A COMPARATIVE STUDY OF THE LAW OF DAMAGES UNDER THE SPANISH AND THE COMMON LAW SYSTEMS

INTRODUCTION

The broad principles of the Law of Damages are comparatively few; but, embracing as they do the whole field of redress by legal means, their application to specific causes of action takes us into almost every part of the wide domain of the law. Having in mind the broadness of the subject, and the idea that it would be very hard, if not impossible, to discuss all its minute details in a work of this kind, I shall confine myself to the salient principles of this branch of the law under the Spanish and the Common Law System, and my endeavor will be to contrast one law with the other and make comparisons between the two. No attempt will be made to discuss the rules of pleading and evidence applicable to actions for damages. The discussion of these subjects would make this work very extensive.

According to Bouvier's Law Dictionary, damage is "the loss caused by one person to another, or to his property, either with the design of injuring him, or with negligence and carelessness, or by inevitable accident." And damages are, according to the same author, "the indemnity recoverable by a person who has sustained an injury, either in his person, property, or relative rights, through the act or default of another."

Escriche defines damage as "the detriment, injury or loss which are occasioned by reason of fault of another in the property or person." (Escriche, Diccionario Razonado de Legislación y Jurisprudencia, Vol. 2, p. 597.) And the Laws of Partidas define damage as "empeoramiento, o menoscabo, o destruymiento, que ome recibe en si mismo, o en sus cosas por culpa de otro." (Part. 7, Tit. 15, Law 1.)

The theory upon which damages are allowed under the Common Law is based upon the doctrine that where a civil injury has been sustained the law provides a remedy that should be commensurate with said injury (13 Cyc. 12). The Spanish law of damages is based upon substantially the same theory. Under the Spanish law, a person who by an act or omission causes damage to another without fault or negligence shall be obliged to repair the damage done (Art. 1902, Civil Code). Of what nature soever the damage be, and from what cause soever it may proceed, the person who has done the injury ought to repair it by an indemnity proportionate to his fault and to the loss caused thereby (1 Cushing, Domat's Civil Law, p. 741).

The underlying theory therefore of the Common Law of damages and that of the Civil Law are similar. We will, however, note as we advance in the discussion

of this branch of the law that, in spite of this similarity, the two laws are irreconcilable on many points.

CHAPTER I.
DAMNUM ABSQUE INJURIA.

While by the general system of the Common Law for every invasion of a right there is a remedy, and that remedy is compensation, it is not, however, to be understood that legal relief is to be had for every species of loss that individuals sustain by the acts of others. "In addition to the great class of moral rights and duties which the law does not attempt to protect or enforce (Parley *v.* Freeman, 3 T. R. 51) there are many sufferings inflicted by human agency, where the immediate instruments of injury are free from fault, or the act beyond their control. In these cases the law does not seek to interfere. It is only legal injury that sets its machinery in operation; and this is meant by the maxim that *damnum absque injuria* gives no cause for action" (1 Sedgwick on Damages, 8th Ed., pp. 32, 33).

The Supreme Court of Maine, in the case of Spring *v.* Russell et al., 7 Me. 273, speaking of this doctrine said:

> "It does not necessarily follow that because a plaintiff may have sustained a serious injury in his property, consequent upon the voluntary acts of a defendant, that therefore, he has a right to recover damages for that injury. Some acts may be justified by an express provision of law; or the damage may have arisen as the consequence of those acts which others might lawfully do in the enjoyment and exercise of their own rights and management of their own business; or it may have resulted from the application of those principles by which the general good is to be consulted and promoted though in many respects operating unfavorably to the interests of individuals in society."

Under the Spanish law, in order to maintain an action for damages two elements must concur: the invasion of a right and a resulting injury. "If a slander be met with a justification, it is *damnum absque injuria*, and an answer to the action in the civil law." (3 Colquhoun, Summary of the Roman Civil Law, p. 267.)

