WHEN NEGLIGENCE IS CRIMINAL

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THE main criterion of the present penal code is that the basis of criminal liability is human free will and the purpose of the penalty is retribution. To the classicist, and specially the framers of the Spanish penal code of 1870, man is essentially a moral creature with an absolutely free will to choose between good and evil. They assert that man should only be adjudged and held accountable for wrongful acts, so long as that free will appears unimpaired.[1]

This philosophy is expressed in article 3 of the present penal code when it says that felonies are committed not only by means of deceit (dolo) but also by means of fault (culpa) and that there is deceit when the act is performed with deliberate intent and there is fault when the wrongful act results from imprudence, negligence, lack of foresight or lack of skill.

The structure, therefore, of the present law on crimes is clear. As a rule, the crimes defined therein may be committed either through deceit or fault, the severity of the punishment imposed being dirctly affected by these elements. Deceit tends to increase the penalty while fault tends to lessen it. As far as the law is concerned, to condemn the act as a crime it must be characterized by either deceit or fault without which the act is purely innocent and legal. But an exception to this general rule looms large in the context of the code. There are certain crimes which can be committed only through deceit while others can be done only through negligence.[2]

It should be noted in passing that in the latter cases, when negligence is specifically provided as an essential element, it would be improper to assert that a crime (like malversation which can be performed through negligence) has been committed through negligence. Rather, it should be simply said that malversation has been done. For the expression, that a particular crime has been committed through imprudence, means that though imprudence is not expressly included in the definition of the crime as an essential and inseparable element thereof, yet in its presence, together with other things, the crime is performed.

* LL.B., 1957.

[1] COMM'N REPORT ON CODE OF CRIMES 2 (1954).

[2] Quizon v. JP, G.R. L-6641, July 28, 1955.

In the very recent case, *Quizon v. Justice of the Peace,* which if allowed to stand for long may be as well a forerunner of a revolt questionable or otherwise against some deeply imbedded and traditional concepts in our criminal jurisprudence, the Supreme Court went a step further: that when a crime, like homicide, has been committed through reckless imprudence, the accurate statement is not homicide through reckless imprudence but reckless imprudence resulting in homicide.

This article is an attempt to make a brief outline of those crimes where imprudence is involved, either as an element expressly provided by the Revised Penal Code or as an alternative characteristic whose presence would result in the commission of the crime, though not expressly indicated by the literal tenor of the law.

Though in recent memory, no influential table has been made to list down the articles of the penal code where imprudence is made criminal, the question has been the subject of intense and long discussions among distinguished authorities. And this work is chiefly to treasure and systematize the brilliant thoughts coming forth from their minds. Only when there is vagueness of solution and there is such vagueness in some regions of the commentaries for some special motives of the authors, is there an attempt to furnish a theory of remedy — and only a theory of remedy.

It would be amiss, however, to start drawing this outline without a notion, basic at least, of the concept of criminal imprudence.

The Revised Penal Code says that reckless imprudence consists in voluntarily, but without malice, doing or failing to do an act from which material damage results by reason of inexcusable lack of precaution on the part of the person performing or failing to perform such act, taking into consideration his employment or occupation, degree of intelligence, physical condition, and other circumstances regarding persons, time and place. Simple imprudence, on the other hand, consists in the lack of precaution displayed in those cases in which the damage impending to be caused is not immediate nor the danger clearly manifest.[3]

Judge Cooley defines negligence to be the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury.[4]

It is a relative or comparative term, not an absolute one, and its application depends upon the situation of the parties and the degree of care and vigilance which the circumstances reasonably require.[5]

[3] Art. 365 REVISED PENAL CODE.

[4] Cited in U.S. v. Barias, 23 Phil. 434 (1912).

[5] U.S. v. Barias, 23 Phil. 434 (1912).

Article 365 recognizes two classes of criminal negligence: reckless imprudence and simple imprudence or negligence.

Simple imprudence or negligence consists in the lack of precaution displayed in those cases in which the damage impending to be caused is not immediate nor the danger clearly manifest.[6]

The distinction between reckless imprudence and simple imprudence is not clearly indicated in the books. Where immediate personal harm, preventable in the exercise of reasonable care, threatens a human being by reason of a course of conduct which is being pursued by another, and the danger is visible and consciously appreciated by the actor, the failure to use reasonable care to prevent the threatened injury constitutes reckless imprudence. On the other hand, simple imprudence is a mere lack of provision in a situation where either the threatened harm is not immediate or the danger is not openly visible.[7]

Article 365 of the Revised Penal Code punishes criminal negligence and thus furnishes the middle way between a wrongful act committed with malicious intent which gives rise to a felony or misdemeanor, and a wrongful act committed without any intent which may entirely exempt the doer from criminal liability. In cases of criminal negligence, the law supplants the element of malicious intent or *dolus* by carelessness, imprudence or negligence.[8] Therefore, any act executed without malice or criminal intent but with lack of foresight, carelessness, or negligence, and which has harmed society or an individual, deserves the qualification of either reckless or simple negligence or imprudence.[9]

In its attempt to penalize criminal negligence, however, the Revised Penal Code has reached a rather inconsistent and unfair situation. For while it imposes retribution upon a person who, by simple imprudence or negligence, shall cause some wrong which, if done maliciously, would have constituted a light felony, yet it closes its eyes when another person commits the same light felony thru negligence that is wanton and reckless, not merely simple. Reckless imprudence is punishable only if the act complained of constitutes a grave or less grave felony, had it been intentional.[10]

However strong the reason may be to punish reckless imprudence resulting in a light felony, the court is deterred from laying its hand upon it by the principle of *nulla poena sine lege* embodied in article 3 of our Revised Penal Code. So long as it is not made punishable by law, an act or omission, though brutal and oppressive in itself, cannot be the object of penal revenge, even if it is closely analogous to a crime provided in the code.

[6] Art. 365 REVISED PENAL CODE.
[7] People v. Vistan, 42 Phil. 107 (1921).
[8] U.S. v. Maleza, 14 Phil. 468 (1909).
[9] People v. Fernandez, 43 O.G. 2181 (1847).
[10] See Art. 365 REVISED PENAL CODE.

This anomaly should be remedied by legislative enactment. In its project of reform, however, the proposed Code of Crimes seems to have been placed again in another dubious position. Under this law, it is possible to say that a crime, which if done maliciously would be repressed by a fine, would be no crime at all, if committed negligently, no matter how wanton may be the negligence. This is so, because article 61 of the same code says that when the nature of the crime is such that it may be committed through negligence, the crime so committed shall be repressed with the repression lower by one or two categories than that prescribed for the intentional crime, in the order named in article 78, No. 2. And under article 78, No. 2, there is no lower repression than a fine. Without any repression for it, an act or omission, would be completely innocent.

