

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

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(Concluded from the last issue)

CHAPTER IV

LIQUIDATED DAMAGES AND PENALTY

There are two excellent rules given for inferring that the parties intended the sum as liquidated damages: (1) Where the damages are uncertain, and not capable of being ascertained by any satisfactory and known rule, whether the uncertainty lies in the nature of the subject itself, or in the particular circumstances of the case; or (2) where from the nature of the case and the tenor of the agreement, it is apparent, that the damages have already been the subject of actual and fair calculation and adjustment between the parties (*Shreve v. Brereton*, 51 Pa. St. 175; *Schofield v. Preston*, 16 Phila. (Pa.) 100). As to whether a sum agreed to be paid as damages for the violation of an agreement shall be considered as liquidated damages or only as a penalty, is held to depend upon the meaning and intent of the parties as may be gathered from a full view of the provisions of the contract, the terms used to express the intent and the peculiar circumstances of the subject-matter of the agreement (*Morse v. Rathburn*, 42 Mo. 594, 97 Am. Dec. 359; *Perkins v. Lyman*, 11 Mass. 76, 6 Am. Dec. 158). If the intention of the parties can fairly be gathered from the instrument, the name given by the parties will have no controlling effect. The whole instrument must be considered (*Pennypacker v. Jone*, 106 Pa. St. 237; *Eakin v. Scott*, 70 Tex. 442, 7 S. W. 777).

Under the Spanish law there exist no definite rules by which to determine whether a sum named in the contract was intended as a penalty or liquidated damages. As a general rule, however, the intention of the contracting parties prevails in every case (*Azcárraga v. Rodriguez*, 9 *Phil. Rep.* 637; *Palacios v. Municipality of Cavite*, 12 *Phil. Rep.* 140; *Jimeno v. Gacilago*, 14 *Phil. Rep.* 16; *Reyes v. Limjap*, 15 *Phil. Rep.* 420). When the terms of the contract are clear and leave no doubt about the intention of the contracting parties, the literal sense of its clause shall rule; but when the words appear contrary to the evident intention of the contracting parties, the intention is to prevail (Art. 1281, *Civil Code*).

Under the Common law and the Spanish law, therefore, the intention of the contracting parties is the controlling factor in the determination of the question as to whether a sum named in the contract was intended as penalty or liquidated damages. It is to be noted, however, that under the Spanish law there exists some distinction in the manner in which the question presents itself. Agreements to do or to refrain from doing some particular acts, or in default thereof, to pay a given

sum of money, are frequently made under the Spanish law. These are alternative obligations and the sums stated in the contract can not be termed penalties. On the other hand, the agreement may bind the party absolutely to do, or to refrain from doing, the particular act, and then declare that if the promise is not performed, the party stipulating shall pay a sum of money as a penalty. This is properly termed a penalty.

Rule of construction in doubtful cases.—In doubtful cases, under the Common law, it is the tendency and preference of the law to regard a sum stated to be payable if the contract is not fulfilled as a penalty and not as liquidated damages (*Hamilton v. Overton*, 6 Blackf. (Ind.) 206, 38 Am. Dec. 136; *Foley v. McKeegan* 4 Iowa 1, 66 Am. Dec. 107).

Under the Spanish law, the intention of the contracting parties always controls. If there is doubt and the intention of the contracting parties cannot be ascertained, the contract shall be null and void (Art. 1289, *Civil Code*).

The American rule on this point seems to be more sound than the Spanish.

Damages capable of being ascertained.—Under the Common law, whatever the nature of the contract or the terms in which it has been expressed, the courts will, as a general rule, construe the damages as penalty where they are capable of being ascertained (*White v. Arleth*, 29 Fed. Case No. 17, 536; *Squires v. Elwood*, 33 Nebr. 126, 49 N. W. 939). While the parties are allowed to fix their own measure of damages, yet the amount fixed must be proportionate to the breach alleged. Where the damages provided for in the agreement are entirely inadequate and excessive, they will be construed as penalty rather than as liquidated damages (*Watts v. Sheppard*, 2 Ala. 425; *Clement v. Cash*, 21 N. Y. 253).

Under the Spanish law, if the obligation contains a penal clause, the penalty shall substitute the indemnity for damages and the payment of interest in case of failure to comply with the terms of the same, provided there is no stipulation to the contrary. The parties, however, are allowed to fix their own measure of damages (Art. 1152, *Civil Code*).

Breaches of contract.—Under the Common law, where a party has defaulted in the performance of some contract involving a stipulation of forfeiture, the courts as a general rule construe the same as liquidated damages rather than as a penalty, unless it can be seen from the evidence that the forfeiture is disproportionate to the breach (*Malojone v. Philadelphia*, 147 Pa. St. 416, 23 Atl. 628; *Lincoln v. Rock Granite Co.*, 56 Ark. 405, 19 S. W. 1056). Where a contract has been not to engage in a particular profession or business within a stated limit, such agreement is construed as liquidated damages rather than as penalty (*McCurry v. Gibson*, 108 Ala. 451, 18 So. 806; *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102). But if the damages claimed are unjust and excessive or the amount claimed is disproportionate to the damages that would result from the breach, they are construed as penalty (*Kelso v. Keid*, 145 Pa. St. 606, 33 Atl. 323; *Heatwole v. Gorrell*, 35 Kan. 692, 12 Pac. 135).

