Jurisprudencia Civil, p. 394), the case decided on February 19, 1902 (93 Jurisprudencia Civil, p. 268); before the Supreme Court of the United States in the case of Fernandez vs. Perez (202 U. S. 80); before the Supreme Court of the Philippines in the case of Rakes vs. The Atlantic, Gulf and Pacific Company (7 Phil. Rep., 359), and Ocampo vs. Jenkins (14 Phil. Rep., 681). It is very discouraging to find that in none of these cases, except perhaps, those decided by the Supreme Court of Spain, is the question ably met and squarely decided. The decision of March 23, 1882, throws great light upon the mooted question of whether or not an independent civil action, arising out of the same wrongful act, may be brought separately. In that case the plaintiff was bitten by a dog belonging to the defendant. Article 584 of the Penal Code imposes a penalty upon the owner of any ferocious or harmful animal. He is therefore criminally liable according to the Penal Code. The court took cognizance of the civil action arising out of the same wrongful act although it was not one of the special cases enumerated above. In delivering its opinion the Supreme Court of Spain dispelled all doubt and settled for all time the mooted question. It says, "The party injured by an act which gives rise to a criminal prosecution may institute the penal and civil action jointly or separately, but only in the case in which the civil action is renounced or expressly reserved will it be understood not to have been instituted with the penal action; if they are brought jointly, as it appeared to have been done in this case, the complainant will have to be content with the result of the action to which she voluntarily submitted herself, and she cannot institute, in another proceeding, the civil action founded in the same cause, because the matter has already been adjudicated." (48 Jurisprudencia Civil, p. 394; 6 American Law Review, p. 136; also cited in the case of Almeida vs. Avaroa, 8 Phil. Rep. 137.)

In the case decided February 19, 1902, the appellant company contended that the provisional acquittal of the company of the criminal charge brought against it, gives the appellee no right to institute a civil action arising out of the same wrongful act. It was said that it was true the appellee could bring the two actions, civil and criminal, jointly or separately. But while the penal action was pending no separate civil suit could be instituted until there had been a final and irrevocable

judgment in the penal action. Consequently, a provisional acquittal of the company gave the appellee no right to institute a separate civil suit.

It was also contended that as the obligation in this case arose out of the crime, it should be, according to the provisions of Article 1092, governed by the provisions of the Penal Code. In delivering its opinion the Supreme Court of Spain said: "Considering the provisions of Articles 1092 and 1093 of the Civil Code in connection with those of Articles 111 and 116 of the Law of Criminal Procedure, they clearly show that even though it is true that the acts which might constitute a felony or misdemeanor have to be decided by tribunals of competent criminal jurisdiction, yet when these tribunals put an end to the respective cases in any of the forms authorized by the aforesaid provisions of law, the jurisdiction of the civil tribunals is left completely and absolutely open with no other limitation than those prescribed in the first paragraph of Article 116 of the Law of Criminal Procedure. * * *" (93 Jurisprudencia Civil, p. 268.)

The case of Fernandez vs. Perez was originally brought in the United States District Court for the District of Porto Rico. It was an action of trespass on the case for the wrongful levy of an attachment. It was alleged that the attachment was levied maliciously and without probable cause, to the injury of the standing and dignity of the defendant in error as a merchant. The lower court awarded seven thousand dollars damages to the defendant in error, but on appeal the decision was reversed. The ground for the reversal was purely technical. Chief Justice White dissented. He said, "In my opinion the error, if any, was a mere question of mode or procedure involving no want of jurisdiction * * *."