Manresa, in commenting upon article 1908 of the Civil Code, says:

> "In order to condemn, by reason of a trial, to indemnity for damages, it is necessary that real existence of the damage be established. * * * It is not sufficient that the duty be derived from the provisions of the substantive law, because when a penal obligation of forcible application is not in question, it may be, notwithstanding the violation of the legal provision, a tortious or negligent act, and yet no injury be suffered by anybody, in which case one of the essential elements for the reality of the right is lacking." (12 Manresa, Commentaries on the Spanish Civil Code, p. 638.)

The Supreme Court of Spain, in a decision rendered on October 8, 1884, laid down the following doctrine:

> "Considering that, in accordance with the provisions of article 612 of the Penal Code, the entrance of cattle upon another's premises without

> causing damage, or even causing it, if said damage be less than five pesetas, is not punishable as misdemeanor, by reason of which, and article 613 being in relation with the two preceding ones, the misdemeanor defined in the same is not committed, although the entrance of the cattle be voluntary or by tort or negligence of the owners, if no damage amounting to more than five pesetas is caused."

As will be noticed, the Spanish doctrine of *damnum absque injuria* is more loose than that of the Common Law. In view of the above-quoted decision of the Supreme Court of Spain, if the invasion of another's right is not accompanied by a resulting damage which amounts to at least five pesetas, it is not punishable as misdemeanor. It would follow, therefore, that under the Spanish law a citizen's right may be invaded and yet the tort-feasor may not be punished if the damage suffered by him does not amount to the arbitrary amount of five pesetas, for it is a well-known doctrine that exemption from criminal liability carries with it exemption from civil responsibility also (Almeda et al. *v.* Abarroa, 8 Phil. Rep. 178).

Under the Common Law, on the other hand, every invasion of another's right, if accompanied by any damage, no matter how insignificant in amount, on the property or person of the plaintiff, subjects the tort-feasor to an action for damages.

I think that the Common Law doctrine of *damnum absque injuria* is far better than that of the Spanish law. Nothing is more sacred than a man's right, and public policy and high considerations of justice demand that its invasion, if accompanied by damage, be properly punished. While it is a sound rule not to allow any recovery for any damage done to the person or property of another if none of the rights of the offended party has been invaded, yet it is pitiable to see a man's right invaded and his property or person injured and the offender not subjected to any criminal or civil punishment. That would be encouraging wrongs.

CHAPTER II.

NOMINAL DAMAGES.

It is a well-settled rule of the Common Law that where a legal right has been invaded nominal damages may be recovered, although there may be no evidence of actual damage sustained (Whipple *v.* Cumberland Mfg. Co., 29 Fed. Cas. No. 17, 516; Whitemore *v.* Cutter, 29 Fed. No. 17,600; Bourdette *v.* Sieward, 107 La. 258, 31 So. 630; Dixon *v.* Clow, 24 Wend. 188). Some courts hold that a damage is not merely pecuniary, but an injury imports a damage (Asby *v.* White, 2 Ld. Raym. 938).

In the case of Asby *v.* White, 2 Ld. Raym. 938, the Court of Queen's Bench, speaking through Mr. Chief Justice Holt, said:

> "My brother Powell, indeed, thinks that an action upon the case is not maintainable, because there is no hurt or damage to the plaintiff; but surely, every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage where a man is

> thereby hindered of his rights. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the year, though it cost him nothing, no, not so much as a little diachylon, yet he shall have his action for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage, for it is an invasion of his property, and the other has no right to come there."

In actions for tort the law does not regard trifling and small inconveniences, but regards only those palpable inconveniences which diminish the comfort, enjoyment, or value of life or property. Even in the absence of proof of actual injury a party may recover nominal damages for an invasion of a right (Havens *v.* Hartford, etc. R. Co., 28 Conn. 69; Wilde *v.* Orleans, 12 La. Ann. 15); but where a slight injury results from the lawful use of property, even nominal damages cannot be recovered (St. Helen's Smelting Co. *v.* Tipping, 11 H. L. Cas. 642). In case of personal injury, even though there is no evidence of appreciable injury, the party is entitled to nominal damages. (Barlow *v.* Lowder, 35 Ark. 492; Crosby *v.* Humphreys, 59 Minn. 92, 60 N. W. 843.)