Inciting to war or giving motives for reprisals. This crime is committed by any public officer or employee or private individual who, by unlawful or unauthorized acts, provokes or gives occasion for a war involving or liable to involve the Philippine Islands or exposes Filipino citizens to reprisals on their persons or property.[11]

Commenting on a corresponding crime in the Spanish Penal Code, Cuello Calon seems to believe that this crime may be committed through reckless imprudence:

> Para la existencia del delito no es preciso el animo de dar motivos a declaracion de guerra o de exponer a los españoles a vejaciones o represalias, basta con que el agente tenga consciencia de que al acto que ejecuta es illegal o que no esta competentamente autorizado y que puede originar tales consequencias.[12]

Viada gives the reason:

> Al examinar este articulo se advierte, ante todo, que la Ley no ha tenido precisamente en cuenta la intencion del agente, sino exclusivamente el hecho material. Preocupado principalmente con el deseo demantener buenas relaciones de amistad con las naciones extranjeras, he querido el legislador castigar todos aquellos actos que pudieran turbarlas, sin inquirir si constituyen verdaderos delitos o simples imprudencias, estimando que a la gravedad de las circunstancias debe posponerse el elemento intencional.[13]

Arbitrary detention. Arbitrary detention is an offense against the liberty of a person and is committed by a public officer who arrests or detains a person without legal authority. Two things are necessary: (1) there must be a detention; and (2) the detention must be without legal grounds — unlawful.[14]

This can be committed through negligence.

[11] Art. 118 REVISED PENAL CODE.
[12] 2 CUELLO CALON, DERECHO PENAL 17 (1948 ed.) (hereinafter cited as CUELLO CALON).
[13] VIADIA, CODIGO PENAL DE 1870, at 93 (1926) ed.) (hereinafter cited as VIADA).
[14] See Art. 124 REVISED PENAL CODE; 2 FRANCISCO, REVISED PENAL CODE 47 (1952) (hereinafter cited as FRANCISCO); Taruc v. Sergeant, 78 Phil. 876 (1947).

Thus, in a certain case, the chief of police who filed the action against an accused woman, asked for the postponement of the trial of the case. The justice of the peace, whose relation with the chief of police was quite strained, denied the motion and set the accused at liberty through an order issued verbally. The chief of police, believing in good faith that such order of release was not legal, arrested again the accused and a criminal action for arbitrary detention was then filed against the chief of police. The Court of Appeals held that the defendant acted without malice. However, the same court held that he could have gone to the justice of the peace to ascertain the true facts before proceeding with the arrest; in not doing so, he acted without diligence and committed negligence; the accused therefore was found guilty of the crime of arbitrary detention through simple negligence.[15]

Cuello Calon:

Para la existencia de la detencion ilegal es preciso que la autoridad que la ordene conozda la ilegalidad de la detencion. El exceso de celo de la autoridad que la ordena o del funcionario que la ejecuta no puede justificar el hecho. Si la autoridad obro creyendo erroneamente en la licitud de la orden de detencion, podra ser culpable de un delito de imprudencia.[16]

This should be distinguished from another kind of imprudence that gives rise to no penal liability:

El error del hecho, la buena fe del agente excluyo la intencion criminal el que cierra con llave una casa deshabitada sin saber que dentro se halla una persona, el que creyendo que su mujer se halla loca la tiene encarrada en una habitacion, no comete este delito por ausencia de intencion criminal.[17]

Delay in the delivery of detained prisoners to proper judicial authorities. Any public officer or employee who shall detain any person for some legal ground and shall fail to deliver such person to the proper judicial authorities within the period of six hours shall be guilty of this offense.[18]

If the officer, through his own fault or negligence, fails to deliver the prisoner before the proper judicial authority within the period of six hours the felony will be tainted with negligence, reckless or simple.[19]

Delaying Release. The release is criminally delayed by any public officer or employee who delays for the period specified in article 124 of the Revised Penal Code the performance of any judicial or executive order for the release of a prisoner or detention prisoner, or unduly delays the service of the notice of such order to said prisoner or the proceedings upon any

[15] People v. Misa, (CA) 36 O.G. 3496 (1935).
[16] 2 CUELLO CALON 61.
[17] *Id.* at 647. (Admittedly, in making this comment, Cuello Calon had in mind the crime of illegal detention. Yet because there is similarity between illegal and arbitrary detentions, it seems that the words of the eminent authority are also applicable to the latter crime.)
[18] Art. 125 REVISED PENAL CODE.
[19] U.S. v. Vicentillo, 19 Phil. 118 (1911).

petition for the liberation of such person.[20]

This is an act amounting to arbitrary detention.[21] It is therefore logical to suppose that this crime can be committed through imprudence when its kindered offense, arbitrary detention, can be so committed.

Cuello Calon:

Aun cuando la prision o detencion fuere originariamente licita, se convierta en ilegal en cuanto el funcionario competente con conocimiento del mandato judicial de libertad dilata su cumplimiento. Si la dilacion fuere por descuido o negligencia, el hecho podia constitui un delito de imprudencia.[22]

Search warrants — abuse in the service of those legally obtained. It is submitted that the abuse in the service of search warrants legally obtained may be committed through imprudence. As the Code says, this crime is performed by any public officer or employee who shall procure a search warrant with just cause but shall exceed his authority or use unnecessary severity in executing the same.[23]

Imprudence may be seen in the hypothesis: A search warrant was issued wherein the property to be searched and seized was specifically described. In executing the same, without bothering to take careful note of the description therein, the officer searched and seized some other property, causing damage to its owner.

The duty of the searching officer to exercise the greatest care without which he would be acting with reckless imprudence is made extremely clear by the traditional injunction of the Supreme Court: constitutional and statutory provisions relative to search and seizure under warrant are to be construed liberally in favor of the individual who may be affected thereby, and strictly against the state and persons invoking them for the issuance of a search warrant.[24]

Consequently, the statute authorizing searches and seizures and search warrants must be strictly construed to prevent an encroachment upon the rights of citizens. The power to search and seize, while necessary to the public welfare, must be exercised without transgressing the constitutional rights of citizens.[25]

Searching domicile without witnesses. This is committed by a public officer or employee who, in cases where a search is proper, shall search the domicile, papers, or other belongings of any person, in the absence of the latter, any member of his family, or in their default, without the pre-

[20] Art. 126 REVISED PENAL CODE.
[21] PADILLA, CRIMINAL LAW 450 (1947 ed.) (hereinafter cited as PÁDILLÁ).
[22] 2 CUELLO CALON 62.
[23] Art. 129 REVISED PENAL CODE.
[24] People v. Sy Juco, 64 Phil. 667 (1937).
[25] Alvarez v CFI, 64 Phil. 33 (1937).

sence of two witnesses residing in the same locality.[26]

Again, imprudence may be present. For example, the officer fails through negligence to get the necessary witnesses. Perhaps he just hated to look for witnesses in the community because of the rain and mud that happened to harass his search during that moment of need.

Offending the religious feelings. This offense is committed by one who, in a place devoted to religious worship or during the celebration of any religious ceremony, shall perform acts notoriously offensive to the feelings of the faithful.[27]

Justice Albert says that an act is notoriously offensive to the religious feelings of the faithful when a person ridicules or makes light of anything constituting a religious dogma; mocks or scoffs at anything devoted to religious ceremonies; plays with or damages or destroys any object of veneration by the faithful.[28]

It should be noted that the offensiveness of the act must be decided in a large way from the viewpoint of the particular religion offended. It is submitted that the court must consider the particular doctrine of the church on the matter. The court cannot substitute its own opinion; otherwise, it would no longer be a question of offending the religious feelings of the offended party but that of the judge.[29]

This article is precisely designed to aid the enforcement of religious freedom. The faithful must be allowed the freedom to exercise their religion without any offensive intervention from anybody. The faithful must be given respect for their religious beliefs and respect is impossible if the corresponding duty of using care that their religious feelings are not offended is not imposed. Hence, in the absence of care, there may be imprudence resulting in the commission of the offense.

