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A COMPARATIVE STUDY OF THE STAGES IN THE LIFE OF A CONTRACT UNDER THE SPANISH LAW AND THE AMERICAN LAW

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(Continued from January number)

E. By Impossibility of Performance under Spanish Law.

(1) As regards the parties.—This way of extinguishing the obligations takes place when the debtor is found physically and legally incapacitated in doing what he promised. The physical impossibility arises principally by the death of the debtor, in prestations to do which are very personal in him, or by the death of the creditor in those prestations of the same nature in respect to said creditor. In both cases, the obligation and the right are extinguished respectively, because they are personal. Also it may arise from a fortuitous event or by a force majeure, or from certain acts which depend upon the mental and physical capacity of the debtor, as when he is incapacitated to fulfill the prestation by a sickness, or by other external independent causes, etc. (8 Manresa 347). The legal impossibility may arise from a direct way, as when the law prohibits the execution of the act agreed upon for being considered immoral, illicit, illegal, untenable, or for some other cause or reason; and from an indirect way, as when the law without prohibiting the execution of what is agreed upon, it makes it impossible, by imposing upon the obligor other greater duties which result inconsistent with the fulfillment of the obligation. The legal impossibility is extended not only to the prohibition of a law as such but also to the rules or orders of the authorities such as municipal ordinances, etc. (8 Manresa 345.)

(2) As regards the subject-matter.—This extinguishment takes place by the loss or destruction of the thing, the object of the contract.

Concept.—"The loss of the thing due means, aside from the destruction of the thing due, its disappearance by loss, theft or robbery, i. e., its non-existence in the hands of the obligor or when, thru any cause, the compliance of the obligation becomes impossible. A thing is understood as lost, when it perishes, goes out of commerce or disappears in such a way that its existence is unknown or it cannot be recovered." (Article 1122, No. 2 Civil Code; see 8 Manresa 335-338.) But to know when

the obligations are extinguished by this cause it is necessary to distinguish the things which are its object, and the part which the debtor had in the loss. The object of the obligations may be determined or undetermined.

Rules about the loss of the things determined.—When the things which may be owed were certain and determined as, for example, an animal, and be dead or lost, as in this case, it lacks the object of the contract the obligation ought to cease. (See Crame Sy Pangco vs. Gonzaga, 10 Phil. 646.) But in order to produce this effect, it is necessary that it should be lost or be dead without the fault of the debtor and before the latter should become guilty of delay (Article 1182); because if this might happen with the fault or omission of the debtor, if he cannot return the th ing lost he has, however, to pay its appraised value. (Article 1185, Civil Code.) It is presumed that the thing was lost thru the fault of the debtor and not through fortuitous event, when the thing was lost in his possession. (Article 1183, Civil Code.) The reason for this presumption is obvious, for the person in whose possession the thing is found, is the only person called upon to look after it, and use the necessary means for its care and preservation. By this fact, if it is lost in his possession it shows his negligence or his fault unless the contrary is proven. (See Palacio vs. Sudario, 7 Phil. 275.) The same would happen when it is lost through fortuitous event and the debtor would have been guilty of delay, as, for example, not giving it back at the day designated for its delivery, or in the fault of this, after the creditor has demanded for it. (Articles 1182 and 1096, part 3, Civil Code.) The same would happen if the obligor had promised to deliver the same thing to two or more different persons. (Article 1096, part 3, Civil Code.) But when the debt for a certain and specified thing originates from a crime or fault, the debtor shall not be exempted from the payment of its value, whatever the cost of the loss may be unless, when after he has offered the thing to the person, who should have received it, this person without reason had refused to accept it. (Article 1185, Civil Code.)

Rules about the loss of the things undetermined.—If the thing owed be generic, as, for example, if the debtor be only obligated to deliver one or many horses, a sum of money, etc., the obligation will not be extinguished until its delivery. The reason of this is based upon the fact that the impossibility of the delivery which exists in that of a determined thing, does no longer exist because the kind, as the jurists say, never perishes, *Genus nunquam perit*, unless the transaction refers to all the things included in the class indicated. (3 Viso 123; see 8 Manresa 338.)

Effect.—The loss of the thing due will produce the effect of extinguishing the obligation, if the debtor is exempted from the following requisites:

(1) That the thing was not lost thru his fault;

(2) That he was not guilty of delay;

(3) That he had not promised to deliver the same thing to two different persons. (Articles 1182 and 1096, part 3, Civil Code.)

Once the obligation is extinguished through the loss of the thing, all the actions

which the debtor might have against third persons by reason thereof will be transmitted to the creditor. (Article 1186, Civil Code.)

(3) As regards the obligation itself.—Another way of extinguishing the obligation by reason of impossibility of performance takes place when the obligation cannot be fulfilled for having the debtor succeeded in the rights of the creditor, or the latter in those of the debtor (merger); or because the law has declared it as not-existing through vices or latent defects (nullity and rescission); or for having fulfilled the conditions which have been imposed to terminate the effect of the contract (resolutory condition); and finally because the law considers it as fulfilled for having elapsed a sufficient time within which the creditor could demand for its fulfillment but he failed to do so (prescription). Let us discuss each one of these modes briefly.

