Elements of Penal Sciences

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PREFACE

On March 9, 1974 the faculty of the College of Law of the University of the Philippines adopted a resolution approving the following:

> "A revision of the introductory course in Criminal Law so as to incorporate in its description a study of the prevailing concepts of Criminal Law. This is understood to include the positivist and classical schools of penal science and general principles of criminal law.
>
> "A seminar on Contemporary Problems of Criminal Law and the Administration of Criminal Justice."

Pursuant to the above mentioned resolution the undersigned updated, revised and enlarged his previous works on "Essentials of Criminal Law and Criminology" of 1928 and "Philippine Criminal Science" of 1934 in the present edition entitled "Penal Sciences", Part I and "Philippine Criminal Law", Part II.

Part I is especially tailored to suit all the requirements and mandates of the resolution of the faculty of College of Law of our State University. Under the revised book, students of Criminal Law will not only be sufficiently informed of the origin of the old bodies of Spanish laws, from the *Siete Partidas* up to the Code of 1870 which were enforced in this country through Royal Decree or other royal mandate, but will be given special emphasis on the role of the classical and positivist schools in the administration of criminal justice particularly in light of the new Constitution.

The revised edition of Penal Sciences warns the students that the aim of modern criminal justice needs something more, very much more, than mere exaction of penalty or retribution upon violators of our statutes, that it is absolutely indispensable to resort to new approaches to study

the man or the criminal himself rather than the crime, and that it is imperative for this reason that we avail ourselves of the experimental or positivist method to achieve that objective. The undersigned stresses the necessity of training present and future students in the new auxiliary disciplines, such as, Criminal Anthropology, Criminal Sociology, Criminal Psychology, Penitentiary Science, or in other words, modern criminology. This new book on Penal Science contains a rich reservoir on these disciplines.

Philippine Criminal Law which constitute Part II of the book covers the study of all crimes and penalties prescribed in the Revised Penal Code of 1930 which unfortunately is still in force up to this late hour. I hope however that before long the proposed Code of Crimes, as approved by the House of Representatives but still unacted upon by the Senate in its last session in 1972, will be approved by the President through Presidential Decree.

Pending the approval of the Code of Crimes, the revised edition of Penal Sciences and Philippine Criminal Law is necessary as a preliminary step to orient the minds of the students to the provisions of the Code of Crimes which is based on positivist thinking.

GUILLERMO B. GUEVARA

Makati, June 1, 1974

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A TEXT BOOK ON PENAL SCIENCES AND PHILIPPINE CRIMINAL LAW

PART ONE

PENAL SCIENCES

CHAPTER I

DEFINITION, ORIGIN, AND THEORIES OF CRIMINAL LAW

1. Criminal law defined.—2. Origin of criminal law.—3. Theories of criminal law.—4. Essential features of the Classical Theory.—5. Essential features of the Positivist Theory.—6. Theory to which the Revised Penal Code belongs.

1. Criminal Law Defined.—Criminal law is the body of rules determining crimes and their penalties which has been provided by the social power for wrongdoers.

It is considered as one of the branches of *internal public law*, for every crime implies a relation between its author and the public power, whose mission it is to prosecute and punish the offender.

2. Origin of Criminal Law.—The origin of criminal law may well be traced to two sources: vengeance as retaliation for wrong, and subordination of the individual

to some higher authority, which, be it the family, the clan, the community, or even the State, strives to maintain a certain degree of order, for purposes more or less clearly defined and understood.

In the history of different peoples, these two principles are mingled and blended into various combinations.

Criminal law has from time immemorial been found to be an absolute necessity for the preservation of public order and for the permanence of human society in general. The theories adopted by ancient Greece and Rome for their criminal laws were founded on the religious conceptions then prevalent, together with the ethical principles maintained by their philosophers. In the Middle Ages, Christian doctrine on the right to punish modified the ancient conceptions of crime and penalty, as well as the then existent Germanic criminal law. There was, however, a general lack of interest among medieval philosophers in criminal law. It was not until the second half of the eighteenth century when writers and philosophers became concerned with matters criminal that a number of criminal theories made their appearance.[1]

3. Theories of Criminal Law.—The theories of criminal law are usually classified as absolute and relative. The former maintains that punishment is something inherent in the very nature of the crime, a necessary consequence thereof. The latter seeks to justify punishment by showing that it has an effect which is in harmony with some purpose whose attainment is, on the the other hand, desirable.

Among such purposes are:

(a) *Prevention.*—It is the sole object of punishment to prevent the offender from committing future crimes.

[1] Cf. Von Bar, *History of Continental Criminal Law.*

Damages in civil actions, it is argued, are generally only compensatory for past injuries. Such may be sufficient by way of compensation, but are not enough for prevention. The State is bound to take cognizance of possible and contingent breaches of law which are contained in the criminal will and must suppress the danger that is thus engendered. And it is only by penal jurisprudence that this suppression may be properly accomplished. Reasoning thus, the imposition of punishment can be defended and by the selfsame test the extent of punishment determined.[1]

(b) *Self-defense.*—The right of self-defense also has been invoked as a justification of punishment. Just as the individual has a right to resort to self-defense, in order to prevent a wrong from being inflicted on himself, so has the State. The individual has a right to repel an attack, and even to kill his assailant, it is argued, when his existence is imperiled. The State, likewise, possesses this right and since every crime threatens the existence of the State, every crime may be punished by the State.[2]

(c) *Reformation.*—That the object of punishment is simply the reformation of the offender was the theory of the humanitarian philosophers of whom Rousseau was the chief, and whose eloquent declamation on this topic was one of the preludes to the French Revolution. The good can take care of themselves—so reads this theory when stated in its baldest terms; it is the duty of the State to take care of and reform only those whom social prejudice is pleased to call bad. Hence, in inflicting punishments, the safety of the injured is not to be considered, but simply the reformation of the injurer. Nor is this to be effected by fear; for fear, as an engine of government, is to be discarded. Fear, indeed, it is subtly argued, may produce increased

[1] *Wharton's Criminal Law*, Vol. 1, pp. 2-3, 11th Edition.
[2] *Wharton's Criminal Law*, Vol 1, p. 4, 11th Edition.

cunning in the execution of crime, but it cannot prevent crime from being undertaken. Relapsed convicts, it is declared, are most plentiful in the land of hard laws. Crime can be repressed thoroughly only by a system of penalties which, by their very benignity, serve to soften rather than to inflame those on whom they are imposed.[4]

(d) *Exemplarity.*—The barbarism of the old English system of punishment was defended on the ground that cruel and conspicuous penalties were necessary to inspire fear. Nor was this peculiar to England. It was the basis of the whole secular jurisprudence of the Continent of Europe. Men were to be scared away from crime, and therefore punishment was to be made as shocking and as ghastly as possible. To this were to be subordinated not only the human instincts of the Court, but the primary rights of the offender. Criminals were to be broken on the wheel before assembled multitudes, and their bones hung on gallows on the highways. Even now, among nations of imperfect civilization, this practice continues. Crime in others, it was alleged, is best checked by exhibiting to the public the most horrible penalties inflicted thereof on the criminal himself. Gradually, in England, cruel public executions have given way to more humane private methods of exacting punishment. Terroristic penalties undertake not only to punish the offender for what he actually has done in the past, but also in anticipation of what others might do in the future, attempt to instill fear in possible wrong-doers. Terrorism also treats the offender, not as a person, but as a thing; not as a responsible, self-determining being with rights common to all members of the community, to whom justice is to be distinctively awarded as a matter between him and the State, but as a creature without any

[4] *Wharton's Criminal Law*, Vol. 1, p. 5, 11th Edition.

rights, on whom punishment is imposed so that others may be deterred from acts requiring punishment.[1]

The relative theories regard punishment as coming into existence only with the State which governs the conditions imposed by social life. The absolute theories regard punishment as possible without the State, and as having been adopted by it for accomplishing certain purposes. The mixed or eclectic theories seek to reconcile the absolute and relative theories.

Another classification of these theories is that which distinguishes theories of right from theories of utility or interest; that is, those which assume a special legal right on the part of the punishing State, from those which are simply satisfied with reasons of utility or the empirical indispensability of things. There are also the contractual theory, the compensation theory, and the restitution theory which found punishment upon the requisite of restoration of order or removal of the social injury caused by crime.

Lastly, with the appearance of the so-called Italian School, all the theories based upon philosophical or simply juristic principles have been grouped under one, namely the CLASSICAL THEORY, while those founded on *positivists'* or experimental principles are classed as NEW or MODERN THEORY.

4. Essential Features of the Classical Theory.—Some of the essential features of the classical theory are:

(a) The classics built their majestic conceptions upon simple reasoning, and for them there was no penal science other than the punitive law which they studied by the abstract-logical method. Criminal law is for the classicist a dogmatic system based upon essentially speculative principles.

[1] *Wharton's Criminal Law*, Vol. 1, pp. 6-8, 11th Edition.

(b) Liability, according to the Classical Theory, is based on free will and moral blame. The Classical School raised to the highest category of dogma the assertion of free will and the moral character of liability. Its formula was: action or omission plus free will equal crime.

(c) Crime is further considered by the Classical School as a juridical entity. Crime, for it, is not a real entity but a juridical entity.

(d) The Classical School considers penalty as an evil and a means of juridical tutelage; for it, according to its most authoritative expounder, Francisco Carrara, penalty has but one justification—*juridical tutelage.*

5. Essential Features of the Positivist Theory.—The outstanding features of this theory are:

(a) Its method is purely experimental. Starting from the evident difference between criminal law and the several juridical branches, a difference based upon the fact that in criminal law man is the most essential factor, the Positivists condemned the dogmatic system, and the cry of Ferri, "Down with syllogism!" shook the old punitive temple. The Positivists School applied the experimental method, and by it suddenly aggrandized to a large extent the small territory which of old had been colonized by the jurists. Since the publication of the work of Lombroso, books inspired by the new anthroposociological tendencies are distinguishable, by the most superficial inspection, from those following the purely speculative method—their pages are interspersed with maps, tables, graphs, photographs and sketches.

(b) This school bases the responsibility of the criminal upon his dreadfulness or dangerous state. The foundation of the doctrine is that man is liable for external criminal

[6] Jimenez de Asúa, *El Nuevo Código Penal Argentino,* pp. 31-35.

acts done by him, only because he lives in society, and so long as he lives therein. Society has a right, and it is its mission as well, to provide for its own defense from the very moment the conditions of physical imputability appear. Hence determinism and social responsibility are not supposed to be a denial of the right to punish but a change in its character and foundation. If man is fatally determined to commit a crime, society is equally determined to defend the conditions of its own existence against all those who menace it. But for the investigation of defensive means, and of its waiver in proper cases, the only guiding criterion is the *personal dangerous* condition, the formula of which was first given by Garofalo calling it *dreadfulness,* a term meaning "the constant and active perversity of the delinquent and the amount of foreseen evil which is to be feared from the delinquent himself."

(c) The Positivists consider crime as a natural and social phenomenon produced by man, in opposition to the formula of Carrara that crime is a juridical entity. Positivists verified that a punishable act is a natural and social fact, an act of man that occurs in society whereby the latter is damaged. Therefore, crime is both an individual phenomenon and a social phenomenon. This discovery made the Positivists arrive at the conclusion that it becomes necessary to study man who performed the act punishable by law, and the environment in which crime is engendered and brought forth.

(d) Positivists consider penalty, not as a punishment, but as a means of social defense, in opposition to the juridical tutelage of the Classicists.[1]

6. Theory to which the Philippine Revised Penal Code Belongs.—The present Revised Penal Code, known also as Act No. 3815 of the Philippine Legislature, approved

[1] Jimenez de Asúa, *El Nuevo Código Penal Argentino,* pp. 43-45.

on December 8, 1930, is a compilation of the penal laws in force in the country, without radical changes in structure. The back-bone of this Code is the Penal Code of Spain of 1870, which was in force in this country up to December 31, 1931; and as such, belongs to the Old or Classical School. It is eminently retributive in its purpose, and considers crime only as an issue of free human will, as a juridical entity pure and simple, paying little or no attention to the person.

Review Questions

1. What is criminal law?—2. To what branch of laws does it belong? Why?—3. What are the sources to which criminal law may be traced?—4. What were the bases of the theories of ancient Greece and Rome for their criminal laws?—5. The ancient conceptions of crime and penalty underwent what modifications in the Middle Ages? Name the cause.—6. What are the theories of criminal law? 7. Name the relative theories.—8. State the foundation of the absolute theory?—9. What is the conception of punishment under the absolute theory?—10. What is the conception of punishment under the relative theory?—11. What is meant by the eclectic theory?—12. What are the theories of right and the theories of utility or interest?—13. What is the latest classification of theories or schools of thought on criminal law?—14. Give the essential features of the Classical School.—Give the essential features of the Positivist School.—15. Upon what grounds does the Classical School base the liability of an offender?—16. Upon what grounds does the Positivist School base the liability of an offender?—17. How does the Classical School regard penalty? —18. How does the Positivist School regard penalty?—19. What is the conception of crime under the Classical School?—20. What is the conception of crime under the Positivist School?—21. State the school to which the Philippine Revised Penal Code belongs.—22. State the salient features of this code.

CHAPTER II

PENAL SCIENCES

1. Penal Sciences or Criminology—2. Criminal anthropology.—3. Criminal psychology.—4. Criminal sociology.—5. Criminal statistics.—6. Criminal politics.—7. Penology.

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1. Penal Sciences or Criminology. — Penal sciences are systematic aggregate of notions relative to crimes, criminals, penalties, and other means of social defense against criminality. Criminal law is included in these sciences, and it studies crime and penalty from the *juridical* viewpoint. The remaining disciplines constituting that aggregate also study crime and penalty but from different points of view, namely, the *natural* and *social.* Penal sciences are made up of *criminal anthropology, criminal psychology, criminal sociology, criminal statistics, criminal politics, penology, criminalistic technology, forensic medicine,* and *police science.*

2. Criminal Anthropology.—This is a science which has for its object the study of the individual criminal. It has for its purpose not only the investigation of the organic and psychic constitution of the criminal, but also the study of the conditions of his social life. The forerunner and pioneer of this great science is Lombroso. To this notable writer the criminal delinquent is nothing more than an atavistic phenomenon, and represents a reversion to barbarism and savagery. The biological, the psychical and the sociological manifestations of this reversal are carefully studied, particularly such psychical disorders as incapacity for regular work and undue impulsiveness. The cause of this reversion is attributed to a disturbing process commonly known in biology by the

name of degeneracy, which is one form of arrested development. For this reason, the criminal, in the opinion of Lombroso, is nothing more than a degenerate, an individual whose organic and psychic development has been arrested in an intermediate state, representing a past phase in the evolution of the species. To Lombroso, epilepsy is also one of the causes of criminality. An attack of this malady will cause one's central nerves to lose their controlling power, thereby disturbing the gradual development and formation of the organism, and thereby giving rise to certain morbid and atavistic retrogressions, functional and psychic as well. In other words, to Lombroso,[1] the congenital or born criminal is an atavistic individual, the result of an arrested development, traceable to an epileptic condition.

3. Criminal Psychology.—There is a divergence of opinion among criminologists as regards the scope of this science. Some of them consider it as part of criminal anthropology which is devoted to the study of the psychologic traits of the criminal. Others attribute to the findings of this science a knowledge of the basic psychological characteristics—moral insensibility and improvidence (Ferri).[2] Still others (Somer, Gross) hold that this science embraces not only the psychopathology of the criminal and the natural history of the delinquent's soul, but also the psychological notions which need to be known by the criminologist for his work. Thus it does not limit its investigation to the psychology of the accused alone, but extends it to that of witnesses, experts, etc.[3]

4. Criminal Sociology.—This is the science so much praised by Enrico Ferri, the genial professor of Rome.

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[1] L'uomo delinquente, Turin, 1924.
[2] *Criminal Sociology*, par. 23 (Engl. ed.)
[3] Gross, *Criminal Psychology*, pp. 1-6 (Eng. ed.)

According to him, this science consists of "the transformation of the science of crime and penalty from a doctrinary exposition of syllogisms into a science of positive observation which, availing itself of anthropology and psychology, of criminal statistics as well as of criminal law and penitentiary disciplines, becomes the synthetical science which is called criminal sociology." Under this conception sociology embraces absolutely all the branches of criminal science; criminal law itself is absorbed by it, and loses its character as an autonomous discipline.

5. Criminal Statistics.—This is the instrument by means of which we determine the relation of causality between certain personal conditions, certain physical and social phenomena, and criminality, as well as the increase or decrease in the latter and the forms of its appearance. Great importance at present is attached to the study of this science, as its data have been largely instrumental in establishing modern criminal doctrines, especially those of the Italian Positivist School.

6. Criminal Politics.—This science is a systematized ensemble of principles in conformity with which the State must organize its fight against criminality. The basis of this science is the knowledge of the criminal, of criminality, of penalties, and other measures of social defense. Two aspects are outstanding in criminal politics, one *critical*, and the other *constructive*. Under the former, the laws in force are examined with a view to determining whether they accomplish their purpose of defending society against criminals; under the latter, if gaps or defects in legislation are found, there are proposed the reforms and innovations which should be introduced therein.

7. Penology.—This science deals with the various direct means of fighting crime with regard to both penalties and measures of security. This science has a large scope, for

it treats of the different penalties and their execution, so that its sphere is wider than that of the so-called *penitentiary* science which deals with the study of penalties involving the deprivation of liberty. Aside from penalties, this science deals with other means of social defense called safety measures which try to insure the safety of society thru the reformation of the criminal, or his readjustment to social conditions, or his elimination therefrom.

8. Auxiliary Sciences of Criminal Law.—Under this heading are grouped the following:

(a) *Criminalistic Technology.*—This is a science which would place at the disposal of the Prosecuting Officer technical knowledge about the traces of the crime such as dactyloscopy, the marks left by tools, and ballistics. Comparison of hand-writing is discussed minutely, and modern methods of recognizing and explaining counterfeits, especially by the application of ultra-violet rays, are demonstrated. The chief aim of the science is to acquaint the student with the most fundamental methods of investigation, to teach him the more simple tests to be made and, in the case of more complicated investigations, to teach him the preservation of valuable clues.

(b) *Forensic Medicine.*—The object of this science is to place medical knowledge at the disposal of the administration of justice, both civil and criminal. The student learns through lectures on this subject what questions relative to crime may be asked the medico-legal expert. The working methods of such experts are demonstrated on patients and corpses.

(c) *Police Science.*—This science teaches the application of scientific methods in the detection of crime and the criminal. This science investigates minutely the place of the commission of the crime, the traces left of the crime, its identification, and so forth.

Review Questions

1. Define criminal science.—2. Distinguish it from criminal law.—3. Criminal science is made up of what human branches of knowledge?—4. What is criminal anthropology?—5. Name the foremost expounder of this science.—6. What is criminal psychology?—7. Is there consensus of opinion among writers as to the scope of this science?—8. What is the opinion of Ferri on the subject?—9. Of Gross?—10. What is criminal sociology?—11. Who is the foremost exponent of this science?—12. What is its scope?—13. What are criminal statistics?—14. Describe the importance of this branch of criminal science?—15. What is meant by the term criminal politics?—16. Name the basis of this science.—17. What are its outstanding features?—18. What is penology?—19. What is the scope of this science?—20. Distinguish it from the so-called penitentiary science.—21. What is criminalistic technology?—22. What is the chief aim of this science?—23. What is forensic medicine?—State its object.—24. What does police science teach?

CHAPTER III

HISTORICAL ANTECEDENTS

1. Historical sketch of the Philippine Revised Penal Code.—2. Sources of the old Philippine Penal Code.—3. History of prior penal laws in the Philippine Islands.—4. Historical sketch of the Spanish criminal law.—5. General principles underlying the Spanish criminal law.

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1. Historical Sketch of the Revised Penal Code.—The Revised Penal Code, known also as Act No. 3815 of the Philippine Legislature approved on December 8, 1930, is a compilation of the Penal Laws in force in the country, without radical changes in their structure. The compilation was made by a Committee created by Administrative Order No. 94 of the Department of Justice dated October 18, 1927, and composed of: Hon. Anacleto Diaz, ex-Provincial Fiscal, former Prosecuting Attorney of the City of Manila, former Judge of the Court of First Instance and now Associate Justice of the Supreme Court, as Chairman; Hon. Quintin Paredes, ex-City Fiscal, ex-Attorney General, former Secretary of Justice, and now of the Philippine and American Bar; Hon. Guillermo B. Guevara, former Judge of the Court of First Instance, former Prosecuting Attorney for the City of Manila, and then practising attorney and Professor of Criminal Law in the University of the Philippine Islands; Hon. Alexander Reyes, former Solicitor General and now Associate Judge of the Public Service Commission; and Hon. Mariano H. de Joya, ex-Provincial Fiscal, ex-Assistant Fiscal of Manila, former Judge of the Court of First Instance of Manila, and now practising attorney.

The powers of the Committee were well defined, being limited, according to the language of the Administrative

Order, to the preparation of "a Revised Draft" of the Penal Code. The Committee were to take into consideration: (1) the Penal Legislation found in our statute books amending, or in some manner, affecting the provisions of the Penal Code; (2) the rulings laid down by the Supreme Court in its decisions applying, interpreting, or otherwise discussing the provisions of the Penal Code; and (3) the present conditions in the Islands, social and otherwise.

Thus the Committee did not consider itself empowered to present a draft of the Penal Code in harmony with the theories of the Positivist School or of modern criminology. The Revised Penal Code, therefore, like the old Penal Code, continues to be based on the principles of the Old or Classical School, altho many provisions of eminently positivistic tendencies (those having reference to the punishment of impossible crimes, juvenile delinquency, etc.) were incorporated in the present code.

2. Origin of the Old Penal Code.—The old Penal Code is substantially the same as the Penal Code of Spain of 1870, with some minor changes which were recommended by the Code Committee for the Overseas Provinces or "Provincias de Ultramar" in order to suit the local conditions.

By virtue of the Royal Decree of September 4, 1884, the code thus presented by the Code Committee was ordered promulgated in the Philippines. Some objections to the enforcement of the code were raised by the then "Gobierno General" to the Minister of Ultramar, but notwithstanding such objections, in a subsequent Royal Decree dated December 17, 1886, the code was directed to be promulgated in the "Gaceta de Manila". The Penal Code, together with the "Ley de Enjuiciamiento Criminal", was accordingly published in the "Gaceta" of March 13,

1887, both laws having taken effect four months thereafter, as provided for by said decree.[1]

This code was one of the municipal or local laws of the Philippines at the time of the capitulation of the Spanish Army on August 13, 1898. By proclamation of General Merrit, then Commander of the Army in Occupation, dated August 14, 1898, it was ordered that this code, together with other laws affecting private relations of persons and property, should remain in force.

The Philippine Commission, the Philippine Assembly and the Philippine Legislature have, from time to time, enacted laws amending several provisions of this code.

3. History of Prior Penal Laws in the Philippines.— The penal laws which were in force in these Islands prior to the adoption of the Spanish Penal Code of 1870 were embodied in different compilations of laws, namely, the Compilation of the Laws of Indies, the "Partidas", the "Novísima Recopilación", the "Autos Acordados" of the "Real Audiencia de Manila", and in a number of Royal decrees and orders.

The Laws of Indies were compiled by an order of Charles II of May 18, 1680. Its Law 66, Tit. 15, Book 2, provided that the Audiences in taking cognizance of civil and criminal suits observe the laws of the kingdom of Castile in matters not especially provided for in said Laws of Indies. Title 8 of their Book II deals with crimes and penalties and their application, but its provisions are mostly of a procedural character. Law 21, Tit. 10, Book 6, says: "We order and command that Spaniards who injure, offend, or ill-treat Indians be punished with more severity

[1] "Legislación Ultramarina", by Rodriguez San Pedro; "Gaceta de Manila", March 13, 1887.

than in cases where the same crimes are committed against Spaniards, and we declare them public crimes."

The 7th Partida provides for accusations, crimes and penalties. It is divided into 34 titles and 163 laws or sections. The 12th book of the "Novísima Recopilación" is devoted to crimes, penalties, and criminal actions. It is divided into 62 titles containing in all 437 laws.

Among the "Autos Acordados" of the Audience of Manila, those of July 16, 1838; August 20, 1856; May 14, 1847; October 24, 1875; and August 27, 1857 contained some penal provisions. The "Ordenanzas de Buen Gobierno" of February 26, 1768, had also some penal features.

The following is an alphabetical list of offenses punished by the laws in force prior to the enactment of the Penal Code: abigeato (abaction or cattle stealing); aborto voluntario (voluntary abortion); adivinación, augurios, hechicerias, etc. (divination, auguries, witchcraft, etc.); adulterio (adultery); alcahuetería o rufianería (acting as pimp or procurer); amancebamiento (concubinage); anónimos (anonymous letters); apostasía y herejía (apostasy and heresy); arrancar árboles o mojones de los términos o heredades (taking out boundary trees and monuments); asesinato (murder); auxiliar a otro para delinquir (to be an accomplice or accessory); bancarrota fraudulenta (fraudulent bankruptcy); bestialidad (bestiality); bigamia (bigamy); blasfemia (blasphemy); calumnia (calumny); castramiento (castration); caza y pesca en tiempo de veda (hunting and fishing during closed seasons); cencerradas (charivaris); confederaciones, ligas y parcialidades (confederations, leagues, and partialities); cohecho (bribery); conspiración (conspiracy); contrabando (contraband); daños (damages); defraudación (fraud); desafío (duel); desenterrar cadáveres (exhumation of corpses); deserción (desertion); diversiones de máscaras (mas-

querades); embriaguez (drunkenness); engaño (deceit); envenenamiento (poisoning); escalamiento de cárcel (scaling of jails); escándalo público (public scandal); estupro (seduction); excomulgado vitando (permanence in excommunication); exposición de parto (abandonment of newborn child); falsedad (falsity); fiestas de guardar (inobservance of holidays); fuegos artificiales (fireworks); fuerza con armas (force with weapons); fuerza a mujer honesta (rape); fuga de reos (evasion of prisoners); gitanos (gypsies); heridas (wounds); homicidio (homicide); hurto (theft); incendio (arson); incesto (incest); infanticidio (infanticide); injuria (injury); juegos prohibidos (prohibited games); juramentos (oaths); lesa majestad (lésé majesté); libelo infamatorio (defamatory libel); libreas (liveries); loterías (lotteries); lutos (mourning dress); maltratamiento (ill-treatment); matrimonio clandestino (clandestine marriage); mohatra (usury); moneda falsa (forged coin); monopolio (monopoly); motín (riot); mujeres públicas (prostitutes); mutilación (mayhem); nombre, cambio de (change of name); ósculo involuntario (involuntary kissing); palabras obscenas (obscene language); parricidio (parricide); parto fingido (simulation of birth); pasquines (posters); perjurio (perjury); plagio (plagiarism); poligamia (poligamy); prevaricación (prevarication); rapto (abduction); rebelión (rebellion); regatonería (reselling of goods at high prices); regicidio (regicide); resistencia a la justicia (resistance to justice); rifas (raffles); robo (robbery); sacrilegio (sacrilege); salud pública (public health); simonía (purchasing of ecclesiastical office); sodomía (sodomy); suicido (suicide); traición (treason); usura (usury); and vagancia (vagrancy).[1]

4. Historical Sketch of Spanish Criminal Law.—Spain had in her "Lex Romana Visigotorum", compiled in the

[1] Febrero Novísimo, Vol. 7.

5th century the embryo of a penal system. This was further developed in the "Forum Judicum" or "Fuero Juzgo", which appeared in the 7th century, two centuries before the famous Capitularies of Charlemagne. It contains the principles of the Germanic law greatly modified by the canonical law. In the year 1263, Alphonse X, otherwise known as Alfonso El Sabio, published the Digest of the Spanish law known as Partidas, in which the Roman law predominates. In the year 1566, Philip II published the "Nueva Recopilación," whose 8th book is devoted to penal matters. During the first years of the last century attempts were made to enact a penal code, but they all failed. In 1822 a penal code was approved and extended to the Philippines in 1884. The Code of 1822 was replaced by that of 1850, and lately by the Reformed Code of 1870, which is the one now in force.

5. General Principles Underlying the Spanish Criminal Law.—The general principles underlying the Spanish criminal law are thus set forth by an ancient author:[1]

As to crimes—

1. Crimes which directly offend against society are those by which the public order is disturbed or altered, or a serious damage is caused to the same.

2. Crime may be committed against a member of society in any of the following manners: by depriving him of life voluntarily or maliciously; by wounding or ill-treating him with a stick or other weapon; by usurping his property; by injuring him with words or acts diminishing his good reputation among his fellow citizens; and by preventing or depriving him of his natural liberty, if the use of it be innocent and not harmful to another.

3. In the mind of the law, criminal acts are only those accompanied by the will of offending, not the mere

[1] Febrero, Ibid.

thought or intent to commit them, unless such intent is shown by acts punished by law, or it is proven that if the offender failed to execute his criminal project, it was not because of desistance or repentance on his part, but due to some obstacle which prevented its execution.

4. Sometimes a person is not delinquent even though he may deliberately perform an act which is in abstract a crime, for instance, he who kills another in his own defense, the husband who takes the life of his adulterous wife and her paramour, etc.

5. On the contrary, there are cases in which a person becomes liable for an offense even though he may not deliberately intend to commit it, if the same was committed with negligence.

6. Since negligence (*culpa*) differs from malice (*dolo*), which is the essential element of an offense, negligence is punished by a lesser penalty.

7. For hazard or a fortuitous accident no person is liable; thus when a violation of law is committed unwittingly, it should not be punished unless there is some negligence on the part of the offender for then it shall deserve penalty.

8. The higher or lesser gravity of an offense is to be measured by the greater or lesser damage done to society, and also by the circumstances surrounding its commission, for instance, the conditions of the offender and the offended party; any relation of an obligatory character existing between themselves, the age of the offender, his status, capacity, condition, etc., the place where the crime was committed, the motive by which the offender was actuated, and other requisites.

9. An accomplice is as guilty as the principal when both conspired and agreed upon a criminal scheme, or

when the aid, protection, favor, or suggestion of the accomplice was the cause of the crime; otherwise he will be less criminal.

10. For the prosecution and accusation of crime there is a certian term fixed by the law.

As to penalties—

1. The power to impose penalties is an attribute belonging to the sovereign.

2. Penalties are imposed because of the evil caused by the offender to society or to some of its members.

3. Penalties are bodily, infamous, or pecuniary.

4. All of them must keep due proportion to crimes and among themselves.

5. This proportion must be graduated according to the nature of the crime and its circumstances.

6. Penalties must be such as not to offend against public modesty and decency.

7. They shall not be excessively severe either.

8. All penalties must have for their object the public utility.

9. There should be no remission of them when the law so provides.

Review Questions

1. Basis and origin of the present Revised Penal Code.—2. When was it ordered promulgated in the Philippines?—3. Why is it still in force in spite of the change of sovereignty?—4. What were the penal laws in the Philippines prior to the promulgation of the present Penal Code?—5. When and who ordered the Compilation of the Laws of Indies?—6. Name the special protection afforded to Indians in said laws.—7. Which book of the "Novísima Recopilación" was devoted to crimes?—8. What other laws or set of rules con-

tained penal provisions at the time?—9. Name ten (10) of the crimes or offenses punished at that time.—10. What is "Lex Romana Visigotorum"?—11. What were the principles prevailing in the "Fuero Juzgo"?—12. When and by whom were the "Partidas" published?—13. When and by whom was the "Novísima Recopilación" published?—14. When was the first Penal Code of Spain published?—15. When was it extended to the Philippines?—16. How many penal codes were enforced in Spain?—17. Name the dates.—18. Name some of the principles underlying the Spanish Criminal Law as to (a) crimes and (b) penalties.

CHAPTER IV

SOURCES AND CONSTRUCTION OF PENAL STATUTES

1. Power to define and punish crime.—2. Source of the penal laws.—3. Sources of the criminal law in the Philippine Islands.—4. Ignorance of the penal laws.—5. Construction of penal statutes.—6. Rules for the application of the Penal Code provisions to special laws.

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1. Power to Define and Punish Crime.—The legislatures of the several states have the inherent power to prohibit and punish any act interpreted as crimes provided they do not violate the restrictions of the fundamental law or the Constitution; and the courts cannot look further into the propriety of a penal statute than to ascertain whether the legislature had the power to enact it. And it is a well settled principle that the legislature cannot, by the enactment of a law, or otherwise, deprive itself, or a subsequent legislature, of the power to pass such laws, under the police power, as may be deemed necessary for the welfare of the state and her people.[1]

2. Source of the Penal Laws.—The law is the only source of penal statutes. Modern criminal law has adopted the maxim *nullum crimen, nulla poena sine lege,* and has set aside the old principle of judicial discretion. Prior to the penal reformation undertaken by Beccaria the judges were allowed to penalize acts not mentioned nor prohibited by legislature act. A large measure of independence was given to judges in the administration of justice. It seemed, however, that abuses were many, and so the maxim *"Ubi non est lex nec prevaricatio,"* meaning there is no crime if there is no law, was adopted as a necessary measure.

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[1] 16 C. J. 60-61.

3. Sources of the Philippine Criminal Law.—The sources of the Philippine Criminal Law are: (1) Act No. 3815, commonly known as Revised Penal Code; (2) Penal Provisions incorporated in the Administrative Code; (3) Penal Acts and Penal Laws enacted by the defunct Philippine Commission, Philippine Assembly, and Philippine Legislature; (4) Penal Acts enacted by the present National Assembly, and (5) Penal Acts of the Congress of the United States specially made applicable to the Philippine Islands.

A special Penal Law is understood to mean any penal law punishing acts which are not treated and penalized by the Revised Penal Code.[2] Therefore neither judicial decisions (Arts. 3 and 21, Revised Penal Code), nor the English or American common law can be made the basis or source of penal statutes in the Philippines.[3]

Whenever a Court has knowledge of any act which it may deem proper to repress and which is not punishable by law, it shall render the proper decision and it shall report to the Chief Executive, through the Department of Justice, the reasons which induced the Court to believe that said act should be made the subject of penal legislation.

In the same way the Court shall submit to the Chief Executive, through the Department of Justice, such statement as may be deemed proper without suspending the execution of the sentence, when a strict enforcement of the provisions of this Code would result in the imposition of a clearly excessive penalty taking into consideration the degree of malice and the injury caused by the offenses.[4]

4. Ignorance of the Penal Laws.—Authors on criminal law, almost unanimously, lay down as an irrebuttable rule

[2] U. S. vs. Serapio, 23 Phil., 584.
[3] U. S. vs. Taylor, 28 Phil., 599.
[4] Article 5, Revised Penal Code.

that "ignorance of the. law does not excuse from compliance therewith" (*ignorantia legis non excusat*). This principle, or rather presumption, does not accord with reality. On the contrary, it is well known that a great majority of people are not acquainted with the penal laws. Nevertheless, such a rule must be accepted for the reason that the welfare of society and the safety of the State depend upon the enforcement of the law. If a person accused of crime were to shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result. Moreover, the rule lies at the root of the administration of justice. No system of criminal justice could be sustained with such an element in it to obstruct the course of its administration. There is no telling to what extent, if admissible, the plea of ignorance would be carried, or the degree of embarrassment, that would be introduced into every trial by conflicting evidence upon the question of ignorance.[5]

5. Construction of Penal Statutes.—The methods of interpretation have been variously classified by different authors. According to one of the most eminent jurists, interpretation which rests on the same authority as the law itself is said to be "legal"; that which rests upon its intrinsic reasonableness is said to be "doctrinal". Legal interpretation may be either "authentic," when it is expressly provided by the legislator, or "usual," when it is derived from unwritten practice. Doctrinal interpretation based upon the meaning of words and sentences, is called "grammatical"; doctrinal interpretation based upon the intention of the legislator, is called "logical." When logical interpretation stretches the words of a statute to cover its obvious meaning, it is called "extensive"; when, on the other hand, it avoids giving full meaning to the words,

[5] People vs. O'Brien, 96 Cal., 171; State vs. Boyett, 32 N. C., 336.

in order not to go beyond the intention of the legislature, it is called "restrictive."[6]

The most generally accepted rules of interpretation of penal statutes are: (1) Laws creating, defining, or punishing crimes, and those imposing forfeitures, are to be construed strictly against the state or the party seeking to enforce them, and favorably to the party sought to be charged. They are not to be enlarged by implication, nor extended to persons or cases not plainly within the meaning of the language employed. But the construction of such statutes must not be so strict as to render them ineffective, or to defeat the manifest purpose and intention of the legislature. In several states (California, Kentucky, New York, North Dakota, Oklahoma, Oregon, Illinois, and Arizona) this rule of the common law has been abrogated by general statutes, providing that penal and criminal laws, like all others, must be construed liberally, according to the fair import of their terms, so as to effectuate the purpose of the legislature.[7] (2) In case a judge is unable to construe a statute clearly, or in case of doubt, that interpretation which is more favorable to the accused must prevail (*in dubio mitius, in dubio pro reo*). (3) In case of obscurity, the statute should be interpreted extensively in favor of the accused, and restrictively in everything which is likely to be prejudicial to him. (4) Contrary to the prevailing rule in civil matters, interpretation "by analogy" has no place in criminal matters.

6. Rules for the Application of the Revised Penal Code Provisions to Special Laws.—Article 10 of the Revised Penal Code provides that *offenses* which are or in the future may be punishable under *special laws* are not sub-

[6] Black, Interpretation of Laws, pp. 5, 6.
[7] Black, Interpretation of Laws, p. 451.

ject to the provisions of this Code. This Code shall be supplementary to such laws unless the latter should specially provide the contrary. The term "special laws" was defined in the case of the United States vs. Serapio, 23 Phil., 584, as penal law which punishes acts not defined and penalized by the Revised Penal Code.

By virtue of the provisions of said Article 10, it was held by the Supreme Court that the attempted or frustrated offenses penalized by the Philippine Commission as for example, the Municipal Code, are not punishable.[8]

Some provisions of the Revised Penal Code, however, are perfectly applicable to special laws. In fact the Supreme Court has extended some provisions of the old Penal Code to special penal laws such as, for example, the provisions of Art. 22 with reference to the retro-activity of penal laws if they favor the accused;[9] those of Art. 16 with reference to participation of an accomplice in the commission of a crime,[10] and those of Art. 45 referring to the confiscation of the instruments used in the commission of the crime.[11]

Review Questions

1. Where does the power to define and punish crime reside?—2. What is the limitation of this power?—3. What is the source of penal laws?—4. Recite the Latin maxims on the subjects.—5. What was the prevailing theory prior to the penal reformation?—6. Name the cause or causes which gave birth to the modern principle.—7. What are the sources of criminal law in the Philippines?—8. May common law or judicial decisions be taken as sources of criminal law?—9. What is the duty of the Court when confronted with a reprehensible act not punishable by law?—10. Define "special law."

[8] U. S. vs. Lopez Basa, 8 Phil., 89.
[9] People vs. Parel, 44 Phil., 437.
[10] U. S. vs. Ponte, 20 Phil., 379.
[11] U. S. vs. Bruhez, 28 Phil., 305.

—11. Is ignorance of the law a valid defense against a criminal charge?—12. Is it not a fact that a great majority of people are ignorant of penal laws?—13. Give the reasons for adopting the presumption to the contrary.—14. Give the classification of methods of interpretation of penal statutes.—15. What is meant by legal interpretation?—16. What is meant by *doctrinal* interpretation?—17. Do. do. *authentic?*—18. Do. do. *usual?* 19. Do. do. *grammatical?* —20. Do. do. *logical?*—21. Do. do. *extensive?*—22. Do. do. *restrictive?*—23. State the most accepted rules of construction.—24. What is meant by *In dubio mitius, in dubio pro reo?*—25. Is interpretation *by analogy* permissible in criminal matters?—26. Are the provisions of the Revised Penal Code applicable to special laws?—27. What provisions of the Revised Penal Code are applicable to special laws? —28. Examine and recite the following cases: U. S. v. Lopez Basa, 8 Phil., 89; U. S. v. Ponte, 20 Phil., 379; U. S. v. Bruhez, 28 Phil., 305; People v. Parel, 44 Phil., 437.

CHAPTER V

CHARACTERISTICS OF CRIMINAL LAW

1. Characteristics of criminal law.—2. Generality.—3. Territoriality.—4. Irrestrospectivity.

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1. Characteristics of Criminal Law.—As a general rule, penal laws have three definite attributes: (a) they must be of general application, that is to say, they must apply to all persons, whether nationals or foreigners, save only in the exceptional cases established by the law of nations and international usage; (b) their force and effect must be co-extensive only with the national territory, and (c) they must not be retro-active in effect.

2. Generality.—Penal laws and those of police and public security are binding upon all persons who reside in this country, fifteen days after such laws have been published in the Official Gazette, or on the date especially set forth in the promulgatory clause.[1]

And the penal laws, as well as any other laws, are repealed only by other subsequent laws, and neither disuse, nor any custom or practice to the contrary shall prevail against their observance.[2]

The following persons enjoy absolute or relative immunity from the operation of the penal laws:

(a) *Members of the National Assembly.*—In all cases, except treason, open disturbance of public order, or other offense punishable by death or imprisonment for not less than six years, they are privileged from arrest during their attendance at the session of the National Assembly, and in

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[1] Art. 8, Civil Code; section 11, Act 2711.
[2] Art. 5, Civil Code.

going to and returning from same; and, for any speech or debate in said body, they cannot be questioned in any other place.[3]

(b) *Chiefs of foreign states* who in their offical character may be within the limits of the national territory. The reason for this privilege is that a chief of a foreign state represents his country, and cannot, therefore, be subjected to the foreign law. This privilege adopted by international usage is extended to both kings and presidents of republics.