Speaking about a similar offense against the Catholic religion, a peculiar provision in the Spanish Penal Code, Cuello Calon comments:

> El elemento moral de este delito no require la concurrencia de animo deliberado de impedir, interrumpir o retardar el culto, es bastante la voluntad de ejecutar el hecho que origine el impedimento, la interrupcion o el retardo.[30]

Unlawful use of means of publication. This is committed by any person who by means of printing, lithography, or any other means of publication shall publish or cause to be published as news any false news which

[26] Art. 130 REVISED PENAL CODE.
[27] Art. 133 *Id.*
[28] ALBERT, THE REVISED PENAL CODE 320 (1946 ed.) (hereinafter cited as ALBERT).
[29] See People v. Baes, 68 Phil. 203 (1939).
[30] 2 CUELLO CALON 91.

endanger the public order, or cause damage to the interest or credit of the State.[31]

It is not necessary that the publication of the false news should have really endangered the public order, or should have caused damage to the credit of the State. The mere possibility of causing danger to the public order, or damage to the interest or credit of the State is what is sought to be prevented by the present subsection.[32]

Thus, a radio commentator may be criminally liable when he recklessly broadcasts a false invasion of the enemy, causing panic and disorder.

Tumults and other disturbances of public order. It is submitted that one form of this offense can be committed through reckless imprudence. That is, when a person, in any meeting, association, or public place, makes any outcry tending to incite rebellion, or sedition or in such place shall display placards or emblems which provoke a disturbance of the public order.[33]

To make an outcry tending to incite rebellion or sedition in any meeting, association or public place is to shout subversive or provocative words, tending to stir up the people to obtain by means of force and violence any of the objects of rebellion or sedition. It differs from the offense of inciting rebellion or sedition under article 138 in the fact that an outcry is prompted by an outburst of strong excitement or terror, usually unpremeditated and oftentimes made under the influence of the occasion; whereas to incite rebellion or sedition is to earnestly insist, to spur on or to urge the people to commit rebellion or sedition, and is usually done after mature deliberation.[34] The tenor of the comment indicates that this office may be committed through imprudence.

Other cases of evasion of service of sentence. A convict who, having been granted conditional pardon by the Chief Executive, shall violate any of the conditions of such pardon is penalized under this provision.

This is broad enough to be violated through imprudence. It is common practice, for the Chief Executive to grant pardons on the condition that the prisoner will not commit another crime. The condition is violated should the prisoner be later convicted of homicide through reckless imprudence.

Commission of another crime during service of penalty imposed for another previous offense. This crime is committed by a person who shall commit a felony after having been convicted by final judgment, before beginning to serve such sentence, or while serving the same.[35]

[31] Art. 154 REVISED PENAL CODE.
[32] ALBERT 365.
[33] Art. 153 REVISED PENAL CODE.
[34] ALBERT 364.
[35] Art. 160 REVISED PENAL CODE.

The felony committed before or during the service of the sentence may be one resulting from imprudence, simple or reckless.

Falsification by public officer, employee or notary or ecclesiastical minister, or by a private individual.[36] The acts of falsification are:

1. Counterfeiting or imitating any handwriting, signature, or rubric;
2. Causing it to appear that persons have participated in any act or proceeding when they did not in fact so participate;
3. Attributing to persons who have participated in an act or proceeding statements other than those in fact made by them;
4. Making untruthful statements in a narration of facts;
5. Altering true dates;
6. Making any alteration or intercalation in a genuine document which changes its meaning;
7. Issuing in authenticated form a document purporting to be a copy of an original document when no such original exists, or including in such copy a statement contrary to, or different from, that of the genuine original; or
8. Intercalating any instrument or note relative to the issuance thereof in a protocol, registry or official book.[37]

If the crime is to be committed by an officer, employee or notary or ecclesiastical minister, the following elements must concur: (1) that the offender is a public officer, employee, notary or ecclesiastical minister; (2) that the offender commits in a public or official document any of the acts above; and (3) that in committing any of said acts, the offender takes advantage of his official position.[38]

If it is falsification of public or official document by private individuals the following elements must concur: (1) that the offender be a private person; and (2) that the offender falsifies a public or official document by any of the modes described above.[39]

Is there falsification through reckless negligence?

It has been a usual principle in Philippine jurisprudence that criminal intent is essential in this case. As the Supreme Court has said, criminal intent is essential to constitute the crime of falsification of private or public documents. Where the statement of an inaccurate fact in a document is due to an error or is consistent with good faith on the party of the accused a conviction for falsification cannot be sustained, for in such case the presumption arising from the illegal act is overthrown.[40]

[36] Arts. 170-174, REVISED PENAL CODE.
[37] Art. 171 REVISED PENAL CODE.
[38] 2 FRANCISCO 263; See Art. 171 REVISED PENAL CODE.
[39] 2 FRANCISCO 291; See Art. 172 REVISED PENAL CODE.
[40] People v. An, 48 Phil. 183 (1925); U.S. v. San Jose, 7 Phil. 604 (1907); U.S. v. Arcea, 17 Phil. 592 (1910); People v. Pacaña, 47 Phil. 48 (1924); v. Mateo, 25 Phil. 324 (1913).

But in two cases, the Supreme Court reversed itself, abandoning this line of thought, and convicted the accused of falsification through reckless imprudence:

> A man must use common sense, and exercise due reflection in all his acts; it is his duty to be cautious, careful, and prudent, if not from instinct, then through fear of incurring punishment. He is responsible for such results as anyone might foresee and for acts which no one would have performed except through culpable abandonment. Otherwise his own person, rights and property, and those of his fellow-beings, would ever be exposed to all manner of danger and injury . . . Therefore, any act executed without malice or criminal intent, but with lack of foresight, carelessness, or negligence, and which has harmed society or an individual, deserves the qualification of either reckless or simple negligence or imprudence.[41]

Due to the exceptional tenor of this doctrine, the facts of the cases in this regard are rather important. (Unfortunately, of the two leading cases, *United States v. Maleza,* supra and *People v. Blancas*, supra, only the former was permanently recorded; the latter was not published.)

The Maleza case:

> On the 31st of May, 1906, Luciano Maleza, as treasurer of the municipality of Sevilla, Province of Bohol, certified that an account of the same date, showing payments made to carpenters and day laborers who worked in the construction of the municipal building during the years 1903 and 1904, as well as the cost of certain packages, of nails used therein, was a true and exact statement; said account amounted to ₱249.35, and was approved by a resolution of the municipal council. He further certified that the services were rendered as stated and were necessary for the public interest, and that the articles purchased had been recorded in the municipal register.
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> It appeared that Gabriel Adlaon, whose signature appears at the foot of the document, had received the said amount as the balance due of a former account. Maleza, however, failed to tell the truth in the statement of facts contained in the said document, inasmuch as he stated therein that the money was intended to pay the carpenters, when as a matter of fact, it was drawn and paid to Luciano Maleza himself, he being commissioned by P. Cayetano Bastes to collect and receive the amount loaned by the said Bastes to the municipal president and treasurer of Sevilla in the year 1903. Adlaon, also, with reckless negligence, failed to tell the truth in stating the facts contained in said document. He said therein that he had received the money, when in reality neither was the money paid for the work done by the carpenters, nor was it received by him.

These facts, in the opinion of the high tribunal, constituted falsification through reckless negligence.