(a) Merger. (Confusion of Rights.)

Concept.—Confusion is "the meeting in one person of the qualities of obligee and obligor in respect to the same obligation." (IV Sanchez Roman 421.)

Causes.—The confusion can take place either by virtue of universal title, as when the debtor succeeds the creditor or the latter, the debtor; or a third person, the two (the debtor and creditor); or either by virtue of a particular title, as when the debtor acquires the credit through another cause other than inheritance and can take place either between the principal debtor and his creditor or between the latter and the surety of the debtor, or between the creditor and some of the joint debtors. Through either of the titles and between either of the persons the confusion may have taken place, it will extinguish the obligation (article 1192, Civil Code), but observing the following rules:

Rules.—(1) In order to extinguish the debt when the qualities of the debtor and creditor through title by inheritance are in the same person, it is required that the inheritance be not accepted with the benefit of inventory, (Article 1192, part 2, Civil Code). It seems, however, that this part of article 1192 is no longer in force as decided in the case of Suiliong & Co. vs. Chio-Taysan, 12 Phil. 13; see section 729, Act 190;

(2) That the confusion which has taken place in the person of the debtor or of the principal creditor, accrues for the benefit of the sureties, because the obligations of the latter being accessories cannot subsist when the principal has extinguished, just as the contrary, that which takes place in the person or any surety, for having succeeded the debtor, or the latter the surety, will not extinguish the principal obligation. (Article 1193, Civil Code; 8 Manresa 387; Article 1848, Civil Code.)

(3) That which takes place in the person of the creditor who inherits from one of the several debtors or in the person of the one of these who succeed the common creditor, does not extinguish the common debt but the portion pertaining to the creditor or debtor in whom the confusion might take place. (Article 1194, Civil Code.) But if the confusion takes place in the person of the creditor who succeeds

one of the joint debtors or in the person of one of those who succeed the common creditors, extinguishes the obligation. (Article 1143, Civil Code.)

Revocation of Confusion.—This revocation can take place: (1) When by a cause subsequent to the act which produces it, this ceases to exist. Such would be when the creditor being the heir of his debtor, the will be declared subsequently null and void;

(2) When the confusion be declared invalid by virtue of a cause previous or simultaneous to the act which produces the same. Thus, when the heir of his debtor after the acceptance of the inheritance, should ask for the revocation or rescission of his acceptance by reason of fraud.

In these cases, the obligations are revived as if the confusion had taken place. (IV Sanchez Román 422; 8 Manresa 380.)

Effect of Confusion.—The effect of confusion is that the obligation is extinguished, because its enforcement becomes impossible and because its purpose has been fulfilled. The confusion makes impossible the exercise of the rights, because it takes away the plurality of the persons or subjects, essential characteristics of the obligation, merging in one person and because it is an absurd thing to conceive of the demand of one person against himself. (8 Manresa 378.)

(b) Rescission and Nullity.

Concept and Differences.—The action for nullity takes place when the contract lacks one of the essential requisites necessary for its validity, and that for rescission, when the contract which appears valid for having observed the formalities of the law, contains some vice or defect which may render its effects ineffective, at the instance of either party, especially of the injured one; or when having no vice at all but some stipulation or condition was not complied with. (3 Viso 136; IV Sanchez Román 343.) From the foregoing it is inferred that the action for rescission can only be based upon valid contracts, which for reasons of justice and equity they are allowed by law to be rescinded, but not upon contracts per se null and void, due to the fact that an act which does not legally exist can not be rescinded. Hence the reason why they are regarded as means of extinguishing the obligations.

Nullity. What are null obligations.—The contract wherein the essential requisites of consent, object and cause are present, can be declared null and void whenever they contain some of the vices which invalidate the same. (Article 1300, Civil Code.) According to this, all the obligations which can not have any legal effect either by reason of the persons, subject of the contract, or for lack of consent, or by reason of the object or by reason of the falsity or illegality of their cause can be nullified. The obligations are null due to the persons, subjects of the contract, when they are entered into by those persons who are incapable to make a contract, as provided for by Article 1263, Civil Code, and as it was discussed before.

The obligations null by lack of consent are those entered into by the same per-

sons or by those who being capable, but fail to agree as to their object or the conditions imposed are impossible, or by a substantial error or fraud as above discussed.

The obligations null, due to the subject matter, are those based upon things which do not exist either naturally or legally, as happens in obligations to give based upon things which have already lost or perished, or over things which are not within the commerce of men; or in obligations to do when they are based upon acts which are impossible in their nature, and before the law.

By reason of the cause, the obligations are null when they are based upon motives which either do not exist or are opposed to law or good morals.

Persons who can ask for nullity.—The action for nullity can be asked for, not only by the principal debtor but also by those subsidiarily liable, if the former is incapable. Thus, the husband for his wife, the guardian for his wards or persons under his guadianship; noting however that if between the two persons among whom the contract has been entered into, the one is capable and the other is incapable, the former cannot ask the nullity based upon the capacity of the latter, but this privilege is only granted to the incapable one. Neither can it be asked by reason of violence, error or fraud by the person who caused the same, because, as in the former case the law only protects the incapable person, thus in the second case it is but natural that the law shall also protect those who have been the victims of the act and not those who acted with bad faith. (Article 1302, Civil Code.)