(c) *Diplomatic representatives.*—The reasons for their exemption are (1) a diplomatic agent is the representative of his country with respect to the government to which he is accredited; (2) a diplomatic agent requires freedom of action in the performance of his duties. Included in this group are ambassadors, plenipotentiary ministers, *chargés d'affairs,* embassy secretaries, and *attachés.* Their immunity begins from the moment they take up their diplomatic duties; the privilege ceases when their commissions expire or if they are dismissed from office. The immunity of a diplomat embraces not only his independence from the territorial laws but also his *inviolability* as to person and dwelling, furniture.[4]

Consular officers do not enjoy these immunities.[5] It is only in certain countries that they are privileged, and cannot be detained for minor offenses. Nearly all authorities agree that consuls, whether engaged in commerce or not, are amenable to the local courts in civil as well as criminal matters; but it is also generally held that they should not

[3] Section 93, Act 2711.
[4] 2 C. J. 1303, 1304.
[5] *Ibid.* 1305.

be arrested or detained except for grave infractions of the law.[6]

Liability for crime of consuls and consular officers has been provided for also in many treaties of the United States. (See those with Belgium, of March 9, 1880; with Austria, of July 11, 1870; with France, of February 23, 1853; with the German Empire, of December 11, 1871; and with Greece, of November 19, 1902).

(d) As to the *Chief Executive,* it may be contended that he is neither civilly nor criminally amenable to the courts of justice of this country, even though there is no express provision to the effect in the Constitution of the Philippine Commonwealth, unless he voluntarily submits himself to their jurisdiction. Such non-liability may be predicated upon the fact that the Chief Executive is sovereign within the sphere of his department, and on the separation and reciprocal independence of the executive, legislative, and judicial branches of the government.[7]

The contrary doctrine seems, however, more generally accepted. In England, the constitutional maxim is that the king can do no wrong.[8]

But, as Justice Miller said in Langford vs. U. S., 101 U. S. 341, "such maxim has no place in our system of constitutional law, as applied either to the Government or to any of its officers." It has been held that all officers are liable, like ordinary persons, for the violation of penal laws affect-

[6] Hershey, Essentials of International Public Law and Organization, p. 423. See also U. S. vs. Ravara, 2 Dall. 297; State vs. De la Foret, 2 Nott. & M'C (S.C.) 217; Com. vs. Kosloff, 5 Serg. & R. (Pa.) 545; 7 Op. Atty. Gen. (U.S.) 367; Moore, Int. Law Dig., Vol., V, pp. 65-72.

[7] Cf. Govt. vs. Springer, 25 Of. Gaz. 1232; People vs. Perez, 45 Phil., 599; Forbes vs. Chuoco Tiaco, 16 Phil., 534; Severino vs. Gov. Gen., 16 Phil., 366; Moon vs. Harrison, 43 Phil., 27; and Abueva vs. Wood, 45 Phil., 612.

[8] 1 Blackstone, par. 426, p. 214.

ing all persons in the community. Their official position affords them no immunity from criminal liability.[9]

Section 1, Title IX of the Philippine Commonwealth Constitution provides that "the President, Vice-President, members of the Supreme Court, and the Auditor General shall be removed from office on impeachment for, and conviction of, malicious violation of the Constitution, treason, bribery, or other high crimes."

According to Story[10] the phrase "all civil officers of the United States" means all those who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers in the army and navy. Rawle, in his treaties on the Constitution, chapter 22, p. 215, says: "In general, those offences which may be committed equally by a private person and a public officer are not the subjects of impeachment. Murder, burglary, robbery, and indeed all offenses not immediately connected with office, except the two expressly mentioned (treason and bribery), are left to the ordinary course of judicial proceeding, and neither house can regularly inquire into them, except for the purpose of expelling a member." Black,[11] commenting on the same section of the Constitution, says: "Treason and bribery are well defined crimes. But the phrase 'other high crimes and misdemeanors' is so very indefinite that practically it is not susceptible of exact definition or limitation, but the power of impeachment may be brought to bear on any offense against the Constitution or the laws which, in the judgment of the house, is deserving of punishment by this means or is of such a character as to render the party accused unfit to hold and exercise his office. It is of course primarily

[9] 20 Cyc. 1449.
[10] Constitution, p. 577.
[11] Constitutional Law, pp. 142-143.

directed against official misconduct. Any gross malversation in office, whether or not it is a punishable offense at law, may be made the ground of an impeachment. But the power of impeachment is not restricted to political crimes alone. The Constitution provides that the party convicted upon impeachment shall still remain liable to trial and punishment according to law. From this it is to be inferred that the commission of any crime which is of a grave nature, would render him liable to impeachment, though it may have nothing to do with the person's official position, except as showing a character or motives inconsistent with the due administration of his office. It will be perceived that the power to determine that crimes are impeachable rests very much with Congress."

Members of the United States Army and Navy may be tried by the civil courts of the Philippine Islands for offenses or violations of law committed by them, but their respective court-martials have concurrent jurisdiction with the local tribunals to try cases against military or naval offenders.[11]

3. Territoriality.—The criminal law of the State applies to all crimes committed within its territory. By territory is understood the area comprised within its frontiers. The following are also considered territory:

(a) *The territorial* sea. The sovereignty of the State extends to a maritime zone measured from its coast, called the territorial waters. In principle, this zone extends as far as the maximum reach of a cannon shot (according to the precept: *potestas terrae finitur ubi finitur armorum vis*), but at present, according to treaty provision, this extension is of three nautical miles or one marine league from the coast line. This limit was fixed in the 18th century in England and established thereafter by the Act of 1878.

[11] U. S. vs. Sweet, 1 Phil., 18.

(b) *Vessels.* On the high seas they are considered as territory of the country under whose flag they sail. In case of vessels in ports or territorial waters of a foreign country, a distinction must be made between merchant ships and warships: the former are more or less subjected to foreign territorial laws;[13] the latter are always reputed to be an extension of the territory of the country to which they belong, and cannot be subjected to the laws of another state.

(c) The *air space.* Due to the progress made in aerial navigation, jurists are beginning to worry about the air limits to which state laws may be extended. Three theories have been put forth on this point. The first holds the absolute freedom of the air,—the air space, saving the property rights and that of preservation of the subjacent state, is completely free. The second theory divides the air space into two zones: one "territorial" which would be under the law of the subjacent state, and the other "free," out of reach of the law. The third theory, which seems more rational, holds that the sovereignty of the subjacent state, and therefore its criminal law, extends to the whole air mass covering its territory.

4. Exterritoriality of the Philippine Criminal Law.— Section 2 of the Revised Penal Code, provides that the Code may also be enforced outside of its territorial frontiers or waters, that is, even if the crimes or offenses were committed in a foreign country, under any of the following circumstances: (a) *in cases of forgery or counterfeiting of any coin or currency notes of the Philippines, or obligations and securities issued by the Government of the Philippine Islands;* (b) *the offender should be liable for acts committed with the introduction into these Islands of the obligations and securities mentioned above;* (c) *should anyone, while being a public officer or employee, commit an offense*

[13] See U. S. vs. Bull, 15 Phil., 7; U. S. vs. Look Chaw, 18 Phil., 573; and People vs. Wong Cheung, 46 Phil., 729.

in the exercise of his function, and (d) *if the offender should commit any of the crimes against national security and the laws of national defense in Title One of the Revised Penal Code.*[14]

5. Irretrospectivity.—The criminal law has not, and cannot have, retro-active effect except in so far as it favors the offender. The reason for this is that the criminal law is a measure for the future and not for the past.

So, under Art. 21 of the Revised Penal Code *no felony shall be punished by any penalty not prescribed by law prior to its commission.*[15]

For this reason, a statute passed subsequent to the commission of a criminal act, which increases the penalty by which such act was punished at the time of its passage, cannot have a retro-active effect, that is, it cannot be enforced in such a criminal act.[16]

Under the provisions of Art. 22 of the Revised Penal Code, *penal laws shall have a retro-active effect in so far as they favor the person guilty of a felony, if he is not a habitual criminal, as such term is defined in Rule 5 of Article 62 of the same Code; this holds, despite the fact that at the time of the publication of such laws a final sentence had been pronounced and the convict was serving the same.*

And again, Art. 366 of the same Code provides that *without prejudice to the provisions of Art. 22 felonies and misdemeanors, committed prior to the date of the effectiveness of the Revised Penal Code, shall be punished in accordance with the Code or acts in force at the time of this commission.*

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[14] Article 2, par. 2, 3, 4 and 5 of the Revised Penal Code.
[15] People vs. Moran, et al., 44 Phil., 387.
[16] U. S. vs. Bungaoil, 34 Phil., 835. See also U. S. vs. Macasaet, 11 Phil., 447; and U. S. vs Cuna, 12 Phil., 241.

Therefore, whenever a statute dealing with crimes establishes more lenient or favorable conditions for the accused with regard to a certain offense, the statute becomes retro-active for that offense. And such a provision is applicable to all general laws such as the election law."[15]

In spite of the provisions of Art. 366 of the Revised Penal Code, it is an established rule that the provisions of the Penal Code in so far as they favor an accused person will have retro-active effects in the case of crimes committed before said Code became effective.

In the case of a certain Nicolas Lachica convicted as a principal, and Clemente Laceste as an accomplice, in a crime of rape, the former subsequently married the victim, Magdalena de Ocampo. Under the provisions of Sec. 2 of Act 1773 and Art. 448 of the Penal Code then in force, the penal liability of Nicolas Lachica was extinguished by the fact of his subsequent marriage. However, the penal liability of Clemente Laceste was not affected by the marriage of the co-accused and the offended party. Subsequently, the Revised Penal Code came into effect, wherein it is provided (Art. 344) that the penal liability of an accomplice or accessory to that kind of crime is likewise extinguished by the marriage of the principal with the offended party. It was held that Clemente Laceste should be given the retro-active effect of the provisions of Art. 344 of the Revised Penal Code, even though the sentence imposed upon him was already final and executory. In its deliberations, the Supreme Court stated, among other things, the following:

"It may be clearly seen that as far back as the year 1884, when the Penal Code took effect in these Islands until the 31st of December, 1931, the principle underlying our laws granting to the accused in certain case an exception to the general rule that laws shall not be retro-active when the

[15] People vs. Parel, 44 Phil., 437.

law in question favors the accused, has evidently been carried over into the Revised Penal Code at present in force in the Philippines through Article 22, quoted above. This is an exception to the general rule that all laws are prospective, not retrospective, variously contained in the following maxims: *Lex prospicit, non respicit* (the law looks forward, not backward); *lex de futuro, judex de praeterito* (the law provides for the future, the judge for the past); and adopted in a modified form with a prudent limitation in our Civil Code (Article 3). Conscience and good law justify this exception, which is contained in the well-known aphorism: *Favorabilia sunt amplianda, odiosa restringenda.* As one distinguished author has put it, the exception was inspired by sentiments of humanity, and accepted by science.

Article 22 of the new Penal Code is applicable to the petitioner who comes within one of the cases especially provided for in Article 344 of the Code: this is a point upon which there neither is, nor can be, any discussion between the parties to this case." [10]

Review Questions

1. What are the characteristics of penal laws?—2. When and upon whom are penal laws obligatory?—3. Name the persons who are more or less exempt from the operation of criminal law.—4. Under what circumstances are members of the Philippine Legislature immune from arrest?—5. Give the reasons for the immunity of the chief of a foreign state.—6. What is meant by diplomatic representatives?—7. Are consular officers immune from arrest?—8. Is the Chief Executive of the Philippine Islands amenable to the courts of the territory?—Give reasons—9. The officers and enlisted men of the Army and Navy?—10. What is "territory" in criminal law?—11. What is the extent of the territorial sea?—12. When are vessels regarded part of the territory?—13. What foreign vessels are amenable to the courts of the country when within its territorial waters or ports?—14. What is the classification of a U. S. Army transport?—15. What do you mean by air space?—16. Name the different theories as to the extent or scope of the air space.—17. For what cases or offenses may the Revised Penal Code be enforced even if com-

[10] Laceste vs. Santos, 56 Phil., 473-474.

mitted outside Philippine territorial waters?—18. Explain the reason why penal laws cannot have a retro-active effect.—19. If a penal statute is modified by another wherein a heavier punishment is imposed, which statute shall prevail over the cause of action existing at the time of the passage of the amendatory statute?—20. Examine and recite the following cases: U. S. vs. Bull, 15 Phil., 7; U. S. vs. Fowler, 1 Phil., 614; U. S. vs. Cuna, 12 Phil., 241; U. S. vs. Parel, 44 Phil., 437; Tavera vs. Valdez, 1 Phil., 468 and Laceste vs. Santos, 56 Phil., 472.

CRIMES OR FELONIES

1. General notions of crimes.—2. The true notion of crime.—3. Elements of crime or felony.—4. Misdemeanors.—5. Classification of felonies.—6. The active subject in a crime.—7. The passive subject in a crime.

1. General Notions of Crime.—Rossi [1] is of the opinion that crime is but a violation of an enforceable duty to society or its members and as such is detrimental to their welfare. Franck [2] maintains that crime is a violation of a right based on the moral law. Pessina claims that it is a denial of right. Romagnosi defines crime as an act of a free and intelligent person, prejudicial to others, and unjust.[3]

None of these definitions is satisfactory, for it is well-known that there are many acts that, while unjust and violative of our moral duties, are not criminal; just as there are acts that though in violation of civil law are not infringements of criminal law (for instance, refusal to pay a debt), and acts that work serious damage without being crimes.

The Positivist School, in its attempt to define crime, has trodden a different path. In order to ascertain the nature of crime [4] the Positivist holds that the feelings making up the moral sense of human groups must first be known. After an investigation of this matter, such a penalist concludes that crime is a violation of the sentiments of piety and probity in the measure in which they are possessed by a community; in that measure indispensable for the adjustment of the individual to social conditions. Thus, according to this conception, there would be a *natural delinquency* constituted by attacks against the fundamental sentiments

[1] Treatise on Criminal Law.
[2] Philosophie du Droit Penal.
[3] Genesi del Diritto Penale, par. 555.
[4] Criminology, Garofalo, 1st Part.

of piety and probity; and an *artificial delinquency* which would embrace all the other crimes that do not offend against such sentiments (crimes against religion, decency, etc.).

It is thus seen that it is difficult, if not impossible, to determine an exact notion of crime in itself, since crime is in such an intimate social and juridical connection with peoples and ages. A notion of crime dependent upon the feelings of a group is necessarily relative. Feelings change with time and what yesterday was punished as a crime is today licit, and vice versa.

2. True Notion of Crime.—The law gives the true notion of crime by means of the menace of penalty. Without a sanctioning law there is no crime, even though an act may be immoral or injurious; there is no crime if the commission thereof has not been prohibited by law and thereby made punishable. Crime, therefore, may be defined as *"any act prohibited by law under the threat of penalty,"* or as the Revised Penal Code says in its Art. 3, *"Acts and omissions punishable by law are felonies."*

The Revised Penal Code classifies crime or felony into intentional felonies or felonies committed through *dolus*, and culpable felonies or felonies committed through *culpa* or negligence. And according to the same Code there is *dolus* when the act is performed with deliberate intent, and there is *culpa* or negligence when the wrongful act results from imprudence, negligence, lack of foresight, or lack of experience.

3. Elements of Crime or Felony.—They are (a) act or omission; (b) wilfulness; and (c) punishment prescribed by law.

(a) *Act or omission.*—The act must be a bodily movement tending to produce an effect in the external world, it being unnecessary that the same be actually produced, as the possibility of its production is enough. Thus, an at-

tempted or frustrated crime, even if not bringing about any change in our midst, may produce it, and is, therefore, an act within the meaning of Article 3 of the Revised Penal Code. The act must be external; hence, it is said that it must produce or be capable of producing a change in the external world. Internal acts are outside the criminal law; the Code only refers to external acts. Consequently, a criminal thought, mere intention, however immoral it may be, would never constitute a crime.[5]

Omission means inaction, non-performance of a positive act which one is in duty bound to perform. It should be borne in mind that we refer to voluntary or intentional omission. When the omission is involuntary and due to neglect or oversight (for example, when a line-keeper omits thru negligence a signal and causes a derailment), the cause does not come within the province of intentional felony, but is considered rather as one of culpable felony or reckless imprudence penalized by Article 365 of the Revised Penal Code.

Among the crimes that may be committed thru omission, those which are the subject of the following articles and Acts may be mentioned: Art. 116, Art. 137, Art. 150, Art. 208, Art. 210, par. 3; Art. 213, par. 2, sub. sec. (b); Art. 218; Art. 221; Art. 271, par. 2; Art. 275, pars. 1, and 3 of the Revised Penal Code and secs. 2670, 2671 of the Administrative Code.

(b) *Acts or omission must be wilful.*—Wilfulness is a necessary element of crime or felony in spite of the suppression of the adjective, voluntary, in the definition of felony under Art. 3 of the Revised Penal Code. Note that this article classifies felonies into intentional felonies (*delitos delosos*) and culpable felonies (*delitos culposos*), and defines *dolus* as the act done with deliberate intent. If,

[5] Dec., February 1, 1901, 66 Jur. Crim., 83.

in order to commit an intentional felony (delito doloso), it is necessary to act with deliberate intent, it must follow that the act necessarily is voluntary because there can be no deliberate intent where there is no freedom, intelligence, or intent.

Wilfulness is a complex *totum* composed of three elements, namely, freedom, intelligence and intent. In the absence of any of these elements there would be neither wilfulness nor voluntary act; and there being no voluntary act, there would be no crime or felony.[6]

A felonious act is always presumed as having been voluntarily committed unless evidence to the contrary appears,[7] because of the moral presumption that freedom and intelligence are the normal conditions of man, and this moral presumption is also a legal one.

The presumption of a free act may be destroyed by evidence that there was force or threat. For this reason, a person acting under compulsion or force is exempt from criminal liability.[8]

The presumption of an intelligent act may be destroyed by proof of insanity, infancy, or excusable mistake.[9]

The presumption of intentional act may be overcome by proof of accident [10] or upon sufficient proof of mistake of fact. Thus, one cannot be held criminally responsible [11] who, by reason of mistake as to the facts, does an act for which he would be exempted from criminal liability if the facts

[6] Viada 1, Código Penal, pp. 15-16.

[7] U. S. vs. Gloria, 3 Phil., 333.

[8] Art. 12, pars. 5 and 6, Rev. Pen. Code; U. S. vs. Exaltación, 3 Phil., 339; U. S. vs. Felipe, 5 Phil., 333.

[9] Art. 12, pars. 1, 2 and 3 Rev. Pen. Code; People vs. Bascos, 44 Phil., 204; U. S. vs. Peñalosa, 1 Phil., 109; U. S. vs. Católico, 18 Phil., 504; U. S. vs. San Juan, 25 Phil., 513.

[10] Art. 12, par. 4 Rev. Pen. Code; U. S. vs. Tañedo, 15 Phil., 196.

[11] U. S. vs. Ah Chiong, 15 Phil., 488; People vs. Bayambao, 52 Phil., 309.

were as he conceived them to be, but would constitute a felony if he had known the true state of facts.

A somnambulist is not an insane person, in the sense that he is deprived of intelligence, but a person without any will-power, that is, without free will, and hence, exempt from criminal liability under Art. 3 of the Revised Penal Code.[13]

As a general rule, *malicious intention or malice* is a necessary ingredient of a crime or felony because of the maxim *Actus non facit reum, nisi mens sit rea;* and by malice or *malicious* intent is meant that determination of the will to accomplish the evil or damage contemplated as the result of the act done.[14]

There are, however, some offenses where criminal or malicious intent is not a necessary ingredient, i. e., when the doing of a prohibited act is made criminal on account of public policy and public interest. For instance, if a certain Act prohibits and penalizes the granting of loans to any member of the board of directors of a state bank, it would be no defense for a director who makes the loan to himself to allege that he acted in good faith, that he was misled by rulings coming from the auditor, and finally, that no loss has been suffered by the bank. The doing of the prohibited act is, in itself, sufficient to constitute a crime.[15] This is what constitutes *malum prohibitum,* in contradistinction to *malum in se,* in which malice is a necessary ingredient.[16]

(c) *Punishment prescribed by law.*—This must be ascribed to the maxim, *Ubi non est lex nec prevaricatio,* that is, there is no crime if there is no law. The condition also accords with the maxim, *Nullum crimen, nulla poena sine*

[13] U. S. vs. Odicta, 4 Phil., 309.
[14] Silvela, El Derecho Penal, Vol. 2, p. 111.
[15] People vs. Concepcion, 44 Phil., 126.
[16] U. S. vs. Sy Cong Bieng, 30 Phil., 577, and U. S. vs. Go Chico, 14 Phil., 128.

lege, by which the modern criminal law is inspired, and which was adopted as a reaction to the abuses of unlimited judicial arbitrariness. Prior to the penal reformation initiated by Beccaria, the most excessive arbitrariness held sway in Europe; judges could penalize acts not mentioned by law and apply thereto such penalties as they might deem appropriate. As time went on the freedom granted judges to try and impose penalties for acts which they themselves made criminal steadily increased, because in many countries the utter severity of the criminal law was opposed to the growing humanity of customs; hence a large measure of independence was given them in the administration of justice. It seems that abuses were galore, and the ample discretion granted the judiciary with a view to freeing the citizens from penalties rejected by popular conscience because of their severity, was availed of to defend personal or class interests only. The practice was injurious and oppressive to citizens who had no protectors.[16]

4. Light Felony.—According to Pacheco, *falta* (light felony) "is a venial offense." In its essence it is the same as crime, but differs from the latter in the little importance of its results; both crime and light felony are voluntary acts or omissions punished by law. Essentially both offenses are identical; light felonies differ from felonies only as regards their offensive intensity. Moreover, according to Article 9 of the Revised Penal Code, light felonies are *infractions of law for the commission of which the penalty of arresto menor or a fine not exceeding 200 pesos, or both is provided.* Therefore, any offense punishable by any of these penalties is only a light felony.

Another characteristic feature of light felonies is that they are punishable only when they have been consum-

[16] Calón, Derecho Penal, p. 124.

mated, with the exception of *those committed against persons, or property.*"

Thus an attempt to commit a light felony may not be punished.

5. Classification of Felonies or Offenses.—Penal laws follow two systems; some divide violations of law into crimes, felonies, and contraventions; others into crimes and contraventions. The first division is called tripartite; the second, bipartite. Crimes are understood to be those offenses against natural rights, such as life and liberty; felonies are those which violate only the rights created by social contract, as property and contraventions, those which infringe upon police rules and regulations.

The bipartite division has found many defenders who believe it to be more rational than the tripartite division. There are, in effect, differences in essence and nature between crimes and contraventions. Crimes are infractions of law prompted by malicious intent, violative of individual and collective rights, injurious to social law, and of harmful and dangerous character; on the other hand, contraventions are innocent acts, innocuous of themselves, executed without malice, do not ordinarily cause any individual damage, and are prohibited and punished only as precautionary measures to prevent future individual or collective evils. As such, they are subject to the police power and local regulations.

Although the Revised Penal Code does not seem to follow any of this classification—its Article 3 divides offenses into intentional and culpable felonies—it practically adopts the tripartite division, because its Article 9 classifies offenses as grave felonies, less grave felonies, and light felonies. In accordance with said Article 9, crimes to which the law attaches afflictive penalties are grave felonies; less grave

[11] Art. 7, Revised Penal Code.

felonies are those to which the law attaches correctional penalties; and light felonies are infractions of law for the commission of which light penalties are prescribed.

6. The Active Subject or Offender in a Crime.—Only a person can commit crime; or, in other words, an individual alone can be criminally responsible, for the reason that in a person only can the condition of unity of conscience and will, which constitutes the basis of criminal imputability, be present. Entities or juridical persons, on the other hand, although having personalities of their own, reveal such unity of conscience and will only when they are agreed upon a given purpose, that is to say, when each and all of their members do will the criminal act and do something for its materialization. In this case there is then an aggregate of individual liabilities. But where there is no absolute meeting of wills, where a preponderant part of the members engages in criminal activity, while the remaining parties are opposed thereto, the liability of the former cannot be extended to the latter inasmuch as it is prevented by the principle universally accepted that criminal liability is personal. So that the prevailing opinion is that criminal responsibility cannot be exacted of juridical persons. The State can at best dissolve such entities as, being organized for lawful purposes, would deviate therefrom and offend against the law. It has the right to impose upon them a civil liability only, and not a criminal one, because the guilty parties would be confounded with innocent ones. [18]

Thus the Supreme Court of Spain held that entities, corporations, and institutions can never become offenders. [19]

Anciently, criminal liability was required of animals and inanimate beings, and proceedings against them were frequent occurrences. Among many interesting actions, there

[18] Calon, Derecho Penal, pp. 203-205.

[19] Dec. of January 1, 1909, 82 Jur. Crim., 53 (See also West Coast vs. Hurd, 27 Phil., 401).

will be remembered that brought in the 15th century by the Bishop of Lausanne against the leeches with which the waters of Berne were teeming; that instituted by the inhabitants of Autun (France) against the rats which invaded their fields, etc.[20]

7. The Passive Subject or Offended Party in a Crime.— —The passive subject or victim in a crime is society in an ample sense, because an infraction of law always constitutes an attack against the conditions of its existence; and penalty is but a social reaction against crime for defense purposes. From this viewpoint, the following may be passive subjects of crime:

(a) an individual person who may become the victim of a crime before, on, or after his birth, and even after his death (see crimes of abortion, infanticide, murder, violation of sepultures, etc.).

(b) juridical persons (robbery, arson, etc.)

(c) the State (see crimes of rebellion, etc.)

Review Questions

1. How is crime defined by (a) Rossi, (b) Franck, (c) Pessina, and (d) Romagnozi.—2. Are these definitions satisfactory?—3. How does the Positivist School define crime?—4. Is it possible to determine an exact notion of crime in itself.—5. Give the true notion of crime.—6. What are the elements of crime or felony?—7. What do you mean by act or omission?—8. When is omission to be classified as felony and when as criminal imprudence?—9. Give some of the few instances of crimes committed thru omission.—10. What are the requisites of free will or wilfulness?—11. What is the presumption arising out of a criminal or injurious act?—12. How is the presumption of voluntary act rebutted?—13. Do. do. intelligent act.—14. Do. do. intentional act.—15. How would you consider the act of a somnambulist?—16. Is malice or malicious intent an indispensable ingredient of a felony or misdemeanor?—17. Distinguish

[20] Vid. Quirós, Proceedings against Beasts in "Alrededor del Delito y de la Pena," Madrid, 1903.

malum in se from *malum prohibitum*.—18. State the reason why punishment prescribed by law is an indispensable requisite of a crime or felony.—19. Give the definition and essence of light felony.—20. Give some of the characteristic features of light felony.—21. Give the classification of felonies.—22. What is grave felony?—23. What is less grave felony?—24. Who is or may be the active subject in a crime?—25. Explain the reason why juridical entities cannot be made the active subjects in a crime.—26. Have animals and inanimate beings ever been made the active subjects in a crime?—27. When?—28. Who is or may be the passive subject in a crime?—. Examine and recite the following cases: U. S. vs. Gloria, 2 Phil., 333; People vs. Bascos, 44 Phil., 204; U. S. vs. Católico, 18 Phil., 504; U. S. vs. San Juan, 25 Phil., 513; U. S. vs. Chiong, 15 Phil., 488; U. S. vs. Odicta, 4 Phil., 309 and People vs. Bayambao, 52 Phil., 309.

CHAPTER VII

CRIMINAL LIABILITY

1. Imputability, responsibility and culpability, distinguished.—2. Malice or *Dolus*.—3. Scope of Penal Liability.—4. Impossible crime. —5. *Culpa* or criminal negligence.—6. Concept of "culpa" in the Classical and Positivist School.—7. Elements of criminal negligence. —8. Classes of criminal imprudence.

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1. Imputability, Responsibility and Culpability, Distinguished.—It is necessary that the performer of an act which bears the resemblance of a crime be found guilty in order that he may be punished by a penalty. But before being guilty he must be *imputable* and *responsible*. A person is said to be *imputable* when he is capable of answering before the social power for a given act. Imputability presupposes the existence of a modicum of psychical conditions. Imputability may be defined as capacity to answer before the social power for an act done.

He is liable who being *imputable*, being capable to answer before the social power, *must* be responsible to it; hence *responsibility* is the juridic duty of an individual to account to society for an act done by him. Thus while imputability means possibility, responsibility means effectiveness. Every person who is neither insane nor a minor, and acts without physical or moral coercion is imputable, but will be responsible only when, after executing an act, such act is charged to his account; and he must account for it before the social authority and abide by the consequences originating therefrom.

A culprit is one who having been found liable for his acts, is held to be at fault with society; and, as a consequence of such fault, is deserving of a penalty. Thus, culpability

is a declaration that a person deserves the imposition of a penalty.

2. Malice or *Dolus*.—For a person to be held liable for a crime it is necessary, as has been stated already, for him to have acted voluntarily; that is, freely, intelligently, and intentionally.

Malice may be defined as an intent to do injury to another, and may be regarded as having the same meaning as *dolus*. *Dolus*, also, includes the idea of fraud, which in our present legal use is not interchangeable with malice; but, in so far as injuries effected by force are concerned, *dolus* and malice are equivalent terms.[1]

Dolus may therefore be defined as a conscious volition tending to the performance of an act which is delictive, or more simply, an intention to do a criminal act. It is not necessary for its existence that the offender be acquainted with the law that prohibits the act, because, as Manzini says, crimes in which *dolus* is required are not only violations of elementary precepts of morals known to all, but also constitute injuries to the rights and interests of others.[2]

3. Scope of Criminal Liability.—According to Article 4 of the Revised Penal Code, criminal liability shall be incurred: (1) *By any person committing a felony (delito) although the wrongful act done be different from that which he intended.* (2) *By any person performing an act which would be an offense against persons or property, were it not for the inherent impossibility of its accomplishment or on account of the employment of inadequate or ineffectual means.*

Under the first paragraph, the following requisites are necessary for the existence of criminal liability: namely, (a) that a felony be committed; and (b) that the wrong

[1] 1 Wharton on Criminal Law, pp. 180-183.
[2] Calon, Derecho Penal, 218, 219.

suffered by the offended party be the direct consequence of the felony committed by the offenders. Thus, the party, trying to kill A, kills B by mistake, shall be responsible just the same for the crime he intended to commit.[3] The mistake will in no wise benefit the culprit, for the reason that the mistake was merely accidental, not essential (as when a man shooting a bird kills a person) ; likewise, a person inflicting upon another a slight physical injury which later on degenerates into serious physical injuries, without any fault or reckless imprudence on the part of the offended party, will be responsible for the latter crime.[4]

Again in the course of a fight, one of the combatants, in his desire to wound his adversary, accidentally wounds a girl who is behind the latter, and the girl died because of the injury, the offender is guilty of homicide. The two requisites of the criminal liability are present in said case: namely, unlawful act (the act of attempting to injure his adversary) and the injury done (the death of the girl) as a direct consequence of the unlawful act.[5]

But, on the other hand, a person who, in struggling with another who sought to wrench away with his bolo, accidentally wounds a bystander, killing him in consequence, is not criminally liable for any crime, because the doer was not committing any unlawful act when he endeavored, as he did, to retain the possession of the weapon.[6]

Likewise, one cannot be held liable for a felony different from that which he proposed to commit when the injury suffered by the offended party is due to some cause or accident wholly extraneous to the fact constituting the felony, or is due to the inexcusable negligence or deliberate

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[3] People vs. Gona, 54 Phil., 605.
[4] U. S. vs. Luciano, 2 Phil., 96; People vs. Sia Bonkia, 60 Phil. 1.
[5] People vs. Vagallon, 47 Phil., 332.
[6] People vs. Bindoy, 56 Phil., 15.

conduct of the aggrieved person.[7] For example, if A and B engage in a fight, and B, because he is suffering from heart disease, dies during the fight, A cannot be held guilty of homicide for the death of B, for the reason that the death of the latter was not directly caused by the act of A. Or if slight physical injuries be inflicted upon B, and the latter deliberately immerses his body in a contaminated cesspool, and as a consequence of this act his wounds become infected, A cannot be held liable for the crime of serious physical injuries.

The Spanish criminal jurisprudence has also uniformly held that a defendant is not criminally liable for the consequences of an erroneous or improper medical treatment, the ground being that a person "is only accountable for his own acts and their natural or logical consequences, and not for those which bear no relation to the initial cause and are due to the carelessness, fault, or lack of skill of another, whether it be the injured man himself or a third person.[8]"

For the rules laid down in the two preceding paragraphs to be enforced, it is necessary that the intended and the resulting crime should befall on different persons. Otherwise, that is if the victim in the intended and resulting crime is one and the same person, the general rule laid down in paragraph 1 of Article 4 of the Revised Penal Code shall prevail.

For instance, if the offender tries to commit parricide (by killing his own father), but by mistake kills a stranger, in other words he commits a simple homicide, the offender should be held liable for the resulting crime (homicide) but the penalty shall be imposed in its maximum period, according to the provisions of paragraph 2 of Article 49. As will be seen in this example the crime befalls on different persons.

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[7] U. S. vs. Mendieta, 34 Phil., 242.

[8] Decision of April 2, 1903, Gazette of May 23rd. Viada, Volume 5, page 81, 5th Edition.

But, if, for instance, A, in attempting to strike B on the face with a knife with the sole purpose of inflicting a wound that would leave a permanent scar on his face, instead actually landed the blow at the base of the neck of the victim thereby causing the latter ultimate death, the accused cannot claim the provisions of Articles 49. In other words, he cannot claim that he be sentenced for the intended crime (physical injuries) instead of the resulting crime (homicide) for the reason that in the opinion of the Supreme Court of Spain and subsequently followed by the Supreme Court of the Philippines, the rule contend in this Article is applicable only in cases where the crime befalls on different persons. (People vs. Albuquerque, 59 Phil., 150).

Exception to the rule. The rule to the effect that *any person committing a felony shall be criminally liable for its consequences even though the wrongful act done be different from that which he intended,* is subject to the limitation established by the provisions of article 49 of the Revised Penal Code.

Said article reads as follows:

In cases in which the felony committed is different from that which the offender intended to commit, the following rules shall be observed:

1. *If the penalty prescribed for the felony committed be higher than that corresponding to the offense which the accused intended to commit, the penalty corresponding to the latter shall be imposed in its maximum period.*

2. *If the penalty prescribed for the felony committed be lower than that corresponding to the one which the accused intended to commit, the penalty for the former shall be imposed in its maximum period.*

For instance: an offender tries to commit parricide (by killing his own father), but by mistake kills a stranger, in other words, he commits a simple homicide. In such case the penalty which shall be imposed upon him shall be that for the crime of homicide in its maximum period.

3. *The rule established by the next preceding paragraph shall not be applicable if the acts committed by the guilty person shall also constitute an attempt or frustration of another crime, if the law prescribes a higher penalty for either of the latter offenses, in which case the penalty provided for the attempt or the frustrated crime shall be imposed in its maximum period.*

This rule, however, cannot be applied to any of the crimes defined in our Revised Penal Code. This rule has application to conditions existing under the old code for the reason that under it certain of-

fenses, such as regicide in its different degrees, were punished with special severity. Thus, for example, the attempt to commit regicide and frustrated regicide were not punished in accordance with the old Penal Code (Art. 158) with a penalty immediately lower by one or two degrees respectively than that corresponding to the consummated regicide. The rule provided for in this paragraph has in view a case such as we have just mentioned. Hence, according to the provisions of the old Spanish Code, if a person sought to commit regicide but by accident committed merely homicide, such a person should be punished not as guilty of homicide, (the penalty of which is only *reclusión temporal*) but with the special penalty prescribed for frustrated regicide, i. e., *reclusión temporal* in its maximum degree to *death.*

It is obvious, however, that regicide cannot be committed in this country, nor crime of such gravity that the mere attempt or frustration to commit the same should merit severe penalties.

It seems, then, that the incorporation of rule 3 of the article which we are now discussing is unnecessary.

4. Impossible Crime.—The second paragraph of Article 4 of the Revised Penal Code constitutes a real innovation, and has for its purpose to include in the Code the so-called impossible crimes, that is, those acts which although done with evil intent do not produce the injury which the culprit desired to inflict, due to the ineffectiveness of the means employed, or to the absence of a real objective, or to the impossibility of the ends.

In accordance with the old Code and the decisions construing it, the impossible crime, that is, when the act committed by the offender cannot constitute a crime, either because the means employed are inadequate (as when one tries to kill another by putting in his soup a substance which he believes to be arsenic when in fact it is common salt), or because of the impossibility of the end in view (as when one tries to murder a corpse), was not punishable, neither as attempted nor as frustrated offense.*

By this innovation as stated in the second paragraph of this Article, acts like these are now punishable and subject

* Decision of the Supreme Court of Spain, November 26, 1879, 21 Jur. Crim., 343.

to the penal sanction of Article 59 of the Revised Penal Code.

5. *Culpa* or Criminal Negligence.—Between a wrongful act committed with malicious intent which gives rise to a felony or misdemeanor, and a wrongful act committed without any intent to do so which entirely exempts the doer from criminal liability, there is a middle way, commonly known as criminal negligence, punishable under Art. 365 of the Revised Penal Code.

The basis for the punishability of criminal acts resides in the duty of every man not only not to make attempt voluntarily against the precepts of law, but moreover to execute his own acts with the fullest measure of precaution so as to avoid hurtful consequences to others resulting from inoffensive acts. The element of malicious intent or *dolus* is supplied and replaced by carelessness, negligence, and imprudence.

6. Concept of *Culpa* in the Classical and Positivist Schools.—The Classical School considers criminal imprudence as a voluntary lack of foresight of the injurious consequences of our conduct. Therefore, its essential elements are: (a) lack of foresight of the consequences of an act, and therefore absence of wilfulness, for nothing can be willed which is unforeseen, and (b) that the consequences of the very acts which were not forestalled could have been foreseen.[19]

The Positivist School considers criminal imprudence as vice or defect of attention. According to Tosti, it is a defective condition of the intellectual faculties of the doer, on account of which his activities may be dangerous to so-

[19] Calón, Derecho Penal, 223.

ciety. For them (the Positivists) the principle of criminal liability, in the case of *culpa*, as in the case of *dolus*, is social defense."[11]

7. Elements of Criminal Negligence.—The following are the elements of criminal negligence:

(a) That there be a real prejudice or injury caused.

(b) That such an injury or prejudice was not intentionally done, but simply the result or incident of another act performed by the doer.

(c) That in performing the act which was the origin or cause of the injury, due care and diligence were not used.

(d) That the act which resulted in the injury or prejudice be *lawful per se*, or at least, not considered as a felony by the Revised Penal Code, even though it may be forbidden sometimes by rules and regulations.

The test for determining whether a person is negligent in doing an act whereby injury or damage results to the person or property of another is this: Would a prudent man, in the position of the person to whom negligence is attributed, foresee harm to the person injured as a reasonable consequence of the course about to be pursued? If so, the law imposes the duty on the doer to refrain from that course, or take precaution against its mischievous results, and failure to do so constitutes *negligence*. Reasonable foresight of harm, followed by the ignoring of the admonition borne of this provision, is the constitutive fact in negligence."[12]

8. Classes of Criminal Negligence.—The Revised Penal Code[13] recognizes and distinguishes two kinds of criminal negligence or imprudence in connection with homicide or

[11] Calón, Derecho Penal, pp. 225-226.
[12] Picart vs. Smith, 37 Phil., 809.
[13] Article 365, Revised Penal Code.

other crime: namely—

(a) *Reckless imprudence or imprudencia temeraria.*— Reckless imprudence consists in voluntarily, but without malice, doing or not doing an act from which material injury results on account of lack of foresight, for which the person executing or committing it can have no excuse. This kind of imprudence is characterized by improvidence (lack of foresight), thoughtlessness, unskilfulness, carelessness, imprudence, and failure to use the most ordinary care. Examples: (a) A loaded firearm was left on a table which was thereafter made use of as plaything by a child, thereby resulting in the latter's death by the discharge thereof; or (b) An automobile was driven along the Escolta during the busiest hours of the day at a speed of 15 or 18 miles an hour, utterly disregarding the conditions of traffic, thereby causing the car to run down and kill a pedestrian. The accepted rule seems to be that where immediate personal harm, preventable by the exercise of reasonable care, is threatened upon a human being by reason of the course of conduct pursued by another, and the danger is visible and consciously appreciated by the actor, the failure to use reasonable care to prevent the impeding injury constitutes reckless imprudence.[14]

The above rule is absolutely true when the victim is free from any charge of contributory negligence, but not otherwise. For example, a railroad track or crossing is a warning or a signal of danger to those who go upon it; and persons crossing the track are bound to recognize the existing danger and to make use of the sense of hearing as well as of sight. And if a person neglects to recognize that fact and ventures blindly and carelessly upon the railroad track without any effort to ascertain whether or not a train is approaching, he does so at his own risk. Such conduct is

[14] People vs. Vistan, 42 Phil., 107; 3 Viada, Cod. Pen., 629.

in itself an act of negligence. He should look and listen, and do everything that a reasonably prudent man would do, before he attempts to cross the track. If he fails to use his senses, he is negligent, and others who have acted legally should not be punished for his lack of care.[15]

This kind of imprudence is punished by the first paragraph of Art. 365 of the Revised Penal Code by the penalty of *arresto mayor* in its maximum degree, to *prisión correccional* in its minimum degree, that is, from 4 months and 1 day to 2 years and 4 months, if the injury caused is such that, had it been intentional, it would be classified as a grave felony, and from *arresto mayor* in its minimum and medium degrees, that is, from 1 month and 1 day to 4 months, if it would have constituted a less grave felony.