The doctrine of liquidated damages is as a general rule not applicable to contracts for the payment of money alone. In such cases the damages are construed as penalty (*Morris v. Tillson*, 81 Ill. 607; *Kuhn v. Myers*, 37 Iowa 351). Where the agreement contains several distinct and independent covenants upon which there may be several breaches, and one sum is stated to be paid upon the breach of performance, that sum will be considered as penalty and not liquidated damages (*Nash v. Hermosilla*, 9 Cal. 584, 70 Am. Dec. 676; *Smith v. Newell*, 37 Fl. 20 So. 249). In determining whether a sum claimed upon a breach of contract is liquidated damages or a penalty, the nature of the contract and the words and intention of the parties must be considered (*Gobble v. Linder*, 76 Ill. 157; *Yetter v. Hudson*, 57 Tex. 604). In almost all cases, however, such sums have been held as liquidated damages, for the damages sustained are uncertain and very difficult to estimate (*Fasler v. Beard*, 39 Minn. 32, 38 N. W. 755; *Barnes v. Clement*, 8 S. D. 421, 66 N. W. 810). The damages for breaches of contract of hire and lease have usually been construed as liquidated on the ground that they can be rarely estimated (*Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 18 S. W. 262; *Ryan v. Martin*, 16 Wis. 57). Where the agreement has been partially performed, it is the policy of the courts to regard the damages as a penalty, and allow the plaintiff to recover only such damages as he has actually sustained (*McGowan v. Ford*, 107 Cal. 177, 40 Pac. 231; *Shute v. Taylor*, 5 Metc. (Mass.) 61). In an action to recover liquidated damages there is no necessity to prove that actual damages have been suffered (*Stanley v. Montgomery*, 102 Ind. 102, 26 N. E. 213; *Gibson v. Oliver*, 158 Pa. St. 277, 27 Atl. 961). In such cases upon a failure to perform the contract the stipulated damages may be recovered with interest, unless the parties have expressly agreed upon a certain sum under the terms of their contract (*Mead v. Wheeler*, 13 N. H. 351; *Winch v. Mutual Ben. Ice Co.*, 86 N. Y. 618; *Hoagland v. Segur*, 38 N. J. L. 230).

Under the Spanish law, in cases of violations of contracts, the general rule is that when a penal clause has been agreed upon in a contract it is a lawful means of repairing losses and damages, and upon evidence of the violation of the conditions stipulated, the injured party is not obliged to prove losses and damages suffered, nor the extent of the same in order to demand the enforcement of the penal clause agreed upon (*Palacios v. Municipality of Cavite*, 12 *Phil. Rep.* 140). In a commercial contract containing an indemnification clause against the person who does not comply therewith, the party prejudiced may take legal steps to demand the fulfillment of the contract or the indemnification stipulated (Art. 56, *Code of Commerce*). Under the Spanish law, the parties are allowed to liquidate the damages for the non-performance of the contract, and the tribunal cannot depart from the sum thus fixed by the parties.

It must be admitted that the Common law rules on liquidated damages and penalties are more complete than those of the Spanish law. However, they are similar in so far as principles are concerned.

CHAPTER V

EXEMPLARY DAMAGES

"Punitive damages," "vindictive damages," and "exemplary damages" are synonymous terms. Such damages are only given in case where malice, fraud, or gross negligence enters into the cause of action (*Scott v. Donald*, 165 U. S. 58; *Cowen v. Winters*, 96 Fed. 929). They are usually given as punishment to the offender for the benefit of the community (*The Amiable Nancy*, 3 Wheat. 546; *Press Pub. Co. v. Monroe*, 73 Fed. 196).

The theory of punitive damages under the Spanish law is similar to that of the Common law. Under the former, as a general rule, damages cannot be recovered unless the tort is aggravated by evil motive, actual malice, and deliberate violence or oppression (*Macleod v. Philippine Publishing Company*, 12 *Phil. Rep.* 427; *Arts.* 326, 327, *Penal Code*). But no civil action for damages on account of malicious prosecution can be maintained unless the court, in acquitting the defendant of the criminal charge orders a criminal prosecution to be commenced against the complaining witness for false accusation (*Art.* 326, *Penal Code*; *Quiros v. Tan-Guinlay*, 5 *Phil. Rep.* 675).

Acts done in good faith.—Under the Common law, where an act has been done in good faith, although it may result in serious injury to the defendant, there can be no recovery of exemplary damages (*Lyles v. Perrin*, 119 Cal. 264, 51 Pac. 332; *Jackson v. Scheidt*, 14 La. *Ann.* 806).

Under the Spanish law, if the act which caused the damages has been done in good faith, no damages, other than compensatory, can be recovered (*Arts.* 1896 and 1897, *Civil Code*).

The Common law and the Spanish law rules on this point are similar. It goes without saying that this principle is sound. Nothing would be more just and equitable than to punish a man who, with deliberate malice and corrupt motive, should injure another in his person or in his property. On the other hand, it is equally just and plausible that a man, who in good faith has done an act which caused some damage to another, should not be required to pay exemplary damages. Experience tells us that human nature is frail, and that to err is human. By adverting to these high principles and to the most elementary notions of penal legislation, no sober and just judge would punish a man who, without evil intent and corrupt motive, has done an act which has caused some damage to another.

Negligent acts.—It is only in cases of gross negligence that the theory of exemplary damages will be applied (*Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 489). Where the negligence is accidental, or no wantonness or circumstances of malice enter into the wrong, there can be no recovery of exemplary damages (*Bierbach v. Goodyear Rubber Co.*, 14 Fed. 826; *Waller v. Waller*, 76 Iowa 513, 41 N. W. 307).

Under the Spanish law, in cases of ordinary negligence no exemplary damages can be recovered (*Art.* 1896 and 1897, *Civil Code*). If, however, the negligence

is so gross as to admit of the inference that it has been actuated by evil motives, fraud, or malice then exemplary damages can be recovered (Sec. II, Chap. II, Tit. II, Book II, *Penal Code*).