Time of action for nullity.—According to article 1301, Civil Code, the tiem within which the action should be brought is four years. But this is modified, I believe, by sections 43 to 45 of Act 190 (Code of Civil Procedure). (See Thesis on Prescription by Mr. Jorge B. Vargas, Philippine Law Journal, Vol. I, No. 3, p. 128.) Said period is to be counted in the manner provided for by Article 1301. The rest of this article, I believe, seems to be in force, except with regard to minors or incapacitated persons which, I believe, is covered by section 45 of Act 190 (Code of Civil Procedure).

Effects of nullity.—Once the nullity of a contract is declared, the parties must restore reciprocally the things which were the object of the contract, with their fruits, and the price with its interest, respectively (Article 1303, Civil Code) except in the cases provided for in articles 1304-1308, Civil Code.

When action for nullity ceases.—In three cases:

(1) When the time within which the action must be brought has elapsed;

(2) When the contract has been ratified after the vice or cause which produced the nullity has ceased. The contract becomes purified of its vices from the time of its execution; it should be noted, however, that only these contracts which contain the three essential requisites of consent, object and cause, are the ones which can be ratified. (Articles 1309, 1310, 1313, Civil Code.)

(3) When the thing, the object of the contract was lost through fraud or blame

of the person entitled to enforce the action. (Article 1313, Civil Code; see also Articles 1311 and 1312, Civil Code.)

Rescission.—What are rescindable obligations.—In order to determine what are rescindable obligations it is enough to refer to articles 1291, 1292, 1293, 1296 and, 1297 of the Civil Code. Under article 1297, see Regalado vs. Luchsinger & Co., 5 Phil. 625; Bachrach vs. Peterson et al. 7 Phil. 571; Peña vs. Mitchell, 9 Phil. 587; Ayles vs. Reyes, 18 Phil. 243 and Gonzales vs. McMicking et al., 21 Phil. 243. Some of these provisions, however, seem to have been superseded by Code of Civil Procedure. (See section 552 of Act 190.)

Time of action for rescission.—The time of action for rescission set forth in article 1299, Civil Code, is now repealed, I believed, by sections 43 to 45, Act 190, in that it must be brought either within ten or six years, whether the contract is in writing or not. (See Thesis on Prescription by Mr. Vargas, supra.) For those persons subject to guardianship and for those absentees, this period shall not commence to run until the incapacity of the former has ceased to exist or the domicile of the latter is known. (Article 1299, Civil Code.)

Requisites.—In order that the rescission may take place, the following requisites must concur: (1) It being a subsidiary remedy it is necessary for the injured party to show first that he has no legal remedy to obtain the reparation of the injury done. (Article 1294, Civil Code; see Guash vs. Espiritu, 11 Phil. 192.)

(2) As the rescission obligates the restitution of the things with their fruits and the price with interest as the case may be, therefore, the same can only be carried into effect when the person who claims it, can return that, which, on his part he is bound to do. (Article 1295, Civil Code.)

(3) The object of the contract must not be in the possession of a bona fide third person; but in this case, an indemnity for damages sustained may be demanded from the person who caused the lesion. (Article 1295, parts 2 and 3, Civil Code.)

Effects of rescission.—The effects of rescission are two: (1) The rescission of the principal obligation carries with it that of its accessories. (Law 56, tit. V, Partida 5); but the rescission of accessory or accessories does not carry with it that of the principal obligation. (See article 1124 of the Civil Code in this connection.) (2) Once the contract is rescinded, the parties must reciprocally restore the things with their fruits and the price with interest, respectively. (Article 1295, part 1, Civil Code.)

(c) Resolutory conditions.

Concept.—Resolutory condition is that the fulfillment of which produces the rescission of the contract, restoring the things in the same state as they were at the time of its celebration. Such would be as if one sells a house to another with the condition that if he should return from America the contract of sale should be rescinded, because in that case, having realized the return, the thing should have to be returned and the contract to be rescinded. (3). Viso 136

Effects.—The immediate effect of the resolutory condition upon its fulfillment is, as appears from the definition, the rescission of the contract. And this being a rescission, the effects, then, of the same should be considered as it was said in speaking about rescission. If the thing be deteriorated, without the fault of the debtor, the deterioration shall be for the account of the creditor, but if it be of the debtor, then, he has to pay an indemnity for damages and injuries sustained. (Article 1122, parts 3 and 4, Civil Code.) But in obligations to do and not to do the court will determine the retroactive effect of the condition fulfilled. (Article 1120, part 2, Civil Code.)

(d) Prescription.

Concept.—The prescription can be considered as a mode of acquiring rights, or of losing the same. The prescription, considered in the second acceptation, is that which is to be treated in this work, for this is the sense which denotes one of the modes by which the obligations are extinguished, because by losing the right to demand, disappear the corresponding obligations.

Definition.—Prescription is "a mode of acquiring or losing ownership and other real rights or of exemption from the fulfillment of obligation, by virtue of the lapse of time and other conditions imposed by law." (III Sanchez Román 252.) From the above definition it clearly appears that while a prescription is a mode of acquiring ownership on the one hand, it is, on the other hand, a mode of losing real rights which imply the exemption from the corresponding obligations, and for this reason the commentators classify it into acquisitive or positive and extinctive or negative. This is the reason why prescription taking in the second sense may also be regarded as one of the means of extinguishing the obligations.