But a chauffeur who, going at a great speed, sees in the middle of the road directly in his path a policeman signaling to him with his hand to stop, pays no attention to the order nor lessens the speed of his car, but goes straight for said policeman, runs over him and kills him instantly is responsible not only culpable for felony, but for intentional homicide. The offender in such case cannot pretend that he did not intend to cause the evil that he did, because even within the limits of human farsight such an act could not produce any other result than what took place.[16]

(b) *Simple Imprudence or Negligence.*—This kind of imprudence is punished by the second paragraph of Art. 365 of the Revised Penal Code, with a penalty of *arresto mayor* in its medium and maximum period, if the injury caused is such that had it been intentional it would be classified as grave felony and with *arresto mayor* in its minimum period, if it would have constituted a less grave felony.

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[15] People vs. Mananquil, 42 Phil., 90.
[16] People vs. Lojo, Jr., 52 Phil., 390.

Simple imprudence is a mere lack of precaution in those causes where either the threatened harm is not imminent or the danger is not openly visible. It is a class of imprudence which can neither be called reckless or *temeraria,* because it is impossible to foresee the evil produced, nor negligence with violation of rules, because in reality no rules are violated. An example of this class is presented in the case of a driver of a cart who passing along the street at the speed prescribed by the ordinance and leading his cart by a strap attached to the bridle or head of the animal, in a moment of distraction, on turning a corner, does not see that there is a child asleep in the gutter on the side of the team opposite to him; as a result whereof, the child is run over by the cart and killed. The act cannot be denominated *accidental* because if the driver had been paying strict attention to his duty, he would have seen the child; nor can it be called reckless negligence, because he was not able to foresee the extremely unusual occurrence of a child being asleep in that place. Neither was there a violation of an ordinance, because he was driving his vehicle in conformity therewith. Hence, it is only simple imprudence or negligence, and should be punished under the provision of the second paragraph of Art. 365.

CHAPTER VIII

CRIMINAL LIABILITY
(Continued)

1. Persons criminally liable.—2. Principals: (a) by direct participation; (b) by provocation; and (c) by cooperation.—3. Accomplices.—4. Accessories after the facts.

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1. Persons Criminally Liable.—Principals, accomplices, and accessories are criminally liable for grave felonies and less grave felonies, while only principals and accomplices are criminally liable for light felonies.[1]

2. Who are Principals.—

(a) *Principals by direct participation* are those who take a direct part in the commission of the act; that is, those who, after having conceived a criminal intent or harbored a common criminal design, get together and take part in the execution of the crime through acts which directly tend to the same end.

The criminal responsibility of the principals to a crime may be *collective, quasi-collective,* or *individual.*

Collective criminal responsibility.—

An instance of collective responsibility: In a homicide, which the offenders previously agreed to commit, not only the one who inflicts the fatal wound is considered a principal, but also the one who holds down the victim and the one who lies in wait at the door to prevent any help being rendered. The acts of each and every one of the offenders in this case are all directed to the same end, that is, to the killing of their victim.[2] Criminal responsibility in such a case is collective.

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[1] Art. 16, Revised Penal Code.

[2] U. S. vs. Reogilon, 22 Phil., 127; U. S. vs. Zalsos et al., 40 Phil., 96; Art. 17, par. 1, Revised Penal Code.

General rule in case there had been conspiracy.

In a crime committed by the joint act of two or more persons through conspiracy or connivance, the act of each conspirator done in furtherance of the conspiracy is, in contemplation of law, the act of all.[3]

In order that there may be common design it is not necessary that, in conspiring for the perpetration of the crime, they should fix in detail all the means by which they are going to execute the crime. It is enough if there is a general plan for obtaining the intended result by whatever means may be deemed adequate from time to time. Generally, it is not material that the plan which was carried out differs widely from the original plan; nor will it be required to show the existence of any previous plan if, from the evidence, it clearly appears that there had been negotiations to the same end.[4]

The rule previously laid down does not mean, however, that a conspirator should necessarily be liable for the acts of another conspirator even though such acts differ radically and substantially from that which they intended to commit. For example, if A and B conspired to whip C, and B, instead of merely whipping C, kills him for personal reasons, A cannot be liable for the homicide committed by B for the reason that the acts committed by B were not included in the purpose of the conspiracy against C.[5]

Exception to the rule.

In the case of a robbery committed by a band, however, or of robbery with homicide, a member of the band will be responsible for a homicide which the other members of the

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[3] U. S. vs. Remigio, 37 Phil., 599; People vs. Cabrera et al., 43 Phil., 64.

[4] Underhill's Crim. Evidence, 794, par. 490; People vs. Carbonel et al., 24 Off. Gaz., 2657.

[5] 12 C. J. 577-578; Buckley vs. State, 181 S. W. 729; See also Clark's Criminal Law, 2nd Ed., 149.

band may commit, even though such member did not take part therein, or was entirely ignorant of its perpetration, unless it appears that he made an effort to prevent the perpetration of such homicide.[6]

Quasi-Collective Criminal Responsibility.—

Between the collective criminal responsibility and the individual responsibility, moreover, there appears to be a middle way which may be termed quasi-collective responsibility.

Even though there had been no previous conspiracy between the defendants to commit a particular wrong or crime, the responsibility of the doers will not be altogether individual if it can be proven that at the time of the attack the doers were animated by one and the same purpose to accomplish the harm done. In other words, there would be quasi-collective responsibility if it could be proven that there had been between the doers a spontaneous agreement or intentional or material cooperation to do the harm thereby caused; in which case, such doers would be criminally liable either as principal or accessory, according to the nature of their material participation in the crime. Thus, because S began an unlawful assault on T and, after the latter had been struck down fatally by a bolo in the hands of F, he continued the attack by cutting T in the stomach with F's bolo. Although no serious injury was inflicted, he was held to be an accomplice in the homicide; his intention to collaborate with F in doing bodily harm to T was held to be sufficiently manifest.[7]

Two individuals assaulted a third inflicting on him two wounds, one mortal, and the other curable in twenty days. The Supreme Court holds that the one who inflicted the second wound answers as accomplice for the crime of homi-

[6] Art. 296, Revised Penal Code; U. S. vs. Macalalad, 9 Phil., 1.
[7] People vs. Tumayao, 56 Phil., 587.

cide, and not for that of physical injuries; the grounds being that while it was the wound inflicted by the other defendant that caused the death of the deceased, there can be no doubt but that by the second wound, inflicted at the same time as the other the one who dealt it cooperated in the fatal result; and that he was, in consequence, according to Article 18 of the Code, an accomplice in the crime of homicide, since without taking part in its execution in any of the three ways set forth in Article 17, he cooperated therein by a simultaneous act.[8]

Individual criminal responsibility.—

In the absence of a conspiracy or a previous plan to commit a crime, the criminal responsibility arising from different acts directed against one and the same person is individual and not collective, and each of the participants is liable only for the act actually committed by himself.[9] Suppose that the deceased were the one who assaulted a group of three individuals with a knife, and in the course of an incomplete self-defense, two of them caused less grave physical injuries upon the assailant, while the third inflicted the fatal wound. In this case, the party who inflicted the fatal wound would be the only one responsible as principal for the crime of homicide; the other two would be held liable only for the less grave physical injuries.[10]

B pointed a shotgun at S without good reason; there ensued a struggle between the two for the weapon. M, a female companion of B, approached the combatant and quickly wounded S in the abdomen with a knife, in consequence of which S died almost instantly. Held that M alone is liable for the resulting homicide, and B can not be

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[8] People vs. Caballero, 53 Phil., 585.

[9] U. S. vs. Magcomot et al., 13 Phil., 386; U. S. vs. Abiog et al., 37 Phil., 137.

[10] Dec. Sup. Ct. of Spain, June 2, 1874, 11 Jur. Crim., 13-14; 1 Viada, Cod.. Pen., 342-343; People vs. Martinez, 42 Phil., 85; People vs. Tamayo, 44 Phil., 38.

convicted as accomplice, there being no prior plan of agreement between them, and because B did not even know that M would intervene in the struggle, and attack the deceased with a knife."[11]

(b) *Principals by provocation or inducement. Those who directly force or induce others to commit a crime are also principals.*[12]

Compulsion exists when the offender, by means of actual violence or intimidation, forces or compels another to commit a crime. A person threatening to kill another with a revolver is an example of actual violence and fear.

It must be borne in mind that these acts of inducement do not consist merely of simple counsel before the perpetration of the crime, nor of simple words uttered at the moment of execution. Such counsel or words constitute, without doubt, wrongful acts and reprehensible incentive before the moral law. But in order that they shall constitute an incentive, or that they shall be considered as a direct inducement according to the Revised Penal Code, it is necessary that he who gives counsel or utters such words shall have great control and great influence over the person who is to act; and it is necessary that this shall be so direct, so efficacious, so powerful, as to make it a physical or moral coercion as powerful as violence itself."[13]

Provocation is made either through *mandate* or *agreement* or by inducement. In the first place we have due obedience; in the second, crimes committed by means of price or reward, and in the third, crimes committed through moral influence or persuasion."[14]

Even though one who induces another to commit a crime may have taken no part in its material execution, he is

[11] People vs. Ortiz & Zausa, 55 Phil., 993.
[12] Art. 17, par. 2, Revised Penal Code.
[13] 1 Viada, Cod. Penal, 354; Art. 17, par. 2, Revised Penal Code.
[14] 1 Viada, Cod. Penal, 354; U. S. vs. Mijares, 3 Phil., 447; U. S. vs. Chan Guy Juan, 23 Phil., 105; U. S. vs. Maharaja Alim et al., 38 Phil., 1.

nevertheless guilty as principal,[15] as well as those who, without actively participating in a crime, are present during the commission thereof and lend their moral support, thereto.[16]

The qualifying circumstance of *alevosía* or treachery does not exist as to a principal by inducement unless it is shown that he not only induced his co-principal to commit the deed, but to use the means, modes, or methods which the latter adopted in its execution.[17]

(c) *Principals by cooperation. Those who cooperate in the commission of the offense by another act without which it would not have been accomplished are likewise principals.*[18] For instance, a person who offers his house as a passage for the thief with whom he is in connivance before and after the commission of the robbery, cooperates in the commission thereof.[19]

"A" conspired with others to steal several thousand pesos worth of bulky goods then lying in the customs house. He agreed to take, aid, and, in fact, accept delivery of the goods in his warehouse from the wagons on which his co-conspirators loaded the goods at the customs house, and to pay them a substantial sum of money upon delivery of the goods. Held:— that "A" is guilty of the crime of theft as a principal and not merely as an accessory.[20]

3. Accomplices.—*Accomplices are those persons who cooperate in the execution of a crime by previous or simultaneous acts, provided that they have not taken direct part in its execution, nor forced or induced another to execute it, nor cooperated in its execution by an indispensable act.*[21]

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[15] U. S. vs. Leal, 1 Phil., 118.
[16] U. S. vs. Ancheta, 1 Phil., 165; U. S. vs. Santos et al., 2 Phil., 453.
[17] U. S. vs. Gamao, 23 Phil., 81.
[18] Art. 17, par. 3, Revised Penal Code.
[19] Dec. Sup. Ct. of Spain, March 9, 1871; 2 Jur. Crim., 7-8.
[20] U. S. vs. Tan Tiap Co., et al., 35 Phil., 611.
[21] Art. 18, Revised Penal Code.

This is in some manner a co-delinquency by cooperation. It differs from it, however, in that the participation of the offender in a case of complicity, although *necessary,* is not *indispensable* as is the case of a co-principal by cooperation. For example, if one lends his dagger or pistol to a murderer fully knowing that the latter will commit murder, he undoubtedly cooperates in the commission of the crime of murder by a previous act which, however, cannot be considered *indispensable* for the reason that even though the offender did not lend his dagger or pistol, the murderer could have obtained it somewhere else or from some other person. In such a case the participation of the offender is that of an accomplice by virtue of the provisions of this article.[32]

In like manner the chauffeur of an automobile who carried in his vehicle his co-accused and their victim in full knowledge that his co-accused would commit the crime of abduction incurred criminal liability as an accomplice in that crime.[33]

A, B, C and D agreed to defend by force what they believed to be their rights. Immediately, A and B proceeded to assault and inflict mortal wounds upon E, F and G. While A and B were inflicting these fatal wounds, C, D and E surrounded the victims in order to prevent their flight. Upon these facts, C, D and E are accomplices in the crime of homicide committed by A and B, because they cooperated in the killing by a simultaneous act which although necessary was not indispensable.[34]

In order to hold one criminally liable as an accomplice for his participation in the commission of a crime, it is essential that it be proven beyond reasonable doubt that between the supposed accomplice and the principal there was com-

[32] See 1 Viada, Cod. Pen., 370.
[33] People vs. Balotan, 45 Phil., 573.
[34] U. S. vs. Domingo et al., 37 Phil., 446.

munity of criminal purpose, i. e., that it be shown that the supposed accomplice committed the acts imputed to him with the intention to help morally or materially in the commission of the crime.[25]

For this reason, a corporal in the Constabulary who, while physical injuries were inflicted upon a prisoner which later caused his death, merely stood by, cannot be held liable for the commission of the crime as an accomplice in the absence of sufficient proof to show that he induced, ordered, or advised the person who committed the assault to do so.[26]

Likewise, the witnesses to a marriage ceremony cannot be held liable as accomplices in the crime of illegal marriage in the absence of proof to show that such witnesses testified to facts other than that they were present when the ceremony was performed.[27]

On the other hand, when a servant, at the instigation of his master, assists in inducing a girl to leave her home for immoral purposes, he is liable as accomplice in the crime of abduction.[28]

In the crime of qualified theft, the qualifying circumstance of breach of confidence does not apply to an accomplice to the said crime if he was not in the same confidential relation which the principal had with the offended party.[29]

The qualifying circumstance of breach of confidence which, in regard to the principal, justifies the imposition of a penalty one degree higher than that prescribed for theft, does not apply to an accomplice who was not in confidential relations with the offended party.[30]

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[25] People vs. Tamayo, 44 Phil., 38.
[26] U. S. vs. Guevara, 2 Phil., 528; U. S. Cunanan, 37 Phil., 777. See also People vs. Silvestre et al., 56 Phil., 353.
[27] U. S. vs. Gaoiran, 17 Phil., 404.
[28] U. S. vs. Sotto, 9 Phil., 231.
[29] People vs. Valdellon, 46 Phil., 245.
[30] People vs. Valdellon, 46 Phil., 245.

4. Accessories After the Fact.—*Accessories after the fact are those who, having knowledge of the commission of the crime, and without having participated therein either as principals or accomplices, take part subsequent to its commission in any of the following ways:*

(a) *By profiting themselves or assisting the offenders to profit by the effects of the crime.*

(b) *By concealing or destroying the body of the crime, or the effects or instruments thereof, in order to prevent their discovery.*

(c) *By harboring, concealing, or assisting in the escape of the principal of the crime, provided the accessory acts in abuse of his public functions, or wherever the author of the crime is guilty of treason, parricide, murder, an attempt to take the life of the Chief Executive or is known to be habitually guilty of some other crime.*[31]

Examples of (a) are the following: one who buys or receives as a present stolen property, knowing that the property is stolen;[32] one who assists in the burial of the victim of a homicide without giving account thereof to the authorities.[33] An example of an accessory under par. 3 is one who gives false information as to the author of a crime tending to mislead the public authorities.[34]

But one who does not denounce the perpetration of a crime to the authorities is not an accessory after the fact.[35]

Knowledge of the commission of the crime can be acquired even after its perpetration. Thus, if an innocent purchaser of stolen goods, after having been informed of its unlawful origin, sells such goods, and fails to disclose

[31] Art. 19, Revised Penal Code.
[32] U. S. vs. Barambangan et al., 34 Phil., 645, Art. 19, par. 1, Revised Penal Code.
[33] U. S. vs. Leal, 1 Phil., 118.
[34] U. S. vs. Romulo et al., 15 Phil., 408.
[35] U. S. vs. Caballeros, 4 Phil., 350.

the name of the person to whom he sold it, he is guilty as an accessory after the fact.[36]

Examples of (*b*) : one who throws into a well the body of a murdered man, or he who wipes out a blood stain, etc., for the purpose of concealing the crime.[37] But the mere presence of a person at the time and place of the commission of a crime is not sufficient to show such as an act of simultaneous cooperation which would make such person an accessory to the crime.[38]

Example of (*c*) : in accordance with the provisions of Par. 3, of Article 19 of the Revised Penal Code, there are two classes of accessories, to wit: (a) public officers who help the author of a crime by misusing their office and duties; and (b) private individuals who help persons guilty of treason, parricide, murder, or attempt against the life of the Chief Executive, or those who help persons who are habitual criminals.

In the first case, the public officer who harbors, conceals, or assists in the escape of the offender, shall be liable as an accessory even though the crime committed by the offender was merely that of *estafa,* seduction, or any other crime less grave than murder, parricide, treason, etc., provided there was misuse of public office on the part of such officer. For example, a municipal president or chief of police who refuses to arrest a thief or a forger who commits a crime in his presence and gives him money that he may escape, is an accessory whose punishment is provided for in Art. 53, in connection with Art. 58 of the Revised Penal Code. The help given to the offenders in this case

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[36] Dec. Sup. Ct. of Spain, Jan. 27, 1872, Jur. Crim., 121; 1 Viada, Cod. Pen., 385.

[37] U. S. vs. Bacong et al., 40 Phil., 496; Art. 19, par. 2, Revised Penal Code.

[38] People vs. Silvestre et al., 56 Phil., 353; U. S. vs. Cunanan, 37 Phil., 777.

is misuse of the public office, because there is no doubt but that a president or chief of police in such a case makes illegal use of his office in giving help to the offenders.

If a public officer helps a murderer or a person who commits parricide, or other person guilty of any of the crimes mentioned above, he will likewise be dealt with as an accessory, and sentenced not only to the principal penalty provided in Art. 53, but also to the accessory penalty prescribed in Art. 58, regardless of whether or not there was abuse of public functions.

In the second case, i. e., when the one who harbors, conceals, or assists in the escape of the offender is a private person, it is necessary, before he can be held criminally liable as an accessory, that the crime committed be that of treason, parricide, murder, or attempt against the life of the Chief Executive, or that the principal be an habitual criminal. Thus, for example, if A after committing abduction or bigamy goes to the house of his friend B, and borrowing money from him, escapes to a foreign country, B does not incur criminal liability. He is not an accessory, although he loaned the money, for the reason that the crime committed by his friend A is not one of those specified in this paragraph.

The liability of an accessory is subordinate to that of the principal, because the participation of the accessory is subsequent to the commission of the crime. Hence his guilt is directly related to that of the principal.[29]

Accessories who are exempt.

Art. 20 of the Revised Penal Code establishes, however, an exemption in favor of those who are accessories of their spouses, ascendants, descendants, legitimate, natural and adopted brothers or sisters, or relatives by affinity in the same degree, with the exception of those who, having knowl-

[29] U. S. vs. Mendoza, 23 Phil., 194.

edge of the commission of the crime, shall *profit* by the same, or assist the delinquent to profit thereby. For instance, A, wife of B, received from the latter a stolen ring with full knowledge of its unlawful origin. Her relationship in this case constitutes no defense, for the reason that she *profited* or assisted the offender to profit by the effect of the crime.[46]

Judicial decisions are silent as to whether a peace officer, who, with evident abuse of his office, furnishes means of escape to a brother of his who committed murder, may be considered as an accessory in the crime of murder. Pacheco in his Codigo Penal, Vol. 1, pp. 273-275, believes that such peace officer is not an accessory. We believe his opinion to be sound. Tie of blood or relationship is a more powerful incentive than the call of duty.

Review Questions

1. Who are criminally liable (a)—for grave felony and (b)—for less grave felony? Who for light felony?—2. What is meant by *principals by direct participation?*—3. What is the nature and scope of the liability of a group accused?—4. State the rule in case of a robbery committed by a band under Art. 296, of the Revised Penal Code.—5. In case of a joint attack by several persons, when will criminal responsibility be individual, and when collective?—6. What may be termed quasi-collective criminal responsibility.—7. What is meant by *principal by inducement?*—8. When does compulsion exist? —9. What acts are sufficient to constitute inducement?—10. Name the different ways of making inducement.—11. If a party who had induced another to commit crime did not take part in its material execution, may he still be held as principal?—12. May a principal by inducement be held amenable for the qualifying circumstances attending the execution of the crime, if it appears that he did not take part in its material execution?—13. Who are *principals by cooperation?*—14. Distinguish them from accomplices.—15. Who are accomplices?—16. What is the essential condition of criminal re-

[46] U. S. vs. Decano et al., 14 Phil., 595; U. S. Abanzado et al., 37 Phil., 658.

sponsibility in the character of an accomplice?—17. What is the indispensable requisite for a person to be held as an accomplice?—18. Who are accessories after the fact?—19. What is the liability of a peace officer who misuses his office and furnishes means of escaping to his brother who committed murder?—20. When may a private individual harboring a criminal be held responsible as accessory?—21. Is a peace officer who harbors his brother immediately after the latter committed the crime of homicide criminally liable?—22. When may an accessory not be considered as such with regard to his relatives?—23. Examine and recite the following cases: U. S. vs. Manayao et al., 4 Phil., 293; U. S. vs. Ponte, 20 Phil., 379; U. S. vs. Javier et al., 31 Phil., 235; People vs. Valdellon, 46 Phil., 245; U. S. vs. Flores et al., 25 Phil., 295; People vs. Calalas, 45 Phil., 640.

CHAPTER IX

EXTENUATING CIRCUMSTANCES

1. Basis and classification of extenuating circumstances.—2. Subdivision of the causes of non-imputability.—3. Subdivision of the causes of justification.—4. Effect of the different causes of exemption.—5. Causes of non-imputability.

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1. Basis and Classification of Extenuating Circumstances.—The causes of extenuation from criminal liability have for their effect to prevent it from arising, and are based chiefly upon the absence of, or some trouble in, the mind and will of the actor, or upon the fact that the act of the actor is just and lawful. The causes are divided into two classes: (a) causes of non-imputability, and (b) causes of justification. The *causes of non-imputability* consist in the absence or disturbance of the fundamental conditions of imputability. Lunatics and minors are not imputable because of their lack of intelligence; likewise, one who is deeply disturbed; he who acts under the compulsion of an irresistible physical force is not imputable for the reason that his will is nullified. The *causes of justification* are characterized by the absence of illegality in the act done; the doer acts under normal conditions of imputability, his mind and will work normally; he is not, however, imputable for the act performed because it is *just*, or he is entitled to do it. Thus a person who acts in self-defense has a right to kill or wound his unjust aggressor to defend himself, and is not imputable; he who acts in compliance with the law performs a perfectly licit act which cannot be imputed to him.

2. Subdivision of the Causes of Non-Imputability.—The causes of non-imputability may, in their turn, be subdivided into: (a) lack of intelligence (persons *non compos mentis* [par. 1, Art. 12], and infants [par. 2, *ibid*]); (b) lack of free will (persons acting under force or violence [par.

5, Art. 8] and persons acting under the impulse of an uncontrolled fear [par. 6, *ibid*]); and (c) lack of intent, such as an accident and unavoidable cause [pars. 4 and 7, Art. 12].

3. Subdivision of the Causes of Justification.—The causes of justification are subdivided into: (a) self-defense, [par. 1, Art. 11]; (b) defense of relatives, [par. 2, Art. 11]; (c) defense of strangers, [par. 3, Art. 11]; (d) performance of a duty or right [par. 5, Art. 11]; (e) obedience to an order, [par. 6, Art. 11]; (f) state of necessity or injury caused in avoidance of an evil, [par. 4, Art. 11].

4. Effects of the Different Causes of Exemption.—Circumstances or causes of non-imputability exempt the actor from criminal liability only, not from civil liability.[1] Circumstances or causes of justification exempt the actor from both liabilities—criminal and civil.

5. Causes of Non-Imputability.—

(a) *Lunacy.*—When it appears in the Court of First Instance that an accused person is afflicted with present insanity to such a degree that he ought not to be brought to trial, is the duty of the Court to suspend the proceedings, and to commit the accused to an asylum or hospital for the insane until he is restored mentally. The Court may, at its discretion, order a preliminary hearing at any time to determine whether the accused is then insane or not. In passing upon the propriety of suspending the proceedings on the ground of present insanity, it should be borne in mind that not every aberration of the mind or exhibition of mental deficiency is sufficient to justify such suspension. The test is to be found in the question of whether the accused would, with the assistance of counsel, have a fair trial.[2]

Par. 1 of Art. 12 exempts from criminal liability *an imbecile or a lunatic person, unless the latter has acted during*

[1] Article 101, Revised Penal Code.
[2] U. S. vs. Guendia, 37 Phil., 337.

a lucid interval. Therefore, according to the letter of the law, mental diseases are reduced to imbecility and insanity; other important psychoses, such as epilepsy, hysteria, and a number of others being out of the pale of the exemption. The Supreme Court of Spain, interpreting the provisions of Art. 12, held that, for the application of these exempting circumstances, there must be a total deprivation of intelligence in the acts done, that is, one must be deprived of reason; that there be no responsibility for one's own acts; that one acts without the slightest discernment;[2] that the discerning faculty be completely absent,[4] or that there be a total deprivation of free will as in the case of a lunatic or imbecile who acts under the impulse of an invincible cause strange to free will which he lacks;[5] that mere abnormality of the mental faculties does not exclude imputability;[3] and that deaf-muteness cannot be equivalent to either imbecility or lunacy.[7] In its decisions cited below,[8] the doctrine was also laid down that epilepsy may be either an exempting circumstance, or a mitigating one under par. 1, Art. 13; but in order to apply it there should be proven that at the very moment of performing the act there was a complete or incomplete unwillingness as to the act performed.

The Revised Penal Code, however, recognizes an illness of the offender affecting his will-power as mitigating cirumstance (Art. 13, par. 9).

The Revised Penal Code distinguishes an imbecile from an insane person in that it does not exempt the latter from criminal liability if he has committed the crime during a

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[2] Dec. Nov. 21, 1891, 47 Jur. Crim., 412.
[4] Dec. April 29, 1916, 96 Jur. Crim., 239.
[5] Dec. April 9, 1902.
[6] Dec. April 20, 1911, 86 Jur. Crim., 326.
[7] Decs. April 12, 1873, 8 Jur. Crim., 420, and Dec. 26, 1913, 91 Jur. Crim., 394.
[8] Decs. March 12, 1912, 88 Jur. Crim., 336, and August 28, 1913, 91 Jur. Crim., 49.

lucid interval. The commentators Viada,[9] Groizard [10] and Silvela [11] also make a distinction between imbecility and insanity in the sense that the former presupposes a continuous mental eclipse, while in the latter, light and shadow may alternate. In the opinion of Cuello Calón,[12] such a distinction is unscientific inasmuch as modern psychiatry holds that in the so-called lucid intervals mental sanity is but apparent, and that the mental disease continues or persists.

(b) *Infancy.*—Minority exerts a deep influence on imputability. In this period of human life, in infancy and adolescence, there is a lack of moral and mental maturity, as there is a lack of physical maturity; for this reason, an infant and an adolescent are to be treated, from the criminal point of view, in a manner different from that in which an adult person is treated.

Criminalists have, with regard to minors, established certain rules in accordance with which they determine the liability of such minors. They are as follows: (a) during infancy there is no imputability; (b) during adolescence, non-liability must be presumed as a rule; however, since an adolescent may sometimes be conscious of his acts, his discernment must be ascertained; (c) if discernment is established, adolescence will be considered only as a mitigating circumstance; (d) juvenile age must be reputed as a mitigation cause, because discernment is incomplete; there is a greater impulse of passion, and reflection has less strength at such age.[13]

In accordance with Art. 12, par. 2 and 3, of the Revised Penal Code *a person under nine years of age can commit*

[9] Vol. 1, p. 92, Commentarios al Código Penal.
[10] Vol. 1, p. 197, Commentarios al Código Penal.
[11] Vol. 1, p. 195, Derecho Penal.
[12] Derecho Penal, p. 241.
[13] Cf. Carrara, pars. 218, 226; Pessina, par. 80.

no crime and is therefore exempt from criminal liability. A person over nine and under fifteen years of age is also exempt from criminal liability unless he has acted with discernment, in which case, such minor shall be proceeded against in accordance with the provisions of Art. 80.

When such minor is adjudged to be criminally irresponsible, the Court, in conformity with the provisions of this and the preceding paragraph, shall commit him to the care and custody of his family who shall be charged with his surveillance and education; otherwise, he shall be committed to the care of some institution or person mentioned in said Article 80.

Whenever a minor of either sex, under eighteen years of age at the date of the commission of a crime, is accused thereof, the Court, after hearing the evidence in the proper proceedings, instead of pronouncing judgment, shall suspend all further proceedings and shall commit such minor to the custody or care of a public or private, benevolent or charitable institution, established under the law for the care, correction or education of orphaned, homeless, defective and delinquent children; or to the custody or care of any other responsible person in any other place subject to visitation and supervision by the Public Welfare Commissioner or any of his agents or representatives, if there be any; or otherwise, by the superintendent of public schools or his representatives, subject to such conditions as are prescribed herein below, until such minor shall have reached his majority or for such less period as the court may deem proper.[14]

Under the provisions above quoted, a judicial investigation or trial is necessary as a prerequisite to the confinement of the offender, the expression "the Court, before passing sentence of conviction, shall suspend all further pro-

[14] Art. 80, as amended by Act 4117.

ceedings" notwithstanding. "If the accused minor is innocent"—said the Supreme Court [24]—"of course, Act. No. 3203 (now Art. 80 of the Rev. Pen. Code), has no application; but, if guilty, then the competent Court, instead of sentencing him, shall suspend the sentence and order the confinement of the minor in a reformatory there to remain until he reaches the age of majority or for such less period as the Court may deem proper * * * "

Art. 80 which was known as Act 3203, is the first effort on the part of the Legislature to abide by the spirit of modern penology, which consists in taking out the infant and adolescent from the intimidatory and expiatory province of criminal law. As an initial experiment in juvenile courts for children, for the purpose of complementing these provisions, we have the Third Branch of the Municipal Court of the City of Manila, which, by virtue of Administrative Order 128, series 1925, of the Department of Justice, is vested with exclusive jurisdiction to try cases against delinquent minors.

(c) *Irresistible Force.*—The Revised Penal Code exempts from criminal liability *any person who acts under the compulsion of an irresistible force.*[25] This force, according to the Supreme Court of Spain,[27] must be a physical one, coming from a third person, and in such form as to annul the freedom of the actor and force him to commit the crime. Impulses and passions of moral nature cannot be included in this exemption,[28] nor superstitious ideas,[29] nor the character of the insults.[30]

For these reasons a statement made under oath by a witness may not be made the basis of a conviction for per-

[24] Bactoso vs. Prov. Governor of Cebu, XXIII Off. Gaz., 2518.
[25] Art. 12, par. 5, Rev. Pen. Code.
[27] Dec. March 3, 1905, 74 Jur. Crim., 243.
[28] Decs. Feb. 22, 1902, 68 Jur. Crim., 210, and Oct. 17, 1905, 75 Jur. Crim., 189.
[29] Dec. July 12, 1888, 41 Jur. Crim., 369.
[30] Dec. Oct. 13, 1893, 51 Jur. Crim., 198.

jury if it can be proven that such statement was made through violence and threat or duress,[21] nor may a person be held guilty who buries the corpses of murdered persons, if it appears that such person did the burying because he was forced and struck with the butt of a gun by the murderer.[22]

Irresistible force can never consist of an impulse, passion, or obfuscation of the perpetrator; it must consist of an extraneous force coming from a third person.[23]

(d) *Uncontrollable fear.*—Under Art. 12, par. 6 of the Revised Penal Code, *any person who acts under the impulse of an uncontrollable fear of an equal or greater injury is exempt from criminal liability.*

Before the defense in a criminal action, that the defendant in committing the crime acted under the circumstance described in this paragraph, can be sustained, it must appear that the menace which caused the fear was of an evil greater than, or at least equal to, that which he was required to commit, and that it promised an evil of such gravity and imminence that it might be said that an ordinary man would have succumbed to it.[24]

Fear, according to the Supreme Court of Spain, must come from a certain cause; that is, there must be a real and known evil which is an efficient cause of fear.[25] Fear must also be imminent,[26] restraining in an invincible manner the mind of the actor.[27]

Certain commentators, among them Silvela, in Vol. 1, p. 199, and Groizard, in Vol. 1, p. 313, are of the opinion that

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[21] U. S. vs. Felipe, 5 Phil., 333.
[22] U. S. vs. Caballeros et al., 4 Phil., 350.
[23] Dec. March 15, 1876, 14 Jur. Crim., 361.
[24] U. S. vs. Elicanal, 35 Phil., 209. See also People vs. Bayambao, 52 Phil., 309.
[25] Dec. Jan. 10, 1899, 62 Jur. Crim., 26.
[26] Dec. Nov. 8, 1905, 75 Jur. Crim., 273.
[27] Dec. Feb. 28, 1906, 67 Jur. Crim., 200.

the appreciation of the evil which was sought to be avoided should not be judged strictly, because one's own injury will always seem to be graver than that caused to another. In such a case, it would be sufficient that such person had acted in good faith believing in the gravity of the injury which threatened him.

(e) *Accident.*—Art. 12, par. 4, of the Revised Penal Code likewise exempts from criminal liability *any person who, while performing a lawful act with due care, causes an injury by mere accident without fault or intention of causing it.*

The circumstance may be illustrated thus: A chauffeur while driving his automobile on the left side of the street, at lawful speed and with due care, ran over a boy who suddenly attempted to cross the street.[28]

(f) *Unavoidable cause.*—The last exempting circumstance of Art. 12, par. 7, is established in favor of *any* person who fails to perform an act required by law, when prevented by some lawful or *insuperable* cause.

A cause for his exemption will be, according to Groizard,[29] an impediment coming from the compliance of an enforceable duty; such is the case of a policeman who fails to deliver his prisoner to the judicial authority within the period of six hours provided for in Art. 125 of the Revised Penal Code if it appears that the distance between the place of detention of the prisoner and that of the judicial authority could not be travelled in six hours.

Review Questions

1. Give the basis and classification of exempting circumstances. —2. Why are lunatics and minors not imputable?—3. Why is a

[28] U. S. vs. Tayongtong, 21 Phil., 476.
[29] Pen. Co. vol. 1, p. 335.

person acting in self-defense?—4. Name the causes of non-imputability?—5. Name the causes of justification.—6. Is there any difference as far as civil liability is concerned, between non-imputability and justification?—7. Distinguish lunacy from imbecility.—8. Is this distinction sound?—9. Is deaf-muteness analogous to lunacy or imbecility?—10. What is the duty of the Court when confronted with a lunatic or imbecile?—11. Do, do, do, an infant or minor?—12. What is the general rule established by criminalists for determining liability of minors?—13. What is the meaning of the word "minor" as used in Art. 80 of the Revised Penal Code?—14. At what age is a person entirely exempt from criminal liability?—15. What is the duty of the Court whenever a minor is brought before it on a charge of an offense not punishable by life imprisonment?—16. State the nature of irresistible force which causes exemption.—17. May impulses and passions of a moral nature be made the basis of exemption?—18. What are the requisites of *uncontrollable fear?*—19. Of accident?—20. Of insuperable cause?—21. Give an example of each.—22. Examine and recite the following cases: U. S. vs. Guendia, 37 Phil., 337; U. S. vs. Felipe, 5 Phil., 333; U. S. vs. Caballeros et al., 4 Phil., 350; U. S. vs. Elicanal, 35 Phil., 209; U. S. vs. Tayongtong, 21 Phil., 476.

CHAPTER X

EXTENUATING CIRCUMSTANCES
(Continued)

1. Causes of justification.—2. Self-defense.—3. Defense of relatives.—4. Defense of strangers.—5. Performance of duty or right.—6. Obedience to an order.—7. State of necessity.

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1. Causes of Justification.—As stated in Chapter IX, *ante*, the causes of justification may be summarized as follows: self-defense, defense of relatives, defense of strangers, performance of duty or right, obedience to an order, and state of necessity.

2. Self-Defense.—Lawful defense has from very old times been considered as a cause of exemption from liability. The Classical School assigns as its basis the impossibility on the part of the State to avoid presently an unjust aggression and protect a person who is unlawfully attacked; it would be inconceivable for the State to require that the innocent succumb to an unlawful aggression without any resistance.[1]

The Positivist School on the other hand deems that lawful defense is an exercise of a right, and that it is just for the reason that as the aggressor shows his "dreadfulness," anything done to repel his attacks is but an act of social justice; on the other hand, he who defends himself is not a "dreadful" person.[2]

Art. 11, par. 1, of the Revised Penal Code exempts from criminal liability *anyone who acts in defense of his person or rights, provided that the following circumstances concur:* (a) *unlawful aggression;* (b) *reasonable necessity of the means employed to prevent or repel it; and* (c) *lack*

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[1] Pessina, par. 73; Carrara, par. 291.
[2] Calon, Derecho Penal, 292.

of sufficient provocation on the part of the person defending himself.

As is seen, the Code allows a great amplitude of criteria for the defense not only of a person but of all his rights; and this word *right,* correctly interpreted, shows that the enjoyment of anything which is protected by law may be justly defended against an unlawful aggression. Nevertheless, the jurisprudence of the Supreme Court of Spain seems to intimate that the defense of property is not unlimited, it having held that such defense is only permissible when there is an assault upon the person charged with the protection of the same.[3] But there may be besides the subject of lawful defense, life and corporal integrity, honesty,[4] honor,[5] and the inviolability of domicile.[6]

Unlawful Aggression

The first requisite of self-defense is *unlawful aggression.* This requires an actual or physical attack upon the body, or, at least, a threat to cause an actual injury; for example, when one aims his revolver at another with intent to shoot, or when one is attacked in his own house, etc.[7] It also requires that the attack be unlawful, that is, unjustified or unauthorized by law. Mere injury of a right, unless coupled with attack or aggression, will not give rise to self-defense.[8] Thus, an insult cannot be considered as an unlawful aggression.[9] On the other hand, a slap in the face is an unlawful aggression.[10]

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[3] Dec. Nov. 26, 1886, 37 Jur. Crim., 476.

[4] Dec. May 7, 1913, 90 Jur. Crim., 551.

[5] Dec. June 8, 1901, 76 Jur. Crim., 359; **People vs. Luague 62 Phil. 50v.**

[6] Dec. Jan. 20, 1894, 52 Jur. Crim., 83.

[7] **U. S. vs. Rivera, 41 Phil., 472.**

[8] **Decs. Sept. 29, 1905, 75 Jur. Crim., 131, and March 17, 1921, 106 Jur. Crim., 178.**

[9] **U. S. vs. Carrero, 9 Phil., 544.**

[10] **Dec. March 8, 1887, 38 Jur. Crim., 380.**

The attempt to rape a woman constitutes an aggression sufficient to put her in a state of legitimate defense inasmuch as a woman's honor cannot but be esteemed as a right as precious, if not more, than her very existence; and it is evident that a woman who, thus imperiled, wounds, nay kills the offender, should be afforded exemption from criminal liability since such killing cannot be considered a crime from the moment it became the only means left for her to protect her honor from so great an outrage. (People vs. Luague and Alcansare, 62 Phil., 504)

But in the case of a preconcerted fight the circumstance of unlawful aggression is of no avail. Thus, if A and B agreed to engage in a fight, and in fact did fight, neither of them could avail himself of this defense. In other words, neither of them could claim that he was unlawfully attacked by the other. It would, therefore, be immaterial whether A or B struck the first blow.[11]

Again, in the case of M, there could be no plea of self-defense. M, pursued by the deceased, reached his house wherein he picked up a pestle. Turning toward the deceased, he faced him saying: "Come on if you are brave." Thus he attacked and later killed him. M, cannot allege self-defense for what he did after believing himself to be duly armed, was to agree to fight, provoking it in turn, which is incompatible with the plea of self-defense. In those circumstances, the fight was unnecessary, because M could have avoided it by going up into his house and locking himself in. This is illustrated by the case of People vs. Monteroso, 51 Phil., 815.