The principle prevailing at Common law on this point is similar to that obtaining in the Spanish law. It goes without saying that this principle is sound. While it is true that the conscience of man is a closed book wherein no man on earth could read, yet if the individual has acted with such gross negligence as would lead a sober man to believe that he was not acting in good faith, it is justifiable to presume that he is moved by evil motives, and deliberate malice. Hence, the advisability of imposing on him the corresponding penalty.

Actions for injuries to property.—As a general rule, under the Common law, exemplary damages will only be allowed where such injury to property is attended by circumstances of wilful fraud, malice, or gross negligence (*Stroud v. Smith*, 194 Pa. St. 502, 45 Atl. 329; *Inman v. Ball*, 65 Iowa 543, 22 N. W. 666). As to personal property, exemplary damages may be awarded in case of injury, seizure, or conversion, where such injury seizure, or conversion is attended with circumstances of aggravation (*The Amiable Nancy*, 3 Wheat, 546; *Inman v. Ball*, 65 Iowa 543, 22 N. W. 666). In cases of injuries to real property, exemplary damages are usually not allowed (*Stillwell v. Barnett*, 60 Ill. 210; *Carli v. Union Depot, etc. Co.*, 32 Minn. 101, 20 N. W. 89). However, where the wrongful act complained of is accomplished with certain circumstances of aggravation and is wantonly or recklessly committed, exemplary damages may be recovered (*Loftus v. Maxey*, 73 Tex. 242, 11 S. W. 272; *Craig v. Cook*, 28 Minn. 232, 9 N. W. 712).

Under the Spanish law, in the absence of corrupt motive, malice, or other circumstances of aggravation attending the act, no exemplary damages can be recovered for injuries to property, both real and personal (Arts. 1897, 451, 452 and 453, *Civil Code*). But when the act is tainted with fraud, malice, or violence exemplary damages can be recovered (Arts. 1896 and 454, *Civil Code*).

Actions for injuries to persons.—Exemplary damages are only awarded under the Common law in case of personal injury where the injury complained of is malicious or wanton, or the negligence gross. The act must partake of a criminal or wilful nature, and in the absence of evidence to that effect, the damages must be compensatory only (*Milwaukee, etc. R. Co. v. Arms*, 91 U. S. 489; *Beale v. Railway Co.*, 2 *Fed. Cas.* No. 1159). In case of railroad accident, in order to recover exemplary damages, there must be shown such an entire want of care as to amount to gross negligence (*Chattanooga, etc. R. Co. v. Liddell*, 85 Ga. 482, 11 S. E. 853; *Batterson v. Chicago, etc. R. Co.*, 49 Mich. 184, 13 N. W. 508).

Under the Spanish law, in cases of injuries which partake of the nature of a crime exemplary damages are assessed by way of penalty. A very common example would be the payment of indemnities to the family of the offended party or to the offended party himself (Arts. 49 and 113, *Penal Code*). In case of railway accident,

as a general rule, no damages other than compensatory can be recovered (Art. 14, *Railroad Law*, December 29, 1876). When the accident, however, is caused through reckless negligence, the act partakes of the nature of a crime or misdemeanor by reckless imprudence, and therefore exemplary damages may be recovered (Arts. 568 and 598, *Penal Code*).

The rules of the Common law on this point are substantially similar to those of the Spanish law. While it is unjust to punish innocent acts, yet when the acts are tainted with fraud, malice, or violence, they should be punished. Railroad companies should be very careful in the selection of their agents and servants. Their semi-public character demands that the public should be properly treated by them. The doctrine, therefore, holding railroad companies liable in exemplary damages for acts done by their agents in bad faith and with gross negligence is a warning to railroad companies and a security to the travelling public.

In actions ex contractu.—Under the Common law exemplary damages were almost universally denied in actions *ex contractu* (*Snow v. Grace*, 25 Ark. 570; *Hoy v. Grenoble*, 34 Pa. St. 9, 75 Am. Dec. 628). No more can be recovered as damages than will fully compensate the party injured (*Ryder v. Thayer*, 3 La. Ann. 149). There exists, however, an exception to this general rule in the case of a breach of contract to marry, when exemplary damages may be allowed (*Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Johnson v. Travis*, 33 Minn. 231, 22 N. W. 628).

Under the Spanish law, in actions arising out of contracts, exemplary damages cannot be recovered. The general rule is that no damages can be recovered other than those which will compensate the injured party (Arts. 1101, 1106, 1107, and 1108, *Civil Code*). When the violation of the contract, however, is aggravated by evil motives as to give the act the character of a crime or a misdemeanor, exemplary damages may be awarded. An example would be a violation of a contract amounting to the crime of *estafa* (Arts. 534 to 541, *Penal Code*). In cases of breach of promise to marry, no exemplary damages can be recovered. The offended party is only entitled to an indemnity for the expenses which he may have incurred by reason of the promise which has not been fulfilled (Art. 44, *Civil Code*).

In my opinion the Common law rule of damages in case of a breach of promise to marry is more sound than the Spanish rule. The former affords more security to the morals of the community, and gives more strength to contracts of marriage, one of the most sacred contracts known to the law.

In actions against common carriers.—Under the Common law, as a general rule where there is a breach of a contract on the part of the carrier on account of negligence on his part, and there are no circumstances to aggravate the case, exemplary damages will not be allowed (*Thomas v. Southern R. Co.*, 122 N. C. 1005, 30 S. E. 343; *Norfolk R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. 809). In case, however, the breach of the contract is attended with gross negligence, insult, or indignity, the passenger may recover exemplary damages for the injury sustained (*Morse v. Duncan*, 14 Fed. 396; *Alabama Great Southern R. Co. v. Sellers*, 93 Ala. 9, 30 Am. St. Rep. 17).