As a general rule, therefore, if a trespass is committed, that is, if a right is invaded or interfered with, although without any actual damage resulting, the person to whom the right belongs may maintain an action and recover nominal damages. See Seitz *v.* Dry-Dock, etc. R. Co., 16 Daly 264.

In Actions Involving Personal Property.—Nominal damages may also be recovered for the conversion or detention of personal property in the absence of proof that actual damages have been sustained. (Hammond *v.* Solliday, 8 Colo. 610, 9 Pac. 781; Jones *v.* Cobb, 84 Me. 153, 24 Atl. 798). This rule is held to apply even in cases where the converted property is returned by the wrong-doer to the owner thereof (Conroy *v.* Flint, 5 Cal. 327; Gernahan *v.* Chrisler, 107 Wis. 645, 83 N. W. 778).

In Actions Involving Real Property.—The right to recover nominal damages is also applicable to cases of injuries to real property. In such cases, while no actual damages may result, the question of title to the property is involved and the decision of that question depends upon the recovery or non-recovery of damages for the injury complained of (Stein *v.* Burden, 24 Ala. 130, 60 Am. Dec. 453; Chapman *v.* Thames Mfg. Co., 13 Conn. 269, 33 Am. Dec. 401). The Supreme Court of Maine, in the case of Hathorne *v.* Stinson, 12 Me. 183, 28 Am. Dec. 167, held:

> "Generally when one encroaches upon the inheritance of another, the law gives a right of action, and even if no actual damages are found, the action will be sustained, and nominal damages recovered, because, unless that could be done, the encroachment acquiesced in might ripen into legal right, and the trespasser, by a continuance of his encroachments, acquire a perfect title."

The well known rule that for every invasion of a legal right there is the corresponding claim for nominal damages applies also to matters of contract. Where a

right of action exists in the injured party, although there is no evidence of actual damages, nominal damages can be recovered for violations or breaches of contract. (Troy Laundry Mach. Co. *v.* Dolph, 138 U. S. 617; Western Union Tel. Co. *v.* Hall, 124 U. S. 444.) This rule has been held to apply even where there is a finding that the plaintiff was benefited by the breaches complained of, or the performance of the contract would result in an actual injury to the plaintiff (Ellser *v.* Brooks, 54 N. Y. Sper. Ct. 73; Excelsior Needle Co. *v.* Smith, 61 Conn. 56, 23 Atl. 693).

The doctrine of nominal damages that prevails in the Common Law jurisdictions seems to have never been adopted in the Spanish jurisprudence. The Supreme Court of the Philippine Islands, in the case of Sanz *v.* Lavin Brothers, 6 Phil. Rep. 299, speaking through Chief Justice Arellano, said:

> "An unbroken line of decisions, both before and after the promulgation of the Civil Code has established the doctrine 'that every judgment for damages, whether arising from a breach of contract or whether the result of some provisions of the law, must rest upon satisfactory proof of the existence in reality of the damages alleged to have been suffered.' (Judgments of the Supreme Court of Spain of the 13 and 26 of November, 1895; December 7, 1896; and September 30, 1898.)"

In the case of Mercado *v.* Abangan, 10 Phil. Rep. 676, the Supreme Court of the Philippine Islands held:

> "No judgment for damages can be sustained unless the record shows the existence of such damage."

In the case of Fabros *v.* Villa Agustin and Tabliga, 18 Phil. Rep. 336, the same Supreme Court laid down the following doctrine:

> "In order to justify the recovery of any sum as losses and damages, it is first necessary to prove the existence and the amount thereof."

CHAPTER III.

COMPENSATORY DAMAGES.

It is always the object of the law to award compensatory damages, i. e., damages that would make good or replace the loss caused by the wrong or injury. This proceeds from a sense of natural justice. But while it is the theory of the law to award compensatory damages to indemnify a party for all losses or injuries suffered, yet it does not follow in all cases that the remedy is commensurate with the injury.

The theory of the Spanish law of compensatory damages is practically the same as that of the Common Law. Domat, in his *Civil Law*, speaking of the nature of damages under the Civil Law, said:

> "Of what nature soever the damage be, and from what cause soever it may proceed he who is answerable for it ought to repair it by an amends proportionable either to his fault, or to his offense, or other cause on his part, and to the loss which has happened thereby." (1 Cushing, Domat's Civil Law, 741.)