In this case the counsel for the plaintiff in error takes the first view above cited, that is, the person injured by the crime or misdemeanor has no other remedy independent of the criminal prosecution. He says: "Injuries that result in damages of independent and intangible nature incapable of exact valuation, such as the loss of a limb, death of a member of the family, impairment of health, strength, credit, dignity, honor, reputation, and the like, are so grave as to require the criminal punishment of the author as the primary consideration and as incident to the criminal proceedings, the person causing the injury, if found guilty criminally, may apparently, as a sort of additional penalty be required to indemnify the person injured. Such injuries are included in the Criminal Code as acts to be punished like crimes and misdemeanors. And in order to recover damages it is absolutely necessary under the Spanish law, that the author must first be found guilty in the criminal proceeding." (Brief and Argument for the Plaintiff in Error, p. 29; 6 Michigan Law Review, p. 136.)

The counsel for the defendant in error in the same case maintains the second view above cited, that is, a separate civil action can only be brought in certain special cases, and in all others it must depend upon the criminal prosecution for its enforcement. He says: "Crimes are divided into two classes, viz., *delitos de acción pública*

(crimes of public action) and *delitos de acción privada* (crimes of individual action.) In the former the public peace and order is involved and they must be prosecuted irrespective of the wishes of the party particularly aggrieved or offended, and the proceedings may be commenced without indictment. In the former class of cases the civil demand must be brought in connection with the criminal action and an acquittal of the crime charged destroys the right to recover in the civil action (Code of Criminal Procedure, Article 108). But this is not so in the latter class of cases, for in this class the civil action ought not and indeed cannot be brought jointly with the criminal action." (Articles 111 to 117, of the Code of Criminal Procedure.)

The action in the case of Rakes vs. The Atlantic, Gulf and Pacific Company was to recover damages for personal injuries. The plaintiff, one of a gang of eight negro laborers in the employment of the defendant, was at work transporting iron rails from a barge in the harbor to the Company's yard near the Malecon in Manila. At a certain spot at or near the water's edge the track sagged, the tie broke, the car either canted or upset, the rails slid off and caught the plaintiff, breaking his leg. Action was brought to recover damages for personal injuries.

It will be noted that the counsel for the defendant and appellant in this case concurs in the opinion of the counsel for the plaintiff in error in the case of Fernandez vs. Perez. He firmly believed that the only way to enforce the claim of the plaintiff is by resorting to a criminal prosecution. He says: "It is difficult to imagine an injury caused by the act or omission of an employee which could not amount to at least the offence described in Article 605 of the Penal Code, and it would seem that Chapter II, Title XVI, Book IV, C. C., while providing in general terms for a possible case of a negligent act or omission of a person of mature years and responsibility which might not constitute a crime or fault, was intended almost exclusively to cover liability for acts of children and other irresponsible persons specially mentioned, both as alleged in the complaint and attempted to be proven, is wilful, it is unnecessary to make any nice distinction to bring it within Article 581 or 605 of the Penal Code of a graver offence." (Brief of Counsel for Defendant and Appellant, p. 5.) He continues: "Should the court hold that the new Civil and Criminal Procedure has abrogated by implication the necessity of resorting to criminal action to secure civil relief, this could in no manner change the subsidiary liability of the master for the criminal negligence of the servant to a primary liability, for that would be equivalent to making a surety primarily liable for the indebtedness of the principal, without attempting first to exhaust the remedy against the latter or even making him a party; nor could such a holding authorize the application of the remedy provided in the Civil Code for acts and omissions which do not constitute such crimes or faults, to acts and omissions which do constitute such crimes or faults, when there is clear civil remedy specially provided in the Penal Code." (Brief of Counsel for the Defendant and Appellant, p. 8.) Again he says, "The reason for the distinction between the liability of the master for the acts and omissions of the servant which amount to crimes or misdemeanors and for those in which the element of

fault or negligence is so slight as not to involve any penal responsibility is perfectly apparent and consonant with justice and public policy. In the former the policy of the law is to make the culprit primarily responsible both criminally and civilly for all the consequences of his violation of the law, giving the injured party a secondary or subsidiary right of recovery against the master only after he has exhausted his remedy against the servant." (Brief of Counsel for the Defendant and Appellant, p. 9.)