For further discussion of the subject see the elaborate thesis on prescription entitled "The effect of the Code of Civil Procedure upon the periods of Prescription laid down by the Civil Code and the Code of Commerce" by Jorge B. Vargas, published in Philippine Law Journal, Vol. I., Nos. 3 and 4.

F. By Impossibility of Performance under Americann Law.

(1) General Rule.—Whether the impossibility arising without the fault of the promissor, after a contract has been entered into discharges the promissor from liability or failure to perform, depends upon, whether his liability to perform is an implied obligation imposed by law, or is created by an express promise. If such liability be imposed by law, then, a subsequent impossibility arising without the fault of the promissor, discharges him from liability. (Page on Contracts, Vol. III, sec. 1362.) Thus in the case of Paradine vs. Jane Alleyn 25, followed by the Courts of the United States it was held: "When the law creates a duty or charges and the party is disabled to perform it without any fault in him and has no remedy over, then the law will excuse him, as in the case of waste where the house is destroyed by a tempest." But if the liability of the promissor is created by an express promise without qualification, subsequent impossibility does not as a general rule excuse performance.

In the same case (supra) it was held: "Where a party by his own contract creates a duty or charges upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." The reason of this distinction was explained in School District vs. Danby, 25 Conn. 530, where it was held among other things: "The act of God will excuse the not doing of a thing where the law had created the duty, but never where it is created by the positive and absolute contract of the party. The reason for this distinction is obvious. The law never creates or imposes upon any one a duty to perform what God forbids, or what he renders impossible of performance, but it allows people to enter into contract as they please provided they do not violate the law." This rule is true, even though the impossibility arises from acts of God such as floods, storms, tempests, earthquakes and the like. (Elliott on Contracts, Vol. III, secs. 1895, 1892.)

(2) Exceptions to General Rule.—There are certain classes of impossibility however, which discharge a promissor from liability created by his express promise. The authorities are not in accord as to these classes of impossibility. Some authorities, however, reduce them into three: (1) Where the impossibility is created by law; (2) Where the continued existence of something essential to the performance is an implied condition of the contract; and (3) Where contracts are made for personal services which can not be performed by the assignee or agent. (Page on Contracts, Vol. III, sec. 1363.)

The impossibility created by law may arise, either by reason of (1) a change in the law, or (2) by some action by or under the authority of the Government. In such cases the promissor is discharged. (9 Cyc. 630.)

From the nature of the contract it is evident that if the parties contracted on the basis of the continued existence of the person or thing to which it relates, the subsequent perishing of the person or thing will excuse the performance. (Taylor vs. Caldwell, 3 Bert & S. 826.)

Impossibility of contracts for personal services as where the promissor is to perform certain services of a personal nature and such as cannot be performed by hi assignee or his successor, is discharged by the death of either party. (Marvell vs. Phillips, 162 Mass. 399); or by such sickness on the part of the person by whom such services are to be rendered as to incapacitate him from performing them. (Powell vs. Newell, 59 Minn. 406); or by the arrest of an employee and his detention for a considerable period of time in a contract for services involving personal skill and ability (Leopold vs. Salkey, 89 Ill. 412; Page on Contracts, Vol. III, secs. 1364-1366)

G. Discharge by Operation of Law under American Law.

1. In General.—There are certain rules of law which, operating upon certain sets of circumstances, will bring about the discharge of a contract; this may occur without any reference to the intention of the parties. It may result from (1) Merger ;

(2) Alteration of written instruments; and (3) Discharge in Bankruptcy and Insolvency. (9 Cyc. 633; Elliott on Contracts, Vol. III, sec. 1980.)

2. Merger.—(a) Definition.—Merger may be said to be "the unavoidable destruction of the operative force of one contract by another of higher degree. In other words, merger causes one contract to absorb or supersede another, i. e., the second to become a substitute for the first." (Elliott on Contracts, Vol. III, sec. 1981.) The merger does not depend on the intention of the parties at all, but the mere acceptance of the higher security ipso facto extinguishes the lower as a matter of law (Warner vs. McNulty, 7 Ill. 355.)

(b) Examples.—Some examples of merger are: If a contract under seal is accepted in the place of a simple contract, whether oral or in writing, the simple is discharged (Leonard vs. Hoghlett, 41 Md. 380); or when the parties have deliberately put their agreements in writing, it is conclusively presumed that the whole engagement of these parties, and the extent of their undertaking was reduced to writing; and all oral testimony, colloquium and declarations of parties at the time when it was completed as it would tend to modify or affect the one agreed upon, is rejected. (Greenleaf on Evidence (15th ed.)sec. 275); or a judgment rendered in an action based on a prior judgment merges such judgment for most purposes. (Gould vs. Hayden, 63 Ind. 443.))

(c) Requisites.—In order to have the doctrine of merger operative, the subsequent specialty must bear the following relation to the prior written contract: (1) the specialty must be between the same parties and upon the same subject matter; (2) the subsequent specialty must be valid; (3) it must be intended as a satisfaction of the prior contract and not merely as collateral security thereto. (Page on Contracts, Vol. III, sec. 1355.)