Reasonable necessity for the means employed

The second requisite of self-defense is *reasonable necessity for the means employed to repel the aggression.*

It should be borne in mind that neither the necessity of

[11] U. S. vs. Cortes, 36 Phil., 837.

self-defense nor the means employed therefore are to be absolute, for it must be assumed that one who is attacked has not sufficient tranquility of mind to reason, or make calculations and comparisons which can be made easily in the calm of home.[12] For that reason, the Supreme Court of Spain,[13] held that it is not an indispensable but a rational necessity which the law requires, and that it is necessary in each individual case to appreciate its relative necessity, more or less imperative, in accordance with the rules of rational criteria.[14]

It may be said in this connection that reasonable necessity for the means employed ceases to exist from the very moment the party defending himself continues his attack upon the aggressor, in spite of the fact that the danger arising from the aggression and sought to be avoided, has already disappeared.[15] This does not mean of course, that a person unlawfully attacked is in duty bound to retreat; on the contrary, he may pursue his adversary until he has secured himself from danger.[16] The ancient common rule in homicide denominated "Retreat to the wall", has given way to the "Stand ground when in the right" rule.[17]

The reasonable necessity of the means employed in the defense, according to the decisions of the courts, is not subordinate to the existence of the injury done, but to the imminence and danger of the injury itself.[18] Thus, if a person enters the dwelling of another and attacks one of the inmates thereof, the latter is justified in defending himself with such weapons as are at hand; and if from the

[12] Silvella, Vol. 2, p. 157.
[13] Dec. December 31, 1919, 103 Jur. Crim., 289.
[14] Dec. April 12, 1884, 31 Jur. Crim., 755, and March 16, 1904, 72 Jur. Crim., 284.
[15] U. S. vs. Vitug, 17 Phil., 1.
[16] U. S. vs. Rivera, 41 Phil., 472.
[17] U. S. vs. Domen, 37 Phil., 57.
[18] U. S. vs. Paras, 9 Phil. Rep., 367.

defense thus made the aggressor dies, it is attributable to his own wrongful act.[19]

The defendant was walking along a dark street at night with pistol in hand on the lookout for certain individuals who had been making an insulting demonstration in front of his house. The deceased, the leader of the party making such demonstration, suddenly emerged from a hiding place near the street after the defendant had passed, and approaching the defendant from behind, threw his arms around him, at the same time attempting to snatch the pistol from his hand. But the defendant forcibly broke the hold of the deceased and turned to face him. Whereupon, a struggle for the possession of the pistol took place; in the course of which, the pistol accidentally was discharged by the defendant and a wound inflicted upon the deceased which caused his death. The deceased was much stronger than the defendant and was seeking an opportunity to give the latter a beating. There was no provocation on the part of the defendant. *Held:* That in view of the darkness and the surprise which characterized the assault, and in view of the probability that the deceased, by reason of his superior strength, would have gained control of the pistol and in all probability would have used it against the defendant eventually, the discharge of the pistol by the defendant was a justifiable act of self-defense.[20]

When one acts in defense of his person and of his rights, the rational necessity of the means employed in the defense must be determined by its relation to the circumstances of the assault, and the reasonable fear which such assault might have inspired in the mind of the person assaulted. Thus, the command to "lie down and give me your money,"

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[19] U. S. vs. Brello, 9 Phil. Rep., 424.

[20] People vs. Lara, 48 Phil. Rep., 153.

given to the defendant by the deceased in a dark and uninhabited place, for the purpose of playing a practical joke upon him, is sufficient ground for the defendant to fear the imminence of a real danger to his life and property. It will impel him to repel it hurriedly by the first means which occurr to him; that is, by discharging his pistol against his assailant, a means which is the more related to the seriousness and importance of the aggression, if it be borne in mind that it is difficult to prove readiness to repel in some other manner an aggression of such nature; and that a person under such circumstances cannot be required to show sufficient coolness to adopt a less violent means of repelling the attack."[21]

There are reasonable means to prevent or repel an assault when the person assaulted employs adequate and sufficient means to avoid the danger menacing him, but under such critical circumstances, sufficient coolness to choose other means of defense cannot be required of such a person."[22]

As a general rule, altho a dagger or a knife is more dangerous than a club, the use of a knife or dagger must be deemed reasonable if it cannot be shown that the person assaulted had other available means and could coolly choose other less deadly weapons to repel the assault."[23]

To use a firearm against a dagger or a knife, in the regular order of things, does not imply any difference between such weapons."[24]

In case of unlawful aggression, there is reasonableness of means employed when the person assaulted uses in self-defense a proper and adequate weapon in order to avoid an unexpected injury, and when in attacking his opponent

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[21] Dec. of Sup. Ct. of Spain of March 17, 1885, 34 Jur. Crim., 508.
[22] Dec. of Sup. Ct. of Spain of July 4, 1887, 59 Jur. Crim., 498.
[23] Dec. of Sup. Ct. of Spain of October 5, 1887, 39 Jur. Crim., 422; People vs. Sumicab, XXX Of. Gaz. No. 102, p. 3333.
[24] Dec. of Sup. Ct. of Spain of October 27, 1887, 39 Jur. Crim., 571.

he does not go beyond the limits of necessity and prudence.[25]

Two persons met in the street. The one slapped the face of the other who retaliated by clubbing the first and inflicting upon him a less serious physical injury. Convicted as principal of this crime, he appealed, and alleged that he acted in self-defense, or that at least, the majority of the circumstances exempting him from criminal liability were present, and that Article 87 was applicable. The Supreme Court so held, that the act of slapping another without any reason whatsoever and without the person slapped having given cause to warrant such an assault, constituted the use of force qualifying an unlawful aggression which justifies the person assaulted to defend himself; and that inasmuch as it did not appear from the record that the defendant had given cause for assault, there could be no doubt but that in retaliating with a club he acted in self-defense without any provocation on his part; although, in so doing, all of the requisites required by law to exempt from criminal liability were not present, since the means employed by the defendant in repelling the aggression were not reasonably adequate to the nature of the assault but exceeded the boundaries fixed by the circumstances.[26]

Lack of sufficient provocation

The third requisite of lawful self-defense is *lack of sufficient provocation on the part of the person defending himself;* that is to say, the defender must not have caused the aggression by his own conduct, by exciting or provoking the aggressor. Thus, the Supreme Court of Spain held that neither a dispute,[27] nor recrimination for an illicit act [28] may

[25] Dec. of Sup. Ct. of Spain, Dec. 30, 1890, 45 Jur. Crim., 790, 793.
[26] Dec. of Sup. Ct. of Spain, January 20, 1904, 72 Jur. Crim., 123-124.
[27] Dec. Oct. 1, 1877, 17 Jur. Crim., 138.
[28] Dec. March 3, 1890, 44 Jur. Crim., 286.

be considered as sufficient provocation. It also held that the provocation must be immediate and present.[30]

According to this third requisite, the person defending himself, that is, the person assaulted, must not have given cause for the aggression by unjust conduct, nor by inciting nor provoking the assailant. If the provocation is not sufficient, his self-defense is not legitimate; and "sufficient," according to the Supreme Court of Spain, means that the provocation be proportionate to the aggression which gave rise to it[31]. According to the same Court, to demonstrate because of an illicit act,[32] or to engage in a verbal argument [33] cannot be considered sufficient provocation.

The Supreme Court of the Philippines found in the following case *lack of sufficient provocation:* A certain P, having discovered that his neighbor (whom he killed subsequently) had built a part of his fence on his (P's) land, asked him why he had done so. The question so angered the neighbor that he rushed at P, pushed him into a shallow pool of water, and then made attempt to push him still further into the pool, but without any manifest purpose of taking his life or doing him really grave bodily harm. P, however, in the heat of anger and in an attempt to defend himself from the unprovoked assault of the deceased, struck his adversary a fatal blow on the head with "terrible force," using a heavy bamboo pole 7 feet long and as thick as a man's arm. It was held that these facts constitute the crime of homicide, with the concurrence of the two requisites of self-defense, i. e., unlawful aggression and lack of provocation.[34]

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[30] Dec. April 20, 1906, 76 Jur. Crim., 366.

[31] Dec. of Sup. Ct. of Spain, February 20, 1893, 50 Jur. Crim., 166-168.

[32] Dec. of Sup. Ct. of Spain, March 3, 1890, 44 Jur. Crim., 286.

[33] Dec. of Sup. Ct. of Spain of October 5, 1877, 17 Jur. Crim., 159-162.

[34] U. S. vs. Pasca, 28 Phil., 222.

3. Defense of Relatives.—The Revised Penal Code [34] exempts from criminal liability *anyone who acts in defense of the person or rights of his spouse, ascendants, descendants, or legitimate, natural, or adopted brothers or sisters, or of his relatives by affinity in the same degrees, and those by consanguinity within the fourth civil degree, provided that the first and second requisites prescribed in the next preceding circumstance are present, and the further requisite, in case the provocation was given by the person attacked, that the one making the defense had no part therein.*

As will be seen, unlawful aggression is the first and essential requisite of this circumstance. The second requisite is reasonable necessity for the means employed.

As a third requisite, the Code requires, in case there was provocation on the part of the person assaulted, that the offender did not participate in the same. If the offender took part in the provocation, the benefits of this circumstance cannot be extended to him. For this reason, the Supreme Court of Spain held that the defense against an unlawful aggression upon a relative as included in this paragraph, should not be confused with a quarrel engaged in to help such a relative.[35] If the first two requisites are taken into acoount, the third one, being negative, must also be considered as long as nothing to the contrary appears.[36]

In the case of a husband who entered his house one morning while it was yet dark and surprised a person in the act of holding his wife by the hands, with the intention of laying her on the floor and lying with her, if his first impulse was to inflict upon the aggressor a rather serious wound on one of the arms, he undoubtedly acted in defense of the person and rights of his offended wife; he made

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[34] Art. 11, par. 2, Revised Penal Code.

[35] Decs. of Sup. Ct. of Spain of December 2, 1898, 61 Jur. Crim., 331 and of April 21, 1900, 64 Jur. Crim., 315.

[36] Dec. of Sup. Ct. of Spain of April 20, 1930.

use of a legitimate right, one which is included in article 11 No. 2, of the Revised Penal Code, inasmuch as there concurred the three requisites specified by law. Neither of the spouses provoked the affair nor gave the wounded man any occasion to enter the house, in which the woman was alone at a very early hour of the morning; so that the husband, on seeing a man making a violent attempt upon the honor of his wife, found himself obliged to repel and prevent this attempt, thus availing himself, as a rational means, of the bolo which he carried; and for this reason he should be exempted from all responsibility and should be absolved."

Again, a person, who, in defending his father against an unlawful aggression, killed the aggressor in the honest belief that his father was in imminent danger, is exempted from criminal liability."

Or again, the accused, upon hearing the voice of his wife calling for aid, ran into his house and found a man struggling with her and endeavoring to throw her down with the evident intention of raping her; whereupon, he attacked her assailant with his bolo and inflicted upon him fatal wounds. This is a typical case of defense of relatives provided for in this paragraph of the Revised Penal Code."

Defense of Strangers.—Paragraph 3 of Art. 11, of the Revised Penal Code exempts from criminal liability *anyone who acts in defense of the person or rights of a stranger, provided that the first and second requisites mentioned in the first circumstance of this article are present, and that the person defending be not induced by revenge, resentment, or other evil motive.*

" U. S. vs. Padilla, 34 Phil. Rep., 641.

" U. S. vs. Esmedia, 17 Phil. Rep., 260. See also U. S. vs. Rivera, 26 Phil., 138, and U. S. vs. Batungbacal, 37 Phil. Rep., 382.

" U. S. vs. De Ocampo, 6 Phil. Rep., 449.

The same requisites for unlawful aggression and reasonable necessity for the means employed are also necessary in this circumstance, together with the further requisite that the party undertaking the defense be not actuated by an evil motive, such as revenge or resentment.

Illustrative of this is the following: An elderly man, seeing his neighbor, a man of seventy-eight years, held down on the ground and in serious danger of being throttled by a young and robust assailant, gave the neighbor a small gaff of the type used on game cocks. The latter, in his dire need, used the gaff to wound mortally his assailant. In this case, both are exempt from criminal liability, the one who gave aid and he who inflicted the mortal wound.[40]

5. Performance of Duty or Right.—Art. 11, par. 5, provides that *any person who acts in the fulfillment of a duty or in the lawful exercise of a right or office is exempt from criminal liability.*

Two requisites are necessary in order that this circumstance may exist, viz: (a) that the perpetrator performs a lawful duty or exercises a lawful right; and (b) that the injury or offense committed be the necessary consequence of the performance of a duty or the exercise of a right or office.[41]

Thus, a physician who amputates the leg of a patient in order to save him from gangrene cannot be guilty of the crime of mutilation, for the reason that in such a case the physician is protected by the provisions of this paragraph. On the same basis, the executioner of Bilibid Prisons is not guilty of murder by reason of the executions he has performed.

Likewise, a peace officer who takes possession of personal property by means of a search warrant lawfully issued and

[40] U. S. vs. Subingsubing, 31 Phil., 376.
[41] U. S. vs. Aviado, 38 Phil., 10.

properly served cannot be held liable for the crime of robbery of the said property."

Or, similarly, when a policeman finding a fugitive from jail and demanding his surrender is repulsed. The fugitive, instead of surrendering, attacks the officer with a piece of bamboo in the shape of a lance and runs away, carrying his weapon with him. The policeman is justified in firing his revolver at the fugitive; and, in case the latter is killed, such officer will not be criminally liable because of the provisions of this paragraph."

But a lawyer who, in the course of his oral argument, slanders his opponent cannot claim exemption under this paragraph; for the reason that a lawyer, to interpose a good and effective defense of his case, need not commit the crime of insult; on the contrary, he should show moderation and politeness."

The duty to which this paragraph refers is not a moral or religious duty but that imposed by law."

With respect to acts performed in the exercise of a right, the latter must be one recognized by law. The Supreme Court of Spain held that a father who strikes his son and inflicts on him a slight ecchymosis which does not require medical attention does not exceed his right to punish."

6. Obedience to an Order.—*Any person who acts in obedience to an order issued by a superior for some lawful purpose is exempt from criminal liability,* according to Art. 11, par. 6 of the Revised Penal Code.

Rossi, in his treatise on Criminal Law, explains the doctrine on due obedience by saying that when the acts ordered by a superior are analogous to those which he can

[42] U. S. vs. Cuison, 4 Phil., 194.
[43] People vs. Delima, 46 Phil., 738.
[44] Dec. of Sup. Ct. of Spain of June 16, 1890, 44 Jur. Crim., 748.
[45] Decs. Nov. 7, 1895, 55 Jur. Crim., 214, and March 17, 1920, 104 Jur. Crim., 146.
[46] Dec. Feb. 13, 1878, 18 Jur. Crim., 140.

lawfully order in connection with matters under his jurisdiction, the inferior is exempt from liability; but if, on the contrary, the act ordered is without any exterior character from which it may be implied that the superior acted lawfully and within the scope of his authority, there is imputability.

Following this same principle, our Supreme Court of the Philippines held that this exempting circumstance is limited in its application to obedience due a person higher in position than the perpetrator, when the order is lawful and when the means employed to carry it out are also lawful. In other words, in order to seek the benefits of this provision of the Revised Penal Code, it must be made to appear that both he who gives the order and he who executes it are acting within the limits prescribed by law.[47]

7. State of Necessity.—Another exemption under Art. 11, par. 4, is established in favor of *any person who, in order to avoid an evil or injury, does an act which causes damage to another, provided that the following requisites are present:* (a) *that the evil sought to be avoided actually exists;* (b) *that the injury feared be greater than that done to avoid it; and* (c) *that there be no other practical and less harmful means of preventing* it.

One who is in these circumstances can now cause or inflict *damage* to *another,* whether the injury is cause to the *person* or *property.*

A real difficulty in the application of this exempting circumstance presents itself where the properties under consideration are of the same value, particularly where human life is at stake.

May a person be exempted from criminal liability who,

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[47] U. S. vs. Cuison, 20 Phil., 433; People vs. Bough et al., G. R. 17486, Feb. 8, 1922.

in order to save his own life, causes the death of another? The commentator Calón, after examining numerous theories, answers the question in the affirmative in the following language: "The act done is unjust, yet not punishable. All the authors are agreed upon the impunity of these acts. What is the reason of such unpunishability? Few matters of criminal law have been the subject of so numerous studies as this; many theories have been advanced in justification of the unpunishability of these acts. The true ground for their being not punishable lies in the fact that such acts are neither just nor unjust, neither illicit nor permitted; they are out of the pale of criminal law; they must be accepted as imposed by destiny, as an unavoidable disgrace." "At most the courts must resort"—adds the distinguished commentator—"to the theory of uncontrollable fear of an equal or greater evil."[48]

A typical example of the application of this exempting paragraph is the destruction of a building for the purpose of preventing conflagration, or the throwing into the sea of cargoes for the purpose of saving a ship, etc.

On this interesting matter, Wharton (Crim. Law, pp. 167, 170, 815) has the following to say:

"Necessity is a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil." Homicide through necessity—i.e., when the life of one person can be saved only by the sacrifice of another—will be discussed in a subsequent chapter. This issue, it should be observed, is not simply whether a particular life is to be sacrificed in case of necessity, but whether it is right for a person to commit a crime in order to save his life. The canon law prescribed that a person whose life is dependent on immediate relief may set up such necessity as a defense to a prosecution for seizing such relief. Eminent English and American authorities speak to the same general effect. Life, however, can be taken usually only under the plea of necessity; when necessary for the preservation of the party setting up the plea, or the preservation of the lives of relatives in the first degree.

[48] Derecho Penal, pp. 310, 311, and 316.

It sometimes has been said that necessity can never be advanced as a defense when the necessity is the result of the defendant's own culpable act. This, however, as Berner demonstrates, cannot be accepted as universally true. Thus a person who negligently causes a house to catch fire will not, by this negligence, be barred from setting up necessity as a defense, if, in rushing from a burning chamber, he should crush another in the throng. Nor will the trespasser, who, while stealing fish, falls overboard, and in his struggle to save himself upsets a boat, be barred from setting up necessity, if life should thereby be accidentally lost, because his act which put him in this situation is wrongful. But if the necessity be rashly rushed into, it may cease to be a defense.

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The canon law, which lies at the basis of our jurisprudence in this respect, excuses the sacrifice of the life of one person, when actually necessary for the preservation of the life of another, and when the two are reduced to such extremities that one or the other must die . . . *quoniam necessitas legem non habet* (because necessity has no law). *Si quis propter necessitatem famis, aut nuditatis furatus fuerit ciberia, vestem, vel pecus; poeniteat hebdomadas tres, et, si reddiderit, non cogatur ieiunare. Quod non est licitum in lege necessitas facit licitum.* (If any one urged by hunger or nudity steals articles of food, clothes, or cattle, shall undergo penitence for three weeks, and if he returns the thing stolen, he shall not be obliged to jejune. That which is not licit under the law, necessity makes licit). So an eminent French jurist: *"En un mot, l'act n'est peutetre excusable que lorsque l'agent cede a l'instinct de sa propre conservation, lorsqu'il se trouve en présence d'un péril inminent, lorsqu'il s'agit de la vie."* (In a word, the act is not perhaps excusable except on the ground that the actor yields to the instinct of self-preservation, that he finds himself in the presence of an imminent peril, that the question is one of life or death). In this same view leading German jurists unite.

But it should be remembered that necessity of this class must be strictly limited. Hence it has been held by the canon jurists that the right can be exercised only in extremity, and in subordination to those general rules of duty to which even such a necessity as that before us must be subordinate. Hence, when the question is between an unknown infant's life and a mother's, the mother is to be preferred; and between a sailor and a passenger, supposing there are more than enough sailors for the purpose of navigation, the passenger, as will presently be seen, ought to be preferred. But no assent by the party sacrificed can be by itself a defense.

Upon so great authority as that of Lord Bacon it has been held that when two shipwrecked persons get on the same plank, and one of them, finding it inadequate to save them both, thrusts the other from it so that he is drowned, it is excusable homicide. Lord Hale, however, doubts this, on the ground that a man cannot ever excuse the killing of another who is innocent under a threat, however urgent, of losing his own life if he does not comply; and that if one man should assault another so fiercely as to endanger his life, in order to compel him to kill a person, this would give no legal excuse for his compliance. On this Mr. East remarks, that if the commission of treason may be extenuated by the fear of present death, and while the party is under actual compulsion, there seems to be no reason why homicide also may not be mitigated upon a like consideration of human infirmity. However, in case the party should have recourse to other apparent means of protection in his apparent necessity, his fear furnishes no excuse for killing.

Review Questions

1. What are the causes of justification?—2. Basis of self-defense according to the Classical School?—3. Do. do. according to the Positivist School.—4. What are or may be the subject of self-defense?—5. Requisites of self-defense?—6. Requisites of unlawful aggression?—7. May an insult be considered unlawful aggression?—8. What is the rule in case of a preconcerted fight?—9. What do you mean by *necessity for the means employed?*—10. Indispensable and rational necessity distinguished.—11. When does reasonable necessity cease to exist?—12. What is the ancient common law rule in this connection?—13. What is the present rule?—14. What do you mean by *lack of sufficient provocation?*—15. Requisite of lack of provocation?—16. Scope of defense of relatives.—17. Requisites of defense of relatives.—18. Requisites of defense of strangers.—19. Requisites of performance of duty or right.—20. Nature of the duty to which this circumstance refers.—21. Extent or scope of *obedience to an order.*—22. Requisite of *state of necessity.*—23. Two shipwrecked persons get on the same plank and one of them, finding it not sufficient to save them both, thrusts the other from it, so that he is drowned. Is this excusable homicide?—24. Give an example of it.—25. Examine and recite the following cases: U. S. vs. Rivera, 41 Phil., 427; U. S. vs. Cortes, 36 Phil., 931; U. S. vs. Vitug, 17 Phil., 1; U. S. vs. Domen, 37 Phil., 57; U. S. vs. Pasca, 28 Phil., 222; U. S. vs. Padilla, 34 Phil., 641; U. S. vs. Esmedia, 17 Phil., 261; U. S. vs. Batungbacal, 37 Phil., 382; U. S. vs. Subingsubing, 31 Phil., 376 and U. S. vs. Aviado, 38 Phil., 10.

CHAPTER XI

ABSOLUTORY CAUSES

1. Absolutory causes, what are they?—2. Non-liability for being an accessory after the fact?—3. Non-liability for physical injuries?—4. Non-liability for adultery?—5. Non-liability for rape, etc?—6. Non-liability for theft, fraud, etc?—7. Consent or pardon of the victim?

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1. Absolutory Causes, What are They?—Besides justifying circumstances and exempting circumstances enumerated in Articles 11 and 12, the Revised Penal Code recognizes also certain causes of non-liability for punishment, known as *absolutory causes.*

In causes of justification (Art. 11), we have a criminal but no crime; in causes of exemption (Art. 12), we have a crime but no criminal; in absolutory causes we have both, criminal and crime, but by reasons of public policy and sentiment, there is no penalty imposed.

The following are the absolutory causes established by the Revised Penal Code.

2. Non-Liability for Being an Accessory After the Fact.—*The penalties prescribed for accessories shall not be imposed upon those who are such with respect to their spouses, ascendants, descendants, legitimate, natural, and adopted brothers and sisters, or relatives by affinity within the same degrees, with the single exception of those who have profited themselves or assisted the offenders to profit by the effects of the crime.*[1] The reason for this benignity is ascribed by the commentators to the respect which the blood ties deserve from the law; for such ties naturally constrain us, at least out of respect to our own name, to

[1] Art. 20, Revised Penal Code.

hide the crimes that may be attributed to any of the relatives mentioned above; and further, because, as Silvela says,[2] the legislator would act against the public sentiment were he to provide otherwise.

3.—Non-Liability for Physical Injuries. *Any legally married person who, having surprised his spouse in the act of committing sexual intercourse with another person, shall kill either of them or both of them in the act or immediately thereafter, or shall inflict upon them any serious physical injury, shall suffer the penalty of destierro.*

If he shall inflict upon them physical injuries of any other kind, he shall be exempt from punishment.

These rules shall be applicable, under the same circumstances, to parents with respect to their daughters under eighteen years of age, and their seducers, while the daughters are living with their parents.

Any person who shall promote or facilitate the prostitution of his wife or daughter, or shall otherwise have consented to the infidelity of the other spouse shall not be entitled to the benefits of this Article.[3]

It is to be noted that the exemption established in Art. 247 of the Revised Penal Code is limited to the case of a husband or wife who caught his or her spouse in *actual* adultery, that is, actual *carnal* knowledge with his or her paramour. If the acts surprised do not amount to adultery, if it is only preliminary thereto, then the privilege given by this Article cannot be invoked.[4] Thus a husband who catches his wife sleeping with another man on the same bed is not justified in killing or injuring either or both of them. This is illustrated by the case of People vs. Bituanan, 56 Phil., 23.

[2] Vol. 2, p. 202.
[3] Art. 247, Revised Penal Code.
[4] 3 Viada, Cod. Pen., 96.

Nor can the privilege of this article be extended to a man who was not lawfully married to the woman he called his wife and whom he killed together with her paramour; this, despite the fact that the offender was in the honest belief that he had lawfully married the deceased and had lived with her for a long time as a lawful husband.[5] Even though a married woman should be subsequently killed by her husband after he had caught her lying with another man, and after she successfully eluded him, in hot pursuit, for some time, only to be overtaken in flight and mortally wounded in a place quite apart from that where he originally found her, still such acts unquestionably fall within the scope of the provisions of Art. 247 here commented upon. It is presumed reasonable to hold that the woman was killed immediately, after she was caught in the commission of adultery; for not even an hour elapsed between the catching and the killing and the time that intervened was only that necessarily employed by the husband in the unsuccessful pursuit of his wife's paramour.[6]

4. Non-Liability for Adultery.—*The offender or offenders in an adultery case are not liable if it appears that the complainant or alleged offended spouse had consented to or pardoned the adulterous acts.*

5. Non-Liability for Rape, Etc.—*The offender is not liable for acts of lasciviousness, abduction and seduction after his marriage with the aggrieved party.*[7]

A deceitful marriage, however, devised by an accused for the sole purpose of dodging the sanction of the penal code, is devoid of legal effects and will not extinguish the criminal liability of the offender.[8]

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[5] U. S. vs. Tubban, 29 Phil., 434; U. S. vs. Verzola, 33 Phil., 285.
[6] U. S. vs. Alano, 32 Phil., 381; U. S. vs. Vargas, 2 Phil., 194.
[7] Art. 344, par. 2, Revised Penal Code.
[8] Art. 344, par. 4, Revised Penal Code.
[9] People vs. Santiago, XXVI Off. Gaz., 1549.

6. Non-Liability for Theft, Etc.—Art. 332 of the Revised Penal Code provides also that *no criminal but civil liability only shall result from the commission of the crimes of theft, swindling, or malicious mischief committed or caused mutually by the following persons:* (a) *spouses, ascendants, and relatives by affinity in the same line;* (b) *the widowed spouse with respect to property which belonged to the deceased spouse, before the same shall have passed into the possession of another;* (c) *brothers and sisters, and brothers-in-law and sisters-in-law, if living together.*

The exemption established by this article shall not be applicable to strangers participating in the commission of the crime.

It should be borne in mind that the exemption established in this article is *limited* to offenses specifically named therein, i. e., *theft, fraud* and *malicious mischief.* Robbery is not, therefore, included in this exemption.[10] Neither is any other crime or offense perpetrated as a necessary means to commit any of the offenses mentioned in said article. For example, if A, the son of B, in committing *estafa* against the latter, falsified a public document, A may be exempt from *estafa,* but he will be criminally liable for falsification.[11]

The following persons are included within the exemption and protection provided for in this article: a step-father with regard to the property belonging to his stepson; natural or adopted children with regard to property belonging to their natural or adopted parents,[12] and a concubine with regard to property belonging to her paramour.[13]

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[10] Dec. June 23, 1890, 44 Jur. Crim., 783.
[11] 3 Viada Cod. Pen., 624.
[12] 3 Viada Cod. Pen., 625.
[13] Dec. April 19, 1890, 44 Jur. Crim., 500.

7. Consent or Pardon of the Victim.—The consent of the victim cannot be a cause of exemption, except in those cases where it is required as an essential element that the act charged was committed against the will of the offended party; thus, there is no robbery nor theft if the taking of another's property is made with the acquiescence of its owner; nor is there rape when the carnal intercourse was had with the consent of the alleged victim.

Although consent of the victim of the crime is not mentioned in our Penal Code, certain corresponding sanctions are established by Arts. 258 (wherein a woman practices an abortion upon herself, or consents that another person should do so) and 253 (wherein a person assists another to commit suicide).

Consequently, *a pardon by the aggrieved party does not* extinguish a penal action.[14] Neither does the return by the culprit of the stolen or embezzled article.[15]

Not even cases of quasi-private nature (such as adultery, seduction, and insults), may now be terminated by the pardon alone of the offended party after the complaint has already been presented.

Review Questions

1. What are the so-called absolutory causes of non-liability for punishment?—2. When is a person who shielded the crime of another not to be held responsible as an accomplice?—3. State the reason of this exemption.—4. Under what circumstances may a person, who is not acting in self-defense or in defense of his relative or of a stranger, inflict physical injuries upon another without being held criminally responsible therefore?—5. What is the meaning of the expression *actual adultery?*—6. To what extent may an offended consort pursue and attack his unfaithful spouse outside of the place where adultery was committed?—7. Is consent of the aggrieved party

[14] Art. 23, Revised Penal Code.

[15] U. S. vs. Ongtengco, 4 Phil., 144; People vs. Velazco, 42 Phil., 75.

a defense in adultery? Explain the reason.—8. When will the liability of an offender for rape be extinguished?—When is subsequent marriage not a defense at all in rape, etc.?—10. What constitutes a defense of justification in calumny?—11. Give the reasons of the rule.—12. Under what circumstances may a person be held civilly responsible only for the crimes of theft, fraud, and malicious mischief? —13. What is the extent or scope of this exemption?—14. May the consent of the victim exempt the offender from criminal liability?— 15. May the pardon?—16. May the restitution of the stolen properties?—17. Examine and recite the following cases: U. S. vs. Tubban, 29 Phil., 434; U. S. vs. Alano, 32 Phil., 381; People vs. Santiago, XXVI Of. Gaz., 1549; People vs. Velazco, 42 Phil., 75.

CHAPTER XII

CIRCUMSTANCES AFFECTING CRIMINAL LIABILITY

1. Modifying circumstances in general.—2. Generic circumstances.—3. Qualifying circumstances.—4. Mitigating circumstances. —5. Basis of the mitigating circumstances.—6. Sources of the mitigating circumstances: (a) imperfect intelligence; (b) imperfect free will; (c) damage exceeding intent; (d) incomplete exemption; (e) good behavior; (f) similar circumstances.

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1. Modifying Circumstances in General.—Two kinds of circumstances may be distinguished in every crime: *essential,* that is, those circumstances without which the crime cannot exist, and *accidental,* or those circumstances which may be eliminated and still the crime may exist.

Now, the presence of these accidental circumstances in the perpetration of a crime modifies the responsibility of the offender.

Aggravating circumstances which in themselves constitute a crime especially punishable by law, or which are included by the law in defining a crime (essential) *and prescribing the penalty therefore, or those circumstances which are inherent shall not be taken into account for the purpose of increasing the penalty.*[1]

For instance, in the crime of estafa the circumstance of abuse of confidence is *essential and inherent,* while the circumstance that the offender is a *minor* or a relative of the aggrieved party would be *accidental.* Even though abuse of confidence is an aggravating circumstance under paragraph 4 of Art. 14, since the law in defining

[1] Art. 62, Pars. 1 and 2, Revised Penal Code.

and punishing the crime of *estafa* has already taken it into account, such circumstance (abuse of confidence) will not have any effect at all on the imposition of the penalty. In other words, whenever the law, in describing or defining an offense, includes in such definition some of the circumstances enumerated in Art. 14, such circumstances will not be considered as aggravating ones.

2. Generic Circumstances.—Generic mitigating or aggravating circumstances are those accidental circumstances which are not inherent in the crime. Their effect is to decrease or increase the penalty according to the rules prescribed by Arts. 62 et seq. of the Revised Penal Code.

3. Qualifying Circumstances.—They are some of those aggravating circumstances enumerated in Art. 14 which, when present or attendant in certain offenses, qualify them; for instance, premeditation, treachery, and price or reward are generic aggravating circumstances in the majority of offenses, but *qualify* the crime of murder; that is, a simple *homicide* may be raised to the category of murder by the presence alone of *one* of said circumstances.

4. Mitigating Circumstances.—Mitigating circumstances are mostly of such a personal character that, while they do not quite justify the act performed, nevertheless they lessen the liability of the doer due to their peculiar nature.

5. Basis of the Mitigating Circumstances.—An examination of the mitigating circumstances enumerated in Art. 13 of the Revised Penal Code shows that they are based upon some cause or causes which diminish or hinder our free will or intelligence, or evince a lesser perversity. As Silvela says: "To be of eighteen years of age, in which control of passions and appetites is more difficult; provocation and threat which lean inadvertently to revenge or to repel force by force; the circumstances of committing the act in the immediate vindication of an offense, or of acting

under an impulse so powerful as naturally to produce passion and obfuscation, which circumstances are not essentially different from one another; and, finally, that of committing the act in a state of intoxication or of a more or less complete disturbance of the mind express or represent moments on which incitement to crime—be it or not controlled by freedom—is apparent. A crime may or may not be committed, but if it be, a mitigation will be found in the stimulus by which the doer was actuated, and if no crime be committed, the greater the excitement to evil which he has controlled and subdued the more the glory obtained by him.'"[1]

6. Sources of Mitigating Circumstances.—Mitigating circumstances may originate from any of these sources: (a) *imperfect intelligence;* (b) *imperfect free will;* (c) *damage exceeding intent;* (*d*) *incomplete exemption;* (e) *good behavior; and* (f) *similar circumstances.*

7. Imperfect Intelligence.—Under this classification we have the following:

(a) *Non-age.*—Under paragraph 2 of Art. 13, *it is a mitigating circumstance that the offender is under eighteen years of age or over seventy years.* In the case of the minor, he shall be proceeded against in accordance with the provisions of Art. 80.

That the offender be less than 18 years of age. This means that the offender should be more than 15 but less than 18, because if he is less than 15 years, the case would come under the provisions of Art. 12, pars. 2 and 3. It must be borne in mind that this is a qualified or extraordinary mitigating circumstance in accordance with the provisions of Art. 68 of this Code, because the effect of minority is as follows: (1) if the offender is less than 15 but more than 9, a discretionary penalty shall be imposed

[1] Derecho Penal, Vol. 2, p. 206.

upon him, but always lower by two degrees at least than the penalty provided for by law for the crime which he committed; and (2) if the offender is more than 15 but less than 18, the penalty immediately next lower in degree than that provided for by law must be imposed upon him.

But whether he is over or under 15 years, the offender can not be committed to jail nor can any penalty be imposed upon him in accordance with the provisions of Art. 80 of this Code. Hence, it seems wholly unnecessary to fix the penalty as provided for in Art. 68 for offenders under 18 years of age, unless the offender becomes so unruly or incorrigible as to warrant the taking of the measures provided for in par. 7 of Art. 80.

In the case mentioned below, there was no evidence as regards the age of the accused, aside from his own testimony, to the effect that he was only 17 years of age. The Court, in its judgment, found that by his appearance the accused was a "youth 18 or 19 years old." It was held that owing to the marked difference between the penalty to be imposed if the culprit were over 18 years and that applicable if he were under 18 years of age, the conclusion of the trial court drawn from personal observation was not sufficient to establish beyond a reasonable doubt that the defendant was, as a matter of fact, 18 years of age when the crime was committed.[3]

Or over 70 year age. This provision is taken from circumstance No. 15, Art. 25, of the proposed Correctional Code of 1913 which provides as follows: Extreme old age or minority which does not constitute ground for exemption."

The period of old age and of infirmity, differently determined in human life by physiologists, is deemed by some criminalists to constitute a mitigating circumstance.

[3] U. S. vs. Agadas et al., 36 Phil., 246.

The well-known authority, Francisco Carrara, does not, however, accept this theory in an absolute manner. Anent this, he says: "But old age in itself cannot mitigate the liability of the acts committed by the old man; on the contrary, society is entitled to demand from him, because of his experience and the cooling of his passions, a greater respect for the law; and if the years did not deprive him of the knowledge of good and evil, greater duties possibly are imposed thus upon him. Furthermore, from the point of view of immediate injury, a crime committed by an old man presents in its subjective moral force greater intensity than that perpetrated by a young man, in so far as bad example is concerned. Moral sense proclaims this truth in the minds of all."

The trial judge, in the absence of positive evidence to the contrary, cannot disregard the statement given by an accused to the effect that he was only 17 years of age.[4]

(b) *Intoxication.—It is only mitigating when not habitual or subsequent to the plan to commit a crime.*[5]

Habituality should be established by positive evidence, otherwise the contrary is to be presumed.[6]

(c) *That the offender is deaf and dumb, blind or otherwise suffering from some physical defect which thus restricts his means of action, defense, or communication with his fellow beings.*[7]

The Supreme Court of Spain in its Decisions of December 27, 1899 and of December 26, 1913, has already held that deaf-muteness and lack of instruction are mitigating circumstances similar to minority.

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[4] Derecho Criminal, par. 231.
[5] U. S. vs. Agadas et al., 36 Phil., 247.
[6] Art. 15, Revised Penal Code; U. S. vs. Abijan, 1 Phil., 83.
[7] U. S. vs. Fitzgerald, 2 Phil., 419; U. S. vs. Yape, 10 Phil., 204.
[8] Art. 13, par. 8, Revised Penal Code.

8. Imperfect Free Will.—It includes:

(a) *Provocation or threat.*—The fact that *sufficient provocation or threat on the part of the offended party immediately preceded the act* constitutes a mitigating circumstance.[9] In order, therefore, that provocation or threat may become a mitigating circumstance, it should be immediate, that is to say, between the provocation or threat and the act there must not be any interval of time. Threat should also be adequate, i. e., apt, related to the act, and sufficient to stir us up into its commission.[10]

By provocation is understood any conduct or act capable of exciting or irritating anyone.

Thus, when the aggression is committed in retaliation for an insult, injury or threat, the offender cannot allege self-defense, but at most a mitigating circumstance under the provisions of this paragraph.[11]

In case the provocation which preceded an aggression committed by the accused against several individuals, among them one who, without taking any part in said provocation or in the quarrel, only tried to separate the contending parties, should be alleged a mitigating circumstance, the provocation only should be considered to mitigate the penalty to be imposed upon the accused for the offense committed against the party or parties causing said provocation. This may be illustrated as follows: Supposing A was insulted by B, and because of the insult a fight ensued between the two. While the fight was going on, C repaired to the scene for the purpose of separating the contending parties and quelling the fight. It so happened that A mortally wounded C and inflicted grave physical injuries upon B. Upon the prosecution of A for the physical injuries

[9] Art. 13, par. 4, Revised Penal Code.
[10] 1 Viada, Cod. Pen., 212.
[11] U. S. vs. Carrero, 9 Phil., 544.

inflicted upon B and for the death of C, A's liability should be mitigated by the circumstance of provocation for the physical injuries sustained by B who caused the provocation, but not so for the death of C."[12]

An order for the arrest of the defendant for a misdemeanor is not such a provocation that it will be considered in mitigation for the killing of the officer giving such order."[13]

(b) *Vindication of an offense.—That the act was committed in immediate vindication of a grave offense to the one committing the felony, his spouse, ascendants, descendants, legitimate, natural or adopted brothers or sisters, or relatives by affinity within the same degrees.*"[14]

This circumstance involves two requisites: (1) that the vindication be *immediate;* and (2) that the offense be *grave.*

In the circumstance previously commented upon, it is necessary that the provocation or threat *immediately precede* the act, i. e., that there be no interval of time; while in this circumstance, it is only needed that the vindication of the offense be *proximate,* which admits of a longer interval of time between the insult and the vindication. This greater leniency in the case of the circumstance which we now comment upon is due undoubtedly to the fact that it concerns the honor of a person, an offense which is more worthy of consideration than mere spite against the one giving the provocation of threat.

The question as to whether or not a certain personal offense is grave must be decided by the Court, having in mind the social standing of the person, the place, and the time when the insult was made.

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[12] U. S. vs. Malabanan, 9 Phil., 262.
[13] U. S. vs. Abijan, 1 Phil., 83.
[14] Art. 13, par. 5, Revised Penal Code.

Thus if a person kills another for having found him in the act of committing an attempt against his (accused's) wife, he is entitled to the benefits of this circumstance for having acted in vindication of a grave offense against his honor and that of his wife.[15]

During a *fiesta* the accused, a man 70 years of age, asked one Patobo for some roast pig. Patobo answered: "There is no more; come here and I will make roast pig of you." With this as the provocation, a little later, while the said Patobo was squatting down, the accused came up behind him and struck him on the head with an ax causing his death the following day. The Lower Court took into consideration the mitigating circumstance that the act was committed in immediate vindication of a grave offense. The offense the accused was endeavoring to vindicate would, to an average person, be considered as a mere trifle; but since to this defendant it evidently was a serious matter to be made the butt of a joke in the presence of so many guests, it was proper to give the defendant the benefit of this mitigating circumstance.[16]

The circumstance of immediate vindication is not inherent in that of passion and obfuscation. The two can co-exist separately.[17]

As is seen, there is no fixed rule for determining the gravity of an offense. It is incumbent upon the Court to decide the point according to the merits of each case.

(c) *Passion or obfuscation.—That of having acted upon an impulse so powerful as naturally to have produced passion and obfuscation.*[18]

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[15] U. S. vs. Arribas, 1 Phil., 86; see also U. S. vs. Davis, 11 Phil., 96.

[16] U. S. vs. Ampar, 37 Phil., 201; See also U. S. vs. De Ocampo, 6 Phil., 449.

[17] U. S. vs. Davis, 11 Phil., 96.

[18] Art. 13, par. 6, Revised Penal Code.