Direct Consequences.—Under the Common Law it may be stated as a general rule that a party is entitled to damages for all actual pecuniary loss or personal injury which directly results from the wrongful act or omission of another and which is the natural result of the act or omission complained of (Bell *v.* Cunningham, 3 Pet. 69; Baker *v.* Drake, 53 N. Y. 211, 13 Am. Rep. 507). Damages to be recoverable must be the natural and proximate consequence of the wrong complained of, and must not arise from the wrongful act of a third party (Hughes *v.* McDonough, 43 N. J. L. 459, 39 Am. Rep. 603; Crain *v.* Petrie, 6 Hill. (N. Y.) 522, 41 Am. Dec. 765). This doctrine, however, does not exclude responsibility when the damage results to the party injured through the intervention of the legal and innocent acts of third parties, for in such instances the damage is regarded as occasioned by the wrongful acts (McDonald *v.* Snelling, 14 Allen (Mass.) 290, 92 Am. Dec. 768; Hughes *v.* McDonough, 43 N. J. L. 459, 39 Am. Rep. 603). Where the intermediate cause of the damage has resulted from an act of God, the original party cannot be held liable for the loss sustained, as such intervention cannot be considered the natural and proximate cause of the injury inflicted, or to have been within the contemplation of the parties at the time (Hoadley *v.* Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Flori *v.* St. Louis, 69 Mo. 341, 33 Am. Rep. 504).

As to proximate and remote damages it is a fundamental principle of law, applicable alike to breaches of contract and to torts, that in order to found a right of action there must be a wrongful act done and a loss resulting from that wrongful act; and the loss must be the natural and not merely a remote consequence of the wrongful act. Where the injuries are remote, contingent or speculative, and do not directly flow from the injury or breach, damages will be denied (Central Trust Co. *v.* Clark, 92 Fed. 293; Cahn *v.* Western Union Tel. Co., 46 Fed. 40). As a general rule it may be stated that where the result of an unlawful act is a natural one, and one that would naturally flow from the act done, it is proximate. If upon the contrary the damages complained of would not naturally flow from the negligent act, but were brought about by some unforseen casualty, then they would be remote. (Clemens *v.* Hannibal, etc. R. Co., 53 Mo. 366, 14 Am. Rep. 460; Corrister *v.* St. Joseph, etc. R. Co., 25 Mo. App. 619).

In actions for torts, as a general rule, the wrongdoer is liable for all injuries resulting directly from the wrongful acts, whether they could or could not have been forseen by the wrongdoer (McAfee *v.* Crofford, 13 How. 447; Eten *v.* Luyster, 60 N. Y. 252). But the particular damages complained of must be the legal and natural consequences of the wrongful act imputed to the defendant, and are such as, according to the usual course of events, might reasonably have been anticipated (Selden *v.* Cashman, 20 Cal. 56, 81 Am. Dec. 93; Lawrence *v.* Hagerman, 56 Ill. 68, 8 Am. Rep. 674). Remote and contingent expenses will not be considered (Gallagher *v.* The Yankee, 9 Fed. Cas. No. 5186; Mould *v.* The New York, 40 Fed. 900).

In actions of contract, as a general rule, the damages which one party to a contract ought to receive, in respect to such breach of contract," should be such as may

fairly and reasonably considered either arising naturally—i. e., according to the usual course of things, from such breach of contract itself—or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it." (Hadley *v.* Baxendale, 9 Exch. 341; Hunt *v.* Oregon Pac. R. Co., 36 Fed. 481.)