A. FIRST VIEW CRITICISED AND TWO DISTINCT REMEDIES POINTED OUT.

The position maintained by the counsel for the plaintiff in error in the case of Fernandez vs. Perez, and the counsel for the defendant and appellant in the case of Rakes vs. The Atlantic, Gulf and Pacific Company, is untenable in view of the fact that Article 1092 of the Civil Code points out two clear remedies provided for in the Penal Code and in the Law of Criminal Procedure.

1. *The first remedy* provided for may be enforced by the public prosecutor. It was the duty of the public prosecutor under Article 108 of the Law of Criminal Procedure to join the civil and criminal actions arising out of the same wrongful act, unless the injured party expressly waived or reserved the civil action. The people of Spain and of her colonies take advantage of this opportunity. They depend in many instances upon the prosecutor for the enforcement of the civil liability. Such a remedy is not known in the English and American law. In this respect the Spanish law is more liberal than the common law.

2. *The other remedy* is by instituting a separate civil action entirely independent of the criminal prosecution. Article 116 of the Law of Criminal Procedure authorizes the party injured by the crime or misdemeanor to bring his civil action at once without waiting for the institution of the criminal action. To recover damages in the civil suit it is not always necessary that the accused be first convicted in the criminal case. However, according to Article 114 of the same Law, if the criminal action is subsequently instituted his civil action is suspended until the termination of the criminal case by final sentence. If a criminal action is immediately instituted according to Article 111 of the same Law, the civil action must be suspended. The penal action once started, the civil remedy should be sought therewith, unless it had been waived by the party injured, or had been expressly reserved by him for civil proceedings for the future (Article 112, Law of Criminal Procedure). If the civil action alone arising out of a crime that could be enforced only on private complaint, was instituted the penal action thereunder is extinguished (Rakes vs. The Atlantic, Gulf and Pacific Company, 7 Phil. Rep., p. 359).

The injured party under the Spanish law is also authorized to institute the criminal action himself and in such a case, he is presumed to have brought the civil action therewith, unless he expressly waives or reserved the civil action for further

proceedings for the future. Every Spanish citizen not under special disqualification, whether injured or not by the crime may institute the penal action. When it is thus instituted, it is called the people's action (Articles 101 and 270, Law of Criminal Procedure).

The above rules are not applicable in cases falling under Act No. 277 of the Philippine Commission. According to the ruling in the case of Ocampo vs. Jenkins, 14 Phil. Rep., p. 681, both the criminal and civil action may be brought separately and may be prosecuted at the same time. The fact that an appeal is pending in the Supreme Court in a criminal case for liability under Act No. 277 of the Philippine Commission, does not prevent the prosecution of a civil action for damages under the same Act. The pendency of a criminal appeal does not suspend the prosecution of the civil suit, and a judgment in one is no bar to the prosecution of the other.

B. SECOND VIEW DISCUSSED AND CRITICISED.

The second view maintained by the counsel for the defendant in error in the case of Fernandez vs. Perez, is not well supported by authority. The learned counsel said that in a case of public action (acción publica) the civil liability should be brought jointly with the criminal proceeding, and in a case of individual action (acción privada) the civil liability must be brought separately. This view is repugnant to the ruling of the Supreme Court of Spain in its decision of March 23, 1882, heretofore cited. The court in that case ignores the distinction pointed out by the counsel for the defendant in error, and separately decides that a separate civil action may be instituted in cases not falling under the special crimes mentioned (crimes of individual action).

C. THIRD VIEW DISCUSSED.

The third and last view that civil liability may be enforced in an entirely independent civil action, is consistent with the holding of the Supreme Court of Spain, and of the Supreme Court of the Philippines (Decisions of March 23,1882, 48 Jurisprudencia Civil, 394; and February 19, 1902, 93 Jurisprudencia Civil, 268; Rakes vs. The Atlantic, Gulf and Pacific Company, 7 Phil. Rep. 359; Ocampo vs. Jenkins, 14 Phil. Rep. 681).