3. Alteration of written instruments.—(a) Definition.—"It is a change in an instrument by a party thereto, or one entitled thereunder, or one in privity with such person after the instrument has been signed or fully exercised, without the consent of the other party to it, by an erasure, interlineation, addition, or substitution of material matter affecting the identity of the instrument or contract, or the rights and obligations of the parties." (2 Cyc. p. 142.) This definition is broad enough to convey an idea of its scope and nature, and enough for the purpose of this work. For further discussion, however, of this subject, see 9 Cyc. 137 et seq.; Elliott on Contracts, Vol. III, p. 184 et seq.; Page on Contracts, Vol. III, p. 2322 et seq.

(b) Effect.—As a general rule, the effect of any alleged change in an instrument depends upon the character of the change i. e., whether it is material or immaterial. Any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke—which changes the legal identity or character of the instrument, either in its terms or the relations of the parties to it—is a material change or technical alteration and such a change will invalidate the instrument against all parties not consenting to the change. This holds also true,

even as against a bona fide holder without notice, as the latter can acquire no better title than that of the person under whom he claims. (2 Cyc. 177.)

4. Bankruptcy and Insolvency.—Bankruptcy effects a statutory release from debts and liabilities probable in the bankruptcy proceedings when the bankrupt has obtained from the court an order of discharge. For further discussion on the subject see Bankruptcy, 6 Cyc. 390 et seq.; Page on Contracts, Vol. II , p. 2354 et seq.; Elliott on Contracts, Vol. III, p. 155 et seq.

H. By Operation of Law under Spanish Law.

This mode of extinguishment is not expressly recognized as such in the Spanish Legislation. But its substance, however, is found in and regarded under the Spanish Law, in an indirect way. Such would be the so called legal compensation, prescription, and the discharge in bankruptcy and insolvency.

As it was said, legal compensation "is that which is created against the will of one of the parties and *even without the consent of either party*, from the time the reciprocal concurrence of the debts and the conditions required from the latter, take place." It is operative from the moment the two debts co-exist. (Luengo & Martinez vs. Herrero, 17 Phil. 29.)

Section 69 of Act 1956, (The Insolvency Law) provides: "*A discharge*, duly granted, *shall release* the debtor from all claims, debts, liabilities, and demands set forth in his schedule or which were or might have been proved against his estate in insolvency, and may be pleaded by a simple averment that on the day of each date such discharge was granted to him, setting forth the same in full, and the *same shall be a complete bar* to all suits brought on any such debts, claims, liabilities, or demands, etc."

Prescription, as it was said, is "a mode of acquiring or losing ownership and other real rights, or of *exemption from the fulfillment of obligations*, by virtue of the *lapse of time* and *other conditions imposed by law*."

From the above concepts and provisions of law, it is clearly observed that the obligations can also be extinguished not only by their satisfaction or compliance nor by the agreement of the parties, but by the operation of law which makes the enforcement of said obligations ineffective. It can be said, therefore, that the consummation by operation of law is also recognized, though indirectly, in the Spanish legislation.

I. Discharge by breach under American Law.

(1) Definition.—A breach of contract "is the commission of some act, or the omission of some act, which violates the specified or implied conditions of a contract." (People vs. New York, Etc., Exchange, 29 N. Y. S. 307.)

(2) Modes of Discharge by Breach and Requisites.—A contract may be discharged by breach in three ways:

(a) By one party renouncing his liabilities under it;

(b) By his making it impossible that he can perform his promise; and

(c) By his totally or partially failing to perform his promise.

Breach by renunciation and breach by acts rendering the performance impossible may take place while the contracts are still wholly executory, i. e., before either party is entitled to demand a performance by the other of his promise. Breach by failure to perform can only take place up or during the time for performance. (9 Cyc. p. 635.) In all cases the breach must be a substantial breach. (Brown vs. Edsall, 23 S. D. 610); and a party is not justified in treating it as broken by the adverse party, unless there has been distinct and unequivocal intention manifested, either by words or by conduct of the adverse party, not to perform the contract. (Majestic Milling Co. vs. Copeland, 93 Ark. 195.)

Effect.—Where one of the parties to a contract before the performance is due renounces it before that time, or where one of the parties to a contract, either before the time for performance or in the course of performance, makes performance by him impossible, or where one of the parties to a contract declares that he will not perform his part, or so acts as to make it impossible for him to do so he thereby releases the other from the contract and its obligations, and may sue at once for the breach. (9 Cyc. pp. 635, 639, 641.)

J. Consummation by Breach under Spanish Law.

This mode of consummation is substantially found in the article 1124 of the Civil Code and the following decisions of the Supreme Court of the Philippine Islands.

Article 1124 of the Civil Code provides: "The right to resolve the obligation is considered as implied in reciprocal ones, in the cases in which one of the obligated persons does not comply with his duties.

"The injured party may choose between exacting the compliance with the obligation or its resolution with indemnity for damages and payments of interest in both cases. He may also ask for the resolution even after having asked for the compliance, when the latter may appear impossible."