Summarizing Spanish jurisprudence on this point, Cuello Calon has this to say:

> Según la doctrina del T.S., cuando en la ejecución de una falsedad no concurre malicia, el hecho constituye la imprudencia. . . Así, he declarado que ciertas falsedades documentales pueden cometerse por imprudencia, 25 diciembre

[41] U.S. v. Maleza, 14 Phil. 468 (1909); People v. Blancas, 56 Phil. 801 (1931).

1885, 1 diciembre de 1890, 5 mayo 1926, 21 febrero 1930, 9 marzo 1931, 2 junio 1932. Cometen falsedad documental por imprudencia los que estampan sus firmas al pie de un documento falso redactado por otro sin cerciorarse previamente de la veracidad de los extremos en el consignados, 14 de febrero de 1944. Conforme a lo dispuesto en la ley 18 diciembre 1946 en el art. 23 de la Ley Organica del Notariado de 28 mayo 1862 se ha introducido la siguiente disposicion: 'El notario que diere fe de conocimiento de alguno de los otorgantes, inducido a error sobre la personalidad de estos por la actuacion maliciosa de los mismos o de personalidad de estos por la actuacion maliciosa de los mismos o de otras personas, no incurrira en responsabilidad criminal, la cual sera exigida unicamente cuando proceda con dolo; perso sera immediatamente sometido a expediente de correccion disciplinaria con la obligacion de indemnizar los daños y perjuicios que se hayan producido por tal error a terceros interesados.'[42]

In its latest case on the question, however, the Court of Appeals, speaking through Justice Sanchez, adhered to the traditional principle that falsification can be committed only through *dolo*.[43]

Grave scandal and immoral doctrines, etc. This is committed by any person who shall offend against decency or good custom by any highly scandalous conduct not expressly falling within any other article of the Revised Penal Code.[44]

Cuello Calon:

> Este constituida por la conciencia del caracter impudico, ofensivo del pudor y de las buenas constumbres, del acto realizado y por la voluntad derealizarlo. No es menester que concurra el movil especial de ofender al pudor o las buenas costumbres; el dolo puede exister aun cuando el culpable no proceda con propositos dishonestos.
>
> Este delito puede cometerse por imprudencia.[45]

Judgment rendered through negligence. There is judgment rendered through negligence when a judge, by reason of inexcusable negligence or ignorance renders a manifestly unjust judgment in any case submitted to him for decision.[46] By explicit proviison of law, negligence is an essential element.

Prevarication. An officer of the law (this term comprises all who, by reason of the positions held by them are duty bound to prosecute and punish offenders) is guilty of prevarication if, in dereliction of the duties of his office, he maliciously refrains from instituting prosecution for the punishment of a violator of the law, or tolerates the commission of offenses.[47]

Cuello Calon:

> Concurrencia de malicia o de negligencia o ignorancia inexcusables. La mal-

[42] 2 CUELLO CALON 219.
[43] People v. Villena, (CA) G.R. No. 18946-R, May 28, 1955.
[44] Art. 200 REVISED PENAL CODE.
[45] 2 CUELLO CALON 516.
[46] Art. 205 REVISED PENAL CODE.
[47] ALBERT 486; See art 208 REVISED PENAL CODE.

cia o el abuso malicioso del oficio presupone en el agente la conciencia del caracter secreto de los hechos descubiertos y conocimiento de su deber de no comunicar los secretos de que tenga conocimiento (conocimiento que debe presumirse en todo abogado o procurador); no es menester ni animo de lucro, ni movil de perjudicar. En cuanto a la negligencia o ignorancia, han de ser inescusables, como la ley declara.[48]

Evidently then, in the absence of malice, this crime can be committed only through imprudence.

Thus, a barrio lieutenant who neglected his duty and failed to move at the proper time for the prosecution of, and punishment for, a crime of arson the commission of which he was informed, was held guilty of prevarication.[49]

Betrayal of trust by an attorney or solicitor — Revelation of secrets. Betrayal of trust is committed by an attorney or solicitor when, by any malicious breach of professional duty or inexcusable negligence or ignorance, he prejudices his client or reveals any of the secrets of the latter learned by him in his professional capacity.[50] By explicit provision of law, imprudence is an essential element of the crime proper.

There is revelation of secrets by an attorney or solicitor when, having undertaken the defense of a client or having received confidential information from said client in a case, he undertakes the defense of the opposing party in the same case, without the consent of his first client.[51] In the opinion of Cuello Calon, the essence of this crime is the absence of consent of the first client.[52] Apparently, the failure to secure the consent of the first client can be due to malice or negligence of the attorney-at-law or solicitor.

Malversation of public funds or property. There is malversation of public funds when any officer embezzles or makes personal use of any government fund or property for which he is accountable or abstracts or misappropriates the same, or through his fault or negligence permits any other person to abstract, misappropriate or make personal use of the same.[53]

A person is guilty of malversation of public funds only when he converts them to his own use or to the use of another, or handles them so *negligently*

[48] 2 CUELLO CALLON 323.
[49] U.S. v. Mendoza, 23 Phil. 194 (1912).
[50] Art. 209 REVISED PENAL CODE.
[51] *Ibid.*
[52] 2 CUELLO CALON 325.
[53] Arts. 217 and 218 REVISED PENAL CODE; See ALBERT 502. Consequently, the following crimes, being species of malversation of public funds or property, can have imprudence, simple or reckless, as their essential elements: failure of accountable officer to render accounts (article 218, Revised Penal Code), failure of a responsible public officer to render accounts before leaving the country (article 219, Revised Penal Code), illegal use of public funds or property (article 220, Revised Penal Code), and failure to make delivery of public funds or property (article 221, Revised Penal Code).

as to permit someone else to so convert them.[54]

Infidelity in the custody of prisoners. The penal code says that if the evasion of the prisoner shall have taken place through the negligence of the officer charged with the conveyance or custody of the escaping prisoner, said officer shall suffer the penalties of *arresto mayor* in its maximum period to *prision correccional* in its minimum period and temporary special disqualification.[55]

This offense may also be committed by any private person to whom the conveyance or custody of a prisoner or persons under arrest shall have been confided.[56]

It should be noted that reckless imprudence is an essential element of this particular kind of infidelity in the custody of prisoners.

In the leading case of *United States v. Bandino*,[57] the accused, a municipal policeman, negligently allowed the prisoner in his custody to go and buy some cigarettes near the place where he was held in custody. The prisoner, taking advantage of the confusion in the crowd there, fled.

In convicting the accused of infidelity in the custody of prisoners, the Supreme Court laid down the philosophy of the law: the custodian is deemed to have connived with the prisoner when the latter's escape is effected through the former's reckless negligence.

Removal, concealment, or destruction of documents. Any public officer who shall remove, destroy, or conceal documents or papers officially entrusted to him, to the damage of a third party or to the public interest is punished under this article.[58]

Cuello Calon:

> Si la destruccion o la ocultacion, pues la sustraccion solo puede ser dolosa, no fuere imputable a malicia, sino a descuido, negligencia o imprudencia, el hecho podra constituir un delito de imprudencia. Cuando la correspondencia fuere detenida por orden de la authoridad competente no hay delito.[59]

In a recent case, the Court of Appeals ruled that this offense may be committed by a public officer through reckless imprudence.[60]

Officer breaking seal. This crime is committed by any public officer charged with the custody of papers or property sealed by proper authority who breaks the seals or permits them to be broken.[61]

[54] U.S. v. Acebedo, 18 Pihl. 428 (1911).
[55] Art. 224 REVISED PENAL CODE.
[56] Art. 225 REVISED PENAL CODE.
[57] 29 Phil. 459 (1915).
[58] Art. 226 REVISED PENAL CODE.
[59] 2 CUELLO CALON 230.
[60] People v. Valbuena, CA-G.R. No. 1851-R, Feb. 25, 1955.
[61] Art. 227 REVISED PENAL CODE.