Under the Spanish law, the defendant is only liable for all actual pecuniary loss or personal injury directly resulting from the wrongful act or omission and which are the natural result of the said act or omission (Art. 1101, Civil Code). In cases of contract, the damages and injuries for which the defendant is liable are those forseen or which may have been forseen at the time of constituting the obligation, and which are a necessary consequence of the failure to comply with it. Said damages must be such as could have been forseen at the time the contract was made, not afterwards, and that they be the necessary consequence of the nonperformance of the obligation, not a mere contingency, nor however incidentally connected with the nonperformance. In case of fraud, it is not required that the damages be the necessary consequence of the nonperformance, it being sufficient if they be derived from it. (Art. 1107, Civil Code; 8 Manresa's Commentaries on the Civil Code, 100, 101; Art. 1905, Civil Code; 12 Manresa's Commentaries on the Civil Code, 626, 627; 1 Cushing Domat's Civil Law, 749). The damages which a person receives in his property or in his person, must come immediately and directly from an omission or from an act performed against the law (Rule 21, tit. 34, Part. 7; Decision of the Supreme Court of Spain of March 22, 1881). However, even though the damages consist, generally speaking in the loss which one has suffered and in the profits of which one has been deprived, the offending party must not be condemned to damages other than those which were forseen or could reasonably be forseen at the time the contract was made, when the failure to perform the obligation was not due to fraud; and even in the case of fraud, damages other than those which are the direct and immediate consequence of the nonperformance or bad performance of the contract should not be considered in the assessment of damages (Escriche, *Diccionario Razonado de Legislacion y Jurisprudencia*, Vol. 2, p. 601).

The general principle denying compensation for remote consequences pervades the Civil as well as the Common Law, and applies equally to cases of breach of contract. and of violation of duty. The language, however, used in this subject, and the reasons assigned for the disregard of remote damages, are far from being uniform. In regard to contract, it is sometimes said that the defendant shall be held liable for those damages only which both parties may be fairly supposed to have contemplated at the time they entered into an agreement, as likely to result from it; and this appears to be the rule adopted by the writers on modern civil law.

Under the Common Law, where contracts and torts are kept wholly distinct, the *animus* or intention of the party in default, as a general rule, is immaterial. Whether the non-performance of the agreement results from inability or deliberate malice,

the rule of damages is the same. Under the Spanish law, on the other hand, in cases of fraud, compensation is blended with punishment. Bad faith and good faith are things which are always considered in assessing damages. If the defendant acted in good faith he is liable only for damages which were forseen; but if the defendant acted in bad faith he is liable for the damages which are caused by unforseen intervening events, the reason being that, as one French author says, "the Code does not require that the non-performance of the contract should be the immediate and direct cause of the damage, but only that the damage should be the immediate and direct result of its violation, which is a very different thing." (Toullier, *Droit Civil*, Vol. 1, p. 290.)

Avoidable Consequences.—As a general rule, under the Common Law a party cannot recover for avoidable consequences. Where an injured party finds that a wrong has been perpetrated on him, he should use all reasonable means to arrest the loss. He cannot stand idle and permit the loss to increase, and then hold the wrongdoer liable for the loss which he might have prevented. (Warren *v.* Stoddart, 105 U. S. 224; Pennsylvania R. Co. *v.* Washburn, 50 Fed. 335.) A party injured by a breach of contract must make reasonable exertions to render the injury as light as possible; and he cannot recover for any loss which he might have avoided with ordinary care and reasonable expense (Cunningham Iron Works *v.* Warren Mfg. Co., 80 Fed. 378; United States *v.* Burnham, 24 Fed. Cas. No. 14690). One who has been injured by the negligence of another must use ordinary diligence to effect a cure, and there can be no recovery for damages that might have been avoided by the exercise of such care (Texas etc. R. Co. *v.* White, 101 Fed. 928; Ownes *v.* Baltimore etc. R. Co., 35 Fed. 715). The reasonable expense of avoiding the consequences of the defendant's wrong are recoverable, and when the plaintiff fails to take proper steps, he is limited in his recovery to what the costs of such steps would have been (Shaw *v.* Cummiskey, 7 Pick. 76; Indianapolis B. & W. Ry. Co. *v.* Binney, 71 Ill. 391; Jutte *v.* Hughes, 67 N. Y. 267).

Under the Spanish law it is the duty of the owner of a thing damaged or being damaged to make every effort to decrease the damage. (Article 1906, Civil Code.)

The rule, therefore, of avoidable consequences, prevailing under the Spanish law, is similar to that prevailing in the Common Law. It goes withouts aying that this rule is equitable and just.