In order that the mitigating circumstance of loss of reason and self-control (passion or obfuscation) may be taken into consideration in imposing the penalty for a crime, it is necessary that facts showing provocation sufficient to produce such a condition of mind be clearly established and proven,[19] and that the acts of the person injured must have been the immediate cause of such loss of reason and self-control. When the victim appears on the scene after the trouble has terminated, and is then attacked by the contestant, the aforesaid circumstance cannot be applied in mitigation of the penalty.[20] And the causes which produce in the mind loss of reason and self-control, and which lessen criminal responsibility, are those which originate from lawful sentiments, not those which have arisen from vicious, unworthy, and immoral passions.[21]

Thus, circumstances of passion or obfuscation cannot be invoked in favor of a person who murders another even though it can be proven that the murderer's motive was to maintain a strike, and that the deceased was a strike-breaker for the reason that any passion or obfuscation which would have arisen under such circumstances, were not lawful one. (People vs. Daos, et al, 60 Phil. 155).

(d) *Such illness of the offender as would diminish the the exercise of the will-power of the offender without, however, depriving him of consciousness of his acts.*[22]

The Supreme Court of Spain, long before the incorporation of this circumstance in the Code of 1928, had already held in its Dec. of September 28, 1897, that a woman under the influence of lactic fever, who kills her son the day

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[19] U. S. vs. Pilares, 18 Phil., 87.
[20] U. S. vs. Esmedia, 17 Phil., 260.
[21] U. S. vs. Hicks, 14 Phil., 217; People vs. Daos et al, 60 Phil. 155.
[22] Art. 13, par. 9, Revised Penal Code.

after delivery, is entitled to the benefits of this analogous circumstance. It likewise considered senility or mental derangement as a similar mitigating circumstance.

9. Damage Exceeding Intent.—*That the offender had no intention to commit so great a wrong as that committed.*[23]

This circumstance can be taken into account only when the facts proven show that there is notable and evident disproportion between the means employed to commit the criminal act, and its consequences.[24]

In other words, it is required that the injury caused be not commensurate or proportional to the intensity of the means employed nor to the efficacy of the instrument used to commit the same.[25]

Furthermore, the intention of the offender must, as a general rule, be inferred from the nature and extent of the tangible evil committed, because this evil is almost always the sensible manifestation of the will of the offender, except when the evidence or other facts and circumstances may serve as a reasonable ground to hold that the material act has gone beyond the limits of intention.[26]

For this reason, one who with definite and perverse intention of doing injury inflicts upon his victim a serious and fatal wound in the abdomen can not invoke in his favor the circumstance that he did not have the intention to commit so great a wrong as that committed.[27] Neither should this circumstance be taken into account in a case of physical injuries committed by throwing a stool at a person, because the means availed of by the offender were adequate, not only to produce the evil which he caused, but another evil more serious.[28]

[23] Art. 13, par. 3, Revised Penal Code.
[24] U. S. vs. Reyes, 36 Phil., 904.
[25] Dec. of Sup. Ct. of Spain of August 10, 1900.
[26] Dec. of Sup. Ct. of Spain of June 10, 1892, 48 Jur. Crim., 602.
[27] U. S. vs. Mendac, 31 Phil., 240.
[28] Dec. of Sup. Ct. of Spain, June 5, 1895, 54 Jur. Crim., 680.

In U. S. vs. Dacquel, 36 Phil., 781, the Supreme Court applied this circumstance in favor of the accused: A lieutenant of the barrio, who, because a religious procession took place without his consent, began striking everyone; thus hitting a nine-year old girl in the right arm and inflicting upon her physical injuries which took more than 30 days to heal.

It was likewise taken into account in the case of the U. S. vs. Luciano, 2 Phil., 96. The assailant, who, in the heat of anger, struck his victim twice with a piece of *bojo* cane from which blows the victim in consequence died, was favored by the pathological condition of the victim. It was likewise taken into account in U. S. vs. Trono et al., 3 Phil., 213, in which the accused, police officers, arrested the deceased as suspect of having stolen a revolver, and in order to compel him to confess, severely ill-treated him, in consequence of which he died. The accused were held guilty of the crime of homicide with this mitigating circumstance.

10. Incomplete Exemption.—Under paragraph 1 of Art. 13, *any of the exempting circumstances enumerated in Articles 11 and 12 of the Revised Penal Code, is mitigating circumstance, when all the requisites necessary to exempt from criminal liability in the respective cases are not attendant.*

The circumstances of justification or exemption which may give place to mitigation when not all the requisites required by law are present are the following: self-defense (par. 1, Art. 11); defense of a relative (par. 2, id.); defense of a stranger (par. 3, id.); state of necessity (par. 4, id.); accident (par. 4, Art. 12); performance of a duty (par. 5, Art. 11); and uncontrollable fear (par. 6, Art. 12).

So far as self-defense is concerned, it should be borne in mind that in accordance with the provisions of Art. 67 of this Code, when two of the three requisites mentioned

therein are present (for example, unlawful aggression and lack of sufficient provocation), the case must not be considered as one in which an ordinary or generic mitigating circumstance (which would be the subject of par. 1 which we are now commenting upon) is present. Instead, it should be considered a special mitigating circumstance referred to in Art. 67 of this Code.

On the other hand, if only one of the requisites is present in any of the cases referred to in circumstances Nos. 1, 2 and 3 of Art. 11 (for example, unlawful aggression), the provisions of par. 1 of Art. 13 which we are now commenting upon, would be perfectly applicable because the case constitutes an ordinary or generic mitigating circumstance.

According to the decisions of the Supreme Court of Spain, insanity or imbecility cannot give place to mitigation under this paragraph, for the reason that the mental condition of a person is indivisible; that is, there is no middle ground between sanity and insanity.[29]

Circumstances Nos. 8 and 9 of this Article, however, consider mitigating certain physical defects and ailments which in some way diminish will power. These circumstances, therefore, seem to be somewhat inconsistent with the decisions of the Supreme Court of Spain above quoted, because it cannot be denied that epilepsy, monomania, etc., which in some manner represent the middle ground between sanity and insanity, are now considered mitigating circumstances by virtue of the provisions of circumstances Nos. 8 and 9 of this Article.

Obedience due another cannot give way to mitigation.[30]

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[29] Decs. of Sup. Ct. of Spain of December 19, 1891, and of October 3, 1884, 33 Jur. Crim., 68.

[30] Dec. of Sup. of Spain of July 12. 1897.

But performance of duty and uncontrollable fear may do so.[31]

It is unnecessary to inflict a mortal wound with a dagger in order to repel an attack with a piece of bamboo, and he who does so is not exempt from criminal liability, but entitled only to the benefit of the mitigating circumstance of incomplete self-defense.[32]

11. Good Behavior.—It is also mitigating circumstance that the *offender had voluntarily surrendered himself to a person in authority or his agents, or that he had voluntarily confessed his guilt before the Court prior to the presentation of evidence for the prosecution.*[33]

In a recent decision of the Supreme Court of the Philippine Islands it was held that voluntary surrender of the offender is a separate and independent circumstance from that of voluntary confession of guilt. So, when the accused person, besides voluntarily surrendering after the commission of the crime, confesses also his guilt or pleads guilty to the complaint before the presentation of the evidence for the prosecution, he will be entitled to two mitigating circumstances. This is illustrated by the case of People vs. Forto, July 5, 1935, R. G. No. 43126.

12. Similar Circumstances.—In addition to the mitigating circumstances mentioned above, the Revised Penal Code[34] contains a provision of great amplitude which allows *the courts to accept other mitigating circumstances provided they are of a similar nature or analogous to those specified in* pars. 1 to 9 of Art. 13 of the Code.

Few are the circumstances held to be similar by the jurisprudence. Among them, the following may be mentioned:

[31] Decs. of Sup. Ct. of Spain of April 14, 1894, 52 Jur. Crim., 458, and of January 10, 1899.

[32] U. S. vs. De Castro, 2 Phil., 67.

[33] Art. 13, par. 7, Revised Penal Code.

[34] Art. 13, par. 10, Revised Penal Code.

old age when accompanied by mental weakness, but not otherwise[36], voluntary restitution by a thief of a stolen article[37]; the circumstance that offender was moved to attack the injured party because the latter concealed himself and refused to pay his account, is similar to obfuscation[38]; and the honest belief of a killer that his victim was his legal spouse.[39] But neither good conduct,[40] nor repentance and good faith,[40] may constitute a similar circumstance.[41]

Review Questions

1. What are the circumstances to be distinguished in every crime?—2. What are the different gradations or forms of criminal liability?—3. When will aggravating circumstances not operate as such?—4. What do you mean by *generic circumstances?*—5. What do you mean by *qualifying circumstances?*—6. State the nature or character of mitigating circumstances.—7. State the basis of mitigating circumstances.—8. Enumerate the sources of mitigating circumstances.—9. What circumstances are included in imperfect in-

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[36] Dec. Sup. Ct. of Spain, Dec. 23, 1872, 7 Jur. Crim., 695.
[37] Dec. Sup. Ct. of Spain, Nov. 14, 1887, 39 Jur. Crim., 689.
[38] People vs. Marenillo, R. G. 42946.
[39] U. S. vs. Tubban, 29 Phil., 434.
[40] Dec. Sup. Ct. of Spain, Feb. 11, 1879, 20 Jur. Crim., 155.
[40] Dec. Sup. Ct. of Spain, Dec. 17, 1880, 23 Jur. Crim., 367.
[41] In the Correctional Code of Del Pan (Art. 25) the following are added to the mitigating circumstances of the Penal Code: that the offender committed the crime to conceal his own dishonor or that of any of his nearest relatives; that he helped or lent his assistance to his victim; that he stopped the execution of the crime upon the first warning by the authority or its agents; that he confessed his guilt before the production of evidence by the prosecution; that more than 5 years elapsed since the commission of the crime without the offender having committed any other offense; necessity in cases of taking another's property to satisfy such necessity; ignorance of law when the crime does not involve manifest moral perversity; that the accused is a deaf-mute, is blind, or otherwise affected by a physical defect limiting his means of action, defense, or communication with the external world; good conduct previous to the crime; eminent services rendered to mankind; unjustified abandonment of the adulterous spouse by the offended party in case of adultery; and the little value of the thing stolen in cases of theft or robbery without violence upon persons.

telligence?—10. What kind of circumstance is minority or age under 18 years?—11. When is intoxication mitigating?—12. What circumstances are included in imperfect free will?—13. What is the essential requisite of *provocation* or *threat?*—14. What are the requisites of *vindication of an offense?*—15. Requisite of *passion* and *obfuscation.*—16. Requisite of *damage exceeding intent.*—Give a few examples of this circumstance.—17. What do you mean by circumstances of incomplete exemption?—18. Enumerate some of them.—19. What do you mean by *similar circumstances?*—20. Enumerate some of them.—21. Examine and recite the following cases: U. S. vs. Abijan, 1 Phil., 83; U. S. vs. Yape., 10 Phil., 204; U. S. vs. Malabanan, 9 Phil., 262; U. S. vs. Ampar, 37 Phil., 201; U. S. vs. Pilares, 18 Phil., 87; U. S. vs. Hicks, 14 Phil., 217; U. S. vs. Reyes, 36 Phil., 904; U. S. vs. Diaz, 15 Phil., 123; U. S. vs. Luciano, 2 Phil., 96.

CHAPTER XIII

CIRCUMSTANCES AFFECTING CRIMINAL LIABILITY

(Continued)

1. Aggravating circumstances.—2. Bases for aggravating circumstances.—3. Classification of aggravating circumstances.—4. Personal causes.—5. Time or place.

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1. Aggravating Circumstances.—They are those accidental circumstances present at the time of the perpetration of a crime which have the effect of aggravating the criminal liability of the offender.

The facts constituting an aggravating circumstance should be proved by competent evidence as well as the crime itself to which it is related.[1]

Mere supposition or presumption is insufficient to establish their presence according to law. No matter how truthful these suppositions or presumptions may seem, they must not and cannot produce the effect of aggravating the condition of the defendant.[2]

2. Bases for Aggravating Circumstances.—These circumstances are based not only upon the greater perversity of the person who commits a crime under any of them, but also upon the greater extent of the damage caused by the crime; upon the greater easiness for committing it; and upon the greater possibility of the guilty escaping the penal sanction by which the same is punished by law. In such sense, aggravating circumstances are of a purely personal and subjective character, and merely represent

[1] U. S. vs. Barbosa, 1 Phil., 741.
[2] U. S. vs. Perdon, 4 Phil., 141.

what Modernists or Positivists call *dangerous state or greater dreadfulness* of the offender. These circumstances are enumerated in Art. 14 of the Revised Penal Code.

3. Classification of the Aggravating Circumstances.—They may be classified or grouped under (a) *personal causes;* (b) *place or time;* (c) *number of culprits;* (d) *number of crimes committed;* (e) *inducement; and* (f) *means or modes of committing the offense.*

4. Personal Causes.—Under this group we find:

(a) *Public position.*—Paragraph 1 of Art. 14 of the Revised Penal Code provides that it *is aggravating the circumstance that advantage be taken by the offender of his public position;* that is, when the offender employs or uses the influence and prestige which official position affords him as a means to commit crime. Such would be the case of a policeman who, pretending to arrest and have a certain woman prosecuted for a certain offense, takes his victim to an isolated place where he lies with her against her will.[3]

(b) *Offense to public authority.—That the crime be committed in contempt of, or with insult to, the public authorities.*[4]

This circumstance is to be considered only in cases where the authority is *not* the offended party; for, if he is, then the crime committed would be assault upon, or contempt of, a person in authority.

The following is an example of the application of this circumstance: A and B were fighting in a public street when the president of the municipality happened to pass by. He tried to separate them or stop the fight. But in spite of the mediation and presence of the president, A and B did not stop fighting until B was killed by A. In this case, A

[3] U. S. vs. Yumul, 34 Phil., 169.
[4] Art. 14, par. 2, Revised Penal Code.

committed the crime of homicide with this aggravating circumstance.

(c) *Offense to rank, age, or sex.*—Paragraph 3, Art. 14 of the Revised Penal Code reads in part: *"That the act be committed with insult or in disregard of the respect due the offended party on account of his rank, age, or sex.*

As to *disregard of respect and dignity,* it is necessary that there be a difference between the social condition of the offender and that of the offended party. For example, an offense committed by a private citizen against a person in authority, by a student against his professor, by a ward against his guardian, etc.[5]; whenever there is an identity of conditions between the offender and the offended party this aggravating circumstance is not present.[6]

Disregard of respect and dignity is to be taken into consideration only in crimes which cause an offense to, or contempt of, persons in authority, the same being crimes against *persons* and *honor.* So when a thief steals property belonging to a judge, for example, the aggravating circumstance of disregard of respect due the offended party cannot be considered.

Disregard of age.—This is another circumstance which should be taken into consideration only in crimes against person and honor. This circumstance exists when the offended party, by reason of his age, can be considered the father of the offender.[7]

Disregard of sex.—When the condition of being a woman is indispensable in the commission of the offense, as for example, in the crime of rape, abduction, seduction, or parricide (killing of a wife by her husband), this circumstances cannot be taken into consideration for it is inherent in said crime.

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[5] U. S. vs. Cabiling, 7 Phil., 469.
[6] Viada, Cod. Pen., 324-325.
[7] I Viada, Cod. Pen., 326; U. S. vs. Reguera et al., 41 Phil., 506.

(d) *Abuse of confidence.—That the act be committed with abuse of confidence, or obvious ungratefulness.*[8]

This circumstance exists when a certain confidence has been reposed or placed upon a person, and such person, betraying the confidence reposed on him, commits the crime. Such would be the case of a guest who robs or commits rape in the house of his host.[9]

5. Place or Time.—Under this group we have the following:

(a) *Consecrated place, etc.—That the crime be committed in the palace of the Chief Executive, or in his presence, or where public authorities are engaged in the discharge of their duties, or in a place dedicated to religious worship.*[10]

Crimes committed in churches or other places devoted to God or worship, or in a courtroom while the court is in session, etc., will be aggravated by this circumstances. Cemeteries are not, however, included within the term "consecrated place."

This circumstance has not been applied in such a case as the following: The accused and the deceased were respectively plaintiff and defendant in a civil case in the court of a justice of the peace. After the testimony was taken, the justice invited the deceased into an adjoining room, and as he arose to accept the invitation, the accused, without warning, made an attack upon him with a knife and killed him on the spot.[11]

(b) *Dwelling of the offended party.*—The last sentence of paragraph 3 of Art. 14 of the Revised Penal Code, provides that the circumstances that the crime, *be committed*

[8] Art. 14, par. 4, Revised Penal Code.
[9] U. S. vs. Cruz, 4 Phil., 252; U. S. vs. Barbicho, 13 Phil., 616.
[10] Art. 14, par. 5, Revised Penal Code.
[11] U. S. vs. Punsalan, 3 Phil., 260.

in the dwelling of the offended party, if the latter has not given provocation, are aggravating.

As may be seen, a condition *sine qua non* of this circumstance, is that the offended party did not provoke the offender.

This circumstance does not exist when the crime was committed in the place where both the offended party and the offender live.[12] Neither is it present in a case of robbery in an inhabited house which is the dwelling of the offended party, because this circumstance is inherent in the crime of robbery committed in an inhabited house.[13]

The fact, however, that the crime of adultery was committed in the house of the offended party should be considered as an aggravating circumstance, in spite of the fact that the conjugal dwelling is the common dwelling of both the husband and the wife.[14]

It has been held that even though the aggressor did not go up into nor enter the interior of the house of the deceased, yet since he entered the field about the house, and went under the house in order to inflict on the offended party the various wounds resulting in death, there was present in the commission of the crime the aggravating circumstance that the same was committed in the dwelling of the offended party.[15] And where the defendant began the aggression upon the person of the deceased in the latter's own dwelling by binding his hands and taking him to a place near the house to kill him, the crime must be considered as characterized by the presence of this aggravating circumstance.[16]

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[12] 1 Viada, Cod. Pen., 330; U. S. vs. Licarte, 23 Phil., 10; U. S. vs. Destrito, 23 Phil., 28.

[13] U. S. vs. Cas, 14 Phil., 21; Art. 399, *infra*.

[14] U. S. vs. Ibañez et al., 33 Phil., 611.

[15] U. S. vs. Macarinfas, 40 Phil., 1.

[16] U. S. vs. Lastimosa, 27 Phil., 432.

A house of prostitution is not a dwelling house, at least during the hours in which it is open to the public.[17] Neither is a gambling house.[18]

(c) *On occasion of fire or calamity.—That the crime be committed on the occasion of a conflagration, shipwreck, earthquake, epidemic, or other calamity or misfortune.*[19]

For instance, a thief who commits robbery in a house on fire is evidently guilty of robbery with this aggravating circumstance.

(d) *Night-time,* etc.—That is, *that the crime be committed in the night-time, or in an uninhabited place, or by a band, whenever such circumstances may facilitate the commission of the offense.*[20]

Whenever more than three armed malefactors shall have acted together in the commission of an offense it shall be deemed to have been committed by a band.[21]

Night-time is that space of time included between twilight and dawn. Two or five minutes after sunset or before sunrise cannot be considered night-time within the meaning of this paragraph.

Night-time is not always considered as an aggravating circumstance, since there are many crimes which may be committed with as much impunity during the day as at night-time, such as bribery, illegal marriage, seduction, etc. In all these cases, night-time is a mere accident, since the time has no influence at all in the perpetration of the crime. So night-time will be considered only as an aggravating circumstance when it appears that same was especially sought for, or, at least, that the offender had taken advantage

[17] U. S. vs. Balmori et al., 18 Phil., 578.
[18] U. S. vs. Baguio, 14 Phil., 240.
[19] Art. 14, par. 7, Revised Penal Code.
[20] Art. 14, par. 6, Revised Penal Code.
[21] Art. 14, par. 6, Revised Penal Code.

thereof, in order to facilitate and expedite the commission of the crime, or for the purpose of impunity.[22]

Treachery and night-time are two separate and distinct aggravating circumstances. The latter cannot be considered as inherent in the former.[23]

(e) *Uninhabited place.*[24]—By uninhabited place is understood a place where there is no population nor even a group of persons;[25] a place where there are no people or any number of houses within a perimeter of less than 200 meters. and this is a circumstance which ought to be taken into account even though not purposely sought for by the offender.[27]

Night-time and an uninhabited place constitute two aggravating circumstances which are different and separate.[28]

The circumstance of uninhabited place is present when the crime is committed on the sea.[29] Where it appears that the crime was committed within 150 meters of an inhabited house, and there is no evidence as to the nature of the ground between the place of the killing and the house referred to. the aggravating circumstance of "despoblado" has not been established beyond a reasonable doubt.[30]

Review Questions

1. What are aggravating circumstances?—2. State the bases for aggravating circumstances.—3. Give the classification of aggravating circumstances.—4. What circumstances fall under personal causes?—5. Requisite of *public position.*—6. Scope of *of-*

[22] U. S. vs. Ramos et al., 2 Phil., 434; U. S. Bonete, 40 Phil., 958.
[23] Dec. July 3, 1878, 19 Jur. Crim., 19. See also U. S. vs. Domingo et al., 18 Phil., 250.
[24] Art. 14, par. 6, Revised Penal Code.
[25] Dec. March 9, 1883, 28 Jur. Crim., 216.
[26] Dec. July 9, 1894, 28 Jur. Crim., 216.
[27] Dec. Feb. 28, 1894, 52 Jur. Crim., 279.
[28] Dec. July 6, 1887, 39 Jur. Crim., 232.
[29] U. S. vs. Maharaja Alim et al., 38 Phil., 1.
[30] U. S. vs. Bahatan et al., 34 Phil., 695.

fense to public authority.—7. Requisite of *disregard of respect and dignity*—8. Crimes in which it may be taken into account.—9. *Disregard of age*, when present?—10. *Disregard of sex*, when can it not be taken into account?—11. *Vagrancy*, what is it?—12. What is the special law on the subject?—13. *Abuse of confidence*, when present?—14. *Consecrated place*, its meaning and scope.—15. May the circumstance of *place where public authorities are engaged in the discharge* of their duties be present in the crime of *atentado?*—16. What is the essential condition of the *dwelling of the offended party?*—17. When can it not be taken into account.—18. Give an example of the circumstance of fire or calamity?—19. Night-time, what is it within the meaning of the Penal Code?—20. When can it be taken into account and when not?—21. Is night-time inherent in treachery?—22. What is an uninhabited place?—23. When can it be taken into account?—24. How many circumstances are there in night-time or uninhabited place?—25. Examine and recite the following cases: U. S. vs. Yumul, 34 Phil., 169; U. S. vs. Cabiling, 7 Phil., 469; U. S. vs. Reguera, 41 Phil., 506; U. S. Barbicho, 13 Phil., 617; U. S. vs. Punsalan, 3 Phil., 260; U. S. vs. Lastimosa, 27 Phil., 432; U. S. vs. Ibañez, 33 Phil., 611; U. S. vs. Destrito, 23 Phil., 28; U. S. vs. Bonete, 4 Phil., 958; U. S. vs. Bahatan, 34 Phil., 695.

CHAPTER XIV

CIRCUMSTANCES AFFECTING CRIMINAL LIABILITY

(Continued)

1. Number of culprits.—2. Number of crimes committed.—3. Inducement.—4. Means or modes of committing the offense.—5. Alternative circumstances.

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1. Number of Culprits.—We have the following circumstances falling under this group:

(a) *Help of armed persons,* that is, *that the crime be committed with the aid of armed men or persons who insure or afford impunity.*[1]

This circumstance may be identified with *alevosía,* and especially aggravates the robbery defined by Art. 300 of the Revised Penal Code.

This circumstance is not present when both parties, offender and offended, are members of a group of individuals or band, and provided with arms; or when the aid of armed men is a means employed to insure impunity, for the reason that such aid constitutes treachery or *alevosía.*[2]

(b) *Band* or *"cuadrilla."*—By "cuadrilla" or band is meant a group of more than three armed men.[3]

When only two of a party of four committing a robbery are armed, the party does not constitute a "cuadrilla."[4]

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[1] Art 14, par. 8, Revised Penal Code.
[2] See U. S. vs. Abaigar, 2 Phil., 417.
[3] Art. 14, par. 6, Revised Penal Code.
[4] U. S. vs. Mendigoren, 1 Phil., 658; Dec. Sup. Ct. of Spain, May 22, 1871, 2 Jur. Crim., 321.

(c) *Aid of minors.*—Article 14, par. 20 of the Revised Penal Code reads in part: *"that the crime be committed with the aid of persons under fifteen years.*

2. Number of Crimes Committed.—We find under this group the following:

(a) *Generic recidivism.*—This term may be applied to the recidivism referred to in paragraph 10 of Art. 14, which says: *that the offender has been previously punished for an offense to which the law attaches an equal or greater penalty, or for two or more crimes to which it attaches a lighter penalty.*

When the offender commits a crime of a kind different from that for which he was previously tried and convicted, his recidivism is called *generic;* if it is a crime of a similar nature to the former crime, it is denominated *specific.*

Modern criminalists contend that a recidivist who adds a new crime to former ones can no longer be considered as an ordinary offender as he has been heretofore. On the contrary, a recidivist is now classed as a criminal of a particular kind, as a man of a certain mode of life, and as a member of a social class utterly dangerous. So that criminalists in dealing with the juridical and social phenomenon of recidivism assign a secondary place to the objective appreciation of the crimes committed, taking chiefly into account the personality of the recidivist and the motive or motives of the crime in order to determine the degree of his social dangerousness. In a word, nowadays, criminalists in studying recidivism are concerned mainly with the man who is the recidivist, and whether he belongs to the habitual or professional class; either of which appears to be socially dangerous. Or, to use the formula of Ferri and Jiménez Asúa, such class is formed by individuals in a *dangerous state.*[5]

[5] Calon, Derecho Penal, 356.

A pardon under *Art. 89 of the Revised Penal Code* does not completely extinguish the penalty and all its effects. Therefore, it does not prevent a former conviction from being considered as an aggravating circumstance.[6]

(b) *Specific recidivism.*—Thus may be called the recidivism defined in par. 9 of Art. 14 which says: *A recidivist is one who, at the time of his trial for one crime, shall have been previously convicted by final judgment of another crime embraced in the same title of this Code.*

According to this provision, in order that there may be recidivism or *reincidencia,* it is not enough that the offender should have been convicted previously of a crime embraced within the same title of the Penal Code at the time of the commission of the crime for which he is tried, but it is necessary that he should have been convicted previously by final judgment *at the time of the rendition of the sentence for the latter offense.*[7]

(c) *Quasi-recidivism.*—Thus it may be termed when a person commits a felony after having been convicted by a final sentence, and before beginning to serve such sentence, or while serving same. For a recidivist of this kind, the law provides that the maximum degree of the penalty prescribed for the new felony shall be imposed.[8]

(d) *Habitual delinquency.*—Habitually delinquent according to the provisions of the last paragraph of Article 62 of the Revised Penal Code, is a person who, *within the period of 10 years from the date of his release or last conviction of the crimes of robo, hurto, estafa,* or *falsificación, is found guilty of any of said crimes for a third time or oftener.*

Under the provisions of par. 5, of Article 62 of the Revised Penal Code, habitual delinquency shall have the following effects:

[6] U. S. vs. Sotelo, 28 Phil., 147.
[7] U. S. vs. Tieng Pay, 42 Phil., 212.
[8] Art. 160, Revised Penal Code.

a. Upon a third conviction the culprit shall be sentenced to the penalty provided by law for the last crime of which he be found guilty and to the additional penalty of *prisión correccional* in its medium and maximum periods;

b. Upon a fourth conviction the culprit shall be sentenced to the penalty provided for the last crime of which he be found guilty and to the additional penalty of *prisión mayor* in its minimum and medium periods; and

c. Upon a fifth or additional conviction, the culprit shall be sentenced to the penalty provided for the last crime of which he be found guilty and to the additional penalty of *prisión mayor* in its maximum period to *reclusión temporal* in its minimum period.

Mitigating and aggravating circumstances as defined in Articles 13 and 14 of the Revised Penal Code do not determine the degree of the additional penalty to be imposed for habitual delinquency. Additional penalties for habitual delinquency under the provisions of Article 62, par. 5, are to be imposed according to the sound discretion of the courts as counselled by the rule of reasonableness, and upon a just appreciation of all the facts and circumstances of the case. (People vs. Tanyaquin, 57 Phil., 426.)

Habitual delinquency is not a crime in itself, capable of exact definition. It is only a factor in determining a total penalty. It is impossible to lay down any mechanical criteria for fixing the additional penalty for habitual delinquency within the limits fixed by Article 62, par. 5, of the Revised Penal Code. (People vs. Sanchez, 57 Phil., 770.)

When an habitual delinquent has committed several crimes, without being first convicted of any of them before committing the others, he cannot be sentenced for each of said crimes to the gradually increasing additional penalty,

and for the purposes of the law, said crimes must be considered as one, applying the additional penalty to one of them, and ignoring the rest. For instance, when a person has committed two *estafas,* one after the other within a short space of time, without having been convicted of the first, before committing the second, and the proper additional penalty having been applied to the first crime, no additional penalty can be imposed in view of the offense presently before the Court. Such is the doctrine laid down in People vs. Santiago, 55 Phil., 266.

The law on habitual delinquency does not contemplate the exclusion from the computation of all convictions falling outside the 10 years immediately preceding the crime for which the defendant is being tried, provided such convictions are followed, at a greater or lesser interval of time, by another transgression within 10 years from one conviction to another. The Revised Penal Code in fixing the period of 10 years, mentions the date of the defendant's release or his last conviction as the starting point. If the law intended to rule out all convictions occurring 10 years before the commission of the crime under consideration, it would have expressly excluded them. As a matter of fact the law does not contemplate to punish the accused again for crimes which gave rise to prior convictions, but merely considers them in ascertaining whether or not the accused is an habitual criminal, with a view to correcting such criminality upon the occasion of his committing another crime; and the Legislature has full power to determine in what cases such persistence in evil should be corrected. (People vs. Rama, 55 Phil., 981.)

3. Inducement.—*That the crime be committed in consideration of a price, reward or promise.*[9]

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[9] Art. 14, par. 11, Revised Penal Code.

This means that criminal liability is aggravated not only when *actual* payment in money has been made, but also when some other kind of reward or promise of reward has been made. Price, reward and promise are not necessarily implied in the circumstance of deliberate premeditation.[10]

4. Means or Modes of Committing the Offense.— The following are included within this classification:

(a) *Inundation or great damage.—That the crime be committed by means of inundation, fire, poison, explosion, stranding of a vessel or intentional damage thereto, derailment of a locomotive, or by the use of any other artifice involving great waste and ruin.*[11]

This circumstance may be taken into consideration only when any of the means enumerated in the article are availed of for the commission of the crime but not for the purpose of hiding or preventing its discovery once it has been consummated.[12] It cannot, of course, be considered among the crimes of murder characterized by poisoning, arson, destruction by means of explosion, inundation and stranding of vessels, for the reason that such crimes are especially defined and punished in Arts. 248 and 320 *et seq.* of the Revised Penal Code.

(b) *Premeditation.—That the act be committed with evident premeditation.*[13]

Premeditation is characterized: (a) by the idea and firm, deliberate, meditated, and slow resolution to commit the crime,[14] and (b) by persistence in the resolution to commit the crime.[15]

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[10] U. S. vs. Rabor, 7 Phil., 726; U. S. vs. Manalinde, 14 Phil., 77.
[11] Art. 14, par. 12, Revised Penal Code.
[12] Dec. Sup. Ct. of Spain, March 6, 1889.
[13] Art 14, par. 13, Revised Penal Code.
[14] Dec. Sup. Ct. of Spain, Aug. 5, 1916, 97 Jur. Crim., 66.
[15] Dec. Sup. Ct. of Spain, Jan. 31, 1913, 90 Jur. Crim., 141.

There is no fixed period of time in premeditation. The period of time necessary to justify the inference of deliberate premeditation is a period sufficient in a judicial sense to afford full opportunity for meditation and reflection, and sufficient to allow the conscience of the actor to hearken to its warnings.[16] Nevertheless, premeditation must be *known*, and this means that premeditation ought to be demonstrated by reiterated and external signs, and not by mere suspicions.[17] Thus, the fact alone that a few hours before the commission of the crime, the accused told the wife of the deceased of his resentment against said deceased for having allowed the latter's sister-in-law, whom the defendant was courting, to move to another town, is not sufficient proof of premeditation.[18]

(d) *Craft, fraud, disguise.—That craft, fraud or disguise be employed.*[19]

This is an intellectual rather than material or physical means employed by the offender in the execution of his evil desire. This paragraph is intended to cover the case where a thief falsely represents that he is the lover of the servant in a certain house in order to gain entrance (*astucia* or craft); or where A simulating the handwriting of B, a friend of C, invites the latter, by means of a note written in such simulated handwriting without the knowledge of B, to meet B at a designated place. This is done in order to give A, who lies in wait at the appointed place an opportunity to kill C (fraud); or where one uses a disguise to prevent his being recognized (disguise).[20]

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[16] U. S. vs. Gil, 13 Phil., 530.

[17] U. S. vs. Bañagale, 24 Phil., 69; Dec. Sup. Ct. of Spain, May 7, 1879, 20 Jur. Crim., 418.

[18] People vs. Nargatan, XXIV Off. Gaz., 1720.

[19] Art. 14, par. 14, Revised Penal Code.

[20] U. S. vs. Cofrada, 4 Phil., 154; U. S. vs. Rodríguez, 19 Phil., 150.

(e) *Abuse of superior strength.—That advantage be taken of superior strength, or means be employed to weaken the defense.*[21]

This circumstance is applicable only to offenses against persons and sometimes to crimes against persons and property, i. e., robbery with physical injuries or homicide. It is present whenever the offended party is overpowered by the excessive physical strength of the offender. Such would be the case of a big and strong man who ill-treats a little boy, a woman, or an old and sick man.[22]

(f) *Treachery.—That the act be committed with* treachery (*alevosía*). *There is treachery when the offender commits any of the crimes against the person, employing means, methods, or forms in the execution thereof which tend directly and especially to insure its execution, without risk to himself arising from the defense which the offended party might make.*[23]

This is a circumstance which can be taken into consideration only in crimes against persons and in some others, such as robbery with homicide.

A sudden and unexpected attack upon a sleeping person or family by armed men constitutes treachery;[24] and if the attack were entirely unexpected because it was not preceded by any dispute between the offender and the victim, treachery would still exist, even though the victim were face to face with his assailant.[25]

It would be designated treachery, although the crime were merely an attempted or frustrated offense, if the offender employed in its execution, means, methods or forms which

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[21] Art. 14, par. 15, Revised Penal Code.
[22] U. S. vs. Estopia, 28 Phil., 97; Dec. Sup. Ct. of Spain, Oct. 9, 1875, 13 Jur. Crim., 172.
[23] Art. 14, par. 16, Revised Penal Code.
[24] U. S. vs. Villorente, 30 Phil., 59.
[25] People vs. Pengzon, 44 Phil., 224.

tended to insure the execution thereof. Notice should be taken of the wording of this paragraph: "which tend directly and specially to insure." It does not say "to insure it. Thus, in an assault made suddenly and unexpectedly and under guise of friendship and before the victim has the opportunity to regain his composure, or in the killing of a child of tender years by a group of adults in the fullness of their physical capacities, this circumstance of treachery should be taken into account.[26]

Treachery is also present when the offender binds his victim before inflicting upon him the fatal wound.[27] When treachery is taken into account as a qualifying circumstance in murder, it is improper again to consider in addition to that circumstance the generic aggravating circumstance of abuse of superior strength, since the latter is necessarily included in the former.[28]

(g) *Ignominy.—That means be employed or circumstances brought about which add ignominy to the natural effects of the act.*[29]

This circumstance is applicable to offenses against chastity. Such would be the case of an offender who commits rape on the person of a married woman in the presence of her husband.[30]

(h) *Wrongful entry.—That the crime be committed after an unlawful entry. There is an unlawful entry when an entrance is effected by a way not intended for the purpose.*[31]

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[26] U. S. vs. Baul, 39 Phil., 846; U. S. vs. Binayoh, 35 Phil., 23; U. S. vs. Elicanal, 35 Phil., 209; U. S. vs. Lansangan, 27 Phil., 474.

[27] U. S. vs. De Leon, 1 Phil., 163; U. S. vs. Lastimosa, 27 Phil., 432.

[28] U. S. vs. Estopia, 28 Phil., 97; U. S. vs. Oro, 19 Phil., 548; U. S. vs. Vitug, 17 Phil., 1.

[29] Art. 14, par. 17, Revised Penal Code.

[30] U. S. vs. Iglesia, 21 Phil., 55.

[31] Art. 14, par. 18, Revised Penal Code.

This circumstance does not require scaling or climbing, nor the use of force or violence; it is enough that entrance be gained by a way not intended for the purpose.[32]

A murderer who enters the house of his victim through an open window is guilty of the crime of murder with the concurrence of this circumstance.[33] This circumstance is an essential element in the cases of robbery described in Arts. 299 and 302 of the Revised Penal Code.

(i) *Breaking of doors, etc.—That as a means to the commission of a crime, a wall, roof, floor, door, or window, be broken.*[34]

This is a qualifying circumstance in the crime of evasion of service of sentence punished by Art. 157 of the Revised Penal Code.

(j) *Cruelty.—That the wrong done in the commission of the crime be deliberately augmented by causing another wrong not necessary for its commission.*[35]

Two essential and necessary requisites must be present: (a) that the injury done be deliberately augmented, that is, purposely, with full knowledge that increase of injury is being caused; and (b) that such injury or wrong be unnecessary for the execution of the criminal intent.[36]

(k) *Other unlawful means.*—The last sentence of paragraph 20, article 14 of the Revised Penal Code, reads as follows: *"or by means of motor vehicles, airships, or other similar means."*

5. Alternative Circumstances.—*Alternative circumstances are those which must be taken into consideration as aggravating or mitigating, according to the nature and*

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[32] Dec. Sup. Ct. of Spain, July 5, 1886.
[33] U. S. vs. Liwakas, 17 Phil., 234.
[34] Art. 14, par. 19, Revised Penal Code.
[35] Art. 14, par. 21, Revised Penal Code.
[36] People vs. Bersabal, 48 Phil., 439.

effects of the crime and the other conditions attending its commission. They are the relationship, intoxication and the degree of instruction and education of the offender.

The alternative circumstance of relationship shall be taken into consideration when the offended party is the spouse, ascendant, descendant, legitimate, natural, or adopted brother or sister, or relative by affinity in the same degree of the offender.

The intoxication of the offender shall be taken into consideration as a mitigating circumstance when the offender has committed a felony in a state of intoxication, if the same is not habitual or subsequent to the plan to commit said felony; but when the intoxication is habitual or intentional it shall be considered as an aggravating circumstance.[37]

(a) *Relationship.*

As a general rule, relationship is mitigating when the crime or offense committed is against property. In crimes against persons, it is mitigating when the offender is superior in rank to the offended party; for example, a father in respect to his son; and it is aggravating when the offender is inferior in rank to the offended party; for example, a son in regard to his father. In cases of grave felonies, however, as parricide, infanticide, *lesiones graves*, etc., this rule is not applicable, for the reason that in such cases relationship is always an aggravating circumstance which qualifies the offense.

In crimes against chastity, relationship is aggravating. Thus when the offender in a crime of rape is the father of the victim, relationship must be considered as aggravating.[38] So it is also when the defendant is the stepfather of the offended party.[39]

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[37] Art. 15, Revised Penal Code.
[38] U. S. vs. Viloria, 27 Phil., 466.
[39] People vs. Bersabal, 48 Phil., 439.

(b) *Degree of instruction.*

From the present jurisprudence of the Supreme Court it appears: (a) that the special circumstance of Art. 15 of the Revised Penal Code, that is, the lack of instruction and education of the convict, may and should be considered, as a general rule, even in cases of crimes against property, when it appears that, under all the circumstances which surrounded the commission of the crime, the strict degree of responsibility which the Penal Code imposes upon common convicts should not be exacted of them; and (b) that said special mitigating circumstance may be compensated with one or some aggravating circumstances in order to reduce the penalty prescribed by law, but it will not prevent the imposition upon the convict of the penalty in its maximum degree when one or more aggravating circumstances concur which are not susceptible of compensation because of the lack of other mitigating circumstances.[40] It cannot be applied in the case of a prisoner who treacherously attacks his guard for the purpose of making his escape,[41] nor in crimes against chastity.[42]

It is for the trial court rather than the Supreme Court to determine the proper application of this article. For this reason, the Supreme Court will seldom reverse the judgment of a trial court because of its failure to apply the provisions of this article.[43]

(c) *Intoxication.*

Intoxication is an aggravating circumstance when the offender is an alcoholic or becomes drunk after planning the commission of the crime, for reasons which are easily understood. A timorous criminal may embolden himself by imbibing liquor before committing the crime which accounts for this aggravating circumstance.

[40] U. S. vs. Reguera et al., 41 Phil., 506.
[41] U. S. vs. Mahomad, 33 Phil., 524.
[42] U. S. vs. Ramirez et al., 39 Phil., 738.
[43] U. S. vs. Estorico, 35 Phil., 410.

(d) *Moral attributes, etc. of the offender.—Aggravating or mitigating circumstances which arise from the moral attributes of the offender, or from his private relations with the offended party, or from any other personal cause, shall only serve to aggravate or mitigate the liability of the principals, accomplices and accessories upon whom such circumstances are attendant.*[44]

In a homicide, for instance, committed by two persons, it may happen that one of them has acted with full deliberation, while the other, with passion or obfuscation. The circumstance of premeditation and obfuscation in this case arises from the *moral attributes* of the two offenders; or it may happen that one of the accused persons is under 18 years of age, while the other is a recidivist, or has taken advantage of his official position. All these circumstances are dependent upon *personal causes,* and as such, will benefit or prejudice the party from whom they arise.