In the case of Rakes vs. The Atlantic, Gulf and Pacific Company, the court speaking through Justice Tracey said: "It is contended by the defendant as his first defence to the action that the necessary conclusion from these collated laws is that the remedy for injuries through negligence lies only in a criminal action in which the official criminally responsible must be made primarily liable and his employer held only subsidiarily to him. According to this theory the plaintiff should have procured the arrest of the representative of the company accountable for not repairing the tract, and on his prosecution a suitable fine should have been imposed, payable primarily by him and secondarily by his employer.

"This reasoning misconceived the plan of the Spanish Codes upon this subject. Articles 1093 of the Civil Code makes obligations arising from faults and negligence *not punished by law*, subject to the provisions of Chapter II of Title XVI" of Book IV of the Civil Code. "As an answer to the argument urged in this particular action, it may be sufficient to point out that nowhere in our general statutes is the employer penalized for failure to provide or maintain safe appliances for his workmen. His obligation therefore is one not punished by law and falls under civil rather than criminal jurisprudence. But the answer may be a broader one. We should be reluctant under any condition to adopt a forced construction of these scientific Codes, such as is proposed by the defendant, that would rob some of these Articles of effect, would shut out litigants against their will from the civil courts, would make the assertion of their rights dependent upon the selection for prosecution of the proper criminal offender, and render recovery doubtful by reason of the strict rules of proof prevailing in criminal actions. Even if these Articles have always stood alone, such a construction would be unnecessary, but clear light is thrown upon their meaning by the provisions of the Law of Criminal Procedure of Spain, which, though never in actual force in these Islands was formerly given a suppletory and explanatory effect."

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An examination of this topic might be carried much further, but the citation of these Articles suffices to show that the civil liability was not intended to be merged in the criminal nor even to be suspended thereby, except as expressly provided in the law.

CHAPTER V.

GENERAL DISCUSSION OF PRIVATE WRONGS OR TORTS ARISING OUT OF ACTS OR OMISSIONS NOT PUNISHED BY LAW IN WHICH ANY KIND OF FAULT OR NEGLIGENCE INTERVENES.

This concludes our examination on the subject "Civil Obligations Arising from Crimes or Misdemeanors." To complete our study, let us proceed to investigate those civil obligations arising from acts and omissions, in which fault or negligence, not punished by law, intervenes.

The existence of such private wrongs or Torts under the Spanish law is recognized by Bonel, Sanchez Roman, Manresa, and Falcón. The comments of Bonel and Sanchez Roman on this subject strengthen our position. They said that a civil action for the recovery of damages for an injury by the fault or negligence of another had been recognized by both the Roman and Civil Law (4 Bonel y Sanchez Roman, Codigo Civil Español, p. 894). Under the Roman law reparation of damages is regulated by the Lex Aquilia. This Law consists of three chapters, the first of which provided that if any person wrongfully killed the slave or cattle of another, the offender should be bound to pay the highest price for which the slave or animal could have been sold during the previous year. The second chapter of this law was

in *disuse* in Justinian's time but an explanation of it will be found in the Institute of Gaius. Institute 3,215,216 says, "An adstipulator, who defrauded a principal stipulator by releasing the promisor, was made liable in damages." The third chapter comprehended all damage done to every kind of property, animate or inanimate, except the killing of slaves and cattle.

From this Lex Aquilia the law of reparation in Rome was gradually developed, by *interpretation* and the granting of *actiones utiles* and *actiones in factum.*

Under the Aquilian law, every man was responsible for damage done by his fault or negligence, as well as for damage done by fraud or design. The Lex Aquilia originally afforded reparation for injuries *corpore corpori*, i. e.—for injuries done by the wrongdoer on the property of the plaintiff, but its provisions were afterwards equitably extended to cases of injury done *corpori sed non corpore*, or those caused indirectly by the fault of the defendant, either to the owner of the property injured, or to any one having an interest in it (Inst. 4.3.16; Dig. 9.2.11, sec. 8, 10; 12;17, pr.; 51, pr.; Gaius, 3.219). Those who denied fault were liable to pay double the amount sued for (Gaius, 3, 216; Dig. 9.2.2, sec. 1). It should also be observed that the slightest fault of a positive character rendered the defendant liable, but a mere fault of omission was held insufficient (Dig. 9.2.44, pr.; 7.1.13, sec. 2).