Certain and Uncertain Damages.—Where a party under the Common Law claims damages by reason of injury inflicted either in actions *ex delicto* or *ex contractu*, he must not only show an injury sustained, but also show with reasonable certainty the amount of damages he has sustained in consequence thereof (Parke *v.* Frank, 75 Cal. 364, 17 Pac. 427; Forrest *v.* Buchanan, 203 Pa. St. 454, 52 Atl. 267). It is not necessary, however, to show the exact amount of damages to an absolute certainty; but the amount of damages claimed must be shown with reasonable certainty in

order to warrant recovery (Parke v. Frank, 75 Cal. 364, 17 Pac. 427; Pullen v. Wright, 34 Minn, 314, 26 N. W. 394).

Under the Spanish law, to sustain an action for damages resulting from tort or from non-performance or bad performance of contracts, the party claiming damages must establish by competent evidence to a certain degree of certainty the amount of the damages claimed by him. The Supreme Court of the Philippine Islands, in the case of Sanz v. Lavin, 6 Phil. 299, held:

> "An unbroken line of decisions, both before and after the promulgation of the Civil Code, has established the doctrine that every judgment ment for damages, whether arising from a breach of contract or whether the result of some provisions of the law, must rest upon satisfactory proof of the existence in reality of the damages alleged to have been suffered. (Supreme Court of Spain, Sentences of Nov. 13, 26, 1895; Dec. 7, 1896; and Sept. 30, 1898.)"

The principle of law on certain and uncertain damages obtaining in the Spanish law is similar to that obtaining in the Common Law. I need not state here that this principle is sound, for the fact that it is upheld by the highest tribunals of the United States, Spain and the Philippine Islands, is an eloquent argument in its favor.

Physical Pain.—Under the Common Law, physical pain has always been considered as an element of damages for which compensation should be allowed. (Wade v. Leroy, 20 How. 34; Grant v. Union Pac. R. Co., 45 Fed. 673; Campbell v. Pullman Palace Car Co., 42 Fed. 484.)

Under the Spanish law, physical pain has never been considered as an element of damages. The civil liability in cases of physical injuries is almost always limited to indemnity for damages to the party aggrieved for the time during which he was incapacitated for work (Article 121 Penal Code; Viada, Commentaries on the Penal Code, Vol. 1, p. 539.)

It goes without saying that the Common Law rule on this point is very objectionable. The Spanish rule seems to me more sound. The value of honor, feelings or sensation of a person cannot be appraised; it is impossible to fix the amount of damages which would in any way compensate the sufferings experienced by an injured person. All sums which the jury or judge may fix are purely imaginary and speculative. Such a doctrine is contrary to reason. It grants recovery for a thing which may not exist, besides opening the way to fraud and perjury. Men are not by nature endowed with the same strength of feeling. What might cause some persons much trouble might not cause any at all to others. Hence the impossibility of exactly, or even approximately, measuring in money the physical pain and mental suffering experienced by a person who is injured.

Mental Anguish.—Under the Common Law, mental suffering accompanying personal injury or physical pain is always the subject of compensation (Denver, etc. R. Co. v. Roller, 100 Fed. 738, 49 L. R. A. 77; Southern Express Co. v. Platten, 93

Fed. 938). But the mental anguish should be connected with the bodily injury and be fairly and reasonably the natural consequence that flows from it, and damages for prospective mental anguish are not recoverable as being too speculative (Illinois Central R. Co. *v.* Cole, 165 Ill. 334, 46 N. E. 275; Hall *v.* Cedar Rapids, etc. R. Co. 115 Iowa 18, 87 N. W. 739).

Under the Spanish law, mental anguish is not considered as an element of damage. Under article 1902 of the Civil Code no damage can be recovered for pain suffered by an injured person at the time of or subsequent to the accident causing the injury (Marcelo *v.* Velasco, 11 Phil. 287). The Supreme Court of Spain, in a judgment rendered on December 6, 1882, in a case of slander, said:

> "* * * inasmuch as the value of honor is a thing that cannot be appraised, it is not possible to fix the amount of damages, nor can the payment of an indemnity be imposed upon the offender under article 18 of the Code, by way of civil liability arising out of the criminal act." (27 Jurisprudencia Criminal, 414.)