In actions against common carriers under the Spanish law, no damages other than compensatory damages can be recovered if the carrier is guilty of ordinary negligence (Arts. 361, 362 and 368, *Code of Commerce*). If the breach, however, is such as would lead a sober man to think that it was accompanied by fraud, gross negligence, or violence, it loses the character of a simple breach of contract and it acquires the nature of a crime or misdemeanor; in this case the carrier is liable for exemplary damages.

Liability of principal for acts of agent.—As to how far a principal is liable in exemplary damages for the acts of his agent under the Common law, is a question upon which there is a conflict of authorities. The better rule on this subject seems to be that a principal will not be held liable in exemplary damages for the acts of an agent, unless it be shown that he authorized or approved the act for which the exemplary damages are claimed (*Cleghorn v. N. Y. Cent. etc. R. Co.*, 56 N. Y. 44, 15 *Am. Rep.* 375; *Hagan v. Providence, etc. R. Co.*, 3 R. I. 88, 62 *Am. Dec.* 377); that he approved of, or participated in the wrong of which his agent has been guilty (*Kilpatrick v. Haley*, 66 Fed. 133; *Becker v. Dupree*, 75 Ill. 167); or that he has not exercised proper care in selecting his servants (*Henning v. Western Union Tel Co.*, 41 Fed. 864).

Under the Spanish law, as a general rule, the principal is liable for the acts of the agent done within the scope of his authority, and in so far as the agent has exceeded his power, if the principal has expressly or tacitly ratified the same (Art. 1727, *Civil Code*; *Tuason v. Orozco*, 5 *Phil. Rep.* 596). In marine accidents, the owners and agents of a vessel causing the loss of another vessel by collision are not liable beyond the value of the vessel itself causing the collision and other things appertaining thereto (Art. 837, *Code of Commerce*; *Philippine Shipping Co. v. Garcia Vergara*, 6 *Phil. Rep.* 281).

Liability between joint defendants.—Under the Common law, where the liability is joint as to the actual damages sustained, exemplary damages can, as a general rule, only be awarded against those who participated in or contributed to the malicious act or the gross negligence complained of (*Burns v. Campbell*, 71 Ala. 271; *Nightingale v. Scannell*, 18 Cal. 315); but where all have acted in concert and are equally guilty they are all liable to the same extent (*Hair v. Little*, 28 Ala. 236; *Lombard v. Batchelder*, 58 Vt. 558, 5 Atl. 511).

Under the Spanish law, the principals, accomplices and accessories of a crime are liable *in solidum* for their quotas, each within their respective class (Art. 125, *Penal Code*). It would, therefore, seem to follow that, where the liability is joint as to actual damages and the assessment of punitive damages is proper against either of the joint defendants, exemplary damages may be awarded against all or either of the joint defendants.

Liability of public officers.—Under the Common law, where a public official has acted in good faith and there is no evidence in his acts of fraud or malice,

exemplary damages are not awarded (*Tracy v. Swatwout*, 10 Pet. 80; *Neese v. Radford*, 83 Tex. 585, 19 S. W. 141). If, however, an officer in the exercise of his official duties oversteps and abuses his powers and is guilty of oppression under color of his office, exemplary damages will be allowed (*Strickler v. Yager*, 29 Fed. 244; *Willis v. Miller*, 29 Fed. 238).

Under the Spanish law, the liability of judicial officers is limited to the indemnification of damages to private persons when in the exercise of their function they violate the laws through negligence or inexcusable ignorance (Art. 260, *Organic Law of the Judiciary*). This liability, however, is limited to cases in which a failure on the part of the judge to perform some ministerial functions prescribed by law, as to which he has no judicial discretion, causes damage to a person (*Alzua v. Jonnson*, 21 *Phil. Rep.* 308). This doctrine applies to the Governor-General (*Forbes v. Chuo Tiaco and Crossfield*, 16 *Phil. Rep.* 534). If the officers, however, maliciously, criminally and intentionally exceeds his authority and abuses his powers, he is liable for exemplary damages (Arts. 194 to 218, *Penal Code*).

A critical examination of the provisions of the Spanish and the American decisions on this point would disclose that the rules as to the liability of judicial officers under the Common law and the Spanish law jurisdictions are identical. Both judicial systems recognize the liability of judicial officers for wrongs committed by them in the performance of purely ministerial functions. It is hardly necessary for me to state here that this doctrine is sound.

Liability of corporations.—Under the Common law, the authorities are not in accord as to the question whether a corporation can be held liable in exemplary damages for the acts of their servants. The better rule seems to be that where a wrong is committed in the ordinary course of the servant's duty, and is committed wilfully and wrongfully, the corporation can be held liable as in ordinary cases of tort (*Cowen v. Winters*, 96 Fed. 929; *Louisville, etc., R. Co. v. Garrett*, 8 Lea, 438, 41 *Am. Rep.* 640).

Under the Spanish law, corporations being legal entities which act only through their agents, they are liable in exemplary damages for acts of their agents and servants when said acts are committed wilfully and wrongfully in the ordinary course of the servants' duties (Sentence of the Supreme Court of Spain of January 3, 1887). In default of persons criminally liable, corporations are civilly liable for crimes committed within their establishments (Art. 17, *Penal Code*). This liability, however, is only subsidiary, and they become liable only in default of the persons criminally liable (Art. 20, *Penal Code*).

Acts punishable as crimes.—As to whether exemplary damages may be recovered for acts punishable as crimes under the Common law the courts have been divided in their opinions. The weight of authority seems to be that they may be recovered (*Brown v. Evans*, 17 Fed. 912; *Brown v. Swineford*, 44 Wis. 282, 28 *Am. Rep.* 582; *Bar v. Moore*, 87 Pa. St. 385).