Puig Peña, speaking on the corresponding Spanish penal provision:

> Este quebrantare tiene que ser malicioso. Podra ser cometido por imprudencia cuando, por ejemplo, un tercero quebrante los sellos y haya esto podido suceder por la negligencia del functionario? No existe aqui un precepto parecido al art. 395 relativo a la malversacion por imprudencia, pero entendemos que no hay una imposibilidad juridica que impida estimarla. Por ultimo, debemos decir que este articulo no exige ni el daño de tercer ni perjuicio para la causa publica.[62]

Opening of closed documents. This offense is committed by any public officer not included in article 227 of the Revised Penal Code who, without proper authority, opens or permits to be opened, any closed papers, documents, or objects entrusted to his custody.[63]

The Supreme Court of Spain, in its decision of May 31, 1884, implied that this crime can be committed through reckless imprudence:

> Un peatón, encargado por el Administrador de Correos de conducir la correspondencia, la confio a un cuñado suyo, el cual oculto o sustrajo parte de ella sin conducirla a su destino. El Tribunal Supremo declara a este ultimo unico responsable del delito que define el art. 377 del Codigo penal, porque accidentalmente y por mandato de su cuñado se encargado aquel dia de la correspondencia y oculto y tenido participacion, ni con malicia ni por improdencia temeraria el peaton, en cuyo proceder, al entregar la valija a su cuñado, no se descubre intencion delosa ni es un acto que revele la falta de provision ni el grave descuido que determinan a la verdader y culpable improdencia temeraria.[64]

Cuello Calon has a contrary opinion:

> Intencion delictuosa constituida por la conciencia en el funcionario de que los papeles o documentos cerrados que le esten confidados no deben ser abiertos y ademas por la voluntad de abrirlos o de consentir su apetura.[65]

Homicide through reckless imprudence. Homicide is the unlawful killing of a person which is neither parricide, murder nor infanticide.[66] Its elements: (1) that a man has been killed; (2) that the acts of another person was the cause thereof; and (3) that the killing was not justified under the law.[67]

It is a settled principle of law that this crime can be committed through reckless imprudence.

At about 2:30 in the afternoon of March 3, 1946, *P*, 14 years old, alighted from a passenger truck on the left side of the street in front of the public market. As she was crossing the street to get shelter in said market, defendant's truck came along and struck *P*. *P* died from a fracture of her

[62] 2 PUIG PENA 205.
[63] Art. 228 REVISED PENAL CODE.
[64] Cited in 2 HIDALGO, EL CODIGO PENAL 49 (1908 ed.).
[65] 2 CUELLO CALON 332.
[66] 2 FRANCISCO 667.
[67] *Ibid.*

cranium. The accused was convicted of homicide through reckless imprudence.[68]

It should be noted that only when homicide is consummated can it be committed through reckless imprudence. When it is merely frustrated, intent to kill is necessary. This crime (frustrated homicide) is committed when the offender, with the intention to kill, performs all the acts of execution which would bring about the realization of such intention as a consequence but which, nevertheless, is not realized by reason of causes independent of the will of the perpetrator. In the absence of that intent to kill, the crime committed is physical injuries only.[69]

The inference is clear that attempted homicide cannot be the result of reckless imprudence, because intent to kill is essential.

Parricide. Any person who shall kill his father, mother or child whether legitimate or illegitimate, or any of his ascendants or descendants or his spouse, shall be guilty of parricide.[70]

Apparently, this crime is essentially similar to homicide, the only difference being the peculiar relation of the victim with the accused. This can be gleaned from the definition of the offense of homicide which says that any person who *not falling within the provisions of article 246* (the provision on parricide) shall kill another without the attendance of any of the circumstances in article 248 (the provision on murder) shall be guilty of homicide.[71]

But if homicide can be committed through reckless imprudence there is no reason to deviate from the same line of reasoning in the case of parricide, when the difference between the two crimes is merely in the relation of the offender to his victim and not in the mode of committing the offense.

> Para la existencia de esta infraccion basta la muerte (el simple homicidio) de alguna de las personas mencionadas en el texto legal, no es menester la concurrencia de premeditacion ni de cualquiera otra de las circunstancias que cualifican el assisinato, si concurriera otra de las circunstancias que cualifican el asesinato, si concurriera alguna de ellas sera apreciada y produciria los efectos de una agravante generica. Es indiferente para la existencia de este delito el delincuente obre bajo el influjo de un impetu de pasion (v.g., habiendo precedido provocacion por parte de la victima o en vindicacion proxima de una ofensa grave), pues, tal impetu solo podria ser estimado como atenuante, segun ha declarado repetidas veces la jurisprudencia.[72]

This view is supported by the case of *People v. Recote.* The facts of the case were as follows:

> The accused, while intoxicated and lying down on the bench, was awakened by his son to go sleep in the bedroom. While in the bedroom, he found a pistol in the fold of his wife's blanket and started asking who owned it. His sons, hearing him cock the pistol, rushed to him, to prevent him from firing the gun. While they were thus trying to wrest the gun away, it exploded and hit the accused's wife who was coming from the sala. Death was instantaneous. *Held*, under the circumstances, the accused is guilty of the crime of parricide committed through reckless imprudence. It has not been shown that he had motive for committing the killing. The killing resulted from negligence (culpa) rather than from a criminal intent (dolo).[73]

Suppose what the criminal negligently failed to know was his relation to the victim? Can the killing be considered as parricide? Cuello Calon believes that this ignorance of the relationship would result in homicide or murder.[74]

As said before, there is an essential likeness between homicide and parricide, the principal difference being merely the relation between the killer and his victim. This being so, the inference is strong, following the doctrine of the Supreme Court in cases of frustrated and attempted homicide, that intent to kill is also necessary for the commission of frustrated or attempted parricide. It cannot be committed through reckless imprudence merely; the presence of reckless imprudence should justify conviction for physical injuries.

Very close to the present question is the problem — is malice necessarily involved in the crime of infanticide? Viada, in finding out how it is committed by a stranger other than the mother or the maternal grandparents, laid down a principle broad enough to meet squarely the issue:

> El extraño que mata a un recien nacido se hace tambien responsable del delito de infanticidio, y por ese delito incurre, no en la pena del simple homicidio, sino en la del assesinato, por suponer duda la Ley que en tan inicua muerte obra siempre el matador con manifiesta alevosia.[75]

The reason is clearly expressed by a decision of the Supreme Court of Spain:

> ...que es siempre aleviosa la muerta dad a un niño que, por su corta de edad, no puede oponer resistencia alguna a la agresion de que es objeto por parte de persona adulta; y cuando se trata, como en el caso actual, de un recien nacido, la apreciacion de dicha circunstancia de agravacion se impone ademas por mandato del ultimo parrafo del art. 424 del Codigo penal, segun el que, fuera de los casos comprendidos en los dos parrafos anteriores, la muerte de un recien nacio debe calificarse de asesinato o de parricidio, segun los casos, y claro es que si la cualificacion del primer delito obedece, sin genero de duda, a la notoria concurrencia en el hecho de la circunstancia de la alevosia, derivada de la completa indefension de la victima y del ningun riesgo para el ofensor, ese elemen-