As I have stated in the preceding section I think the Spanish rule on this point of the law of damages is more sound than that of the Common Law.

Loss of Time.—In estimating damages under the Common Law, the plaintiff is entitled to recover for the reasonable amount of time that he may have lost in consequence of the injury complained of (Davidson *v.* Southern Pac. Co., 44 Fed. 476; Sunney *v.* Holt, 15 Fed. 880). But in all cases in order to recover for the loss of time the plaintiff must show proof of business and its extent, and the particular part transacted by himself (Stoetzle *v.* Sweringen, 96 Mo. App. 592, 70 S. W. 911; Wynne *v.* Atlantic Ave. R. Co., 156 N. Y. 702, 51 N. E. 1094).

Under the Spanish law damages are also allowed for loss of time. In determining the amount of damages for which the defendant is liable, courts must also allow for the reasonable amount of time that the defendant has lost by reason of the criminal act. Such civil liability is a necessary consequence of criminal responsibility (Article 7, Penal Code; United States *v.* Catequista, 1 Phil. 537).

I think this principle is sound and just.

Loss of Profits.—Profits can be recovered only when they are made reasonably certain by the proof of actual facts with data for a rational estimate of their amount (Central Coal, etc. Co. *v.* Hartman, 111 Fed. 96). Mere speculative or remote profits, not capable of being correctly ascertained by courts, are not recoverable (The Apollon, 9 Wheat. 362; Lower *v.* Harris, 57 Fed. 368). In contract, as a general rule, a party is entitled to recover the profits that would have resulted, if the contract had been fulfilled. It must, however, be clearly shown that the profits claimed are capable of being definitely ascertained (Philadelphia, etc. R. Co. *v.* Howard, 13 How. 307; Safety Insulated Wire, etc. Co. *v.* Baltimore, 66 Fed. 140). The recovery of profits, as in the cases of breaches of contract in general, depends upon whether

such profits are within the contemplation of the parties at the time the contract was made (Jordan v. Patterson, 67 Conn. 473, 35 Atl. 521; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718).

Under the Spanish law damages are allowed for the loss of profits. If one is deprived of profits, even though an exact estimate of the same is not possible, he can recover them (Cushing, Domat's Civil Law, Vol. 1, p. 772). An action for damages on account of some loss of profits would lie against a partner who, by his acts, has caused some loss of profits to the partnership (Article 1686, Civil Code).

The Common Law and the Civil Law doctrines on this point are similar. There is no doubt that this rule is sound.

Expenses.—As a general rule a party is entitled to recover as damages all reasonable expenses to which he may have been put in consequence of the wrong or injury inflicted. (Switzerland Mar. Ins. Co. v. The Umbria, 46 Fed. 927; Watson v. Lisbon Bridge, 14 Me. 201, 31 Am. Dec. 49.) In contract, as a general rule, a party is entitled to all legitimate expenses that may be shown to have been occasioned by the breach of a legitimate contract, provided it appears that such expenses were the natural consequence of the breach (Switzerland Mar. Ins. Co. v. The Umbria, 46 Fed. 927; Hathaway v. Sabin, 63 Vt. 527, 32 Atl. 633). In actions for personal injuries a party is entitled to recover as damages all reasonable expenses paid or incurred by him for the treatment of such injury. (Denver, etc. R. Co. v. Lorentzen, 79 Fed. 291; Crouse v. Chicago, etc. R. Co., 102 Wis. 196, 78 N. W. 446.)

The rule is the same under the Spanish law. The expenses which a person may have incurred by reason of the non-fulfillment of a legal contract, or the commission of a wrong, are also recoverable (Articles 452, 453, 454, 455, 472, 512, 389 and 390, 1898, Civil Code).

Matters in Aggravation or Mitigation of Damages.—The question of aggravation or mitigation of damages is one of evidence and not of law, and no general rule can therefore be laid down, for the reason that what might mitigate damages in one case might aggravate them in another. The question is one of evidence, and each case must be determined upon its own peculiar merits (Foster v. Chamberlain 41 Ala. 158; Bowman v. Barnard, 24 Vt. 355).