Under the Spanish law, all persons criminally responsible for a crime or misdemeanor are also civilly responsible (Art. 17, *Penal Code*; *Springer v. Odlin*, 3 *Phil. Rep.* 344; *Varela v. Finnick*, 9 *Phil. Rep.* 482; *Almeida et al. v. Abarroa*, 8 *Phil. Rep.* 178; *United States v. Guysayco*, 13 *Phil. Rep.* 292). But in order to recover reparation for damages and indemnity for losses suffered, the same must have been caused by the act itself (*Almeida v. Abarroa*, 8 *Phil. Rep.* 178; Sentence of the Supreme Court of Spain of January 3, 1877).

Amount of damages.—Under the Common law, in assessing the amount of exemplary damages to be awarded, the jury takes into consideration the malice or wantonness of the act complained of, and all the particular circumstances which go to aggravate the case (*Bradman v. Goldsmith*, 48 Vt. 403; *Smith v. Wunderlich*, 70 Ill. 426); but the damages awarded should bear some reasonable proportion to the real damages sustained (*Burk Nett v. Lanata*, 15 La. Ann. 337; *Alabama, etc. R. Co. v. Frazier*, 93 Ala. 45, 95 So. 303).

Under the Spanish law, the civil responsibility incurred by the accused, consequent upon his criminal liability, are declared and fixed by the courts in the manner prescribed by law (*United States v. Guy-Sayso*, 13 *Phil. Rep.* 292; Art. 122, *Penal Code*). The Court, in assessing the amount of damages, takes into consideration the price of the thing and its special value to the injured party (Art. 121, *Penal Code*). The Court further takes into consideration the circumstances attending the case, inasmuch as exemplary damages are assessed as penalty, and in the imposition of penalties, courts always consider the circumstances surrounding the acts complained of (Art. 77, *Penal Code*).

Survival.—As exemplary damages are given under the Common law as a punishment to the wrongdoer and not as compensation, there can be no survival after the death of the guilty party (*Hewlett v. George*, 68 Miss. 703, 9 So. 885; *Sheik v. Hobson*, 64 Iowa 146, 19 N. W. 875).

Under the Spanish law the action for the recovery of exemplary damages survives the death of the guilty party. The action to demand restoration, reparation, and indemnification for losses or damages descends to the heirs of the person injured, and the obligation to make the restoration or reparation for damages and indemnification for losses or damages descends to the heirs of the person liable (Art. 123, *Penal Code*). Unlike criminal actions, actions for the recovery of damages are not extinguished by the death of the guilty party (Arts. 115 and 116, *Law of Criminal Procedure of Spain*). However, the action, if it exists at all, is lodged in the surviving next of kin and not in the executor or administrator (Arts. 657 to 661 and 924, *Civil Code*; Arts. 119 To 126, *Penal Code*; to *Guioc Co. v. Del Rosario*, 8 *Phil. Rep.* 546).

The rule therefore of exemplary damages on this point prevailing in the Common law is opposed to those prevailing in Spanish law jurisdictions. Under the former no action for exemplary damages can survive the death of the guilty party, the

theory being that, as exemplary damages are given as punishment of the wrongdoer, there can be no survival after the death of the guilty party. Under the latter, on the other hand, such actions survive after the death of the person liable; on the theory that civil actions arising from crimes or misdemeanors are given to the heirs of the offended parties.

The Spanish law on this point seems to be founded on sound principles of justice and equity. If a person, through corrupt motives, has damaged another, said person should be required to pay exemplary damages. His subsequent death should not be allowed to interfere with the action, for at any event, whether the wrongdoer dies or lives, the damage is done and the law should have it repaired with the offender's property. The unjust slayer should be required to defray the charges of physicians and surgeons, and to indemnify those persons whom the deceased was, by a full and perfect duty, bound to maintain. To deny this remedy to the heirs of the deceased offended party would be unjust.

Matters in mitigation.—Exemplary damages being allowed, under the Common law, because of the malicious motive which prompted the wrongdoer's act, if the plaintiff may enhance the damages by showing circumstances of aggravation, the defendant may also give such evidence as he may have tending to reduce the damages (*Millard v. Brower*, 35 N. Y. 297). So he may show that he acted in good faith and with no malicious intent (*Livingston v. Burroughs*, 33 Mich. 511); that he did acts of reparation or restoration which lay in his power (*Tupp v. Grouner*, 60 Ill. 474; *Eisenhart v. Ordean*, 3 Colo. App. 162, 32 Pac. 493); or that he acted under the advice of a counsel (*Shores v. Brooks*, 81 Ga. 468, 8 S. E. 429; *Devenny v. The Mascotte*, 72 Fed. 684).

The nature of exemplary damages, under the Spanish law, being that of a penalty, the plaintiff may enhance the damages by showing aggravating circumstances and the defendant may also present evidence to mitigate them. The circumstances surrounding the case have very much to do with the fixing of the amount of the damages (Art. 77, *Penal Code*).

The Spanish law rule and that of the Common law on this point are similar. It goes without saying that this rule is sound. Litigants should be given as much liberty as possible to adduce whatever evidence would favor their respective sides of the case.

CHAPTER VI MEASURE OF DAMAGES

The general rule for the measure of damages under the Common law rests upon the principle of compensation to the injured party for all the losses he has sustained. This should, however, be enforced with the least burden to the guilty party; and it should be consistent with the idea of compensation, and the duty of the injured party to mitigate the injury according to the opportunities within his reach (*McDonald v. Una Timber Co.*, 88 Tenn. 38, 82 S. W. 420). The measure of damages is governed, not by a fanciful price, but by the actual loss sustained.