[68] People v. Lopez, 44 O.G. 584 (1947).
[69] People v. Pacubas, 64 Phil. (1937); People v. Castillo (CA) 42 O.G. (1946).
[70] Art. 246 REVISED PENAL CODE.
[71] Art. 249 REVISED PENAL CODE.
[72] 2 CUELLO CALON 428.
[73] People v. Ricote, G.R. No. L-5801, March 28, 1955.
[74] 2 CUELLO CALON 429.
[75] 5 VIADA 115.

to de agravacion, que cualifica el delito cometido por el extraño, no puede menos de ser tomado tambien en consideracion para graver, a mayor abundamiento si cabe, siquiera como circunstancia generica o comun, el propio delito cometido por el padre y demas personas que el art. 417 mentiona....[76]

Abortion practiced by a physician or midwife and dispensing of abortives. The law is violated by a physician or midwife who, taking advantage of their scientific knowledge or skill, causes an abortion or assists in causing the same. The provision is also violated by a pharmacist who, without the proper prescription from a physician, dispenses any abortive.[77]

It is possible that pharmacist may dispense of an abortive contrary to this provision through negligence, as when he dispenses abortives not knowing them to be such.

The possibility seems to be covered by the doctrine in the leading case of *United States v. Pineda*,[78] where it was held that the delivery of one drug for another is punishable under this jurisdiction. In the *Pineda* case, it was declared that the profession of pharmacy demands great care and skill, that druggists must exercise and use the highest degree of care known to practical men, that the care required must be commensurate with the danger involved, and that the skill employed must correspond with the superior knowledge of the business which the law demands.

As amplified by the Court of Appeals, when the patient goes to a drug store to secure or buy the medicine prescribed by his physician, he has the right to expect that the medicine so prescribed will be given to him as it is the plain duty of each and everyone, whether a pharmacist or a pharmacy clerk, to give to the patient or purchaser the drug or medicine called for in the prescription. Said pharmacist or pharmacy clerk does not live up to his standard when he gives one medicine for another or delivers an adulterated medicine or drug, thus endangering the life and health of the patient or purchaser; and when they do so, said pharmacist or pharmacy clerk act in their peril. The law cannot countenance or tolerate or condone any negligence or act of negligence on their part.[79]

Going one step farther, it can be said that the physician or midwife having a responsibility to society identical to if not more stringent than

[76] Sentencia, July 13, 1897. The doctrine seems too harsh against the offender. When the offender knows of the existence and presence of the infant the decision has strong logic. But suppose a man did not know of the presence of the baby in a room; negligently he fired his gun, killing the baby. There is no question that he is liable for the infant's death. But reason for the conclusive presumption of malice is absent. How can it be said that he schemed an aggression against the baby when he did not know of its presence in the first place? It seems that the principle should not apply in such a given case where the infanticide should only be through imprudence, considering the strong tendency of Philippine law to convict a man strictly according to actual facts.

[77] Art. 259 REVISED PENAL CODE.

[78] 37 Phil. 457 (1918).

[79] People v. Castillo (CA) 42 O.G. 1914 (1946).

that of a pharmacy clerk or pharmacist, should not be allowed to escape criminal liability when his or her negligence results in the expulsion of a foetus amounting to abortion.

Physical injuries. It is settled that the crime of inflicting physical injuries, either seriously,[80] or less seriously[81] may be committed through imprudence, simple or reckless.

Thus an accused, was convicted of physical injuries through reckless imprudence who, being in control of the car, did not so prepare himself upon crossing a railroad as to be able to stop the car, thus crashing against the passing train giving rise to the physical injuries of the offended party.[82]

It should be noted, however, that slight physical injuries cannot be committed through reckless imprudence. An examination of article 365 of the Revised Penal Code will show that reckless imprudence is only punishable if the act complained of constitutes a grave or less grave felony, had it been intentional. It is true that the same legal precept imposes punishment upon a person who, by *simple* imprudence, shall cause some wrong, which, if done maliciously, would have constituted a *light* felony. Strangely enough, the law does not declare as a crime, and does not provide any penalty for the execution of an act — more serious as it is — through *reckless* imprudence when the same act, if executed intentionally, would amount to a light felony.[83]

But the corollary is clear that slight physical injuries can be committed through simple imprudence, since article 365 of the Revised Penal Code expressly says that a fine not exceeding 200 pesos and censure shall be imposed upon any person who, by *simple* imprudence, or negligence, shall cause some wrong which, if done maliciously, would have constituted a light felony.[84]

Abortion. Professor Manuel O. Chan believes that this crime, the unlawful expulsion of a foetus, can be committed through imprudence. A man, for instance, would be guilty of the crime if, while recklessly driving a car, he bumps against a pregnant woman causing her abortion. The basis of the comment is the elementary principle that one is liable for the wrongful effect of his imprudence. However, the eminent professor contends that the offense should be intentional abortion under article 256 and not unintentional abortion under article 257.

The Spanish Supreme Court, commenting on the corresponding provision of the Penal Code of Spain of 1944:

> La doctrina establecida con repetition por el Tribunal Supremo en cuanto a

[80] Art. 263 REVISED PENAL CODE.

[81] Art. 265 *Id.*

[82] U.S. v. Manabat, 28 Phil. 560 (1914).

[83] People v. Ande y Marino, (CA) G.R. No. 12221-R, April 9, 1955.

[84] For further discussion, please see text p. 202.

la imprudencia punible exige como requisitos basicos, desde el punto de vista penal, que se produzca el daño en el desarrollo de una actividad licita, y desde el punto de vista procesal que en los hechos probados existan elementos de descuido, desatencion, improvision, impedricia y otros analogos de los que se derive la culpa, y al no darse en el presente caso aquel requisito ni estos elementos, pues se trata de un aborto deloso y delunas lesiones consecuencia del mismo, no es posible aplicar el articula 565.[85]

Unlawful arrest. There is unlawful arrest, when any person, in any case other than that authorized by law, or without reasonable ground therefor, arrests or detains another for the purpose of delivering him to the proper authorities.[86]

It should be noted that an essential element is that the arrest or detention is not authorized by law or without reasonable ground therefor. But to have no such reasonable ground for the arrest or detention may be due precisely to imprudence. The accused is responsible for results which an ordinary man might have foreseen and for acts which are performed through culpable abandon.[87]

In the case of *People v. Fandiño*[88] the Supreme Court intimated that one should use discretion and caution in effecting arrest, for if one intentionally uses more force than is reasonably proper in making an arrest he commits virtually an act of oppression. While the accused in that case was an officer of the law, yet the principle cited is applicable even if the culprit is a private individual, for the crime committed is of identical nature.

The theory just proposed seems to be shaken by the opinion of Spanish authorities that malice is essential in the crime of illegal detention and that good faith excludes the crime, e.g., there is no illegal detention when a person locks up a house not knowing that someone is in the house.[89] Under such opinions, one can say that it is not possible to commit through reckless imprudence the crimes of illegal detention under article 267 and 268 of the Revised Penal Code.