The circumstances which consist in the material execution of the act, or in the means employed to accomplish it, shall serve to aggravate or mitigate the liability of those persons only who had knowledge of them at the time of the execution of the act or their cooperation therein.[45] For instance, in a robbery where one of the accused has acted with abuse of confidence in view of the fact that he was a servant of the offended party, such aggravating circumstance cannot be applied to another accused who does not bear the same relation to the offended party.[46]

Review Questions

1. What aggravating circumstances come within the classification of *number of culprits?*—2. What do you mean by *help of armed persons?*—3. What do you mean by *cuadrilla?*—4. Give the classifi-

[44] Art. 62, par. 3, Revised Penal Code.
[45] Art. 62, par. 4, Revised Penal Code.
[46] People vs. Valdellon, 46 Phil., 245.

cation of recidivism.—5. What do you mean by *generic recidivism?*—6. Name the provisions of our penal statutes regarding *generic recidivism.*—7. Concept of a recidivist according to modern criminalists?—8. Give the salient features of *habitual delinquency.*—9. Name some defects of this provision.—10. Name the provisions of our penal statutes regarding *specific recidivism.*—11. Define *recidivist.*—12. What is *quasi-recidivism?*—13. When is the circumstance of *price* or *reward* present?—14. When may *inundation* or *great damage* be taken into consideration?—15. What are the characteristics of premeditation?—16. What is the period of time in premeditation?—17. What is the nature of the circumstance of *craft, fraud* and *disguise?*—18. *Abuse of superior strength,* when present?—19. When does *treachery exist?*—20. May it be present in all crimes?—21. *Ignominy,* when present?—22. *Wrongful entry,* when present?—23. *Breaking of doors,* when present?—24. May the aggravating circumstance of *prohibited arms* be taken now as aggravating circumstance?—25. What are the essential requisites of cruelty?—26. Name other aggravating circumstances?—27. What are the alternative circumstances?—28. When does *relationship* mitigate and when aggravate?—29. In what particular kinds of offense is it present?—30. Intoxication, when mitigating and when aggravating.—31. Degree of instruction, when mitigating and when aggravating?—32. May the Supreme Court interfere with the finding of the lower court *in re* degree of instruction?—33. State the rule for the application of mitigating and aggravating circumstances arising from moral attributes of the offender.—34. Examine and recite the following cases: U. S. vs. Abaigar, 2 Phil., 417; U. S. vs. Mendigoren, 1 Phil., 658; U. S. vs. Sotelo, 28 Phil., 147; U. S. vs. Manalinde, 14 Phil., 77; U. S. vs. Gil, 13 Phil., 530; People vs. Nargatan, XXIV Off. Gaz., 1720; U. S. vs. Rodriguez, 19 Phil., 150; U. S. vs. Estopia, 28 Phil., 97; U. S. vs. Villorente, 30 Phil., 59; People vs. Pengson, 44 Phil., 224; U. S. vs. Iglesia, 21 Phil., 55; U. S. vs. Liwakas, 17 Phil., 234; U. S. vs. García Gavieres, 38 Phil., 787; People vs. Bersabal, 48 Phil., 439; U. S. vs. Viloria, 27 Phil., 466; U. S. vs. Mohamad, 33 Phil., 524 and People vs. Valdellon, 46 Phil., 245.

CHAPTER XV

DEVELOPMENT OF CRIME

1. Development of crime.—2. Internal acts.—3. External acts. 4. Classification of the external acts.—5. Preparatory acts.—6. Acts of execution.—7. Imperfect crimes according to the Positivist School.—8. Impossible crimes and ineffective means.—9. *Impossible crime under the Classical School and Spanish jurisprudence.* 10. *Impossible crime under the Revised Penal Code.*—11. The impossible crime according to the Positivist School.

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1. Development of Crime.—From the moment a culprit conceives the idea of committing a crime up to the consummation or realization of the same, the agent's acts pass through several stages.

2. Internal Acts.—Of course internal acts are not and cannot be punished. There is no way of detecting or reading with accuracy what is in the mind of another.

3. External Acts.—But external acts are different. They may be, and usually are, punished when they are intimately and directly connected with the execution of the crime.

4. Classification of the External Acts.—The external acts may be divided into (a) preparatory acts, and (b) acts of execution.

5. Preparatory Acts.—They consist of acts of (a) proposal, and (b) conspiracy.

(a) *Proposal takes place when the person who has decided to commit a felony proposes its execution to some other person or persons.* It is punishable *only in the cases in which the law especially provides a penalty therefor.*[1]

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[1] Art. 8, par. 3, Revised Penal Code.

Two requisites are necessary for the existence of a proposal, i. e. (1) a determination to commit the crime, and (2) the proposal of its execution to other persons. A proposal will not therefore exist, if he who proposes it is not ready to commit the crime.

One who offers money to a public officer for the purpose of inducing the latter not to perform the duties pertaining to his office makes not only a proposal in contemplation of violation of the law, but also attempts the crime of bribery as well.[2]

(b) *Conspiracy.—There is conspiracy when two or more persons come to an agreement concerning the commission of a felony and decide to commit it.* As in the case of proposal, *it is punishable only in the cases in which the law specially provides a penalty therefor.*[3]

The two following requisites are necessary in order that conspiracy may exist: (1) determination or decision to act, that is, a decided purpose to commit the crime, and (2) agreement or meeting of wills of two or more parties.

After the conspiracy has been established by sufficient evidence, each conspirator is responsible for all the acts of the others, done in furtherance of the agreement or conspiracy. In a conspiracy, every act of one of the conspirators is, in contemplation of law, the act of each one of them.[4]

The only crimes provided for in our penal statutes in which proposal and conspiracy are punished are treason and rebellion.[5]

6. Acts of Execution.—They include the following: (a) attempted crime; (b) frustrated crime; and (c) consummated crime.

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[2] U. S. vs. Gloria, 4 Phil., 341.
[3] Art. 8, Revised Penal Code.
[4] U. S. vs. Ipil, 27 Phil., 530.
[5] Arts. 115 and 136, Revised Penal Code.

(a) *Attempted crime.—There is an attempt when the offender commences the commission of a felony directly by overt acts, and does not perform all the acts of execution which should produce the felony by reason of some cause or accident other than his own spontaneous desistance.*[4]

The first circumstance that the law requires in order that there may be an attempted crime is that the crime be commenced, and in order that the execution of the crime may be considered as begun, it is necessary that it be made manifest by certain external acts which have some *direct* connection with the crime. For instance, a person who plans to murder another buys a certain quantity of poison from a drug store to carry out his plan. From this act alone, the existence of the attempted crime of murder cannot be established because, even though the beginning of the execution of the crime is clearly established by the *external* act of the offender in going to the drug store and buying poison, such act does not have as yet any *direct* connection with the crime.[4a] He may allege that the poison bought by him was intended for some different purpose. But if the offender, following his criminal design, pours the poison into the soup intended for his victim, he evidently begins the execution of the crime by an *external* act which has a direct connection with the crime of murder, inasmuch as the necessary and logical result of his action, in this case, can be no other than the poisoning of the person for whom the food is intended.

Thus the mere fact a certain person attempts to make an opening by means of an iron bar on the wall of another's house is not sufficient to justify the inference that the doer's intention was to rob, in the absence of additional evidence indicating such intention. The attempt which the Penal Code

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[4] Art. 6, par. 3, Revised Penal Code.

[4a] See People vs. Lamahang, 61 Phil. 703.

punishes is that which, as has already been stated, has logical relation to a particular, concrete offense: that, which is the beginning of the execution thereof by overacts of the perpetrator leading directly to its realization and consummation.

In order that a simple act of entering by means of force or violence another person's dwelling may be considered as attempted robbery, it must be shown that the offender clearly intended to take possession, for the purpose of gaining, of some personal property belonging to another. (See People vs. Lamahang, 61 Phil. 703).

The other circumstance which attempted crime requires is that the subjective act or action of the culprit be not terminated by a cause or accident which is not his own voluntary desistance. In case of an attempt the offender never passes the subjective phase of the offense. He is interrupted and compelled to desist by the intervention of outside causes before the subjective phase is passed. Therefore, although the execution of the acts had begun, because the culprit, through fear or remorse, desisted from continuing his criminal intent, there would be no attempt in the eyes of the law. For example, in the illustration given above, if at the very moment the person for whom the poison is intended brings to his lips the poisonous substance, and the culprit, through fear or remorse, takes it away and confesses his crime, the circumstance which has stopped the consummation of the crime has come entirely from the will and volition of the culprit, and hence, his action does not become punishable. It is a sort of reward granted by law to those who, having one foot on the verge of crime, heed the call of conscience and return to the path of righteousness.[1]

(b) *Frustrated crime.*—A felony is frustrated, according to Art. 6 of the Revised Penal Code, *when the offender*

[1] U. S. vs. Eduave, 36 Phil., 209; 1 Viada, Cod. Pen., 35-36.

performs all the acts of execution which would produce the felony as a consequence but which, nevertheless, do not produce it by reason or causes independent of the will of the perpetrator. It is therefore necessary that the culprit shall have performed all the acts of execution which would produce the crime as a result; that is, that he shall have carried out in their entirety all the external acts without producing, however, the actual injury which he, the culprit, proposed to commit. In the case of frustrated crimes, the subjective phase has been completely passed. Subjectively, the crime is complete. Nothing interrupted the offender while he was passing through the subjective phase. The crime, however, was not consummated by reason of the intervention of causes independent of the will of the offender. He did *all* that was necessary to commit the crime. If the crime did not result as a consequence, it was due to something beyond his control. In the example given above, there would have been a frustrated murder if the victim had taken the soup mixed with poison; that he did not die as a result thereof was because of the timely intervention of a doctor.[8]

The subjective phase is that portion of the acts constituting the crime included between the act which *begins* the commission of the crime and the *last* act performed by the offender which, with the prior acts, result in the consummated crime. From that time on, the phase is objective. It may be said also to be that period occupied by the acts of the offender over which he has control—that period between the point where he *begins* and that point where he voluntarily *desists.* If, *between these two points,* the offender is stopped by any cause outside of his own voluntary desistance, the subjective phase has not been passed and it is an attempt. If he is not so stopped

[8] U. S. vs. Valdes, 39 Phil., 240.

but continues until he performs the last act, it is frustrated crime.[9]

If the subjective phase of the crime already has been passed but prevention of the consummation of the offense is due to the perpetrator's own and exclusive will, will frustrated crime exist? For instance: A doctor conceived the idea of killing his wife, and to carry out his plan mixed arsenic in the soup of his victim. Immediately after the victim took the poisonous food, the offender suddenly felt such a twinge of conscience that he himself washed out the stomach of the victim and administered to her the adequate antidote. The victim was saved by the offender himself. Would this be a frustrated parricide? Certainly not; for even though the subjective phase of the crime had already been passed, the second and most important requisite of a frustrated crime, i. e., that the *cause* which prevented the consummation of the offense, *independent* of the will of the perpetrator, was lacking.

(c) *Consummated crime.*—There is a consummated felony *when all the elements necessary for its execution and accomplishment are present.*[10] So a pickpocket who steals and carries away a pocket-book, but who, upon being detected drops the stolen article,... is guilty of the consummated crime of theft, because he has accomplished his purpose of taking actual possession of the stolen article without the knowledge and consent of its owner.[11]

Consummated theft is likewise committed by the thief who steals and carry away a personal belonging, but, because of remorse of conscience, returns the stolen goods afterwards. This example is distinguished from that of the doctor who intended to poison his wife, because in the present example, the crime of theft was *already consum-*

[9] U. S. vs. Eduave, *supra.*
[10] Art. 6, par. 2, Revised Penal Code.
[11] U. S. vs. Bailon, 9 Phil., 161; U. S. vs. Adiao, 38 Phil., 754.

mated when the culprit attempted to undo his wrong. Theft is consummated the very moment the offender gets possession and control of the stolen property, and the subsequent return thereof *constitutes* only a mitigating circumstance.[12]

7. Imperfect Crimes According to the Positivist School.—Garofalo [13] believes that the punishment must be adapted to the criminal aptitude of the wrongdoer and not to the objective gravity of the offense. Hence, he discards all distinction between attempted and frustrated crime. "An attempt to commit crime, when it reveals the criminal aptitude of the agent, must be considered as the crime itself. The employment of insufficient means is not always proof of ineptitude, especially in the case of juvenile offenders," he goes on.

Ferri, on the other hand, seems not to be inclined to adopt the foregoing theory, because for him the lack of consummation of the crime, depending upon a less energetic and malicious action on the part of the offender, may of itself be an indication of his lesser dreadfulness and offensive power. The draft of an Italian penal code prepared in 1921 by Ferri himself does not establish any difference between an attempted and a frustrated crime. It does, however, provide for judicial guidance in Art. 16, so that the judge may, according to the modalities of the fact and the act committed, "apply the penalty prescribed for the consummated crime, or when the consummation of the crime is not the result because of accidental circumstances." [14]

8. Impossible Crimes and Ineffective Means.—Crime sometimes fails to materialize because, despite the will of the would-be offender, its realization becomes *impossible*

[12] Art. 13, par. 10, Revised Penal Code.
[13] Criminology, Eng. ed., pp. 408-409.
[14] Cf. Jimenez Asua, Estudio Crítico del Proyecto del Código Penal Italiano, 59.

due to the opposition offered by the very nature of things. This impossibility may be either of means or of end. There is an impossibility of *means* when such is ineffective for the execution of the act intended; for instance, in the case of a person who intends to poison another with common salt believing it to be arsenic; that of one who not knowing that a firearm is unloaded shoots with it at another. There is an impossibility as to the *end* when the result contemplated cannot be obtained for lack of object; for example, when one attempts to kill a person who is already dead, or when one uses abortive measures on a woman who is not pregnant.

9. Impossible Crime Under the Classical School and Spanish Jurisprudence.—Both the Classical School (Pessina, par. 105) and the Jurisprudence of the Supreme Court of Spain (decision of Supreme Court of Spain, November 26, 1879, 21 Jur. Crim., 343), consider that an impossible attempt does not constitute a real attempt, for no act can be begun which is impossible to be executed; the facts performed, they say, are simply demonstrative of a criminal will, but this alone is insufficient for the imposition of a penalty.

10. Impossible Crime Under the Revised Penal Code.—The Revised Penal Code deviated from the norm of the Classical School in providing for and punishing in Art. 2, par. 4, in connection with Art. 59, the so-called impossible crime, or the commission of crimes which do not materialize because of the inherent impossibility of accomplishment, or on account of employment of inadequate and ineffective means.

Nowadays, *any person performing an act considered to be an offense against person or property, were it not for the inherent impossibility of its accomplishment or on account of the employment of inadequate or ineffectual means,*

shall also incur criminal liability, and be subject to penal sanction of Art. 59. This provides that *when the person, intending to commit an offense, has already performed the acts for the execution of the same, but the crime was not produced by reason of the fact that the act intended was by nature one impossible of accomplishment or because the means employed were essentially inadequate to produce the result desired by such person, the Court, having in mind the social danger and the degree of criminality shown by the offender, shall impose upon him the penalty of arresto mayor or a fine ranging from ₱200.00 to ₱2,000.00.*

Acts similar or identical to those described in par. 8, *ante*, would constitute impossible crime or impossible attempt contemplated in Arts. 4, par. 2 and 59 of the Revised Penal Code.

11. The Impossible Crime According to the Positivist School.—Positivists, those who take into account, in the first place, the personal factor, i. e., the offender, contend that the acts performed doubtless reveal a criminal will and, therefore, the criminality of the offender. He who employs unfit means thru error, or attempts to do an act impossible of execution, has, notwithstanding his error, shown his dreadfulness; the act is not itself dangerous, but reveals a danger that may come from the offender. The case is otherwise when the unfitness of the means shows that the former is incapable of committing the crime, as in the case of one who believes he is poisoning another with sugar, or killing a person situated at a distance enormously greater than the range of his weapon. In this case, the act would show the ineptitude of such person to commit the crime; he would show thereby his stupidity but not his dreadfulness, and so there would be no reason for the imposition of a penalty.[15]

[15] Calon, Derecho Penal, 375, 376.

The impossible crime has not been forgotten in the proposed Italian penal code of 1921. It rightly recognizes, in the second paragraph of its Art. 16, the necessity of applying a penal sanction to a crime which failed "because of unfitness of means or of impossibility of the end intended," and provides for it a lesser penalty according to the rules given in Art. 67 in case that one or more circumstances rendering the author less dangerous are present.[16]

Review Questions

1. Explain the process or development of the crime.—2. Give the classification of criminal acts.—3. What do you mean by internal acts?—4. Are they punishable?—5. What do you mean by external acts?—6. Give the classification of the external acts.—7. What do you mean by *proposal?*—8. What are the requisites of a proposal?—9. When does conspiracy exist?—10. What are the requisites of a conspiracy?—11. What are the acts of execution?—12. When does an attempted crime exist?—13. What are the requisites of an attempted crime?—14. What do you mean by the subjective phase of a crime?—15. When does a frustrated crime exist?—16. Requisites of frustrated crime.—17. What do you mean by the objective phase of a crime?—18. Why is it that voluntary desistance wipes out all traces of criminal liability of the doer?—19. When does consummated crime exist? 20. What is the concept of imperfect crimes according to the Positivist School?—21. What do you mean by impossible crime?—22. What are the causes which render the crime impossible?—23. Are impossible crimes punishable by the present statutes?—24. Concept of the impossible crime according to the Positivist School.—25. Examine and recite the following cases: U. S. vs. Gloria, 4 Phil., 341; U. S. vs. Ipil, 27 Phil., 530; U. S. vs. Eduave, 36 Phil., 209; U. S. vs. Valdes, 39 Phil., 240; U. S. vs. Bailon, 9 Phil., 161 and U. S. vs. Adiao, 38 Phil., 754.

[16] Jiménez Asúa, Estudio crítico del Código Penal Italiano de 1921.

CHAPTER XVI

PLURALITY OF CRIMES

1. Plurality of crimes in general.—2. Its difference from continued crime.—3. The Law on plural crimes.—4. Punishment of plural crimes.

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1. Plurality of Crimes in General.—A plurality of crimes consists of the successive execution by the same individual of different criminal acts, whether of the same or different kind, upon any of which no conviction has yet been declared. Herein lies precisely its difference from recidivism, in that the offender has not yet been condemned for any of such crimes.[1]

2. Its Difference from Continued Crime.—Plurality of crimes may be confounded with the so-called *continued crime* in that both imply the performance of a series of punishable acts apparently disconnected from one another. A *continued crime,* however, is a sole crime; not a series of successive crimes. Thus, for example: a collector of a commercial firm misappropriates for his personal use several amounts collected by him from different persons. Each embezzled amount involves the commission of an *estafa.* Nevertheless, there is here one crime only because the different and successive appropriations are but the different moments during which one criminal resolution alone, a single defraudation, develops. Should the different appropriations be disconnected from one another, and each of them prompted by a different intention, there would be the so-called plurality of crimes.[2] Likewise, a robber who robs a house and takes therefrom two chickens belonging to two different persons commits only one crime for the

[1] Calon, Derecho Penal, 385.
[2] See U. S. vs. Ferrer, 34 Phil., 277.

reason that there is unity of thought in the criminal purpose of the culprit; and this unity of thought and action cannot be altered by the circumstance that the things stolen belong to two different persons.*

3. The Law On Plural Crimes — The legal controversy on whether or not there is such a thing as crime of rebellion complexed with murder, arson, rape and robbery, can only be intelligently settled through a thorough exposition and analysis of the law on plural crimes.

Under the punitive system established by the classical school to which our Penal Code belongs, a person committing multiple crimes may meet either one penalty only, or several ones, depending on whether the type of multiple crimes committed is ideal or material.

Plural crimes of the ideal type, which entail only one penalty, are divided into three groups, namely:

First Group: the so-called complex crimes penalized under Art. 48 of the Penal Code takes place: a) when two or more offenses are caused or produced by one single act: for instance, a person who throws a hand-grenade and causes thereby several victims, one killed and several injured, is guilty of the complex crime of murder with physical injuries (People vs. Guillen, 47 Off. Gaz. 3433 1951); or a person who shoots to death a Provincial Governor who is in the actual performance of his office is responsible of the crime of assault upon a person in authority with murder. (U.S. vs. Baluyot, 40 Phil. 385)

b) When two crimes have been committed, but one is a necessary means to commit the other. For instance, a person who forges the signature of a payee in a Government warrant in order to cash such warrant is guilty of the complex crime of estafa through the falsification of a public document (People vs. Geyrosaga, 53 Phil. 278); or where an accused forcibly abducts and rapes the victim afterward is guilty of the complex crime of abduction with rape. (People vs. de Guzman, 51 Phil. 105) In the first case, the crime of falsifi-

cation was necessary means to commit the estafa; while in the second, the abduction was a means to commit rape.

It must be taken into account that for the multiple or plural crime to be considered as a complex crime under the provisions of Art. 48 of the Penal Code, it must clearly appear that the offender has availed himself of one crime for the purpose of committing the other. In other words, it must clearly appear that one of the crimes is the end while the other is the means to attain the former; otherwise, a material plurality of crime is obtained, and as such must be treated and penalized independently one from the other in accordance with the provisions of Art. 70 of the Penal Code.

There has been, of late, some confusion or misunderstanding in the application of the provisions of Art. 48 of the Penal Code. Many prosecutors and judges of the court of first instance seem to have labored under the impression that the members of the subversive organization known as "*Hukbong Mapagpalaya ng Bayan*" can be prosecuted and convicted in one complaint, not only for the crime of rebellion, but also for all other grave crimes, such as arson, murder of innocent civilians, robbery and rape, committed by the organization. The government prosecutors, in their desire to exact the maximum punishment for the Huks, have invariably charged them with the so-called "complex crime of rebellion with murder, arson, rape, etc."

The co-mingling of the crimes of rebellion and other heinous acts committed by the members of the H.M.B. cannot be alleged in one complaint without violating the specific provisions of Rule 113, Sec. 2(e), of the Rules of Court, and the provisions of Arts. 48 and 70 of the Penal Code. The slaying of civilians, the rape of an innocent girl or the burning of their home are not in themselves necessary means to consummate rebellion or vice-versa. The multiple crime of rebellion, arson, murder, robbery or rape, having been conceived and executed by different persons, on different occasions and places, and inflicted upon different victims, must be dealt with independently and charged only against whomsoever

appear to be personally and individually guilty thereof. Neither can such mingling of rebellion and other grave acts be considered as continued crime or one single offense, for the reason that it lacks unity of criminal resolution and one - ness of unlawful purpose, so indispensable in *concursus delictorum*, whether it be a complex crime or continued crime.

Second Group: When the law specifically fixes one single penalty for two or more offenses committed. For instance, kidnapping with serious physical injuries, punishable with *reclusion perpetua* to death under par. 3, Art. 267 of the Rev. Penal Code; robbery with homicide as defined and penalized with life imprisonment to death under par. 1, Art. 294; frustrated robbery with homicide, punishable with *reclusion temporal* in its maximum period to *reclusion perpetua* under Art. 297.

Third Group: In cases of continued crime, which in appearance consists of several crimes but in reality, it is a sole or single crime in the mind of the perpetrator. For instance, a bill collector of a commercial firm misappropriates for his personal use several amounts collected by him from different persons at different times. There is here but one crime, because the different and successive misappropriations are but the different moments during which one criminal resolution arises and a single fraud develops. Should the different misappropriations be disconnected from one another and each of them prompted by a different intention, there would be the so-called real plurality of crimes, calling for as many penalties as misappropriations have been committed; but since the intention is only one and hence, the malice is likewise one only, there is but one crime because the different and successive misappropriations are merely different and successive portions of a single misappropriation which is the result of one single malicious intent. (U.S. vs. Ferrer, 34 Phil. 277).

Likewise, a robber who robs a house and takes therefrom two chickens belonging to two different persons, he commits

only one crime, for the reason that there is unity of thought in the criminal purpose of the culprit, and this unity of thought and action cannot be altered by the circumstance that the things stolen belong to two different persons (People vs. de Leon, 49 Phil. 437). Or when a revolver and a shotgun are found at the same time in the possession of a certain person without the license prescribed by law, such person can only be prosecuted in one single count or complaint. (U.S. vs. Gustillo, 19 Phil. 201).

Outside the cases described in the three preceding groups, the multiple crimes, i.e., crimes which have no connection with one another (like rebellion and rape), specially when they were impelled by different intent, must be charged and punished separately, under the provisions of Art. 70 of the Penal Code.

But even though the multiple crimes have been alleged in one information alone, under the erroneous classification of complex crime, the Court may still deny bail to the accused if the information charges, among others, capital offense, like murder or kidnaping. This is specially true if the defense did not timely demur or present motion to quash, on the ground of multiplicity of offense.

We should, however, bear in mind that the Courts cannot whimsically deny bail even in cases of capital offense, unless there is a sufficient showing that the evidence of guilt is vehement or strong. Maybe, if we have a law in this jurisdiction sanctioning the principle of command responsibility, which the military court applied to war criminals in early 1945, the Huk high command could be hanged with or without strong evidence that they have participated in or instigated the perpetration of murders and other acts of pillage, in addition to the crime of rebellion which they have promoted.

But in the absence of such a law, it is unreasonable to expect of our Courts to act otherwise.

In conclusion, we may say that it is a juridical heresy to charge in an information the crime of "rebellion complexed with murder, rape, robbery, arson, etc. "There isn't such an animal in the juridical zoo". But while this is true, the State prosecutors may and should split action against the Huks into as many informations or complaints as crimes have been committed and proven. Application for bail of the top Huk leaders can be successfully blocked by proper showing that they have participated in or instigated the perpetration of some capital offense, like murder or kidnaping.

After the publication of my views on plural crimes, the Supreme Court finally reconsidered its former stand on People vs. Hernandez wherein they held that a dissident who committed murder, rape, arson, common crimes, maybe convicted of the complex crime of sedition with murder, rape, etc. and upheld our views that common offenses committed by dissidents in connection with the crime of sedition must be charged and punished separately not as a complex crime of sedition with murder.

4. Punishment of Plural Crimes.—The two kinds of plurality of crimes above described are found in the Revised Penal Code.

As far as punishment of material plurality is concerned, Article 70 of the Revised Penal Code, as amended by Act No. 217 of the National Assembly, prescribes that *when all or any of the penalties corresponding to several violations of the law cannot be simultaneously executed the following rule shall be observed with regard thereto:*

1. *In the imposition of the penalties, the order of their respective severity shall be followed so that they may be executed successively or as nearly as may be possible, should a pardon have been granted as to the penalty or penalties first imposed, or should they have been served out.*

People vs. Geronimo, 100 Phil. Report. p. 90.

For the purpose of applying the provisions of the next preceding paragraphs the respective severity of the penalties shall be determined in accordance with the following scale:

Death,
Reclusion perpetua,
Reclusion temporal,
Prision mayor,
Prision correccional,
Arresto mayor,
Arresto menor,
Banishment,
Perpetual absolute disqualification,
Temporary absolute disqualification,
Suspension from Public Office, Right of Suffrage, Passive and Active, Profession or Trade,
Public Censure, and
Fine.

2. *Notwithstanding the provisions of the rule next preceding, the maximum duration of the convict's sentence shall not be more than threefold the length of time corresponding to the most severe of the penalties imposed upon him. No other penalty to which he may be liable shall be inflicted after the sum total of those imposed equals the said maximum period.*

Such maximum period shall in no case exceeds 40 years.

In applying the provisions of this rule the duration of perpetual penalties shall be computed at 30 years.

The system of punishment established by paragraph 2 of Article 70 above quoted, is known as *juridical cumulation* which represents a midway between *material cumulation* and the *absorption* system.

The paragraph 2 of Article 70 of the Revised Penal Code above transcribed is applicable to both cases: namely, whether the accused is charged with several violations of

law in one and the same proceedings, or whether he is charged with different violations of law in several and distinct proceedings; the ruling of the Supreme Court in the case of Celis vs. Warden of Bilibid, 18 Phil., 373, notwithstanding. The reason is that the Philippine Code of Criminal Procedure does not only fail to provide for the prosecution of several offenses in one complaint, but on the contrary, it specifically provides in Section 11 that each information must not charge more than one crime. Hence, it seems quite obvious that the former view of the Supreme Court in the case of Celis vs. Warden of Bilibid, *supra*, to the effect that the second paragraph of Article 70 refers only to offenses prosecuted in the same proceeding, is not tenable.

The doctrines, therefore, laid down by the Supreme Court in the cases of United States vs. Carrington, 6 Phil., 20, and United States vs. Galaraga, G. R. No. 17197, August 23, 1921, [unpublished], are reaffirmed and maintained as the final opinion of the Court on the subject. They are more in keeping with the ends of penalty and with the spirit of the provisions of this paragraph, which, by the way, was an innovation introduced in the Spanish Penal Code of 1870. It may be remembered in this connection that previous legislation, adopting the theory of absolute accumulation of crimes and penalties, established no limitation whatever and accordingly, all the penalties for all the violations were imposed even if they reach far beyond the natural span of human life.

It is now established, once for all, that the maximum duration of the sentence of a convict charged with different offenses, whether in the same proceeding or in several others, shall not be more than threefold the length of the time corresponding to the most severe of the penalties imposed upon him, and in no case such maximum period exceeds 40 years (People vs. Garalde, 50 Phil., 823).

As far as punishment of *formal* or *ideal* plurality is concerned, Art. 48 of the Revised Penal Code provides: "*When a single act constitutes two or more grave felonies or less grave felonies, or when an offense is a necessary means for committing the other, the penalty for the most serious crime shall be imposed, the same to be applied in its maximum period.*"

The system followed in the Article just quoted is the so-called *system of absorption,* in accordance with which the penalty for the greater crime is considered to absorb those corresponding to the less serious offenses.

Where a complaint sufficiently charges facts which constitute two distinct offenses resulting from the same act, as where a fatal assault is made upon an agent of authority constituting both homicide, under Art. 249, and assault (*atentado*) under Art. 148 of the Revised Penal Code, the penalty appropriate to the graver offense must be imposed in its maximum degree; and where such maximum is divisible, due account should be taken of the presence or absence of aggravating or mitigating circumstances in applying the penalty within the proper limits.[6]

But where the information alleges that after committing the homicide, the defendant, in order to conceal his crime, set fire to the house where it had been perpetrated, the offense is not a complex crime, because the homicide was not a necessary means to commit the arson, or vice versa, nor is this a case of a single act constituting two or more crimes. They are two independent acts constituting two distinct crimes.[7]

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[6] People vs. Hernández, 43 Phil., 104.
[7] People vs. Bersabal, 48 Phil., 439.

Review Questions

1. What do you mean by plurality of crimes?—2. Distinguish it from continued crime.—3. Give an example of each.—4. Give the classification of plurality of crimes.—5. What do you mean by *formal* or *ideal plurality?*—6. What are the different types of formal or ideal plurality?—7. Give an example of each.—8. What do you mean by *real* or *material plurality?*—9. What are its requisites?—10. State the rule of punishment in case of *real* or *material plurality.*—11. What are those penalties which may be served simultaneously?—12. State the order of preference of penalties in case they cannot be served simultaneously.—13. What do you mean by *material cumulation* of penalty?—14. State the rule of punishment in case of *formal* or *ideal plurality.*—15. What do you mean by punishment by *absorption?*—16. What do you mean by *juridical cumulation?*—17. When does *juridical cumulation* take place?—18. When, punishment by *absorption?* 19. What is the maximum length of time which can be imposed in a *juridical cumulation?*—20. Examine and recite the following cases: U. S. vs. Ferrer, 34 Phil., 277; People vs. Garalde, 50 Phil., 823; People vs. Hernández, 43 Phil., 104; People vs. Bersabal, 48 Phil., 439.

CHAPTER XVII

THE PENALTY

1. General notions of penalty.—2. Definition of penalty.—3. Reason for penalty.—4. Object of penalty.—5. Object of penalty according to the Positivist School.—6. Characteristics of penalty according to the Classical School.—7. Criteria for determining penalty according to the Classical School.—8. Criteria for determining penalty according to the Positivist School.—9. Individualization of penalty in the Philippine Islands.

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1. General Notions of Penalty.—Penalty, in its general signification, means pain; specially considered in the juridical sphere, it means the suffering undergone, through the action of human society, by a person who has been declared guilty of a crime.[1]

2. Definition of Penalty.—Penalty is the suffering attendant upon the execution of a condemnatory sentence, imposed by the social power, upon a person responsible for a violation of the criminal law.[2]

3. Reason for Penalty.—Reason, strictly qualified, is synonymous with explanation, interpretation, or principle. It is totally extraneous and different from idea or cause which gives rise to action. Thus, every crime, every conscious violation of the juridical order, has its attendant reason for penalty.[3]

4. Object of Penalty According to the Classical School.—If the reason for penalty lies in the disturbance of the juridical order by a will thereto opposed, its object will consist in restoring or reestablishing that order by inflicting some evil on the culprit.[4]

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[1] Pessina, Derecho Penal, par. 144.
[2] Calón, Derecho Penal, 412.
[3] Silvela, Derecho Penal, Vol. 1, p. 222.
[4] Silvela, *supra*, 223.

5. Object of Penalty According to the Positivist School.—It is none other than social defense by the constraint and elimination of delinquents ill-adapted to social life as a means of reparation for the damages caused by the crime.[5]

6. Characteristics of Penalty According to the Classical School.—Penalty must produce some type of suffering, although such should have for its limit the integrity of human personality. Therefore, penalties that are aimed against the physical integrity of man, and infamous penalties injurious to his moral integrity ought to be rejected.[6]

It also must be *proportionate* to the crime. This proportion between crime and penalty offers two aspects: one *qualitative,* in accordance with which crimes of different kinds must be punished by different penalties, and the other *quantitative,* according to which each crime should be punished by a more or less lasting penalty in harmony with its greater or lesser criminality.[7]

Penalty must be *personal.* It must be imposed only on the guilty party so that no one shall be punished for the crime of another.

It must be *lawful,* that is, must be the consequence of a sentence rendered according to the law.

It must be *certain,* i. e., nobody may escape therefrom.

It must be *equal* for all, which means that the same penalties shall be applied to the rich and the poor, to the powerful and the humble.[8]

7. Criteria for Determining Penalty According to the Classical School.—As a consequence of the proportion which must exist between crime and penalty, the Classical

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[5] Cf. Garofalo, Criminology, p. 230.
[6] Pessina, Derecho Penal, par. 145.
[7] Cf. Pessina, *supra,* par. 146.
[8] Calón, Derecho Penal, 414.

School holds: (a) that penalties corresponding to different offenses must be fixed by the law within a maximum and a minimum limit in order that the judge may increase or decrease the penalty in consideration of the aggravating or mitigating circumstances attending the execution of punishable acts; (b) that aggravating circumstances must all be specified by the law, their admission must not be left to the discretion of the Court; (c) that mitigating circumstances which may be foreseen should be mentioned by the law, although it is necessary to allow the Court a certain degree of liberty in order that it may take into account such mitigating circumstances as have not been mentioned in the statute.[9]

8. Criteria for Determining Penalty According to the Positivist School.—Positivists contend in this regard: (a) The determination of the *kind of penalty* shall be made by the criminal law, by establishing different groups of penalties applicable to different groups of delinquents and taking into account their greater or lesser dreadfulness. In determining the *kind of safety measure* to be adopted, the law must be strictly guided by the personal element of the offender. (b) The determination of the *measure* or *duration of the penalty* shall be made temporarily by the judge within an ample range between the maximum and the minimum fixed by law, taking into account in the first place the dreadfulness of the offender and adapting the penalty to him; that is, *individualizing the penalty.* The determination of certain *measures* of security shall be made in an absolutely indefinite manner, but as to others they shall be made also within a maximum and a minimum to be fixed by law.[10]

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[9] Calón, Derecho Penal, 428.
[10] Calón, Derecho Penal, 425-426.

9. Individualization of Penalty in the Philippines.— The very characteristic tendency of modern criminal law to adapt the penalty to the offender is called *individualization of penalty.* Now, embryonic traces of that tendency are found in the Revised Penal Code which establishes in its Arts. 12 and 13 circumstances modifying criminal liability, and in Art. 97 of the same Code, which provides for allowance for good conduct of any prisoner in any penal institution, according to the following scale:

(a) During the first two years of his imprisonment, he shall be allowed a deduction of five days for each month of good behavior.

(b) During the third to fifth year, inclusive, of his imprisonment, he shall be allowed a deduction of eight days for each month of good behavior.

(c) During the following years until the tenth year, inclusive, of his imprisonment, he shall be allowed a deduction of ten days for each month of good behavior.

(d) During the eleventh and successive years of his imprisonment, he shall be allowed a deduction of fifteen days for each month of good behavior.

And under the provisions of Article 98 of the same Code, a deduction of one fifth of the period of his sentence shall be granted to any prisoner who having evaded the service of his sentence, under circumstances mentioned in Article 158 of this Code, gives himself up to the authorities within 48 hours following the issuance of a proclamation announcing the passing away of the calamity or catastrophe referred to in said article.

Such allowances, for good conduct, once granted, shall not be revoked.[11]

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[11] Article 99, Revised Penal Code.

Review Questions

1. Give the general notions of penalty.—2. Define penalty.—3. State the reason for penalty.—4. Do. do. object of penalty according to the Classical School.—5. Object of penalty according to the Positivist School.—6. Characteristic of penalty according to the Classical School.—7. Criteria for determining penalty according to the Classical School.—8. Criteria for determining penalty according to the Positivist School. 9. What do you mean by individualization of penalty?—10. Do we have individualization of penalty?—11. What is the rate of good conduct allowance established by Art. 97?—12. What is the rate established by Art. 98?—13. Is the good conduct allowance once granted subject to forfeiture?

CHAPTER XVIII

THE PENALTY *(Continued)*

1. The penalties in the Revised Penal Code.—2. Bases for the determination and classes of penalties in the Code.—3. The graduated scale in the old Penal Code.—4. The graduated scales in the Revised Penal Code.—5. List of penalties in the Revised Penal Code.—6. Classification of penalties in the Revised Penal Code.—7. Safety or preventive measures.

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1. The Penalties in the Revised Penal Code.—The Revised Penal Code gives no definition nor notion of penalty. Neither does it declare the purpose of the penalties prescribed by it. It is evident, however, that such penalties answer a three-fold purpose, to wit: *retribution* or *expiation* as shown by the earnest desire to make the penalty commensurate with the gravity of the offense; *correction* or *reformation,* as shown by the rules which regulate the execution of the penalties consisting of deprivation of liberty (See Rules and Regulations of the Bureau of Prisons of June 12, 1932); and *social defense,* as shown by the inflexible severity of the Code to the recidivist and habitual delinquent.

2. Bases for the Determination of the Duration and Classes of Penalties in the Old Penal Code.—The Code of 1870 has taken as bases for determining the penalty corresponding to each crime the following: (a) the acknowledgment that crime consists of an abuse of freedom, whereby the penalty appears chiefly as a restraint on that freedom which was abused by the culprit; so the basis of this penal system is made up of penalties which deprive of and restrain freedom, while the others, the pecuniary ones, and those concerning rights are but complements of the former; (b) the unity of crimes, in accordance with which they are grouped, by reason of their similarity, in

titles, chapters and sections, and the unity of penalties in graduated scales; and (c) the connection established between said groups of crimes and groups of penalties.

3. Graduated Scales in the Old Penal Code. — Graduated scales in the Old Penal Code were formed by groups of penalties of an equal or analogous nature. Thus, under the provisions of Article 91 of said Code, there were six different graduated scales wherein a marked distinction was made between penalties affecting liberty, such as *cadena, reclusión, presidio, prisión* and *arresto,*[1] those affecting the right of domicile, such as *relegación, extrañamiento, confinamiento,* and *destierro,*[2] and those affecting political rights, such as disqualification, whether absolute or temporary, *suspensión* from office and right to vote and be voted for.[3]

The Revised Penal Code has done away with many of the penalties known in the old Code, such as *relegación, extrañamiento* and *confinamiento,* and has wiped out the distinction between *cadena* and *reclusión,* and *presidio* and *prisión.*

Under the provisions of Article 71 of the Revised Penal Code, as amended by Act No. 217 of the National Assembly, the different principal penalties provided for in Article 25, have been classified and grouped into two graduated scales, known as scales Nos. 1 and 2. Under scale No. 1 it was endeavored to group all personal penalties, such as deprivation of life and liberty, while under scale No. 2 there have been grouped all penalties consisting of deprivation of political rights, such as disqualification and suspension from office and right to vote or be voted for.

4. The Graduated Scales in the Revised Penal Code.— Hereunder are the graduated scales of Article 71:

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[1] See Scales 1 and 2, Old Penal Code.
[2] See Scales 3 and 4, Old Penal Code.
[3] See Scales 5 and 6, Old Penal Code.

SCALE NO. 1.

1. Death.
2. *Reclusión Perpetua.*
3. *Reclusión Temporal.*
4. *Prisión Mayor.*
5. *Prisión Correccional.*
6. *Arresto Mayor.*
7. Banishment.
8. *Arresto Menor.*
9. Public Censure.
10. Fine.

SCALE NO. 2.