The subject of the measure of damages is one on which very few rules have been laid down by the Spanish courts and legislators. As a general rule, however, it may be stated that the wrongdoer is bound to repair the damage done (Law 3, Tit. 15, Part 7; Sentence of the Supreme Court of Spain of February 17, 1874). The reparation is made by means of indemnity. However, the measure of damages is not governed by fanciful rules of price; every judgment for damages, from whatever source that may arise, must rest upon satisfactory proof of the existence and amount of the damages alleged to have been suffered (*Sanz v. Lavin*, 6 *Phil. Rep.* 299; Sentence of the Supreme Court of Spain, November 13, 26, 1895; December 7, 1896; September 30, 1898; *Mercado v. Abangan*, 10 *Phil. Rep.* 676; *Fabios v. Villa-Agustin*, 18 *Phil. Rep.* 336).

The general principles governing the measure of damages under the Spanish law do not differ in substance from those prevailing at Common law. Both systems uphold the universal principle, adopted in the jurisprudence of all the civilized world, that every act of commission or omission which in a judicial sense causes damage to another, imposes a legal obligation on him by whose fault it has happened to repair the damage done.

For injuries to persons.—Under the Common law, in actions for personal injuries the law does not attempt to fix any rule for the measure of damages. The damages recoverable are dependent upon the circumstances of each particular case, and although the discretion of the jury must be depended upon, the amount of recovery must be based on evidence (*Kenyon v. Gilmer*, 131 U. S. 22; *Western Union Tel. Co. v. Simpson*, 73 Tex. 422, Ill. S. W. 385).

Under the Spanish law, in actions for injuries to persons no definite rule as to the measure of damages has been laid down by the courts of either Spain or the Philippine Islands. The assessment of the damages is left to the discretion of the trial court which, in determining the amount thereof, has to consider the circumstances attending the commission of the act. Doctor's charges and hospital bills are recoverable (*Marcelo v. Velasco*, 11 *Phil. Rep.* 287).

Under both the Common law and the Spanish law the assessment of the amount of damages is largely left to the discretion of the jury and the trial court respectively. I think that much discretionary power should not be given judges and juries. Some definite rules should be laid down by which every judge's decision or jury's verdict should be guided. The judge and the jurors are men, and as such have passions which may be influenced by the tide of events. I do not, however, believe in the wisdom of depriving the judge and the jury of all discretionary powers, for it is impossible to lay down rules, which will cover all the cases which may arise in the future. However, I believe that the judge and the jury should be required to make their decision conform to certain well defined rules of law.

Physical and mental suffering.—Under the Common law, the physical pain and mental suffering undergone by the plaintiff as a result of the injury inflicted upon

him may be taken into consideration in estimating the damages in cases of injury to persons (*Wabash, etc. R. Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661; *Russell v. Columbia*, 74 Mo. 480, 41 *Am. Rep.* 325). But in order to warrant recovery for mental suffering a personal injury must have resulted and the mental anguish must be the direct, necessary and proximate result of the physical injuries sustained (*Godeau v. Blood*, 52 Vt. 251, 36 *Am. Rep.* 751; *Hall v. Manson*, 90 Iowa 585, 58 N. W. 881). In actions for personal injuries, compensation is not limited to actual pain and suffering before the trial, but extends to such future suffering as must necessarily result from the injury inflicted (*Washington, etc. R. Co. v. Harmon*, 147 U. S. 571; *Eddy v. Wallace*, 49 Fed. 801). But only such future damages can be recovered as the evidence makes reasonably certain will necessarily result from the injury sustained. (*Lake Shore, etc. R. Co. v. Johnson*, 135 Ill. 641, 26 N. E. 510; *Cleveland, etc. R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836, 54 *Am. Rep.* 272).

Under the Spanish law no damages can be recovered for any pain suffered by an injured person at the time or subsequent to the accident causing the personal injury (Art. 1902, *Civil Code*; *Marcelo v. Velasco*, 11 *Phil. Rep.* 287; sentence of the Supreme Court of Spain of December 6, 1882 (27 *Jurisprudencia Criminal*, 414). In estimating, therefore, the damages in cases of injury to person, physical pain and mental suffering are not considered.

On this point of the law of damages we find some conflict between the Common law and the Spanish law. Under the former, physical pain and mental suffering are important factors in determining the amount of damages. This is based on the theory that while they cannot be measured in money, yet it is certain that they result from the injury inflicted. Under the Spanish law, on the other hand, physical pain and mental suffering do not constitute an element of damages; the theory being that it is impossible to measure in money the pain and suffering which a person who is injured has undergone as a consequence of the injury inflicted on him. In my opinion the Spanish rule on this subject is more sound than the Common law rule. The value of honor, feelings, or sensation of a person cannot be appraised in money; it is impossible to fix an amount of damages the payment of which would in any way compensate the sufferings experienced by an injured person. All sums which the judge or the jury may award are purely imaginary and lack foundation in reality. The doctrine allowing recovery for mental suffering and physical pain is contrary to reason and public policy. It grants recovery for a thing which may not exist at all, besides opening the way to fraud and perjury. Men are not endowed by nature with the same strength of feelings. 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 received physical injuries.

Loss of time.—Under the Common law, a person who has, by reason of personal injuries inflicted upon him, lost time from his ordinary employment is entitled to damages therefor (*Braithwaite v. Hall*, 168 Mass. 38, 46 N. E. 398). In case of per-

sonal injuries the party injured is entitled to medical expenses incurred (*Graeber v. Derwin*, 43 Cal. 495; *Sherwood v. Chicago, etc. Railroad Co.*, 82 Mich. 374; 46 N. W. 773). The expenses for the nursing and attendance upon the injured party, so far as the same is reasonable and necessary, shall also be taken into consideration in estimating the damages (*Chicago, etc. R. Co. v. Holland*, 122 Ill. 461, 13 N. E. 145; *Haes v. O'Reilly*, 126 Pa. St. 440, 17 Atl. 642).