These opinions can be applied even in arbitrary arrest, since it is but a species of illegal detention, as shown by the fact that it is included in the enumeration of the crimes of illegal detention. However, a distinction seems to be possible in the case of arbitrary arrest under article 269: one commits arbitrary arrest through reckless imprudence when he negligently believes that the arrest he has made is permitted by law. In any other case, negligence should not result in arbitrary arrest. This distinction seems to be in line with the doctrine of the cited case of *People v. Fandiño, supra.*

[85] 2 RODRIGUEZ NAVARRO, DOCTRINA PENAL DEL TRIBUNAL SUPREMO (1947 ed.).
[86] Art. 269 REVISED PENAL CODE.
[87] People v. Maleza, 14 Phil. 468 (1909).
[88] 39 O.G. 25 (1939). The Court of Appeals supports the theory of the high tribunal in *People v. Misa,* (CA) 36 O.G. 3496 (1935).
[89] 2 PUIG PENA 390; 2 CUELLO CALON 647.

The weakness of the distinction is that there seems to be no reason for it; it seems better to say definitely that reckless imprudence can result in arbitrary arrest or that it cannot. To extend the rather dubious doctrine of *People v. Fandiño* to its farthest limit, would be to override the explicit opinions of the Spanish authorities, that illegal deprivation of another's liberty can be committed through malice or reckless imprudence.

Abandonment of persons in danger and abandonment of one's own victim. Under this act, the penalty of *arresto mayor* shall be imposed upon:

1. Anyone who shall fail to render assistance to any person whom he shall find in an uninhabited place wounded or in danger of dying, when he can render such assistance without detriment to himself, unless such omission shall constitute a more serious offense;

2. Anyone who shall fail to help to render assistance to another whom he has accidentally wounded or injured;

3. Anyone who, having found an abandoned child under seven years of age, shall fail to deliver said child to the authorities or to his family, or shall fail to take him to a safe place.[90]

According to Justice Albert, three things are made punishable by this article:

First. Failure to succor a person found injured or in peril of his life, in an uninhabited place, if the finder could do so without loss or risk to himself. Such a failure, on the finder's part, to do what he can to avert the danger threatening the sufferer, if it may be laid to wilfullness or malice, constitutes gross negligence punishable under article 365.

Second. Failure to succor a person whom one has accidentally hurt. In this, as in the former case, the offender evidences such a dangerous degree of indifference to human life, such reprehensible selfishness, in a word, such criminal meanness, as makes it imperative for society, in the interest of general security, to take him in hand.

Third. Failure to take a foundling under seven years of age to its parents, to the authorities, or to some place of safety. So long as these facts are established in court, it is immaterial that the finder did not know the child to be under the given age.[91]

Abandoning a minor. This crime is committed by a person who abandons a child under seven years of age, the custody of which is incumbent upon him.[92]

[90] Art. 275 REVISED PENAL CODE.
[91] ALBERT 608.
[92] Art. 276 REVISED PENAL CODE.

The abandonment of children cannot be punished as a crime against personal liberty, upon sound principle, since no human right related to liberty is thereby directly destroyed or lessened. One who abandons or forsakes a minor under seven years of age does not intend that his victim shall forfeit any of the conditions or rights inherent in the free exercise of human activity. What he contemplates is to free himself from the duty of caring for the minor, by taking the risk and responsibility of the minor's losing life or health because of its tender age and consequent inability to take care of itself. *What is ignored and violated is the child's right to life, and the corresponding duty to take care of it.* Where the abandonment is committed in order that the offender may evade the duty of caring for a child or disabled person, imposed upon him by conscience, morality, and law, *it is the right to life that is violated, and the crime of abandonment must be* included among the attempts against life.[93]

It should be noted that the object of the law is the protection of the child's life; the jeopardy and danger to which the child is exposed being precisely the reason for the retribution. But such danger can be brought about not only by the wilfull act of abandonment by the offender but even by his imprudence. It would be incongrous to punish wilfull abandonment and to tolerate imprudence when both give rise to the same danger.

Indifference of parents. Penalty shall be imposed upon the parents who shall neglect their children by not giving them the education which their station in life require and financial condition permit.[94]

The words of the law are clear: negligence is an essential element of this crime.

Removal, sale, or pledge of mortgaged property. The crime is committed by:

1. Any person who shall knowingly remove any personal property mortgaged under the Chattel Mortgage Law to any province or city other than the one in which it was located at the time of the execution of the mortgage, without the written consent of the mortgagee or his executors, administrators or assigns;

2. Any mortgagor who shall sell or pledge personal property already pledged, or any part thereof, under the terms of the Chattel Mortgage Law, without the consent of the mortgagee written on the back of the mortgage and noted on the record thereof in the office of the register of deeds of the province where such property is located.[95]

[93] ALBERT 610.
[94] Art. 277 REVISED PENAL CODE.
[95] Art. 319 REVISED PENAL CODE.

The object of the code is not merely to protect the mortgagee in particular cases in which criminal actions are instituted and to secure the payment of the mortgage indebtedness in such cases — although they may, and should have in effect in many instances — but also to give the necessary sanction to the provision of the statute in the interest of the public at large so that in all cases wherein loans are made and secured under the terms of the statute the mortgage debtor may be deterred from the violation of its provision and the mortgage creditors may be protected against loans or inconvenience resulting from their wrongful removal or sale of the mortgaged property.[96]

The purpose of the law being such, the prejudice, that the law abhors, can result from the negligence of the criminal in failing to secure the proper consent of the mortgagee or pledgee just as much as from his malicious intent to defraud people.

In two cases, moreover, the law was considered violated by the mere fact that there was no proper consent from the mortgagee, though (and this seems to be the implication of the ruling) there was no fraudulent intent on the part of the mortgagor. In these two cases, the Supreme Court ruled that the crime was perpetrated by the mere fact that the vendor faild to secure the proper consent of the mortgagee even though the vendor had informed the purchaser that the thing sold was mortgaged[97] and even though the vendor subsequently paid the debt to the mortgagee.[98] Under this maxim the implication is clear, for the notice to the purchaser is indicative of the lack of intent to defraud him and the subsequent payment to the mortgagee can be considered as proof that no fraudulent conspiracy had been taken against the latter.

Fraudulent intent not being necessary, the crime may be committed through negligence.

Unjust vexation. The elements of grave coercion are: (1) That a person be prevented from doing something not prohibited by law, or that he be compelled to do something against his will whether just or unjust; (2) that in preventing or compelling the victim, some violence, force or intimidation be used; and (3) that he who prevents or compels another to do or not to do something has no right to do so.[99]

When the first and third elements above are present, but the second element (the use of violence or fear or intimidation upon the offended party in preventing or compelling him to do something against his will) is lacking, the crime is unjust vexation.[100]

[96] U.S. v. Kilayco, 32 Phil. 619 (1915).
[97] People v. Alvarez, 45 Phil. 472 (1923).
[98] U.S. v. Kilayco, 32 Phil. 618 (1915).
[99] People v. Picunada, 43 O.G. 2222 (1947).
[100] U.S. v. Tupular, 7 Phil. 8 (1906); People v. Sebastian, 40 O.G. 2498 (1940).

In the absence of the second element, it is possible that the vacuum created can be filled by negligence, simple but not reckless, of the offender. Professor Manuel O. Chan believes this crime can be committed through simple imprudence.

Arson. Arson, in general, is the destruction of property by fire.[101] The crime is composed of two elements: (1) the burning of the house or other thing; and (2) the criminal agency which caused it.[102]

In several cases, the Supreme Court has already held that this crime can be committed through imprudence, reckless or simple.[103] Thus, arson is committed through reckless imprudence when the defendant sets fire to the straw in his ricefield despite the high wind prevailing at the time, resulting in the spread of the fire to some cogon grass in the same field and to the house of another person.[104]

Substitution of one child for another. The Revised Penal Code penalizes any person who is guilty of substituting one child for another and any physician, surgeon, or public officer who, in violation of the duties of his profession or office, shall cooperate in the execution of this crime.[105]

It seems that this crime can be committed through imprudence, especially by a physician or surgeon or public officer, who negligently substitutes one child for another, in the course of his duties as such. The liability seems to be justified by the doctrine implied from *United States v. Pineda*,[106] and *People v. Castillo*[107] that such officers have duties to society, particularly to their clients, which can be violated through malice or imprudence.