But for the damage in the exercise of a right, as killing a slave in self-defence without blame, no claim for reparation could be maintained (Inst. 4.3.3., 4.5; Dig. 9.2.11, pr.; 52, sec. 4; 57).

If any one exercised a profession or trade without being properly qualified to do so, he was liable for all damage which his want of skill or knowledge might occasion. Thus a medical man was held answerable, under the Aquilian Law, if he occasioned the death of a slave by an unskillful operation or improper administration of medicine (Inst. 4.3.7).

Finally among *delicts* was reckoned what the Romans called *injuria* (Gaius 220-225). Generally this means *omne quod non jure fit;* but when used in a specific sense it had reference to an injury to person or reputation, as in the case of assault or slander.

Injuries were divided into real and verbal. The praetorian law softened the rigors of the Twelve Tables, and allowed the injured person to recover such compensation as the nature of the case required (Gaius, 2.224). In actions for libel or slander, the truth of the allegation might be pleaded in justification, at least in those cases where the public was interested in the exposure (Dig. 47.10.18, pr.; Cod. 9.355). It was optional to the injured person to proceed against the offender, either civilly or criminally. This option was given by the Lex Comelia (Dig. 47.10.5.6.7, sec. 4). Not only the perpetrator of the injury, but he, who counselled it, might be prosecuted (Inst. 4.4.11. Dig. 47.10.11, pr., sec. 3-6.15, sec. 8, 10). In all cases it was necessary to show that the act had been done maliciously (Dig. 47.10; 3), and if it was accompanied by any peculiar circumstances of aggravation, the damages awarded were proportionally increased (Inst. 4.4.9).

A quasi-delict has been defined, "an incident by which damage is done to the obligee (though without the negligence or intention of the obligor), and for which damage the obligor is bound to make satisfaction (Austin's Jurisprudence, Vol. III. p. 134). If any thing was thrown from the window of a house near a public thoroughfare so as to injure any one by its fall, the inhabitant or occupier was, by the Roman law, bound to repair the damage, though it might have been done by his family or servants or even by a stranger without his knowledge (Inst. 4.5.1; Dig. 9.3). This affords an illustration of liability arising quasi-ex-delicto. In like manner when damage was done to any person by a slave or animal, the owner, might in certain circumstances, be liable for the loss, though the mischief was done without his knowledge and against his will; but in such a case if no fault was directly imputable to the owner, he was entitled to free himself from all responsibility by abandoning the offending slave, or animal to the person injured, which was called *noxas dare* (Inst. 4.8 and 9; Dig. 9.4). Though these noxal actions are not classed by Justinian under the title of obligation quasi-ex-delicto, in principle, they are evidently within that category. Animal *ferae naturae*, such as lions, tigers, and bears must be kept in a secure place to prevent them from doing mischief; but the same vigilance is not required in the case of animals *mansuetae naturae*, the presumption being that no harm will arise in leaving them at large, unless they are known to be vicious or dangerous (Dig. 4.9; 5.1.15; 44.7.5, sec. 4-6)" (Roman Law—Mackenzie, p. 270).

The Roman law on this subject is more comprehensive and covers a greater field than that of the Spanish law. It will be noted that a great many rules found in the Lex Aquilia on this particular subject are lacking in our Civil Code. The Spanish codifiers give no reason for the omission of so many important rules. The fact remains, however, that the Spanish law is not wanting in this particular.