Under the Spanish law a party injured is entitled to claim damages for the loss of time and medical expenses and treatment incurred by him by reason of the personal injuries he has received (*United States v. Catequista*, 1 *Phil. Rep.* 537; Art. 7, *Penal Code*). With regard to the offense of physical injuries and other offenses against persons, the civil liability is almost always limited to an indemnity for damages to the party aggrieved for the time during which he was incapacitated from work (*Viada, Commentaries on the Penal Code*, Vol. 1, p. 539).

Age, condition in life, and earning capacity.—Under the Common law, the jury in estimating the damages takes into consideration the age (*Smith v. Middleton*, 23 Ky. L. Rep. 2010, 66 S. W. 388; *Russell v. Columbia*, 74 Mo. 480, 41 *Am. Rep.* 325), the ordinary business of the plaintiff and his manner of living (*Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378, 11 So. 733; *Southern Pac. Co. v. Hall*, 100 Fed. 760), and the earnings of the plaintiff at his trade or profession before and after the injury was inflicted (*Southern Pac. Co. v. Hall*, 100 Fed. 760; *Parshall v. Minneapolis, etc. R. Co.*, 35 Fed. 649).

Under the Spanish law, the courts, in estimating the amount of damages, are bound to include, not only those losses suffered by the injured party himself, but also those suffered by his family or by a third person dependent upon him for support (Art. 122, *Penal Code*). *Viada*, in his *Commentaries on the Spanish Penal Code*, in speaking of Art. 121 of the *Penal Code* of Spain, Section 122 of our *Penal Code*, says with regard to this point:

“The estimation of damages are to be made by the court, particularly taking into consideration the standing in society of the aggrieved party and his family. For instance, in a case of *lesiones*, if the aggrieved party is a simple laborer, the indemnity shall be fixed at the amount of wages of a laborer in the locality where the act was committed for the period during which the former was incapacitated from labor. If the aggrieved party be a lawyer or a physician, the indemnity shall be increased in proportion to the income which they respectively obtain from their profession. In case of homicide or murder, wherein the material consequences extend to the whole family of the deceased, the court shall, in fixing the amount of indemnity, take into consideration the greater or lesser number of children left behind by the deceased, their ages and capacity to earn their living” (*Viada, Commentaries on the Penal Code*, Vol. 1, p. 546).

I find no substantial difference between the Common law rules on this point and those of the Spanish law, except that the former is more developed than the latter. I think the rule is sound.

Permanent injuries.—Under the Common law, in assessing the damages, the jury may take into consideration whether the injury complained of is permanent

or merely temporary in its nature and then award damages accordingly (*Denver, etc. R. Co. v. Harris*, 122 U. S. 597; *Sunney v. Halt*, 15 Fed. 880). But to justify the assessment of damages for permanent disability, it must appear that said disability is reasonably certain to result from the injury complained of (*Ohio, etc. R. Co. v. Cosby*, 107 Md. 32; 7 N. E. 373; *Elkhart v. Ritter*, 66 Md. 136).

Under the Spanish law recovery for damages could be allowed on account of permanent disability provided it be proved (*Marcelo v. Velasco*, 11 *Phil. Rep.* 267). The Supreme Court of the Philippine Islands, in the case just cited, said:

"The fact that in the United States damages are allowed in this class of cases for pain and suffering cannot affect the resolution of the question here.

"This question has never been before considered by this court. In the case of *Rakes v. The Atlantic Gulf and Pacific Co.* (7 *Phil. Rep.* 359), nothing was said with reference to this point, and the damages there allowed by the court below and by this court might well have been given by reason of the permanent injury which the plaintiff suffered, he having lost a leg as a result of the accident."

This is a mere dictum. However, I think it is the Spanish law on this subject.

Injuries to personalty.—Under the Common law, the jury, in measuring the damages for injury to personal property takes into consideration the character of the injury and the circumstances under which it was committed (*Western, etc. R. Co. v. McCauley*, 68 Ga. 818). In case of loss or destruction through the negligent act of another, the measure of damages is the reasonable value of the property at the time of the destruction (*Bourke v. Whiting*, 19 Colo. 1, 34 Pac. 172; *Ripley v. Miller*, 46 N. C. 479, 62 *Am. Dec.* 177); and in some instances interest is allowed for the use of the property (*National Steam Nav. Co. v. Dyer*, 105 U. S. 24). The general rule adopted as to the measure of damages for injuries to personal property is the difference between its value before and after the injury (*Krebs Mfg. Co. v. Brown*, 108 Ala. 727, 6 So. 352), although in some cases the rule of restoration has received the sanction of the courts (*Harvey v. Sides Silver Min. Co.*, 1 Nev. 539, 90 *Am. Dec.* 510; *Anderson v. Miller*, 96 Tenn. 35, 94 *Am. St. Rep.* 812).

As to the measure of damages for injuries to personal property, there is not as yet any definite rule laid down by the Spanish courts. The matter is largely left to the sound discretion of the judge, who in determining the amount of damages, should take into consideration the price of the thing and its special value to the aggrieved person (Art. 121 *Penal Code*; *Marcelo v. Velasco*, 11 *Phil. Rep.* 287; *United States v. Guy-Sayco*, 13 *Phil. Rep.* 292, 296). The amount of damages is fixed by the court, and in so doing it should take into consideration the price of the thing, with the data which the aggrieved party may furnish, and the value which the expert appraisers may give to the thing (Art. 121, *Penal Code*; 1 *Viada, Commentaries on the Penal Code*, 545).

There is no doubt that the Common law rules on this point are far more developed than those of the Spanish law. I do not find, however, any substantial difference between the two systems.