1. Perpetual Absolute Disqualification.
2. Temporary Absolute Disqualification.
3. Suspension from: public office, right to vote and be voted for, profession or trade.
4. Public Censure.
5. Fine.

It is thus seen that the criterion of the classical school for determining the duration and kind of penalty has been followed as much as possible in said Article 71, as amended, there being unity and similarity of punishment in each graduated scale.

5. List of Penalties in the Revised Penal Code.—The scale provided for in Article 25 of the Revised Penal Code is as follows:

Capital punishment:
Death
Afflictive penalties:
Reclusión perpetua,
Reclusión temporal,
Perpetual or temporary absolute disqualification,
Perpetual or temporary special disqualification,
Prisión mayor.
Correctional penalties:
Prisión correccional,

Arresto mayor,
Suspensión,
Destierro.

Light penalties:

Arresto menor,
Public censure.

Penalties common to the three preceding classes:

Fine, and
Bond to keep the peace.

Accessory penalties:

Perpetual or temporary absolute disqualification,
Perpetual or temporary special disqualification,
Suspension from public office, the right to vote and be voted for, the profession or calling,
Civil Interdiction,
Indemnification,
Forfeiture or confiscation of instruments and proceeds of the offense,
Payment of costs.

6. Classification of Penalties in the Revised Penal Code.—Penalties are classified by the Revised Penal Code as follows:

(a) Principal and accessory penalties.[4]
(b) Perpetual and temporary penalties.[5]
(c) Personal and pecuniary penalties.[6]
(d) Capital punishment, afflictive, correctional, light and common penalties.
(e) Against life, property, liberty, rights, and domicile.[7]

(a) *Principal penalties* are those which may exist or be imposed alone, for example, *arresto*, banishment, or fine,

[4] Art. 25, Revised Penal Code.
[5] Art. 25, Revised Penal Code.
[6] Art. 25, Revised Penal Code.
[7] Art. 25, Revised Penal Code.

contrary to *accessory penalties* which are to be joined or added to other principal penalties, and cannot for that reason be imposed or subsist by themselves, for instance, civil interdiction, forfeiture or confiscation, and so forth.

(b) *Perpetual penalties* are: *Reclusión perpetua and perpetual absolute and special disqualification,* while *temporary penalties* are those restraining liberty for a certain period such as *reclusión temporal, prisión* or *arresto,* banishment and so forth, specified in Article 25 of the Revised Penal Code.

(c) *Personal penalties* are all the bodily penalties (death) and those restrictive of liberty which are prescribed by Article 25 of the Revised Penal Code, such as *prisión* and *arresto,* etc., and *pecuniary penalties* are the forfeiture of the instruments and proceeds of the offense [8] and fine.[9]

(d) *Capital punishment.* Consists of: Death; afflictive penalties, are: *reclusión perpetua, reclusión temporal, perpetual* or *temporary absolute disqualification, perpetual* or *temporary special disqualification* and *prisión mayor;* correctional penalties are: *prisión correccional, arresto mayor, suspensión* and *destierro;* light penalties are: *arresto menor* and *public censure;* and penalties common to the preceding classes are: *fine* and *bond* to keep the peace.

(e) *Against life:* Death or capital punishment: *against property:* forfeiture and fine; *against liberty:* reclusión, prisión and so forth; *against rights:* disqualification for holding office, and so forth, and *against domicile:* destierro or banishment.[10]

7. Safety or Preventive Measures.—Besides the different penalties described above, the Revised Penal Code provides for precautionary measures in Art. 24 which are not

[8] Art. 25, Revised Penal Code.
[9] Arts. 25 and 26, Revised Penal Code.
[10] Art. 25, Revised Penal Code.

considered penalties within the meaning of our statute. They are as follows:

1. *The arrest and temporary detention of accused persons, as well as their detention by reason of insanity or imbecility, or illness requiring their confinement in a hospital.*

2. *The commitment of a minor to any of the institutions mentioned in Article 80 and for the purposes specified therein.*

3. *Suspension from the employment or public office during the trial or in order to institute proceedings.*

4. *Fines and other corrective measures which in the exercise of their administrative or disciplinary powers, superior officials may impose upon their subordinates.*

5. *Deprivation of rights and the reparations which the civil laws may establish in penal form.*

Review Questions

1. State the nature and purpose of the penalties in the Revised Penal Code.—2. What are the bases for the determination of the duration and classes of penalties in the old Penal Code?—3. What are the purposes of graduated scales in the old Penal Code?—4. Is the lonely graduated scale in Art. 25 of the Revised Penal Code scientific or unscientific?—5. Give the classification of penalties described therein.—6. What do you mean by principal and accessory penalties?—7. What are the perpetual penalties?—8. What are the personal penalties?—9. What are the afflictive penalties?—10. What are the correctional?—11. What are light penalties?—12. Fine, when afflictive, when correctional and when light?—13. What are the penalties against life; against property; against liberty; against rights; against honor and against domicile?—What principle prevails in Rules and Regulations for Administration and Discipline of the Bureau of Prisons?

CHAPTER XIX

THE PENALTY *(Continued)*

1. Duration of penalties.—2. Indeterminate sentence.—3. Duration of indeterminate sentence.—4. Probation system.—5. Persons entitled to probation.—6. Conditions of probation.—7. Period of probation.—8. Effect of the fulfillment of the condition.—9. Effect of the non-fulfillment of the condition.—10. Classification of prisoners.

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1. Duration of Penalties.—Perpetual penalties (*reclusión* and *disqualification*) practically last *thirty years.*[1] At the expiration of such time the convict is automatically pardoned, *unless by reason of his conduct or for some other serious cause he shall be considered by the Chief Executive as unworthy of pardon.*

The duration of the penalties of *reclusión temporal shall be from twelve years and one day to twenty years.*

The duration of the penalties of *prisión mayor and temporary disqualification shall be from six years and one day to twelve years, except when the penalty of disqualification is imposed as an accessory penalty, in which case its duration shall be that of the principal penalty.*

The duration of the penalties of *prisión correccional, suspensión and destierro shall be from six months and one day to six years, except when suspension is imposed as an accessory penalty, in which case, its duration shall be that of the principal penalty.*

The duration of the penalty of *arresto mayor shall be from one month and one day to six months.*

The duration of the penalty of *arresto menor shall be from one day to thirty days.*

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[1] Art. 70, as amended by Act 217 of the National Assembly.

The bond to keep the peace shall be required to cover such period of time as the Court may determine.[2]

2. Indeterminate Sentence. — Notwithstanding the provisions of Chapter 3 Sec. 1 of the Revised Penal Code regarding the duration of penalties with the exception of persons convicted of crimes other than capital or life imprisonment, of treason, rebellion, sedition, espionage; of piracy, habitual delinquency, sentence breaking, violation of conditional pardon, and convicts whose maximum term of imprisonment does not exceed one year, all convicts of offenses punishable under the Revised Penal Code, shall be entitled to the benefit of the indeterminate sentence law. In other words, whenever a Court finds a person guilty of an offense other than those mentioned above, but punishable under the Revised Penal Code, the convicts shall be sentenced to *"an indeterminate sentence the maximum term of which shall be that which, in view of the attending circumstances, could be imposed properly under the rules of the said Code, and to a minimum which shall be within the range of the penalty next lower to that prescribed by the Code for the offense; and if the offense is punished by any other law, the Court shall sentence the accused to an indeterminate sentence, the maximum term of which shall not exceed the maximum fixed by said law and the minimum shall not be less than the minimum term prescribed by the same."*[3]

3. Duration of Indeterminate Sentence.—The duration of the indeterminate sentence may be illustrated by the following example: Suppose a Court finds an accused guilty of the crime of *homicide* with no mitigating nor aggravating circumstance. Under the provisions of par. 1, of Article 64 of the Revised Penal Code, the penalty for the crime of homicide shall be imposed in its medium

[2] Art. 27, Revised Penal Code.
[3] Act 4103, Sec. 1, as amended by Sec. 1, Act 4225; People vs. Valeriano Ducosin, G. R. No. 38332.

degree; that is, from 14 years, 8 months and one day to 17 years and 4 months. Now the penalty next lower in degree than that imposed by law for the crime of homicide is *prisión mayor,* that is, from 6 years and one day to 12 years. Therefore, under the provisions of the indeterminate sentence law the convict in this hypothetical case should be sentenced to serve a jail term ranging from 6 years and one day as *minimum* to 17 years and 4 months as *maximum.*

The provisions of the indeterminate sentence law, as far as crimes penalized by other laws are concerned, are unnecessary. Special penal acts of the Philippine Legislature fix a minimum and a maximum punishment for offenses punished therein. A court of justice is naturally empowered to impose an intermediary penalty between the minimum and maximum fixed by said special law, with or without the provisions of the indeterminate sentence law.

4. Probation System.—The Philippine Legislature in its desire to keep abreast with the pace of modern penology has of late (August 7, 1935) passed Act No. 4221, establishing for the first time in the Philippine Islands the probation system. Under the provisions of this law (Sec. 1) the Court of First Instance after hearing the fiscal and examining the report of the probation officer regarding the circumstances of the perpetration of the offense, the criminal records, if any, and social history of the convict, is empowered to hold in abeyance the execution of a final sentence upon any person of 18 years of age or more.

5. Persons not entitled to probation.—The provisions of the probation law shall not be applied to persons who have committed crimes, punishable with death or life imprisonment, such as homicide, treason, conspiracy or proposal to commit treason, misprision of treason, sedition or espionage, piracy, brigandage, arson, robbery in band, robbery with violence on persons when it was found that they displayed

a deadly weapon; to habitual delinquents; to those who have been once on probation; and to those already sentenced by final judgment at the time of the approval of Act 4221.

6. Conditions of the probation.—The suspension of the sentence provided for in the probation law is conditioned upon the fulfillment by the probationer of the following: (a) He shall indulge in no injurious or vicious habits. (b) He shall avoid places or persons of disreputable or harmful character. (c) He shall report to the probation officer as directed by the Court or probation officers. (d) He shall permit the probation officer to visit him at reasonable times in his place of abode or elsewhere. (e) He shall truthfully answer any reasonable inquiries on the part of the probation officer concerning his conduct or condition. (f) He shall endeavor to be employed regularly. (g) He shall remain or reside within a specific place or locality. He shall make reparation or restitution to the aggrieved parties for actual damages or losses caused by his offense. (i) He shall support his wife and children. (j) He shall comply with such orders as the Court may from time to time make. (k) He shall refrain from violating any law, statute, ordinance, or any by-law or regulation, promulgated in accordance with law.

The Court, in addition to the foregoing, may also impose upon the convict any condition which it may see fit in the exercise of its discretion.[4]

7. Period of probation.—The period of probation for any defendant of any offense for which the law prescribes a penalty not exceeding one year shall not be in excess of two years; in the case of a defendant convicted of any other crime or offense, the period shall not exceed twice the maximum time of imprisonment to which he might be sen-

[4] Act 4221, Sec. 3.

tenced: provided, that the period of probation shall never be less than the sentence imposed.[3]

8. Effect of the fulfillment of the condition.—If after the period of probation, the probation officer reports and the Court finds that the probationer has complied with the conditions of the probation, the Court shall enter an order of definite termination of the case and his final discharge from supervision.

9. Effect of the non-fulfillment of the conditions.—Whenever within the period of probation, any probationer shall fail to comply with the conditions imposed upon him, the Court may issue a warrant for his arrest and may commit him with or without bail. Upon his being arraigned and after an opportunity to be heard, the Court may revoke, continue or modify his probation. If revoked, the Court shall order the execution of the sentence originally imposed.

10. Classification of Prisoners.—

(a) *Municipal prisoners* are the following:

1. Persons detained or sentenced for violation of municipal or city ordinances.

2. Persons detained pending trial before justices of peace or before municipal courts.

3. Persons detained by order of a justice of the peace or judge of a municipal court, pending preliminary investigation of the crime charged until the Court shall remand them to the court of first instance.

4. Persons who, by reason of their sentences, may be deprived of liberty for not more than thirty days. The imposition of subsidiary imprisonment shall not be taken into consideration in fixing the status of a prisoner hereunder, except when the sentence imposes a fine only.[4]

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[3] Act 4221, Sec. 7.
[4] Sec. 1739, Adm. Code.

(b) *Provincial prisoners.*

1. Persons detained pending preliminary investigation before a judge of the Court of First Instance or pending trial before the Court of First Instance are classed as provincial.

2. Persons who, by reason of their sentences, may be deprived of liberty for not more than one year or are subjected to a fine of not more than five hundred pesos, or are subjected to both penalties are classed as provincial. If, however, a prisoner receives two or more sentences in the aggregate exceeding the period of one year, he shall not be considered a provincial prisoner. The imposition of subsidiary imprisonment shall not be taken into consideration in fixing the status of a prisoner hereunder except when the sentence imposes a fine only.[7]

(c) *Insular prisoners.*—Persons who are neither municipal nor provincial prisoners shall be considered insular prisoners; among whom shall be reckoned, in any event, all persons sentenced for violation of the Customs Law or other law within the jurisdiction of the Bureau of Customs or enforceable by it.[8]

Review Questions

1. What are the perpetual penalties?—2. How long do they last?—3. How long is *reclusión temporal?*—4. How long is *prisión mayor?*—5. How long is temporary absolute disqualification?—6. How long is *prisión correccional?*—7. How long is *suspensión?*—8. How long is *destierro?*—9. How long is *arresto mayor?*—10. How long is bond to keep the peace?—11. Who are those persons entitled to the benefit of the indeterminate sentence?—12. How long is the indeterminate sentence?—13. What is the probation system?—14. Under what circumstances may a Court of First Instance hold

[7] Sec. 1740, Adm. Code.
[8] Sec. 1741, Adm. Code.

in abeyance the execution of a sentence?—15. What persons are entitled to probation?—16. What are the conditions of the probation?—17. How long is the period of probation?—18. What is the effect of the fulfillment of the condition of the probation?—19. What is the effect of its non-fulfillment?—20. Who are classed as municipal prisoners?—21. Who are classed as provincial prisoners?—22. Who are insular prisoners?

CHAPTER XX

THE PENALTY *(Continued)*

1. Computation of the term of a penalty.—2. Effect of penalties.—3. Subsidiary imprisonment.—4. Legal periods of divisible penalties.—5. Rules for determining the penalty next higher or next lower in degree.

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1. Computation of the Term of a Penalty.—The rule for the computation of the term of a penalty varies according to whether or not the accused is in prison.

If the offender shall be in prison, the term of the duration of the temporary penalties shall be computed from the day on which the judgment of conviction shall have become final.

If the offender be not in prison, the term of the duration of the penalty consisting of deprivation of liberty shall be computed from the day that the offender is placed at the disposal of the judicial authorities for the enforcement of the penalty. The duration of the other penalties shall be computed only from the day on which the defendant commences to serve his sentence.[1]

Offenders who have undergone preventive imprisonment in the service of their sentences consisting of deprivation of liberty, shall receive credit for one-half of the time of their preventive imprisonment, except in the following cases:

(a) *They are recidivists, or have been convicted previously two or more times of any crime.*

(b) *Upon being summoned for the execution of their sentences they have failed to surrender voluntarily.*

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[1] Art. 28, Revised Penal Code.

(c) *They have been convicted of robbery, theft, estafa, malversation of public funds, falsification, vagrancy, or prostitution.*[3]

2. Effect of Penalties.

(a) *Of disqualification.—The penalty of perpetual absolute disqualification deprives the offender of the right of holding public office or employment, even if conferred by popular election; the right to vote or to be voted for in any election; and all right to retirement pay or other pension for any office formerly held. Temporary absolute disqualification deprives the offender of and disqualifies him during the term of the sentence for any public office and employment, even if conferred by popular election, and the right of suffrage.*[4]

The penalties of perpetual or temporary special disqualification for public office, profession or calling shall produce the following effects:

1. *The deprivation of the office, employment, profession or calling affected, shall be enforced.*

2. *The disqualification for holding similar offices or employments either perpetually or during the term of the sentence, according to the extent of such disqualification shall be maintained.*[5]

The perpetual or temporary special disqualification for the exercise of the right of suffrage shall deprive the offender perpetually or during the terms of the sentence, according to the nature of said penalty, of the right to vote in any popular election for any public office or to be elected to such office. Moreover, the offender shall not be permitted to hold any public office during the period of his disqualification.[6]

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[3] Art. 29, Revised Penal Code.
[4] Art. 30, Revised Penal Code.
[5] Art. 31, Revised Penal Code.
[6] Art. 32, Revised Penal Code.

(b) *Of suspension.—The suspension from public office, profession or calling, and the exercise of the right of suffrage shall disqualify the offender from holding such office or exercising such profession or calling or right of suffrage during the term of the sentence.*

The person suspended from holding public office shall not hold another having similar functions during the period of his suspension.[6]

(c) *Of civil interdiction.—Civil interdiction shall deprive the offender during the time of his sentence of the rights of parental authority, or guardianship, either as to the person or property of any ward, of marital authority, of the right to manage his property and of the right to dispose of such property by any act or any conveyance inter vivos.*[7]

(d) *Of bond to keep the peace.—It shall be the duty of any person sentenced to give bond to keep the peace, to present two sufficient sureties who shall undertake that such person will not commit the offense sought to be prevented, and that in case such offense be committed they will pay the amount determinated by the Court in its judgment, or otherwise to deposit such amount in the office of the clerk of the court to guarantee said undertaking.*

The Court shall determine, according to its discretion, the period of duration of the bond.

Should the person sentenced fail to give the bond as required he shall be detained for a period which shall in no case exceed six months, if he shall have been prosecuted for a grave or less grave felony, and shall not exceed thirty days, if for a light felony[8]

(e) *Of payment of costs.—Costs shall include fees and indemnities in the course of the judicial proceedings, whether*

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[6] Art. 33, Revised Penal Code.
[7] Art. 34, Revised Penal Code.
[8] Art. 35, Revised Penal Code.

they be fixed or unalterable amounts previously determined by law or regulations in force, or amounts not subject to schedule [9]

(f) *Of confiscation.—Every penalty imposed for the commission of a felony shall carry with it the forfeiture of the proceeds of the crime and the instruments or tools with which it was committed.*

Such proceeds and instruments or tools shall be confiscated and forfeited in favor of the Government, unless they be the property of a third person not liable for the offense; but those articles which are not the subjects of lawful commerce shall be destroyed.[10]

The money used to bribe a customs official to permit the illegal importation of opium cannot be confiscated when it clearly appears that it belongs to a third and innocent person.[11]

(g) *Of Indemnification.—Indemnification comprises not only damage caused to the offended party, but also those suffered by his family or by a third person by reason of the crime,* according to Art. 107 of the Revised Penal Code. Thus in a case of physical injury, the offender is bound to pay not only doctor's fee and hospital bill of the aggrieved party, but likewise the salary or wage which the victim failed to receive during the period of his illness. Likewise, in a case of murder or homicide, the culprit is bound to pay indemnity to the family of the deceased or to a third person, if it appears that such person was injured thereby. The social condition as well as the earning capacity of the offended party should be taken into account for the purpose of determining the amount of indemnification.

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[9] Art. 37, Revised Penal Code.
[10] Art. 45, Revised Penal Code.
[11] U. S. vs. Bruhez, 28 Phil., 305.

3. Subsidiary Imprisonment.—Subsidiary imprisonment is the jail term which a defendant must undergo for non-payment of fine or indemnity to the offended party.

If the convict has no property with which to meet the payment of reparation of damage, indemnification for consequential damages and the fine, he shall be subject to a subsidiary personal liability at the rate of one day for each 2 pesos and 50 centavos, subject to the following rules:

(a) *If the principal penalty imposed be prisión correccional or arresto and fine, he shall remain under confinement until his fine and pecuniary liabilities referred to in the preceding paragraph are satisfied; but his subsidiary imprisonment shall not exceed one-third of the term of the sentence, and in no case shall it continue for more than one year, and no fraction or part of a day shall be counted against the prisoner.*

(b) *When the principal penalty imposed be only a fine, the subsidiary imprisonment shall not exceed six months, if the culprit shall have been prosecuted for a grave or less grave felony, and shall not exceed fifteen days, if for a light felony.*

(c) *When the principal penalty imposed is higher than prisión correccional, no subsidiary imprisonment shall be imposed upon the culprit.*

(d) *If the principal penalty imposed is not to be executed by confinement in a penal institution, but such penalty is of fixed duration, the convict, during the period of time established in the preceding rules, shall continue to suffer the same deprivations as those of which the principal penalty consists.*

(e) *The subsidiary personal liability which the convict may have suffered by reason of his insolvency shall not relieve him from reparation of the damage caused, nor from indemnification for the consequential damages, in case his*

financial circumstances should improve; but he shall be relieved from pecuniary liability as to the fine.[12]

The rate of subsidiary imprisonment for non-fulfilment of a fine imposed by a municipal ordinance or ordinances of the City of Manila is one peso per day.[13]

Not an imprisonment for debt.—Subsidiary imprisonment in cases of non-fulfilment of pecuniary penalty imposed upon the culprit is not imprisonment for debt. The laws which prohibit imprisonment for debt relate to the imprisonment of debtors for liability incurred in the fulfilment of contracts, in accordance with the provisions against imprisonment for debt contained in the Philippine Bill of Rights, but not to cases for the enforcement of penal statutes that provide for the payment of money as penalty for the commission of a crime.[14]

4. Legal Period of Divisible Penalties.—In the divisible penalties, the legal period of their duration shall be considered as divided into three parts, forming three degrees: the minimum, medium and maximum, in the manner shown in the table on the opposite page.

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[12] Art. 39, Revised Penal Code.
[13] Act 1732, Sec. 3.
[14] U. S. vs. Cara, 41 Phil., 828.

DEMONSTRATIVE TABLE SHOWING THE DURATION OF DIVISIBLE PENALTIES AND THE TIME INCLUDED IN EACH ONE OF THEIR DEGREES.

Penalties	Time included in the penalty in its entirety	Time included in its minimum degree	Time included in its medium degree	Time included in its maximum degree
Reclusión temporal.	From 12 years and 1 day to 20 years.	From 12 years and 1 day to 14 years and 8 months.	From 14 years 8 months and 1 day to 17 years and 4 months.	From 17 years 4 months and 1 day to 20 years.
Prisión mayor.	From 6 years and 1 day to 12 years.	From 6 years and 1 day to 8 years.	From 8 years and 1 day to 10 years.	From 10 years and 1 day to 12 years.
Absolute disqualification and temporary special disqualification.	From 6 years and 1 day to 12 years.	From 6 years and 1 day to 8 years.	From 8 years and 1 day to 10 years.	From 10 years and 1 day to 12 years.

5. Rules for Determining the Penalty Next Higher or Next Lower in Degree.—Article 71 of the Revised Penal Code provides that the graduated Scales No. 1 and 2 set forth therein shall be taken into account for the purpose of determining the panalty next lower or next higher in degree, corresponding to the frustrated or attempted crime or the accomplice or accessory thereof.

Under the provisions of Article 61 we find the following rules:

(a) *When the penalty prescribed for the felony is single and indivisible, the penalty next lower in degree shall be that immediately following that indivisible penalty in the corresponding scale prescribed in Article 71.* As we know the indivisible penalties under Article 71 are death, *reclusión perpetua, perpetual absolute disqualification* and *public censure.* The penalty next lower in degree than death is *reclusión perpetua;* than *reclusión perpetua* is *reclusión temporal* (see scale No. 1, Art. 71); than *absolute perpetual disqualification* is *temporary absolute disqualification* (See scale No. 2, Art. 71); than *reclusión perpetua* is *reclusión temporal* (See scale No. 1, Art. 71). Public censure is the last penalty in both graduated scales 1 and 2 (See Art. 71).

(b) *When the penalty prescribed for the crime is composed of two indivisible penalties, or of one or more divisible penalties to be imposed to their full extent, the penalty next lower in degree shall be that immediately following the lesser of the penalties prescribed in the above mentioned scale.*

1. An example of two indivisible penalties: *reclusión perpetua* to *death.* The penalty next lower in degree than this would be *reclusión temporal.*

2. An example of one or more divisible penalties to be imposed to their full extent: *reclusión temporal.* The

penalty next lower in degree would be the one following in the scale, that is, *prisión mayor.*

3. When the penalty is composed of several divisible penalties as, for instance, *prisión mayor* to *reclusión temporal* to their full extent, the penalty next lower in degree would be *prisión correccional.*

(c) *When the penalty prescribed for the crime is composed of one or two indivisble penalties and the maximum period of another divisible penalty, the penalty next lower in degree shall be composed of the medium and minimum periods of the proper divisible penalty and the maximum period of that immediately following in said scale.*

When the penalty is composed of one indivisible and the maximum periods of a divisible penalty, as for example, *reclusión temporal* in its maximum period to death, the penalty next lower in degree than the latter would be *prisión mayor* in its maximum period to *reclusión temporal* in its medium period.

(d) *When the penalty prescribed for the crime is composed of several periods, corresponding to different divisible penalties, the penalty next lower in degree shall be composed of the period immediately following the minimum prescribed and of the next two following, which shall be taken from the penalty prescribed, if possible; otherwise, from the penalty immediately following in the above mentioned scale.*

When the penalty prescribed for the crime is composed of several periods corresponding to different divisible penalties, as, for example, *prisión mayor* in its maximum period to *reclusión temporal* in its medium period, the penalty next lower in degree than the latter would be *prisión correccional* in its maximum period to *prisión mayor* in its medium period.

(e) *When the law prescribes a penalty for a crime in some manner not specially provided for in the four preceding rules, the Courts, proceeding by analogy, shall impose corresponding penalties upon those guilty as principals of the frustrated felony, or of attempt to commit the same, and upon accomplices and accessories.*

In this case, a similar procedure shall be followed.

Review Questions

1. State the rule for computation of penalty if (a) the defendant is in prison and (b) the defendant is not in prison.—2. What is the rule in case of *destierro?*—3. Are all offenders entitled to one-half of preventive imprisonment?—4. What are the effects of disqualification (perpetual, absolute and special)?—5. What are the effects of temporary absolute and special disqualification?—6. What are the effects of suspension?—7. Of civil interdiction?—8. Of bond to keep the peace?—9. What does payment of the costs include?—10. What, confiscation?—11. What do you mean by subsidiary imprisonment?—12. What is the rate of subsidiary imprisonment for non-payment (a) of fine imposed by law or penal code and (b) of fine imposed by municipal ordinance?—13. In case the sentence imposes both imprisonment and fine, what is the maximum length of time of subsidiary imprisonment?—14. In case the sentence imposes fine only, what would be the maximum length of time of subsidiary imprisonment?—15. In case the principal punishment is *destierro*, what is the rate of subsidiary banishment?—16. Is there any subsidiary imprisonment for non-payment of costs?—17. What is the proceeding for determining the legal period of divisible penalties?—18. State the rules for determining the penalty next higher or lower in degree?—19. Examine and recite the following cases: U. S. vs. Bruhez, 28 Phil., 305; U. S. vs. Torres, 12 Phil., 121 and U. S. vs. Cara, 41 Phil., 828.

TABULATION OF THE PROVISIONS OF THIS CHAPTER

	Penalty prescribed for the crime	Penalty to be imposed upon the principal in a frustrated crime, and the accomplice in a consummated crime	Penalty to be imposed upon the principal in an attempted crime, the accessory in the consummated crime, and the accomplices in a frustrated crime	Penalty to be imposed upon the accessory in a frustrated crime and the accomplices in an attempted crime	Penalty to be imposed upon the accessory in an attempted crime
First case ...	Death	*Reclusión perpetua.*	*Reclusión temporal.*	*Prisión mayor.*	*Prisión correccional.*
Second case ..	*Reclusión perpetua* to death.	*Reclusión temporal.*	*Prisión mayor.*	*Prisión correccional.*	*Arresto mayor.*
Third case ..	*Reclusión temporal* in its maximum period to death.	*Prisión mayor* in its maximum period to *reclusión temporal* in its medium period.	*Prisión correccional* in its maximum period to *prisión mayor* in its medium period.	*Arresto mayor* in its maximum period to *prisión correccional* in its medium period.	Fine and *arresto mayor* in its *minimum* and medium periods.
Fourth case ..	*Prisión mayor* in its maximum period to *reclusión temporal* in its medium period.	*Prisión correccional* in its maximum period to *prisión mayor* in its medium period.	*Arresto mayor* in its maximum period to *prisión correccional* in its medium period.	Fine and *arresto mayor* in its minimum and medium periods.	Fine.

CHAPTER XXI

THE PENALTY (Continued)

1. Bases for the determination of the kind of penalty to be imposed under the Code.—2. Penalty for consummated, frustrated and attempted crime.—3. Penalty for principal, accomplice and accessory.—4. Special type of accessoryship.—5. Provisions of Art. 73 of the Penal Code, not discriminatory.

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1. Bases for the Determination of the Kind of Penalty to be Imposed Under the Code.—In determining the *kind* of penalty to be imposed, the Code takes into account: (a) the stage reached by the crime in its development; (b) the participation therein of the person liable; and (c) the aggravating or mitigating circumstances which surrounded the crime.

2. Penalty for Consummated, Frustrated and Attempted Crime.—The Code, establishing it as a fundamental principle, proceeds upon the theory that *whenever the law prescribes a penalty for a felony in general terms, it shall be understood as applicable to the consummated felony.*[1]

When the felony does not appear in a state of consummation but in that of attempt or frustration, the rules prescribed by Arts. 50 and 51 are to be applied. *Upon the principal in a frustrated felony, the penalty next lower in degree than that prescribed by law for the consummated felony shall be imposed.*[2] *A penalty lower by two degrees than that prescribed by law for the consummated felony*

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[1] Art. 46, Revised Penal Code.
[2] Art. 50, Revised Penal Code.

shall be imposed upon the principals in an attempt to commit a felony.[3]

An exception to this rule is found in Art. 60 which says that said rule *shall not be applicable to cases in which the law expressly prescribes the penalty to be imposed for frustrated or attempted felony, or for accomplices, or accessories.* This includes, among others, the type case of robbery where a homicide has been committed; in which case, any person guilty of the frustrated crime of robbery, or of an attempt to commit it, is to be especially punished in accordance with Art. 297.[4]

3. Penalty for Principal, Accomplice and Accessory.— The penalty corresponding to principals is fixed by Article 46, according to which, *the penalty prescribed by law for the commission of a felony shall be imposed upon the principals of such felony.*

Upon the accomplices in the commission of a consummated felony, according to Art. 52, *the penalty next lower in degree than that prescribed by law for the consummated felony shall be imposed.*

According to Art. 53, *the penalty lower by two degrees than that prescribed by law for the consummated felony shall be imposed upon the accessories to the commission of a consummated felony.*

The penalty next lower in degree than that prescribed by law for the frustrated felony shall be imposed, according to Art. 54, *upon the accomplices in the commission of a frustrated felony.*

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[3] Art. 51, Revised Penal Code.

[4] Art. 297 of the Revised Penal Code provides that when by reason or on occasion of an *attempted* or *frustrated* robbery a homicide is committed, the person guilty of such offenses shall be punished by *reclusión temporal* in its *maximum* period to *reclusión perpetua,* unless the homicide committed shall deserve a higher penalty under the provisions of said Code.

And *upon the accessories to the commission of a frustrated felony, there shall be imposed,* according to Art. 55, *the penalty lower by two degrees than that prescribed by law for the frustrated felony.*

The determination of the penalty which shall be inflicted upon participants in an attempt is reckoned from a norm. This norm is that which affirms the penalty to be imposed upon a principal in an attempt. With such as a starting point, penalties for accomplices and accessories are determined.

The penalty next lower in degree than that prescribed by law for an attempt to commit a felony shall be imposed, according to Art. 56, *upon the accomplices in an attempted felony.*

The penalty lower by two degrees than that prescribed by law for the attempt shall be imposed, according to Art. 57, *upon the accessories to an attempted felony.*

For example: A municipal president or a chief of police who refuses to arrest a thief or a forger, who commits the crime in his presence, and gives him money that he may escape, must be sentenced not only to the penalty lower by two degrees than that prescribed by law for the thief or forger, but to the additional penalty of absolute temporary disqualification.

4. Additional Penalty to be Imposed Upon Certain Accessories.—Notwithstanding the provisions of Art. 57 of the Revised Penal Code, those accessories falling within the terms of paragraph 3 of Art. 19 of the said Code who *shall act with abuse of their public functions shall suffer the additional penalty of absolute perpetual disqualification if the principal offender shall be guilty of a grave felony, and that of absolute temporary disqualification if he shall be guilty of a less grave felony.*

Review Questions

1. What are the bases for determining the kinds of penalties to be imposed under the Code?—2. What is the penalty for the principal in a consummated crime?—3. Do, do, do, in a frustrated crime?—4. Do, do, do, in an attempted crime?—5. Exception to the rule?—6. What is the penalty for an accomplice in a consummated crime?—7. Do, do, do, for an accessory?—8. What is the penalty for an accessory in an attempted crime?—9. What is the penalty for an accomplice in a frustrated crime?—10. What is the additional penalty for special type of accessoryship?

CHAPTER XXII

THE PENALTY (Continued)

1. Rules for the application of penalties with regard to modifying circumstances.—2. Rules for special mitigating circumstances.—3. Rules for the imposition of penalty when the *intended* crime is different from the *resulting* crime.—4. Execution of penalties.

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1. Rules for the Application of Penalties with Regard to Modifying Circumstances.—According to Art. 62, *mitigating or aggravating circumstances and habitual delinquency shall be taken into account for the purpose of diminishing or increasing the penalty in conformity with the rules prescribed in the Code.*

In order to determine the effect produced by the attendance of these circumstances, the Code takes into consideration the various degrees that may be contained in the penalty. If the penalty is single and indivisible, *it shall be applied by the courts,* according to the first paragraph of Art. 63, *regardless of any mitigating or aggravating circumstances that may have attended the commission of the deed.*

If the penalty is composed of two indivisible penalties, the following rules contained in the second paragraph of Art. 63 shall be observed in the application thereof: (a) *When in the commission of the deed there is present only one aggravating circumstance, the greater penalty shall be applied.* (b) *When there are neither mitigating nor aggravating circumstances in the commission of the deed, the lesser penalty shall be applied.* (c) *When the commission of the act is attended by some mitigating circumstances, and there is no aggravating circumstance, the lesser penalty*

shall be applied. (d) *When both mitigating and aggravating circumstances attended the commission of the act, the Courts shall allow them to offset one another in consideration of their number and importance, for the purpose of applying the penalty in accordance with the preceding rules, according to the result of the compensation.*

But usually and ordinarily, a penalty, be it a *single divisible* penalty or one *composed of three different* penalties, *contains three degrees.* In such case, the Courts shall observe the rules contained in Art. 64 which say: (a) *When there are neither aggravating nor mitigating circumstances, they shall impose the penalty prescribed by law in its medium period.* (b) *When only a mitigating circumstance is present in the commission of the act, they shall impose the penalty in its minimum period.* (c) *When only an aggravating circumstance is present in the commission of the act, they shall impose the penalty in its maximum period.* (d) *When both mitigating and aggravating circumstances are present, the Court shall offset those of one class against those of the other according to their relative weight.* (e) *When there are two or more mitigating circumstances and no aggravating circumstances are present, the Court shall impose the penalty next lower to that prescribed by the law, in the period that it may deem applicable, according to the number and nature of such circumstances.*[1]

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[1] For instance: A, having been insulted by B, struck the latter with a club. A, in striking B, did not have any intention of killing him. He intended to cause, at most, some slight injury. Three days later, B died from internal hemorrhage as a result of A's action. As will be seen, in the perpetration of homicide by A in this case, there were present the mitigating circumstances NUMBERS 3 and 4 of Art. 13, while no aggravating circumstance can be considered. The penalty prescribed for homicide (Art. 249) is *reclusión temporal.* Following the rule prescribed in this paragraph, A should be punished with the penalty next lower in degree than *reclusión temporal,* which is *prisión mayor,* according to the graduated scale prescribed in Art. 70.

(f) *Whatever may be the number and nature of the aggravating circumstances, the Courts shall not impose a greater penalty than that prescribed by law, in its maximum period.* (g) *Within the limits of each period, the Courts shall determine the extent of the penalty according to the number and nature of the aggravating and mitigating circumstances and the greater or lesser extent of the evil produced by the crime.*[2]

2. Rules for Certain Special Mitigating Circumstances.—In addition to the mitigation contained in rule 5 of Art. 64, there are other special rules, among them, that of Art. 68 which provides that in case of a minor under *fifteen but over nine years of age, who is not exempted from liability by reason of the Court having declared that he had acted with discernment, a discretionary penalty shall be imposed, but always lower by two degrees at least than that prescribed by law for the crime which he committed.* And in the case of *a person over fifteen and under eighteen years of age, the penalty next lower than that prescribed by law shall be imposed, but always in the proper period.*

It should be born in mind that the application of the penalty prescribed in the article which we are now discussing is conditional, that is, it may be imposed only if the minor fails to observe good conduct or to comply with the regulations of the institution in which he is confined. In accordance with the provisions of Art. 80 of this Code, delinquents of both sexes under the age of eighteen years, being minors, shall be committed to the custody or care of a benevolent or charitable institution, either public or private, for correction or education, instead of being imprisoned.

Pursuant to the provisions of this Article, a delinquent under 18 years of age may be imprisoned and punished with

[2] An instance of the application of this paragraph is seen in the case of U. S. vs. Velazco, 42 Phil., 75.

the penalties therein provided for, only if, after said minor is committed to any one of the benevolent institutions named in Art. 80, he should observe bad conduct.

Art. 67 on Incomplete Exemption provides *arresto mayor* to *prision correccional* in its minimum period in case of grave felony or in its minimum and medium period in case of less grave felony.

3. Rules for the Imposition of Penalty When the Intended Crime Is Different from the Resulting Crime.—When the felony is altogether different from the intended crime, the provision of article 49 of the Revised Penal Code should be enforced.

See in this connection the comments and notes on pages 52 to 53.

4. Execution of Penalties.—As already stated in Chapter XVIII, par. 5, the punishments which may be inflicted now-a-days in accordance with the existing penal statutes in the Philippines are: death or capital punishment, imprisonment, banishment or *destierro*, fine, public censure, bond to keep the peace, and the accessory penalties, consisting of forfeiture of the instrument and proceeds of the crime, and payment of costs.

Death or capital punishment by execution is preferred to any other, and consists in putting to death by electrocution the prisoner under sentence.[1] The instrument with which this punishment is inflicted is known as the electric chair which is installed in the Insular Penitentiary, otherwise known as the Bilibid Prisons, wherein all capital punishments imposed by the different courts of the Philippine Islands are carried out. Death punishment cannot be imposed upon any person who is less than 18 or more than 70 years of age at the time of the commission of the crime, nor in a case where the decision rendered by the Supreme Court in the matter is not concurred in by an unanimous

vote of all its members.[4] Neither shall the death sentence be inflicted upon a woman within three years next following the date of the sentence, nor while she is pregnant, nor upon any person in a condition of mental deficiency or disturbance.[5]

The penalties of *reclusión perpetua, reclusión temporal, prisión mayor, prisión correccional, arresto mayor* and *arresto menor* are inflicted by confining the prisoner in the main or Bilibid Prison, provincial prison or municipal jail, according to the status of the prisoner in accordance with the provisions of Sections 1708, 1729, and 1739 of the Administrative Code. Inasmuch as the city of Manila has no jail of its own, its prisoners convicted for violations of municipal ordinances or regulations are confined in the main or Bilibid Prison.[6]

Under the provisions of Art. 88 of the Revised Penal Code, the penalty of *arresto menor* may be served either in the municipal jail or in the house of the defendant himself under the surveillance of an officer of the law, when the Court so provides in its decision, after having given due consideration to the health of the offender and to other cogent reasons which may seem satisfactory to it.

The penalty of *destierro* is inflicted by not allowing the culprit to enter the place or places designated in the sentence, nor to come within the radius therein designated which shall not be more than 250 nor less than 25 kilometers from the place designated.[7]

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[3] Art. 81, Revised Penal Code.
[4] Arts. 47, 80, 83, Revised Penal Code.
[5] Art. 83, Revised Penal Code.
[6] Sec. 1729, Adm. Code.
[7] Art. 87, Revised Penal Code.

CHAPTER XXIII

OBSTACLES TO PENAL ACTION AND PENALTY

1. Extinction of penalty in general.—2. Suspension of criminal action.—3. Enumeration of the causes of extinction of penalty.—4. Death of the offender.—5. Service of the sentence.—6. Amnesty.—7. Pardon.—8. Marriage of the offender to the offended party.