Actions to recover damages in cases arising from acts either of commission or omission are maintainable under the Civil Law, irrespective of whether the injury complained of was to the reputation, social or commercial, of the complainant, or to his property or "bienes" alone (Official Gazette of Madrid, November 8, 1894). Article 1093 tells in an unequivocal language the laws governing reparation of damages arising out of extra contractual private wrongs. Chapter II of Title XVI of Book IV of the Civil Code is devoted to them. Falcón's comment on this chapter is as follows: "But there are many acts which without necessarily being crimes or misdemeanors because they do not directly interfere with public order, involve their authors in responsibility because they cause injury to third persons, and this injury has to be repaired. To call these acts *quasi delicts* involves a certain confusion of terminology which the law ought not to tolerate, because it would seem that it treats of that which in modern legal language is termed misdemeanor, and that there are no ther acts from which Civil responsibility may arise, and this is not true.

"Over and above the acts punished by the Penal Code as crimes and misdemeanors there are other acts of civil culpability, properly so called that render their authors responsible for the injuries which they have caused third persons." (6 Michigan Law Review, p. 136.)

I. NATURE AND CHARACTER OF DAMAGES RECOVERABLE IN AN EXCLUSIVELY CIVIL ACTION ARISING FROM SUCH ACTS AND OMISSIONS.

We are now free from doubt that extra-contractual private wrongs exist under the Spanish law. The question then arises, what is the nature and character of damages recoverable in an action brought to enforce the right of the person injured by the fault or negligence of another? The counsel for the plaintiff in error, in the case of Fernandez vs. Perez, maintains that the damages recoverable in an exclusively civil action must be material and capable of exact valuation. He says, "It is a well settled doctrine in the Spanish jurisprudence that damages may be recovered in an exclusively civil action only when the injury done is of a material character capable of being definitely valued, and then only when it is the immediate and necessary result of the negligence or wrongful act complained of. In such a case the damage must be repaired." (Brief and Argument of the Counsel for the plaintiff in error, p. 26; 6 Michigan Law Review, p. 136.)

In answer to the argument it may be sufficient to point out that no where in Chapter II, Title XVI, Book IV of the Civil Code, is the damage recoverable specified and limited as suggested by the learned counsel for the plaintiff in error. Article 1902 provided that any person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done, and in none of the articles subsequent, as we run through the whole chapter, is the damage recoverable limited. It is stated in broad language. There are neither descriptive nor qualifying words placed either before or after the word *damage*. The Articles simply say *damage*, not necessarily material nor capable of exact valuation as urged by the learned counsel. Therefore, to know the nature and character of damages recoverable, resort must be had to the decisions of the courts and the opinion of the commentators.

Manresa's comment on Article 1902 is as follows: "The obligation imposed by said article comprises the two items or the two terms that are present in every indemnity, in accordance with Article 1106 of said Code, that is, the amount of the loss which may have been suffered, and that of the profit which a person may have failed to realize. Thus has the tribunal often cited, settled the matter in its decision of the 15th of January, 1882." (Manresa's Commentaries, Vol. 12, p. 604; cited in the Rakes case.)

The Supreme Court of Spain in its decision of June 27th, 1894, where an action for personal injuries, caused by a derailment accident was instituted, allowed the plaintiff to recover damages for injuries already suffered and which might thereafter be suffered to the injury of his health, mental state and business (75 Jurisprudencia Civil, Case No. 182.) In another case decided by the Supreme Tribunal, January 15, 1902, the plaintiff, who was killed in an accident, caused by the derailment of the defendant's train, was allowed to recover thirty-five thousand pesetas prospective

damages, based upon Article 1106 of the Civil Code. In a later case decided October 19, 1909, the plaintiff brought an action to recover damages for injuries resulting in death. The plaintiff was awarded three thousand pesetas damages.

It will be seen that the limitation suggested by the learned counsel as to the nature and character of damages recoverable is in direct conflict with the holding of the Supreme Court of Spain. Damages to health and mental state are incapable of exact valuation. Injuries resulting in death are of such a nature that it is absolutely impossible to quote them in terms of dollars and cents. Yet the court in each case allowed the plaintiff to recover damages. The contention of the learned counsel is, therefore, untenable.