Our Supreme Court in the case Gutierrez Hermanos vs. Oria Hermanos & Co., 30 Phil. 491, held: "When one party to a mutual obligation fails duly to carry out his agreement, *he thereby releases the other* who does not thus become delinquent. Delinquency commences when one of the contracting parties fulfills his obligation and becomes invested with powers to terminate the contract because of failure on the other's part to carry out the agreement."

And in a recent decision, the Supreme Court, in the case of Young *vs.* Needland Fertile Insurance Co., 30 Phil. 617, held: "A violation of the terms of a contract of insurance, by either party, will constitute the basis for a termination of the contractual relation at the election of the other . . . . In the present case, the deposit of the "hazardous goods" in the building insured, was a violation of the terms of the contract. Although the hazardous goods did not contribute to the loss, the insurer, at his election, *was relieved from liability.*"

From all this, it can be said unhesitatingly that although this mode of extinguishing the obligations is not expressly recognized as such by the Civil Code nor by its commentators, it is however recognized, though indirectly, by the Civil Code as confirmed by the above decisions of the Supreme Court of these Islands.

CHAPTER V

COMMENT

The only aim of this comment is to facilitate the reader in grasping the similarities and substantial differences if any, which lie in the stages of the life of a contract as they stand under the Spanish and American Laws. By a careful consideration of the subject as discussed and generally compared above, it may be said without hesitation that no great substantial differences exist between the two stages, but rather, they agree in most of the points. Beginning with Chapter II, which deals with Preparation and Formation, the writer has the following to say: The nature of Preparation coincides closely with that of Formation and both are in accord to the effect that: "it is the period wherein—all the steps which the prospective contracting parties may undertake to do, with their incidents, leading to the creation of a contract and until this effect is accomplished,—takes place.

As to their elements they agree likewise in that, there must exist the elements of offer and acceptance; it can be observed that under both laws, both offer and acceptance may be made either expressly or impliedly, qualified, or by letter, telegraph or telephone; that offer may be made to determined or undetermined person, though in minor respects, of course, they may differ, as for instance, the treatment of each topic in each law may be more or less elaborate; it can also be observed that under both laws, the offer and acceptance can be withdrawn under the same circumstances, that the offer lapses if not accepted within the time left open and both laws are also in accord as to the time within which acceptance should be made.

As to the requirements necessary to constitute Perfection and Operation respectively it may be noted that the whole treatment of the subject regarding "identities" under the Spanish Law, i. e.—that the parties must be fully in accord with respect to the subject-matter of the contract, the conditions imposed, the nature of the same, the time within which acceptance should be made and that the contract should be made in the form demanded for in the offer—means substantially the same than the topic developed under the American Law,—that the acceptance must correspond to the offer; for under this point it is but clear that in order that the contract may be operative the acceptance must be in the same terms regarding the subject, conditions, nature, etc., as demanded by the offer. Both laws likewise harmonize in that the acceptance must be absolute, i. e., must either accept or not accept at all all the terms of the offer. In this connection however, I note certain deficiency in the Spanish Law. No law nor any comment has been set forth in the Spanish realm, regarding the seriousness which an offer must involve in order to create any liability at all,

as for instance, though the terms of an offer and acceptance may agree in all their points and sufficient to give birth to a contractual relation, yet its efficacy may be fruitless if the offer was only intended for mere joke or courtesy. The Spanish Law and its commentators are silent in this respect, whereas under the American Law this is one of the points wherein the law is well settled; as for instance, the offer, on the one hand, aside of the other requisites, i. e., that it must be complete, certain and definite—it must purport to create liabilities legally enforceable, it must be made with intention to assume liability and must be intended to create legal relations—and on the other hand, the acceptance, aside of the other requisites, i. e., that it must be positive, absolute and correspond to the offer—it must involve the intention to accept and that mere mental intention is ineffective. It may also be noted that the Spanish Law is silent in this regard that the offer must be complete, certain and definite which as a matter of fact constitutes the source of misunderstandings between the contracting parties. Notwithstanding however this deficiency the same cannot be much regretted, for it is clearly implied that it is the duty of the acceptor to inquire and to ascertain, before acceptance, the real terms of the offer. All these questions, however, are all questions of facts and, as it was said, whether they give rise or not to a contract, is a question to be determined by the court. This is true under both laws.

Passing now to the consideration of Chapter III, which deals with Perfection under Spanish law and Operation under the American law, it can also be noticed that the nature of Perfection and Operation do not differ essentially; they agree in that—"it is the stage wherein the contract is created, thus giving birth to all the rights and obligations properly arising therefrom—" Regarding the time determining the Perfection of contracts under the Spanish Law and the time determining the Operation of contracts under the American Law, is a point wherein both laws are partly in apparent conflict. I said partly, because under the Civil Code, a theory followed by the weight of authority, the contract does not become perfect until the acceptance is brought into the knowledge of the offerer. The time therefore which determines perfection under the Civil Code is that wherein the acceptance is received and not the time the acceptance is made, i. e., put in the post-office; whereas under the Code of Commerce, the contract is perfected from the moment the acceptance is made. This theory, maintained by the Code of Commerce, is substantially in accord with the American Law on the subject. Under this law, the general rule is that: "the contract is operative and complete from the moment the letter of acceptance is mailed or a telegram giving assent thereto is delivered to the telegraph office." The partial conflict, therefore, is obvious. As regards the essential requisites necessary to accomplish the perfection and operation of the contracts, respectively, it can be stated in general that under both laws, it is required that the parties to the contract must be legally capable, the consent must be free from any vice, i. e., mistake, violence and intimidation or duress and fraud; it must have lawful subject-matter and good and valid cause or consideration.