Can this crime of substituting one child for another be committed through reckless imprudence by a third person other than the officers enumerated above?

Cuello Calon is explicit on this point:

> El elemento material de este delito esta integrado por el hecho de poner, colocar un niño en lugar de otro nacido de distinta madre, como cuando en cual de una criatura se pone un niño hijo de otra madre, pero el delito ademas de este puede revistir diversas modalidades de ejecucion . . . .
>
> El elemento psicologico del delito esta constituido por la voluntad de sustituir un niño por otro y por la conciencia de que tal sustitucion modificara su estado civil, mas no es preciso el animo especial de alterar este.

[101] 2 FRANCISCO 1230; See also arts. 320 to 324 and art. 326 REVISED PENAL CODE.
[102] People v. Ong Chiat Lay, 60 Phil. 788 (1934).
[103] U.S. v. Butardo, 11 Phil. 60 (1908); U.S. v. Zabala, 6 Phil. 431 (1906); U.S. v. Budiao, 4 Phil. 502 (1905); U.S. v. Jorilla, 1 Phil. 53 (1901).
[104] U.S. Apigo, 25 Phil. 631 (1913).
[105] Art. 437 REVISED PENAL CODE.
[106] 37 Phil. 457 (1918).
[107] (CA) 42 O.G. 1914 (1946).

> El delito se consuma en cuanto tiene lugar la sustitucion material del niño por otro. . . .[108]

Bigamy. There is bigamy when a person contracts a second or subsequent marriage before the former marriage has been legally dissolved, or before the absent spouse has been declared presumptively dead by means of a judgment rendered in the proper procedings.[109]

The crime of bigamy is composed of the following elements: (1) that there must be a valid existing marriage; (2) that the offender contracted a second or subsequent marriage; and (3) that such second or subsequent marriage was contracted before the former marriage has been legally dissolved, or before the absent spouse of the offender has been definitely declared presumptively dead.

The Supreme Court held:

> The diligence required at all times by the law of a person in his conduct, varies in degree according to the situation in which he finds himself and to the importance of the act he must perform. In a matter so important for the good order of society as the celebration of marriage, in which the consequences of an error are necessarily grave and transcendental, only the highest degree of diligence can satisfy the requirement of the law.[110]

It was no surprise therefore that in one case, the Supreme Court convicted an accused of bigamy through reckless imprudence.[111] The accused was found recklessly imprudent in contracting the second marriage, without making any attempt to ascertain for herself whether the information received by her mother-in-law as to the death of her first husband was to be relied upon. She failed to see or to communicate directly or in any way with the person who gave her mother-in-law this information. Moreover, she waited only less than two years after hearing of the death of her husband before contracting the second marriage.

Slight insult or defamation. Slight insult or defamation is a defamation not serious in nature and penalized as a light felony by *arresto menor* or a fine not exceeding ₱200.00.[112]

Where the offensive and scurrilous words are hurled in the heat of passion and without taking thought of the highly offensive character of the words used, the insult is not demed serious.[113] It seems, therefore, that this crime may be committed through simple negligence. The court in several cases seems to imply that the liability arises not so much from intent to injure but from lack of foresight that damage to another's reputa-

[108] 2 CUELLO CALON 624, 625.
[109] Art. 349 REVISED PENAL CODE.
[110] U.S. v. De los Reyes, 1 Phil. 375 (1902).
[111] U.S. v. Biasbas, 25 Phil. 71 (1913).
[112] Art. 358 REVISED PENAL CODE.
[113] U.S. v. Ganzon, 30 Phil. 1 (1915).

tion and honor would result from the words used, thus placing the situation within the area of criminal negligence.

In *People v. Doronila,*[114] the Court of Appeals held that words uttered in the heat of anger or when passions are running high, although they are clearly serious oral defamation under ordinary circumstances, constitute only slight oral defamation.

The reason for such a stand was thus clarified:

> . . . considering the fact that the defamation was committed in a political meeting on the eve of the election when everyone, especially those intensely interested in the result of the election, were excited, and when feelings were running high, when some people did not and could not think clearly and normally and did not weigh the effect of their utterances and had neither the time nor the mood for mature deliberation, the crime of the accused, is only slight defamation.

In Spanish jurisprudence, Cuello Calon has this to say:

> El elemento subjetivo esta integrado por el conocimiento de la inocencia del imputado, el culpable debe saber que el delito imputado no ha sido cometido por el defendido. Ademas debe concurrir voluntad conciente de realizar la falsa imputation. Surge aqui la cuestion de si en este delito debe concurrir un dolo especifico de perjudicar al calumniado; la jurisprudencia sentada es contradictoria, mientras un gran numero de fallos considera que en este delito, como en el de injurias, debe concurrir el animo de perjudicar al calumniado, sin embargo, en algunos fallos se ha sentado la doctrina opuesta, que no es menester la concurrencia de un delito especial, bastando la mere voluntariedad.
>
> No hay voluntad delictuosa y por tanto no hay delito cuando la falsa imputacion se hace de buena fe o en el cumplimiento de un deber o en el ejercicio legitimo de un oficio o cargo.[115]

Damage to property. The offense is committed when the imprudence or negligence of one results only in damage to the property of another.[116]

[114] 40 O.G. 231 (1939).
[115] 2 CUELLO CALON 585.
[116] Art. 365 REVISED PENAL CODE.

REFERENCE DIGEST

CONSTITUTIONAL LAW: RIGHT TO BAIL. Recent events, among them the Montano and Castelo cases, have brought to the forefront the question respecting the right of the accused to bail in capital offenses.

Dr. Jose M. Aruego, a delegate to the Constitutional Convention reviews the law and jurisprudence on the subject in an article in the F.E.U. Law Quarterly.

The present provision of the Constitution in Article III was taken from two provisions of the Jones Law. The provision as there found reads: That all persons shall before conviction be bailable by sufficient sureties except for capital offenses.

During the Constitutional Convention, delegate Encarnacion attempted to strike out the phrase "except for capital offenses" with a view to granting the right to bail to all individuals before conviction but his amendment was defeated. Delegate Francisco, however, secured the approval of the amendment "when evidence of guilt is strong."

Under the Constitution, all persons shall before conviction be bailable by sufficient sureties. Excepted are those charged with capital offenses when evidence of guilt is strong. The application of the constitutional provision presents several problems, some of which are the following which Dr. Aruego treats of in his article:

(1) At what stage may one in custody for a capital offense be entitled to demand bail?

(2) Upon whom is the burden of proving that the evidence of guilt is strong?

(3) What is the extent and character of the evidence that must be presented before a court to show that the evidence of guilt is strong?

(4) If the evidence of guilt is strong, may the accused before conviction be bailed nevertheless?

(5) May one convicted before the lower court be bailed?

It was held by our Supreme Court in the case of *Teehankee v. Rovira,* 75 Phil. 634, that the provision of the Constitution on bail refers to all persons, not only to persons against whom a complaint or information has already been formally filed, although of course, only those who have been