It is interesting to note here that the Spanish law relating to injuries resulting in death is more liberal than that of the common law. At common law no action for recovery of damages for injuries causing death is maintainable. The Supreme Court of the United States in the case of the Insurance Company vs. Brame, 95 U. S., p. 756, said: "That by the common law no action lies for an injury which results in death." But the Spanish law expressly recognizes the existence of such a remedy. The Supreme Court of the Philippines in the case of To Guioc-Co vs. Del Rosario, 8 Phil. Rep., p. 546, said: "Nor do we find anywhere in our legislation any statute creating a remedy for accident causing death, other than such as is contained in the Spanish Codes, by whose terms it is lodged when it existed at all, in the surviving next of kin."

It will be well to point out a clear limitation as to the damages recoverable in an exclusively civil action. The Supreme Court of Spain and that of the Philippines are uniform in holding that no recovery could be had for pain and mental suffering. The case of Clara vs. Velasco, 11 Phil. Rep., p. 287, is conclusive upon this point. The plaintiff in that case insisted that damages should have been allowed her for the pain which she suffered at the time of the accident and during her stay in the hospital. The court said: "We have found nothing either in the judgment of the Supreme Court of Spain, or in any of the commentaries which should permit such a recovery. The fact that in the United States damages are allowed for this class of cases for the pain and suffering cannot affect the resolution of the question here. We hold, therefore * * * that no damages can be allowed for the pain and suffering which the plaintiff experienced at the time and after the accident."

CHAPTER VI.

CONCLUSION

A deduction from all that has been heretofore said may be stated in general terms as follows:

Extra contractual private wrongs exist under the Spanish law (Article 1902, Civil Code). It may arise, first, out of crimes or misdemeanors (Article 1092, Civil Code); and, second, out of acts or omissions, not punished by law, in which any kind of fault or negligence intervenes (Article 1093, Civil Code).

Where the tort arises out of crimes or misdemeanors, the injured party may institute the civil or the criminal action at once (Articles 116, 101 and 270, Law of Criminal Procedure). If he brings the civil action alone, he may obtain judgment and execution thereon without former conviction of the accused (Article 116, Law of Criminal Procedure). If a criminal action is subsequently prosecuted, the civil action once started must be suspended until the termination of the criminal case by a final sentence (Articles 114 and 111, Law of Criminal Procedure.) If the injured party brings the criminal action himself, he is presumed to have brought therewith, the civil action, unless he expressly waives or reserved it for future proceedings (Article 112, Law of Criminal Procedure; same Article was cited in the Rakes case). Usually the injured party brings neither the criminal nor the civil action. The Public Prosecutor is the proper official who looks after the prosecution of crimes and offenses. It is his duty to bring the two actions jointly in the absence of express waiver or reservation by the injured party. In many, many instances, the injured party depended upon the public prosecutor to recover his damages (Article 108, Law of Criminal Procedure).

Where the tort arises out of acts or omissions, not punished by law, in which any kind of fault or negligence intervenes, the injured party can bring an exclusively civil action for damages (Article 1902, Civil Code; 4 Bonel y Sanchez Roman, Codigo Civil Español, p. 894; Official Gazette of Madrid, November 8, 1894.) The courts, in assessing the damages, allowed the successful party to recover for injuries suffered to health, mental state and business (Decision of June 27, 1894). They even go so far as to allow damages to be recovered for injuries resulting in death (Decisions of January 15, 1902, October 19, 1909). Such a remedy is unknown to the common law (Insurance Company vs. Brame, 95 U. S., p. 756).

On the whole it cannot be said that the Spanish law of torts is much more limited than that of the common law. It is true that no tort actions arise out of contract under the Spanish law, but on the other hand the common law lacks that important principle of redressing private wrongs at public expense, and of depending upon the public prosecutor for the recovery of civil damages. The common law recognizes no remedy for injuries resulting in death while the Spanish law abounds with it.