Under capacity no substantial difference can be mentioned other than that under Spanish Law there are two kinds of incapacity, one natural and the other legal; in the former case the contract is *ipso facto* void while in the latter it is only voidable. Whereas under the American Law the weight of authority seems to point out the view that the contract is only voidable regardless of the kind or nature of the incapacity.

Under mistake it seems also, that no substantial difference lies between both laws. They agree that a mistake in order to avoid the perfection or operation of the contract, it must be substantial and not merely incidental. Though the Spanish Law is silent as to whether the mistake must be mutual or not to render the contract, ineffective, it seems apparent, however, from the provisions of the Civil Code on the subject, that whether mutual or partial, the mistake will cause a nullity if it is substantial. So, with the American Law.

Duress is a term under the American Law which corresponds to violence and intimidation under the Spanish Law. It consists both of violence and intimidation. Both laws are in accord that violence must be irresistible and the intimidation of threats must be reasonable such as a man of ordinary courage and prudence be deprived of his free will. This is, of course, a question of fact to be determined in the light of the circumstances of each case. This, will make the contract void under the Spanish Law while under the American Law, only voidable. It is worthy to note the kinds of duress given by the American Law.

Fraud under both laws has substantially the same nature. As it can be seent to avoid the contract, it must fall on the subject-matter or on some material conditions that without which the party defrauded would not have entered into the contract. In a few words, the fraud must be the cause of the execution of the contract. Under the Spanish Law there are two kinds of fraud: dolo causante and dolo incidente. The former case renders the contract void, while the latter only voidable. Though under the American Law, no such kinds exist, nevertheless, the rule is that, the fraud if material will only render the contract voidable, from which it can be deduced that if immaterial, will not impair at all the efficacy of the contract. Both laws seem also in harmony that only the fraud caused by one party, will avoid the contract but not when it is mutual or caused by a stranger without any connivance on the part of the other party. The wisdom of these provisions cannot be questioned. Both agree that the subject matter must be lawful and not contrary to public policy. The only observation if any, that can be made is that under the Spanish Law, this subject is more elaborately discussed than under the American Law.

Cause under the Spanish Law corresponds to Consideration under the American Law. Under both laws the Cause or Consideration respectively are essential to support a contract. They must not be contrary to law or good morals. It seems that under both laws the Cause or Consideration need not be strictly of a pecuniary value, though generally, it must be so under the American Law. Good consider-

ation is not sufficient under the American Law while under the Spanish Law, the liberality of a party holds good.

As to the effect of Perfection and Operation with respect to the different kinds of contracts existing under both laws, it can be said primarily, that under the Spanish Law there are only strictly speaking three kinds of contracts: Consensual, Real and Formal; whereas under American Law there are in first place, the Parol contracts which may be either express or implied and which corresponds to consensual under the Spanish Law; then follow the Formal ones which may be either under seal, in writing or those which require stamps by statutes; and finally those commonly called Bailments which correspond to what we call under Spanish Law real contracts.

Consensual like parol contracts are perfected or operative from the moment the minds of the parties meet without any further requisite; strictly speaking there is no such a formal contract under the Spanish Law, for by express provision of law the contract is valid and binding in whatever form it may have been entered into, this is true, as can be seen in spite of the adoption of the Statute of Frauds by the Code of Civil Procedure, whose effect on the provisions of the Civil Code was settled by the Supreme Court of these Islands to be, to render the contracts only voidable. Under the American Law, however, contracts without consideration must be made under seal to be effective, and this rule is absolute. As to the requirements of the Statute of Frauds that certain kinds of contracts must be made in writing, it may be said that in this respect the American Law agrees with the Spanish Law, for failure to comply with such requirements it likewise renders the contract only voidable.

Contracts of sale under American Law, which refer to personal property, are a sort of parol contracts wherein the contract becomes binding after the consent is secured, though not coupled with delivery; and in this respect is in harmony with the Spanish Law. Real contracts under the Spanish Law correspond to what is commonly called "Bailments" under the American Law, and both harmonize that there must be a delivery before they become perfected or operative.

Considering now the Chapter IV which treats of Consummation under the Spanish Law and Discharge under the American Law it is also observed that the nature of this topic under both laws is substantially the same and agree in that—"it is the period wherein all the juridical relations created by the contract are extinguished." The modes of extinguishing these relations under the Spanish Law are: by performance of the contract which may be either direct as payment whether general or special, or indirect as compensation; by mutual agreement of the parties which may take place either by remission, mutual dissent, transaction, compromise and novation; and finally by the impossibility of complying with the obligations of the contract which may take place either by impossibility due to the parties, or to the subject matter, or to the obligation itself of the contract. Under the American Law, the modes of discharge are: by performance of the contract, by agreement of the parties, by impossibility of complying with the obligations of the contract, by

operation of law and by breach of the contract. As can beobserved the modes of consummation under the Spanish law are more or less the same than those of discharge under the American Law.