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1. Extinction of Penalty in General.—Penalty is extinguished by certain circumstances which appear after the commission of the punishable act, and annul the criminal action already incepted. The peculiar character of the causes that extinguish penalty becomes manifest, in a clearer manner, by the execution of the same, which in itself is a satisfaction and, consequently, a cancellation of public prosecution.[1]

Causes extinguishing penalty differ from those of exemption from criminal liability in that the latter precede the commission of the crime (such as infancy and lunacy) or co-exist with it, that is to say, appear at the moment of its execution (such as self-defense); while causes of extinction of criminal liability exist not only after the commission of the crime but also after prosecution has been commenced by the government, and in certain cases after conviction is pronounced.[2]

2. Suspension of Criminal Action.—Criminal action may be suspended only, instead of being extinguished completely, and the causes of suspension may be either objective or subjective. The former are of a temporary character, or have rather of a temporary effect on the prosecution of

[1] Von Liszt, Derecho Penal, Vol. 3, p. 303, Span. Trans.
[2] Calón, Derecho Penal, 448.

the offender; as, for instance, when his insanity occurs after the perpetration of the crime, etc. The latter, or subject tive causes, may be reduced to two: namely, (a) *lack of information* or complaint in cases where this is necessary (for example, in adultery, seduction, and insults) to institute criminal action; and (b) the *prejudicial question.*

Lack of information is an obstacle, not to criminal action itself, but rather to its institution, in that information when necessary to bring a criminal action, is a suspensive condition of punishability. Some acts are crimes in themselves but their specific punishability is conditioned upon the filing of a complaint by the offended party.[1]

Prejudicial question is defined as one the resolution of which should logically precede the judgment in the case or suit in which it arises and the cognizance of which belongs to courts of another class or jurisdiction. It is provided that, as a general rule, the court which hears a criminal case is competent to decide prejudicial questions, only for purposes of repression, when such questions appear so intimately bound with the punishable act that their severance would be reasonably impossible. To this rule, however, is excepted a case in which the prejudicial question is decisive of the guilt or innocence of the accused, under which circumstance the court taking cognizance of the criminal case should suspend it and have the prejudicial question decided in the civil action or administrative proceedings.

When, in a civil case pending final judgment in the Supreme Court, there appear facts which may give rise to a criminal prosecution for falsification of documents together with the institution of an administrative case for malpractice in view of the fact that the alleged offender is a member of the bar, the malpractice complained of implies an administrative prejudicial question which should be decided preferably in the administrative case.(De Leon vs. Mabanag, G.R. No. 37006, June 26, 1940. Lawyers' Journal, Vol. VIII No. 17, Page 666).

[1] See Art. 344, Revised Penal Code.

On the other hand, the fact that the accused of a certain criminal case for estafa, prior to the filing of the criminal action against him, had instituted civil action against the complainant of said crime for estafa for the same amount involved in the criminal charge, does not constitute prejudicial question and therefore, the dependency of the previous civil case will not operate in the suspension of the criminal case for estafa. (Berbari vs. Concepcion, 40 Phil., 837).

3. Enumeration of the Causes of Extinction of Penalty.—They are the following: (a) death of the offender; (b) service of the sentence; (c) amnesty which completely extinguishes the penalty and all its effects; (d) absolute pardon; (e) marriage of the offender to the offended party in cases of rape, abduction, and seduction and other unchaste abuse; (f) prescription of the crime; and (g) prescription of the penalty.

4. Death of the Offender.—Paragraph 1 of Art. 89 provides that criminal liability is extinguished among other causes by *the death of the convict as to the personal penalties; and as to pecuniary penalties, liability therefor is extinguished only when the death of the offender occurs before final judgment.* Therefore, if the death of the offender occurs in that space of time between the rendition of sentence and its execution, the pecuniary penalty to which he may have been sentenced subsists and may be enforced against the estate, if any, of the deceased.

The reason for the extinction of criminal liability by the death of the offender lies in the eminently personal character of penalty. If it is true that the end or purpose of penalty is the restoration of juridical order disturbed by the criminal,[1] it goes without saying that the death of the offender renders the accomplishment of such purpose absolutely impossible.

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[1] See Chapter XVII, par. 4, *ante.*

5. Service of the Sentence.[4]—Crime, according to the expiatory or retributive theory upon which our Penal Code is based, is nothing short of a debt incurred by the offender as a consequence of his wrongful act, and penalty is but the amount of this debt. When payment is made, the debt is extinguished; there are no longer a creditor and a debtor, and the juridical relation binding them disappears.

6. Amnesty.[5]—Amnesty is that mercy granted by the Head of the State, whereby a certain kind of offense is forgiven and pardoned. It is distinguished from pardon in that the former is generally granted to persons who have committed political offenses, while the latter is granted for common offenses. Furthermore, amnesty completely extinguishes the penalty and all its effects, that is, wipes out all traces and vestiges of the crime, while pardon affects only the future of the offender. Moreover, amnesty is not personal, nor is it usually granted to one or more convicts. Rather, it is granted to all those who have committed certain crimes, whoever they may be, or whatever their condition or particular situation. It is not granted primarily for their benefit but in consideration of the peace and convenience of the State.[7]

Amnesty,[8] however, does not extinguish the civil liability of the offender.

There may be remembered in this connection, the Amnesty Proclamation of the President of the United States of July 4, 1900, whereby all political offenders during the insurrection were pardoned and discharged from criminal liability.

7. Absolute Pardon.[9] —A pardon may be defined as an act of grace, proceeding from the power entrusted with the

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[4] Art. 89, par. 2, Revised Penal Code.
[5] Art. 89, par. 3, Revised Penal Code.
[7] Silvela, Derecho Penal, Vol. 2, pp. 349-350.
[8] U. S. vs. Madlangbayan, 2 Phil., 426; Art. 248, Compilación de disposiciones sobre el Enjuiciamiento criminal de Filipinas.
[9] Art. 89, par. 4, Revised Penal Code. Commentaries on the Revised Penal Code by Guevara, p. 164.

execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed. It is a private, but an official act, withal, of the executive magistrate, delivered to the individual for whose benefit it is intended.[10]

The granting of pardon in the Philippines is generally governed either by Act No. 1524 (conditional pardon), or Act No. 1561 (parole).

A conditional pardon granted under the provisions of Act 1524 (the usual condition being that the offender shall never be guilty again of any offense or misconduct, otherwise the unextinguished portion of the sentence will be again imposed upon him), is in the nature of a deed, for the validity of which delivery is an indispensable requisite. And the delivery is not complete without acceptance. Until delivery, all that may have been done is a matter of intended favor, and may be cancelled to accord with the change of intention.[11]

Parole is the suspension of the sentence of a convict by the Chief Executive who, when he thinks best, and without granting a pardon, is authorized to discharge from custody such convict and prescribe the terms upon which the sentence shall be suspended. If the convict fails to observe the conditions of his parole, the Chief Executive is authorized to direct the arrest and return of such convict to custody, and thereupon, in computing the period of his confinement, said convict shall be required to carry out his sentence without deduction of the time elapsed between the parole and subsequent arrest.[12]

Both pardon and amnesty must be based upon two distinct ideas, to wit: first, that the power exercised by the supreme authority, in enacting and enforcing the law, is

[10] De Leon vs. Director of Prisons, 31 Phil., 60.
[11] De Leon vs. Director of Prisons, *supra*.
[12] Secs. 1 and 2, Act. 1561.

entitled to set it aside in certain cases; and, second, that clemency, oblivion, or pardon is sometimes necessary, and expedient, in many cases, to erase as far as possible the memory of certain crimes, especially those of a political character; or to correct judicial errors when evidenced by facts subsequent to the sentence; or to prepare the reformation of the criminal law by not applying certain penalties which the legislator, from fear of becoming disarmed, does not dare abolish definitely; or so to proceed that laws shall be equal and just by taking into account certain facts of which the legislator has been unmindful, or which have not been given due weight in framing the criminal law.[13]

8. Marriage of the Offender to the Offended Party.—In cases of seduction, abduction, acts of lasciviousness and rape, the marriage of the offender and offended party shall extinguish the criminal action or remit the penalty imposed upon him. This provision is applicable to the co-principal, accomplices, and accessories after the fact of the above-mentioned crimes.[14]

Review Questions

1. What is the nature of the circumstances which extinguish the penalty in general?—2. Distinguish the causes of extinction of penalty from the causes of exemption.—3. Is there any other obstacle to the penal action besides the causes of extinction of penalty? Name them.—4. What do you mean by prejudicial question?—5. Enumerate the causes of extinction of penalty.—6. State the reason why death extinguishes criminal liability.—7. Do, do, do. the service of the sentence.—8. Define amnesty.—9. Distinguish it from pardon.—10. Does amnesty extinguish civil liability?—11. Define pardon.—12. What is the law governing pardon in the Philippines?—

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[13] Silvela, Derecho Penal, Vol. 2, pp. 343-344.

[14] Art. 89, par. 7, Revised Penal Code.

13. What is the nature of a conditional pardon?—14. When does it become effective?—15. Define parole.—16. Distinguish it from pardon.—17. State the theory or reasons upon which granting of amnesty and pardon are based.—18. May granting of pardon extinguish criminal liability?—19. What circumstance would extinguish criminal liability in cases of rape, seduction and abduction?

CHAPTER XXIV

OBSTACLES TO PENAL ACTION AND PENALTY *(Continued)*

1. Concept of prescription of crime according to the Classical School.—2. Concept of prescription of crime according to the Positivist School.—3. Period of prescription established by the Penal Code.—4. Prescription of offenses penalized by special acts.—5. Prescription of penalties.

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1. Concept of Prescription of Crime According to the Classical School.—Prescription of crime may be considered as the natural and necessary effect of lapse of time. It is a common saying that everything is changed and altered by time, and it must therefore exert its influence on crime. Indeed, the lapsing of time cannot but be reckoned with in all human things which by necessity live and develop within it.[1]

2. Concept of Prescription of Crime According to the Positivist School.—One of the most authoritative leaders of the Positivist School does not believe in the justice of prescription of crime—at least, so far as incorrigible criminals are concerned—and considers it as nothing less than a protection afforded to delinquents. Here is in part his opinion: "We can understand the reason for prescription in civil cases. When for a given period of time a plaintiff has neglected to assert his rights, a tacit relinquishment of such right must be presumed, in order to prevent the subsequent disturbance of new rights which another enjoys in good faith. But when we have to do with a crime, is it any reason for not molesting the criminal, that he has been successful for a given period of time in

[1] Silvela, Derecho Penal, Vol. 1, p. 356.

keeping out of the hands of the police? And yet, this is exactly the theory upon which proceed all the codes, in sanctioning the prescription of prosecution after the lapse of five, ten or twenty years, according to whether or not the offense is a misdemeanor or a felony. Notice, then, how the law extends its protection to the enemy of society. After some notorious exploit, a clever swindler changes his name and removes to a new field of operations. This is not to say, however, that prescription in the case of crime should be altogether abolished. It should be retained, but only in certain cases where the conduct of the agent has furnished proof that he is not an anti-social being, and where a supervening change in the conditions which determined the crime, renders improbable the occasion of its future manifestation.'"

3. Period of Prescription Established by the Penal Code.—Art 90 of the Revised Penal Code establishes different periods of prescription according to the severity of the offense, in the following manner:

(a) *Crimes punishable by death, reclusión perpetua or reclusión temporal shall prescribe in twenty years.*

(b) *Crimes punishable by other afflictive penalties shall prescribe in fifteen years.*

(c) *Those punishable by a correctional penalty shall prescribe in ten years, with the exception of those punishable by arresto mayor which shall prescribe in five years.*

(d) *The crime of libel or other similar offenses shall prescribe in two years.*

(e) *The offenses of oral defamation and slander by deed shall prescribe in six months.*

(f) *Light offenses prescribe in two months.*

[1] Garofalo, Criminology, p. 366, Eng. ed.

When the penalty fixed by law is compound, one of the highest penalties shall be made the basis of the application of the rules contained in the first, second, and third paragraphs of this article.

And Art. 91 provides that *the period of prescription shall commence to run from the day on which the crime is discovered by the offended party, the authorities or their agents, and shall be interrupted by the filing of the complaint or information, and shall commence to run again when such proceedings terminate without the accused being convicted or acquitted, or are unjustifiably stopped for any reason not imputable to him.*

The term of prescription shall not run when the offender is absent from the Philippine Archipelago.

Hence, according to the foregoing provisions, prescription shall commence to run from the day the offense is discovered. A crime may be committed and may remain undiscovered. For example, the manager or cashier of a bank may embezzle funds belonging to the bank and may conceal the commission of the crime for three or four years. In such a case, the period for prescription does not commence to run from the time the embezzlement was committed, that is, three or four years ago, but from the time it is discovered.

However, the discovery of the crime should not be confused with the discovery of the offender. For example, if murder is committed now, the fact that the murderer is unknown, will not prevent the period of prescription from commencing to run.

Pursuant to the provisions of the old Code, the period of prescription "shall commence to run from the day on which the crime is committed, or if not known at the time, from the day of its discovery, and the beginning of the judicial proceedings for investigation and punishment."

The phrase the "beginning of the judicial proceedings for investigation and punishment" has been construed in all decisions as equivalent to the beginning of judicial proceedings; to wit, the filing of a formal complaint or information before a competent judicial officer.

In accordance with the provisions of the Revised Penal Code, the commencement of judicial proceedings is not necessary for the period of prescription to begin to run, it being sufficient that "the offended party, the authorities or their agents" discover the crime.

Any proceeding taken against the offender interrupts the prescription; as, for example, summons for his appearance. It is not necessary, notwithstanding the language employed by the law, that action be formally instituted against the offender. It is sufficient that judicial action has been taken against somebody.[3]

If prescription is interrupted for the reason that criminal action has been brought against the offender, and runs again for some reason causing the suspension of the proceedings, will the time previously elapsed be reckoned? Nothing is said in the Revised Penal Code, but the Supreme Court of Spain held that to interrupt means to suppress, to annul, or to leave without effect, the time previously elapsed.[4]

A certain person was convicted of a light felony in the court of a justice of the peace. The accused appealed to the Court of First Instance on August 11, 1915. Nothing was done until October 19, 1915, when the Prosecuting Attorney filed information in the Court of First Instance. The case was tried in the Court of First Instance on March 8, 1916. The accused contended that since light offenses prescribe in two months, the offense with which he was charged had already prescribed. It was held that the pre-

[3] Dec. Sup. Ct. Spain, Nov. 20, 1894, 53 Jur. Crim., 422.
[4] Dec. Feb. 5, 1908, 80 Jur. Crim., 136.

scription did not run against said particular offense under the provisions of Art. 90 of the Revised Penal Code. Article 90 declares that a "light offense prescribes in two months"; that "this prescription shall be interrupted from the commencement of the proceedings against the offender; that the term of prescription shall commence to run again when such proceedings terminate without the accused being convicted or the proceedings suspended by reason of some cause other than the fault of the defendant", in conjunction with the provisions of Article 89 which declare that the criminal liability is extinguished by prescription of the crime as well as the penalty. The reason for the provisions of Article 91 was primarily, the negligence of the prosecuting official, and secondarily, the unimportant nature of the crime to which the Article refers. The sessions of the court being continuous, when prosecuting officials fail to prosecute a crime within two months, or the proceedings, having been instituted, are suspended thru the inactivity of the prosecuting officials for a like period, then the proceedings are considered abandoned. If, however, the case were brought up for trial at the first term of the court at which it could be heard, the reason for the rule fails and the rule itself is not applicable.[5]

In a criminal case for a violation of the provisions of the Election Law, the commencement of the action shall date from the filing of the complaint. The commencement of the action interrupts the running of the prescriptive period of the Election Law. The actual arrest of the defendant is not necessary to interrupt the running of the period of prescription. When the defendant voluntarily appears after a complaint in a criminal action is filed against him, and gives bond for his appearance at any time he may be called, no arrest is necessary.[6]

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[5] Cabuñag vs. Jocson, 35 Phil., 220.
[6] People vs. Joson, 46 Phil., 330.

4. Prescription of Offenses Penalized by Special Acts.—In view of the provisions of Art. 10 of the Revised Penal Code, making them inapplicable to special penal laws, the Philippine Legislature passed on December 4, 1926, Act No. 3326 establishing periods of prescription for violations of special penal laws and municipal ordinances according to the following schedule:

(a) Offenses punished by a fine or imprisonment for not more than one month, or both, shall prescribe after one year.

(b) Offenses punished by imprisonment for more than one month but less than two years, after four years.

(c) Offenses punished by imprisonment for two years or more, but less than six years, after eight years.

(d) Offenses punished by imprisonment for six years or more, except the crime of treason, after twenty years.

(e) Violations penalized by municipal ordinances shall prescribe after two months.

The period of prescription established by this Act shall begin to run from the day of the commission of the violation of the law, and if the same be not known at the time, from the discovery thereof and the institution of judicial proceedings for its investigation and punishment. It shall be interrupted when proceedings are instituted against the guilty person, and shall begin to run again if the proceedings are dismissed for reasons not constituting jeopardy.[1]

5. Prescription of Penalties.—It is regulated by Art. 92 of the Revised Penal Code as follows:

(a) *Death and reclusión perpetua, in twenty years.*

(b) *Other afflictive penalties, in fifteen years.*

[1] Sec. 2, Act 3326.

(c) *Correctional penalties, in ten years, with the exception of the penalty of arresto mayor which prescribes in five years.*

(c) *Light penalties, in one year.*

The period of this prescription *shall commence to run from the date when the culprit first evaded the serving of his sentence. It shall be interrupted if the defendant gives himself up, or is captured, or goes to some foreign country with which this Government has no extradition treaty, or commits another crime before the expiration of the period of prescription.*[1]

Two conditions are required in order that prescription of penalty may exist: (a) that there be a *final* sentence, and (b) that the period of time prescribed by law has elapsed.

The period of prescription begins to run from the date of personal service of notice of the sentence on the defendant or, if he has commenced to serve the sentence, from the day of his escape or other evasion of the terms of the sentence.

There are two causes which interrupt the running of the period of prescription, to wit: (a) fleeing of the offender to a foreign country with which the Philippine Government has no extradition treaty, and (b) perpetration of a new crime before the expiration of the period of prescription. Either of these two causes is sufficient not only to stop the period of prescription, but also to forfeit the period of time already gained.

6. Partial Extinction of Criminal Liability.—*Criminal liability is extinguished partially:*

(a) *By conditional pardon;*

(b) *By commutation of the sentence; and*

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[1] Art. 93, Revised Penal Code.

(c) *For good conduct allowances which the culprit may earn while he is serving his sentence.*[9]

It is the duty of the prisoner conditionally pardoned to comply strictly with the conditions imposed thereby; otherwise, the pardon shall be subject to revocation, and the convict to prosecution under the provisions of article 159 of the Revised Penal Code.[10]

The commutation of the original sentence for another of a different length and nature shall have the legal effect of substituting the latter in the place of the former.[11]

The effect of good conduct allowance is as follows:

1. *During the first two years of his imprisonment he shall be allowed a deduction of five days for each month of good behavior.*
2. *During the period from the third to the fifth year, inclusive, of his imprisonment, he shall be allowed a deduction of eight days for each month of good behavior.*
3. *During the following years until the tenth year, inclusive, of his imprisonment, he shall be allowed a deduction of ten days for each month of good behavior.*
4. *During the eleventh and successive years of his imprisonment, he shall be allowed a deduction of fifteen days for each month of good behavior.*[12]

In addition to the above allowance, when a prisoner who has evaded the service of his sentence under calamity circumstances, described in Article 158 of the Revised Penal Code, shall have given up himself to the authorities within forty-eight hours following the issuance of a proclamation announcing the passing away of the calamity, he shall be

[9] Art. 94, Revised Penal Code.
[10] Art. 95, Revised Penal Code.
[11] Art. 96, Revised Penal Code.
[12] Art. 97, Revised Penal Code.

entitled to a deduction of one-fifth of the period of his sentence.[18]

Review Questions

1. What is the concept of prescription of crime according to the Classical School?—Do, do, do, the Positivist School?—3. What is the period of prescription of felonies punishable by death or *reclusión?*—4. Do, do, do, by afflictive penalty?—5. Do, do, do, by correctional penalty?—6. What is the period of prescription of oral defamation and slander?—7. Do, do, do, of libel?—8. Do, do, do, of light felony?—9. What is the rule when the penalty fixed by law is compound?—10. When shall the period of prescription of penalty commence to run?—11. When shall it be interrupted?—12. If the proceedings were instituted against the principal alone of a crime, when should the period of prescription begin to run in the case of the accomplice and accessory of the same crime who have not been included in the complaint or proceeding?—13. Give the cause or causes which interrupt the period of prescription of crimes or felonies.—14. If the period of prescription is interrupted for the reason that criminal action has been brought against the offender, and runs again for some reason causing suspension of the proceedings, will the time previously elapsed be reckoned? 15. Is the actual arrest of the defendant necessary to interrupt the running of the period of prescription?—16. What is the period of prescription for offenses penalized by special laws, by fine or imprisonment for not more than one month or both?—17. Do, do, do, for not more than one month but less than two years?—18. Do, do, do, for two years or more, but less than six years?—19. Do, do, do, for six years or more, except the crime of treason?—20. Do, do, of violations of municipal ordinances?—21. When shall the period of prescription of offenses penalized by penal statutes begin to run?—22. When shall it be interrupted?—23. When shall penalty or sentence of death or *reclusión perpetua* prescribe?—24. Do, do, do, afflictive penalties?—25. Do, do, do, correctional penalties?—26. Do, do, do, light penalties?—27. When shall the period of this prescription commence to run?—28. When shall the running of said period stop and the benefit accrued be forfeited?—29. Give the two conditions required in order that prescription of penalty may exist.—30. What are the causes which interrupt the running of the period of prescription?—31. Examine and recite the following cases: People vs. Joson, 46 Phil., 380 and Cabuñag vs. Jocson, 35 Phil., 220.

[18] Art. 98, Revised Penal Code.

CHAPTER XXV

CIVIL LIABILITY

1. Basis of civil liability.—2. Civil liability according to the Classical School.—3. Dependence of civil liability upon criminal liability.—4. When and where is civil liability to be enforced?—5. Exception. 6. Persons civilly liable.—7. Persons subsidiarily liable.—8.—Scope of civil liability.—9. Moral injury not recoverable.—10. Extinction of civil liability.

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1. Basis of Civil Liability.—Civil liability is nothing more than the obligation of the offender to make good whatever injury he shall have caused the offended party on the occasion or by reason of his wrongful act. Civil liability is so well founded on natural justice that among primitive peoples (Germanic and Oriental) the practice obtained that for most crimes, even homicide, a pecuniary compensation to the victim or his family was the only liability of the offender which they called "compensation."

According to the modern theories, civil liability does not arise naturally from the fact that there has been a disturbance of the juridical order caused by a wrongdoer with full knowledge of his violation of a mandatory precept of the law, i. e., voluntarily and intentionally; it arises rather from the duty incumbent upon every person to pay for whatever damage he has caused, that is not permitted by law, whether he be conscious or not of his own acts, or whether he knows or does not know what he is doing.[1] Hence the provision of law that imbeciles, lunatics, and minors are civilly liable, even though they are exempt from criminal liability.

2. Civil Liability According to the Classical School.—In the syllogistic penal system of the Classical School,

[1] Silvela, Derecho Penal, Vol. 2, p. 300.

liability for damages consequent upon the commission of crime is a matter of course. According to the Criminological School, penal laws must have for their immediate ends the elimination of dangerous or unadaptable criminals, and reparation for the damage caused.[2]

3. Dependence of Civil Liability Upon Criminal Liability.—Art. 100 of the Revised Penal Code provides that every person criminally liable for a felony is also *civilly liable.*

May this civil liability be enforced without a prior legal determination of the fact of the defendant's guilt? Does civil liability exist at all if the defendant has been found not guilty of the fact out of which the civil liability arises? These questions have been answered in the negative by the United States Supreme Court for the following reasons: first, by the positive legislation of the Philippine Codes,

[2] Garofalo even goes to the length of proposing that imprisonment be imposed only on dangerous or dreadful criminals; and for those who are not such, pecuniary penalties will be enough. He says: "We want it to be found out whether the offender is dangerous to society, whether it should be feared that he will commit new crimes, or there is a likelihood that he will not again disturb the social order. If it be found that the offender belongs to any of the categories of dreadful delinquents (culprits by criminal instinct, moral insanes, impulsives by alcoholism, epileptics, hysterics, burglars, recidivists, or vagrants) an eliminative method more or less absolute should be employed. But if, on the contrary, it appears that the culprit does not belong to any of said classes, and the crime committed by him is any of those enumerated above (theft, *estafa*, malicious mischief, non-malicious arson, homicide, physical injuries, violation of health laws, insults, calumny, seduction, abduction, revelation of secrets, etc.), the better repressive method is to compel him to make reparation for the material or moral damage caused by his act. This will be, as we have said, a more painful penalty for him, more useful for the offended party, who will thus gratify his desire of revenge, and more useful for the State, which will thus be able to reduce its appropriations for penal institutions. All will become content, with the exception of the offender, who, nevertheless, will get an indirect advantage because he will be immune from depravity, which is always increased by jail life." (Indemnización a las víctimas del delito, pp. 101-102). Rich men would thus become benefited by this doctrine, if carried into practice.

civil and criminal, a distinction is drawn between a civil liability which results from the mere negligence of the defendant and liability for the civil consequences of a crime by which another has sustained loss or injury; second, the plain inference from Art. 100, above set forth, is that civil liability springs out of and is dependent upon facts which, if true, would constitute a felony; third, the Philippine Code of Criminal Procedure plainly contemplates that the civil liability of the defendant shall be ascertained and declared in the criminal proceedings.[3]

As a corollary of the preceding doctrine, acquittal from a criminal charge will be a bar to a civil action. "While it is true"—says the Supreme Court—"that a civil action may be maintained by an employer to recover money misappropriated by his employee without the prior institution of a criminal proceeding, nevertheless, if a criminal prosecution based upon the *same* misappropriation is in fact instituted against the employee and he is acquitted, such acquittal operates as a bar to any subsequent action." The rule is different when the criminal proceeding is dismissed on the motion of the fiscal before the accused is arraigned.[4]

Likewise, a person who was prosecuted for homicide thru reckless imprudence, but acquitted from said criminal charge, cannot be made liable in a subsequent civil action based on the same acts. Not even Art. 1902 of the Civil Code may be invoked; first, because said article presupposes the existence of some fault or negligence upon which the action is based; and, second, it refers to some fault or negligence *not* punishable by law, because if the fault or negligence is *punished* by law, it ceases to be in the category

[3] Almeida Chantangco and Lete vs. Abarca, 40 Phil., 1056; 218 U. S. 476, 54 L. ed. 1116; U. S. vs. Tayongtong, 21 Phil., 476. See also U. S. vs. Heery, 25 Phil., 600; U. S. vs. Guy-Saco, 13 Phil., 292; U. S. vs. Sang Kupang Mambang, 36 Phil., 348; and Berbari vs. Concepción, 40 Phil., 837.

[4] Wise & Co. vs. Larion, 45 Phil., 314.

of *quasi* crime or negligence having purely civil effects, and becomes either a felony or light felony according to the gravity of the penalty imposed by law; and in that case it does not come within the purview of Art. 1902 of the Civil Code.[*]

But may civil liability arising from the perpetration of illegal act be enforced without previously instituting criminal action or, better still, without a prior legal determination of the fact of the defendant's guilt? This important question was answered in the affirmative by the Supreme Court of the Philippines in the case of "National City Bank of New York vs. Cu Unjieng et al., G. R. 41927, December 18, 1937.

A civil action — said the Supreme Court in the above-mentioned case — may be validly instituted, without the necessity of first instituting the criminal action, not only for the restitution of what has been taken or otherwise illegally appropriated, but also for the reparation of any damage caused, and the indemnity for losses by reason of the commission of the criminal act, the provisions of Art. 100 prescribe that "every person criminally liable for felony is also civilly liable" notwithstanding. Art. 100 of the Revised Penal Code does not give inference that in no case may one be declared civilly liable without first being declared liable criminally in a criminal prosecution. Such an inference would clearly nullify the provisions of Arts. 110, 111, 114, and 116 of the law of Criminal Procedure of Spain which is a supplementary law to General Order No. 58. Such legal provision expressly permit the institution of a civil action to demand civil responsibility arising from a crime before the criminal prosecution, without any limitation than that once the criminal action is instituted, the civil action must be suspended, if the same has already been begun. (See also Alba vs. Acuna, 53 Phil. 383 Atlantic Gulf & Pacific Company vs. Rakes, 7;

[*] Francisco vs. Onrubia, 46 Phil., 327.

Wise and Co., vs. Larion, 45 Phil. 914 Francisco vs. Onrubia, 46 Phil., 327; People vs. Moreno, 33 Official Gazzete, 151, Page 3.

4. When and Where is Civil Liability to be Enforced?—Civil liability is to be determined in the criminal action instituted against the accused unless the injured party expressly waives such liability or reserves his right to have the civil damage determined in a separate action.[6]

5. Exception.—In cases of adultery, concubinage and defamation, civil action may be brought against the offender for damages sustained by the aggrieved party, independent of the criminal action, i. e., whether it has been instituted or not.[7]

6. Persons Civilly Liable.—The principal person liable for the civil consequence of a crime is the guilty party. If he dies, the obligation is transmitted to his heirs, and action to enforce it likewise descends to the heirs of the person injured.[8] The reason for this is, that even though penalty must be personal, it is to be considered only with regard to corporal punishment; but civil liability is in the nature of a quasi-contractual obligation[9] and, as such, may last beyond the life of the offender, provided his demise occurs after final judgment, as is inferred from Art. 89 of the Revised Penal Code.

7. Persons Subsidiarily Liable.—

(a) Although imbeciles, lunatics and minors are civilly liable for wrongs done by them, their liability is only sub-

[6] Arts. 112 and 742, Span. Code of Crim. Proc.; Sec. 107, Gen. Orders No. 58, and U. S. vs. Heery, 25 Phil., 600, and cases cited. See also U. S. vs. Sang Kupang Mambang, 36 Phil., 348, and Berbari vs. Concepción, 40 Phil., 837.

[7] Arts. 345, par. 3; 360, par. 3, Revised Penal Code.

[8] Art. 108, Revised Penal Code.

[9] See 12 Manresa 536, *passim*.

sidiary and falls directly upon the persons having them under their control or custody. It is only when there is no person having them under his authority or guardianship, or when the guardian is insolvent, that such lunatics, imbeciles or minors must respond with their own property, excepting a sufficient amount for their support in accordance with the civil law.[10] Inn keepers, tavernkeepers, masters, teachers, persons and corporations engaged in any kind of industry are also subsidiarily liable, in default of the persons criminally liable, for crimes committed within their establishments by their servants, workmen, apprentices, pupils or employees in the discharge of their duties.[11] As stated in a previous chapter, liability for damages and fine shall subject persons criminally liable to subsidiary imprisonment if they have no property with which to meet said liability; but they shall not be relieved from liability for damages in case their financial circumstances should improve, even though they have suffered subsidiary personal penalty therefor.[12]

(b) In default of persons criminally liable, *innkeepers, tavern keepers, and any other persons or corporations shall be civilly liable for crimes committed in their establishments, in all cases where a violation of municipal ordinances or some general or special police regulation shall have been committed by them or their employees,* (Art. 102, R. P. C.) Thus, for example, if homicide is committed in an inn or bar on Sunday which, according to the municipal ordinances, should be closed, since the innkeeper in this case violates the ordinances by opening his establishment for business on a prohibited day, he shall be subsidiarily liable for the indemnity or civil liability to the heirs of the deceased.

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[10] Art. 101, Revised Penal Code.
[11] Art. 102, Revised Penal Code.
[12] Art. 39, Revised Penal Code.

Innkeepers are also subsidiarily liable for the restitution of goods taken by robbery or theft within their houses from guests lodging therein, or for the payment of the value thereof, provided that such guests shall have notified in advance the innkeeper himself, or the person representing him, of the deposit of such goods within the inn; and shall furthermore have followed the directions which such innkeeper or his representative may have given them with respect to the care of and vigilance over such goods. No such liability shall attach in case of robbery with violence against or intimidation of persons unless committed by the innkeeper's employees. (Art. 102, R. P. C.)

(c) The subsidiary liability established by Art. 102 of the Revised Penal Code, shall also apply to employers, teachers, persons, and corporations engaged in any kind of industry for felonies committed by their servants, pupils, workmen, apprentices, or employees in the discharge of their duties. (Art. 103, R. P. C.)

It must be understood that the felony must be committed by the servants, wards, employees, apprentices or workmen *while* in the discharge of their duties; otherwise, the subsidiary liability provided in this Code cannot be enforced. Let us suppose that a workman of a construction company stole some things while he was making minor repairs on a house, and after being prosecuted was found guilty by the Court. Under such circumstances, the company will be subsidiarily liable for the restitution of the things or for the payment of their value.

Obligations and Contracts; Obligations Arising From Crimes; Criminal Law.--Civil obligations growing out of crimes are, by express provision of law, taken out of the Civil Code. *Pedro Clemente and Simeona Martinez, plaintiffs-appellants, vs. Foreign Mission Sisters of St. Dominic, Inc., and The*

Roman Catholic Archbishop of Manila, defendants-appellees, G. R. No. 44317, March 31, 1939, Tuazon, J.

Criminal Law; Civil Liability of Employers; Requisites; Words and Phrases, Meaning of.—The following are necessary conditions of an employer's subsidiary liability under article 103 of the Revised Penal Code; (1) that the employer should be "engaged in any kind of industry", and (2) that "the servants, pupils, workmen, apprentices, or employees committed the crime or offense in the discharge of their duties." The phrase "engaged in any kind of industry", found in this article, is intended to qualify "employers", "teachers" and "persons" as well as "corporations". Ibid.

If.; Id.; Words and Phrases; "Industry", Defined; Charitable Institutions.—"An enterprise not conducted as a means of livelihood, or for profit, does not come within the ordinary meaning of the terms 'business', 'trade' or 'industry'. The test of whether an enterprise is charitable is whether it exists to carry out a purpose recognized in law as charitable, or whether it is maintained for gain, profit, or private advantage. Provided a corporation or association can otherwise be classed as a charitable one, the fact that it receives pay from some of the students, inmates, patients, or other persons to whom it extends benefits detracts nothing from its character as a purely charitable institution. The original ellemosynary character of the institution is not transformed by this patronage, even if sufficient to relieve it from financial burdens, but the charity as established remains unaffected." (11 C. J. 304, 305; Schloendorff vs. Society of New York Hospital, 211 N. Y. 125, 105, N. E. 92) Ibid.

Id.; Id.; Hospitals; Nurses Are Not Servants of Hospital. Nurses in treating a patient, are not acting as servants of the hospital. The superintendent is a servant of the hospital; the assistant superintendents, the orderlies, and the other members of the administrative staff are servants of the hospital. But nurses are employed to carry out the orders of the physicians, to whose authority they are subject. The hospital undertakes to procure for the patient the services of a nurse.

It does not undertake through the agency of nurses to render those services itself. (Schloendorff vs. Society of New York Hospital, 211 N. Y. 125, 105, N. E. 92) Therefore, the hospital is not responsible, regardless of whatever contract might exist between it and the party injured by the offense committed by the nurse. Ibid.

Where a motorman has been convicted for reckless imprudence and sentenced to indemnify the offended party, with subsidiary imprisonment in case of insolvency, and the latter has been unable to collect the indemnity from said motorman and so has begun an action to obtain payment from the master, it is held that said action is enforceable under the provisions of this article, the provisions of Art. 1903 of the Civil Code notwithstanding.[13]

(d) *If there are two or more persons civilly liable for a felony, the Court shall determine the amount for which each must respond.*[14] Nevertheless *principals, accomplices, and accessories, each within their respective class, shall be liable severally* (in solidum) *among themselves for their quotas, and subsidiarily for those of the other persons liable.*[15]

In cases of persons committing injury under the pressure of state of necessity (subdivision 4 of article 11), the persons for whose benefit the harm has been prevented shall be civilly liable in proportion to the benefit which they may have received.

The Courts shall determine, in their discretion, the proportionate amount for which each one shall be liable.

When the respective shares cannot be equitably determined, even approximately, or when the liability also at-

[13] The City of Manila vs. Manila Electric Company, 52 Phil., 586.
[14] Art. 109, Revised Penal Code.
[15] Art. 110, Revised Penal Code.

taches to the Government, or to the majority of the inhabitants of the town, and, in all events, whenever the damage has been caused with the consent of the authorities or their agents, indemnification shall be made in the manner prescribed by special laws or regulations."[16]

Likewise, *any person who has participated gratuitously in the proceeds of a felony* is also civilly liable in the sense that he *shall be bound to make restitution in an amount equivalent to the extent of such participation.*"[17] Supposing "A" after having stolen a diamond ring, gave it to "B". The latter, unaware of the unlawful origin of the ring, sold it for five hundred pesos to a foreigner who subsequently lost it. Should "A" be found insolvent, "B" shall be subsidiarily liable in a sum not exceeding five hundred pesos, which is his gratuitous participation in the commission of crime.

Lastly, the law provides immunity in the case of a person who acts under the impulse of an uncontrollable fear of an equal or greater injury and who for that reason is exempt from civil liability; *the persons using violence or causing the fear shall be primarily liable, and secondarily, or, if there be no such persons, those doing the act shall be liable, saving always to the latter that part of their property exempt from execution.*"[18]

8. Scope of Civil Liability.—Art. 104 of the Revised Penal Code provides that civil liability comprises: (a) *restitution;* (b) *reparation of the damage caused;* and (c) *indemnification for consequential damages.*

(a) *Restitution.*—This is the common remedy for the offended party in crimes against property, such as robbery, theft, *estafa,* etc. The remedy is based upon the old maxim: *"Ubicumque res sit pro domino suo clamat."* There are,

[16] Art. 101, par. 2, Revised Penal Code.
[17] Art. 111, Revised Penal Code.
[18] Art. 101, par. 3, Revised Penal Code.

however, certain offenses which do not give rise to any civil liability, for example, contempt and disobedience.

The restitution of the thing itself must be made whenever possible, with allowance for any deterioration or diminution of value as determined by the Court. The thing itself shall be restored even though it be found in the possession of a third person who has acquired it by lawful means, saving to the latter his action against the proper person who may be liable to him.[20] In this case the possessor is entitled to bring an action against the person who may be liable to him; but if such possessor has acquired the thing under the conditions stated in Art. 464 of the Civil Code, he is not bound to make restitution, unless his expenses are refunded.[21]

This is the rule when the possession is the direct consequence of crime, as when the thing sold was stolen; but where, for instance, the owner delivers it to another for the purpose of sale, fixing the price at which the sale is to be made, sale at a price less than that fixed does not prevent the passing of title to the purchaser, and the thing cannot be recovered by the former owner.[22]

(b) *Reparation of damages.*—This is the common remedy in cases of damage to property, criminal negligence, malicious mischief, etc. *The Court shall determine the amount of damage, taking into consideration the price of the thing, whenever possible, and its special sentimental value to the injured party, and reparation shall be made accordingly.*[23] Hence, in a case of robbery, it is necessary to replace not only the unrecovered stolen article, but also to

[20] Art. 105, Revised Penal Code.
[21] Varela vs. Finnick, 9 Phil., 482. See also U. S. vs. Torres, 11 Phil., 606; People and Concepción vs. Alejano, 54 Phil., 987.
[22] U. S. vs. Torres, 11 Phil., 606.
[23] Art. 106, Revised Penal Code.

repair the material damage or injury caused by the culprit in breaking doors, wardrobes, etc.

(c) *Indemnification for losses.*—Indemnification is distinguished from reparation in that the latter is the remedy given to the offended party in crimes against property; whereas the former is limited to the damage caused to the offended party. Furthermore, indemnification comprises, as Art. 107 of the Code says, not only the damages caused to the offended party, but also those suffered by his family, or by a third person by reason of the crime. Thus, in a case of murder or homicide, the culprit is bound to pay indemnity to the family of the deceased, or to a third person if it appears that such person was injured thereby. The social condition as well as the earning capacity of the offended party should be taken into account by the Court for the purpose of determining the amount of the indemnification.

The civil damages that may be recovered in a criminal action are limited to consequential damages caused by, and flowing from, the commission of the crime of which the accused is convicted in that action. Thus, if an accused is convicted of the crime of *estafa*, in that he rented a bicycle for four days at the rate of ₱1.50 a day, and failed and declined thereafter to return the bicycle to its owner, he cannot be sentenced in the criminal action to pay the rent of the bicycle, with subsidiary imprisonment in case of non-payment for the time during which the bicycle was in the possession of the accused. The indebtedness on account of unpaid rent of the bicycle arose under the contract of hire and did not result from the commission of the crime of which the accused is convicted. It is recoverable in a civil action and not in a criminal action charging *estafa* of the bicycle.[23]

[23] U. S. vs. Dionisio, 35 Phil., 141.

9.—Moral Injury Not Recoverable.—As is seen, the Revised Penal Code merely provides for the reparation of the material damage inflicted upon the victim of an offense; it remains silent with respect to the moral injury, such as the discredit which results in loss of business, worries which diminish personal activity, mental suffering and so forth. These injuries are particularly true and felt in offenses, such as defamations defined in Articles 353 to 359 of the Revised Penal Code.

Before the enactment of the Revised Penal Code, the injured party in the crime of libel (now defamation) was entitled to recover from the offender, not only the real and material damages which he might have suffered because of the libel, but also damages to his feelings and reputation.

The provisions of Act 277 regarding libel were incorporated in Articles 353 and 359 of the Revised Penal Code; but said Code, prescribing in Article 360 the action available to the aggrieved party, said nothing regarding indemnity for damage to the feelings and reputation of the victim.

There are offenses which do not give rise to civil liability. Among these may be mentioned the disobedience to summons (Art. 150, R. P. C.) evasion of sentence committed without any violence (Art. 157, R. P. C.), seditious speeches (Art. 142, R. P. C.), crimes relative to opium and so forth (Art. 119, R. P. C.).

10. Extinction of Civil Liability.—Since this liability is in fact, a civil obligation, the law provides that it *shall be extinguished in the same manner as other obligations, in accordance with the rules of the Civil Law,* namely, by payment, condonation, compensation, and prescription.

(References are to pages)

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