Injuries to real property.—As a general rule under the Common law the measure of damages in actions for injuries to real property is the difference in value before and after the injury to the premises (*Chipman v. Hibberd*, 6 Cal. 162; *Pacific Express Co. v. Laskes Real Estate Association*, 81 Tex. 81, S. W. 792). Some courts, however, have considered the measure of damages as the difference in the rental value of the property injured (*Hull v. Chicago, etc. R. Co.*, 65 Iowa 713, 22 N. W. 940; *Elder v. Lykens Valley Coal Co.*, 157 Pa. St. 490, 27 Atl. 545). In some jurisdictions the costs of repair or restoration has been adopted as the measure of damages (*Harrison v. Kiser*, 79 Ga. 588, 4 S. E. 320; *Graessle v. Carpenter*, 70 Iowa 166, 30 N. W. 392).

Under the Spanish law, in an action for injuries to real property, the plaintiff is entitled to recover as damages a reasonable compensation for the wrongful use and occupation of the premises, and the legal measure of damages is the fair and reasonable rental value of the property (*Spanevohn v. Fisher*, 2 *Phil. Rep.* 676).

I find no substantial difference between the rules prevailing in the Common law jurisdiction on this point and those obtaining in the Spanish law jurisdiction. It must be noted, however, that the former are more developed than the latter.

For breach of contract.—Under the Common law, formerly a discretion was allowed the jury in fixing the damages, but under the present practice the measure of damages for breaches of contracts is a question of law to be determined by legal rules. As a general rule, where the parties have fixed the measure of damages in the contract itself, such measure will usually be adopted (*Chicago v. Sexton*, 11 Ill. 230, 2 N. E. 263; *Nash v. Hoxie*, 59 Wis. 384, 18 N. W. 408). But in the absence of stipulation, the measure of damages in case of breach of contract, where there is no bad faith or fraud, "should be such as may fairly and reasonably be 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 both parties at the time they made the contract, as the probable result of the breach of it" (*Hadley et al. v. Baxendale et al.*, 9 Exch. 341; *Cockburn v. Lumber Co.*, 54 Wis. 619, 12 N. W. 49; *Primrose v. Western Union Tel. Co.*, 154 U. S. 1).

In the Spanish law, when a penal clause has been agreed upon in the contract the measure of damages in case of non-fulfillment of the obligation is the sum agreed upon, and the injured party is not obliged to prove the losses and damages he has suffered (Arts. 1152 and 1255, *Civil Code*; *Palacios v. Municipality of Cavite*, 12 *Phil. Rep.* 140). In case of non-fulfillment of an obligation to pay money, and there is no stipulation to the contrary, the measure of damages, shall be the interest agreed upon, and, in the absence of an agreement as to the interest, the legal interest shall be the measure of damages (Art. 1108, *Civil Code*; *Quiros v. Tan Guinlay*, 5 *Phil. Rep.* 675; *Chamber of Commerce v. Pua Te Ching*, 14 *Phil. Rep.* 222; *Tin Fian v. Tan*, 14, *Phil. Rep.* 126). In case of breach of warranty in sale of goods, the measure of damages is not confined to the difference in value of the thing

as warranted and as it proves to be, but includes such consequential damages as are the direct, immediate and probable result of the breach (*Rodriguez v. Findlay and Co.*, 14, *Phil. Rep.* 294).

For conversion of personal property.—As a general rule under the Common law in case of wrongful conversion of property to the use of another, the measure of damages is the value of the property at the time of the conversion, together with the interest from the date of the detention (*Dowe v. Milwaukee Nat. Exch. Bank*, 91 U. S. 618; *Robinson v. Hurley*, 11 Iowa 410, 79 *Am. Dec.* 479). Where the property converted is of fluctuating value, the rule of "higher intermediate value" is adopted for the measure of damages. Under this doctrine a party is allowed the highest value of the property between the time of conversion and the time of trial (*Lobdell v. Stowell*, 51 N. Y. 70; *Scott v. Rogers*, 41 N. Y. 676).

Under the Spanish law, in case of wrongful conversion of personal property, the measure of damages is the value of the property converted in case the same be not finally returned (*United States v. Guzman*, 1 *Phil. Rep.* 138; *United States v. Singuimoto*, 3 *Phil. Rep.* 176, 182; *United States v. Anacleto et al.*, 3 *Phil. Rep.* 172; *United States v. Leyva*, 10 *Phil. Rep.* 43).

The measure of damages under the Spanish law in case of conversion is the value of the property as appraised by experts. I do not know whether this value is the value of the property at the time of the conversion or the value at the time of the trial. It can, however, be presumed that it has reference to the value of the property at the time of its conversion, for the reason that it is fixed by the experts in view of the defendant's criminal act and its concomitant circumstances. The "higher intermediate value" doctrine in vogue in Common law jurisdictions, is not, therefore, known to the Spanish law. Under the latter, whether the value of the property fluctuates or not, is of no consequence.

There is no doubt that the Common-law rule on this point of the law of damages is more equitable than that of the Spanish law. The Spanish doctrine would, perhaps, be sufficiently just during those days of retarded progress when the value of things remain stationary for years; but in this age of progress and civilization, when the ever-increasing wave of commerce changes at every hour the price of things in the market, the Spanish rule as to the measure of damages in case of conversion of personal property falls short of accomplishing justice. A thing might have an insignificant value at the time it was converted into one's use, and yet at the time of the trial be worth a significant sum which, had the offender not converted the thing into his own use, would have inured to the benefit of the owner.

CONCLUSION

In concluding this work I desire to state that, after a careful study of the law of damages under the Common law and the Spanish law systems, I have found out that, while in certain points the Spanish law excels the Common law, yet, taken as a whole, the latter is far more developed and complete than the former.