The question of aggravation or mitigation of damages is a broad subject, and upon which no definite rules have been laid down by the Spanish courts. The courts may consider the motives of the offending party. (Art. 455, Civil Code.)

At Common Law contributory negligence may be considered in mitigation of damages. If the offended party was not guilty of negligence as would bar recovery, the damages are apportioned, taking into consideration the contributory negligence on the part of the injured (Georgia Cent. R. Co. v. McKenney, 116 Ga. 13, 42 S. E. 229; Atlanta, etc. R. Co. v. Wyly, 65 Ga. 120).

Under the Spanish law, contributory negligence, if not gross, mitigates recovery (Rakes v. Atlantic Gulf and Pacific Co., 7 Phil. 359). However, if the contributory

negligence is gross it bars recovery (Taylor v. Manila Electric Railroad and Light Co., 16 Phil. 8; Law 25, tit. 5, Part. 3; Rule 22, tit. 34, Part. 7; Law 2, tit. 7, Part. 2; Art. 827, Code of Commerce).

Costs and expenses of litigation.—As a general rule at Common Law, the expenses of litigation incurred in the prosecution of the suit are not recoverable as damages (Day v. Woodworth, 13 How. 363; Birmingham First Nat. Bank v. Newport First Nat. Bank, 116 Ala. 520, 22 So. 976). But in some cases they are allowed to be taken into consideration in estimating the damages (St. Peter's Church v. Beach, 26 Conn. 355; Cooper v. Cappel, 29 La. Ann. 213). Attorney's fees, as a general rule, are not recoverable as a part of the damages in an action (Oelrichs v. Williams, 15 Wall. 211; Day v. Woodworth, 13 How. 363). Some courts, however, hold that where the wrong or injury complained of is connected with some circumstances of aggravation or malice, the costs of litigation are recoverable as a part of the damages in the action (Cahart v. Wainman, 114 Ga. 632, 40 S. E. 781, 88 Am. St. Rep. 45; Hynes v. Patterson, 95 N. Y. 1).

Among the expenses which may be recovered by a party to an action are the costs and expenses of litigation which, in almost every case, the defeated party is sentenced to pay. The payment of costs and expenses is among the accessory penalties provided for in the Penal Code (Articles 25 and 27, Penal Code).

Interest.—Under the Common Law, as a general rule, interest as damages cannot be recovered on an unliquidated demand, or where the amount due is not susceptible of ascertainment by computation or by reference to the market value (Swinnerton v. Argonaut Land, etc. Co., 112 Cal. 375, 44 Pac. 719; White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13). But where a party has detained money after the same is due, the opposite party may recover by way of compensation not only the original amount but also the interests by way of damages for its detention (McCreery v. Green, 38 Mich. 172; Swamscot Mach. Co. v. Partridge, 25 N. H. 369). In actions for breach of contract the better rule seems to be that such interests as damages will be allowed especially where the damages are capable of being ascertained definitely. (District of Columbia v. Camden Iron Works, 181 U. S. 453; Roussel v. Mathews, 171 N. Y. 634, 63 N. E. 1122.) In actions of tort, as a general rule, interests will not be allowed (The Scotland, 118 U. S. 507; Emerson v. Schoonmaker, 135 Pa. St. 437, 19 Atl. 1025). The weight of authority seems to hold, however, that while the jury should not be allowed to award interests as damages in actions of tort, yet they may take into consideration the length of time that has elapsed since the injury complained of. (Richards v. Citizens' Natural Gas Co., 130 Pa. St. 37, 18 Atl. 600; Clement v. Spear, 56 Vt. 401.)

On this point the Spanish law is similar. Interest is recoverable as damages (Articles 171, 264, 341 and 409, Code of Commerce). The indemnity for damages and injuries, in the absence of stipulation, shall consist in the payment of the legal interest (Article 1108, Civil Code; Quiros v. Tan-Guinlay, 5 Phil. 675). Whenever a

person, who is obliged by a declaration of nullity to return a thing, cannot return it because it has been lost, he shall return the fruits collected and the value which the thing had when lost, together with the interests from the same date. (Article 1307, Civil Code.)

(To be continued.)