With regard to the nature of performance under the Spanish Law which may be either by payment or compensation, it may be said that it is in accord with the American Law in that the nature of payment is not limited to the pecuniary satisfaction of the obligation but it may be either the fulfillment of a promise, or the accomplishment of any obligation whether it consists in giving, doing or not doing. They likewise are in accord as to the requirements to be followed in order that there be a valid payment. But under the American law the mode of compensation as recognized by the Spanish Law is not known. There is no such compensation of debts between the creditor and a debtor to the extent that both debts as to the concurrent amount become *ipso facto* extinguished whenever they are clothed with the necessary requisites. It may be advocated, however, that the so called judicia compensation under the Spanish Law resembles much the nature of a counterclaim under the American Law. The imputation of payments under the Spanish Law corresponds to the application of payments under the American Law. The same with Tender. In substance, these modes reconcile with each other.

The mode of extinguishment by agreement under the Spanish Law may take place either by remission, mutual dissent, transaction, compromise and novation. Under the American Law the subject was generally discussed under two headings: discharge by new agreement and by a substituted agreement. At first glance one might predicate that the so called remission, mutual dissent, etc. . . under the Spanish Law have no place at all under the American Law; but making a careful observation it can be stated that these modes are impliedly touched upon under the general discussion of the mode "by new agreement." The machinery, of course, of accomplishing these modes is different, but their substance, the same. One of the manifestations of the mode "by a su bstituted agreement" is Novation, whichis substantially the same as that under the Spanish Law.

Consummation by impossibility of performance under the Spanish Law may take place either by impossibility due to the parties themselves or to the subject matter or to the obligation itself of the contract. The latter may occur in four ways: By merger (confusion of rights,) by rescission and nullity, by the fulfillment of the resolutory condition and by prescription. Under the American Law the subject is treated in a general way. The so called impossibility due to the obligation itself of the contract is unknown. There is no such confusion of rights under the American Law in the sense it is used and understood under the Spanish Law. The nature of the so called merger under the American Law is far different from confusion of rights. The former speaks of absorption of one contract by another, while the latter speaks of rights. In the former the rights of the parties subsist and there is only a substitution of a new contract in the place of the old, while in the latter the rights are merged

into one. Neither the rescission and nullity are regarded as mode of discharge. The same with resolutory condition and prescription. Practically speaking therefore, the impossibility due to the obligation itself of the contract is unknown in the American legislation. Aside of this mode, however, the other two seem to be recognized under the American Law, such as for instance, in contracts of personal in character, if the party bound to perform the same becomes incapacitated either mentally, legally or physically, the contract shall be terminated, and this is true under both laws. Not so however with regard to the impossibility concerning the subject matter of the contract. Under the Spanish Law, the rule seems to be that the contract is extinguished when the subject-matter is totally destroyed by force majeure or unforeseen event without negligence or fault of the party bound thereby. Under the American Law the rule is different. It does not discharge the contract at all, though the subject-matter isde stroyed by force majeure. The reasoning advocated is that the party willing to be discharged ought to have so expressly provided for in the contract; there are exceptions however to this rule as it was set forth in the general discussion of the subject.

Under the American Law the discharge by Operation of Law is recognized. This may take place either by merger, by alteration of instruments and by discharge in bankruptcy and insolvency. As it was said before, the so called merger is different from the Spanish confusion of rights. Although it is true that the Civil Code and the Spanish commentators do not recognize the mode of consummation by operation of law as such, its substance however may be said to exist in the Spanish legislation. Examples of this contention are the so called legal compensation, wherein the debts to the concurrent amount and with the conditions required, belonging to two who are mutually creditors and debtors of each other, are declared extinguished by operation of law in spite of the will of the parties to the contrary. The same holds true with regard to a person who is discharged by law for his insolvency, and the extinguishment of the obligation by prescription wherein the right of the creditor is declared forfeited by law for his non compliance with its provisions.

The discharge by Breach is also elaborately discussed under the American Law and it is expressly considered as such. Not so under the Spanish Law, though it can be safely stated that it is also recognized and considered as a mode of extinguishing obligations though not in an express manner. As a justification of this fact it suffices to read Article 1124 of the Civil Code and the decisions of the Supreme Court of these Islands on the subject as hereinbefore mentioned.

CONCLUSION

From the general comparison made on the subject and from what it has been pointed out in the brief comment herein inserted, the writer, with sincerity and unbiased judgment concludes, that no substantial differences can be said to lie between the stages of the life of a contract under the Spanish Law and under the American

Law. True, there are some differences as can be observed during the course of the discussion of the subject; but the writer does not regard them substantial but rather incidental and unimportant and in making this assertion he finds his justification upon two grounds: first, because of the fact that each of these laws has originated and grown up under two different sources diametrically opposed; the Spanish Law under the Roman Law and the American Law under the Common Law; and second, because of the fact that ordinarily the laws are enacted to suit local conditions with due regard to the customs and usages of the people of each country; hence the reason why no laws of different countries and of diffetrent sources are so far found to be in accord in all their substance and in all their minute details.