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A SURVEY OF CRIMINAL PROCEDURE IN SPAIN AND SOME COMPARISONS WITH CRIMINAL PROCEDURE IN THE UNITED STATES

DANIEL E. MURRAY*

INTRODUCTION

This article has been written to give the reader in the United States a rather detailed description of Spanish criminal procedure today, and to make some comparisons with criminal procedure in the United States, if one can ever compare one unified system with fifty-one different systems.

It may be generalized that in the United States and in England a layman may observe a series of criminal trials and quickly grasp that most of the procedural steps actually take place at the trial. The layman would overlook various pre-trial motions, for example, motions to quash the indictment or information and motions to suppress the use of certain evidence obtained as the result of an unlawful search and seizure. However, in the main, the layman would obtain a fairly accurate picture because most of the story of a criminal trial is unfolded step-by-step in one continuous drama. Miss Bedford's most recent best seller, *The Faces of Justice*,¹ well illustrates that a layman can graphically portray the drama of the English criminal trial court accurately. However, when one journeys to the Continent and attempts to describe the *Faces of Justice* by

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The author would like to express his appreciation to Dr. Antonio De Fortuny y Maynes, Barcelona, Spain, for placing his office at my disposal and for all of his generous and most patient instruction in the intricacies of Spanish procedure. The author would also like to express his appreciation to Dr. Maynes' associate, Dr. Valentin Molins, for his generous and patient assistance. Appreciation is also due Dr. Eduardo Le Riverend and Dr. Oscar Salas, formerly of the Havana Bar, for their constructive criticisms and suggestions. Any sins of omission or commission in this article are to be assessed against the author.

1. BEDFORD, *THE FACES OF JUSTICE* (1961). Miss Bedford stated that, "Contact with the law, intrinsically, is harsh enough and heaven knows that there are many ways of doing injustice. So I had and have no desire to visit the courts of countries behind the iron curtain, of Portugal or of Spain." *Id.* at 231. It is submitted that this damning without seeing is a bit unfair.

simply observing what transpires in the courtroom, it is similar to trying to describe an iceberg by limiting one's gaze to the part that is above the surface and ignoring the eight-ninths of the iceberg floating below the surface.

In Spain most of the procedural steps occur in advance of the trial (*juicio oral*). In effect there are two trials if one uses the word "trial" in a somewhat loose fashion. The first "trial" is a quasi-inquisitorial procedure known as the *sumario*, a summary or résumé of the facts and the law prepared by a judge of instruction who is in charge of the investigation. If this judge of instruction (who is a judge of the court of "first instance") believes that a crime has been committed and that the accused probably has committed it, he will dictate an "indicting" order declaring the accused a *procesado* (*auto de procesamiento*). This investigative stage may be completed within a few days or it may take many months to complete depending upon the nature and circumstances of the particular crime. After the accused has been declared a *procesado*, his attorney (*abogado*) will be able to request that additional investigative steps be taken by the judge of instruction. These investigative steps may result in the discovery of evidence which is favorable to the accused. At the conclusion of these additional investigative steps the case is ready for the trial proper (*juicio oral*) which may not take place for many weeks or months. The trial will be conducted before a court of "second instance"—the *audiencia*.

The *juicio oral* may be, and usually is, a somewhat brief affair because the interrogation of witnesses, examination of the facts, etc., have occurred in the *sumario*, and the witnesses at the trial merely confirm or deny what they have previously stated during the course of the *sumario*. The author does not mean to imply that the trial (*juicio oral*) is a perfunctory affair devoid of all drama and any right of cross-examination. On the contrary, the author has witnessed some fairly extensive cross-examinations of witnesses which would compare favorably with those found in any courtroom in the United States. But it must be stressed that the facts disclosed in the *sumario* have a great cumulative effect upon the fate of the accused because the

court will compare the testimony of a witness in court with what he stated during the investigation, and, as a result, a witness cannot deviate too much from his original declaration.

In making any comparison of two systems of criminal justice, one must attempt to divorce oneself from any pre-conceived notions that one system is better than another; this is a most difficult intellectual effort. The author believes that he has succeeded, at least to a limited degree, in freeing his mind of chauvinistic notions that the Anglo-American criminal system is necessarily the better system; in fact, the author believes that in some respects the Spanish system accords more protections to the accused than the Anglo-American systems. For example, an indigent defendant in a non-capital case in the United States has only recently been granted a constitutional right to have counsel appointed to defend him, while in Spain every indigent defendant is entitled, under the code enacted in 1882, to have a trial attorney (*abogado*) and a "solicitor" (*procurador*) appointed by the respective bar associations to defend him after he has been declared a *procesado*.² Further, most of the element of surprise witnesses or surprise testimony has been eliminated under the Spanish system; there is no real confusion or ignorance in the mind of the accused as to who will testify for the prosecution and what they will say in general. This latter condition is particularly inequitable in many jurisdictions in the United States. In addition, the fact finding process is under the jurisdiction of a judge, and there seems to be great effort devoted to a painstaking development of the facts. Finally, as a result of the *sumario* a judge may declare (*auto de sobreseimiento*) that there are insufficient facts to indicate that the accused should be "indicted" (*procesado*), there are no comparable safeguards in the United States intervening between an accused and an over-zealous prosecutor. Of course, there are other dissimilar-

2. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Compare the limited protections articulated in *Hamilton v. Alabama*, 368 U.S. 52 (1961) and *Carnley v. Cochran*, 369 U.S. 506 (1962) with the SPANISH LAW OF CIVIL PROCEDURE art. 118-140. Under art. 334 the judge instructor is obligated to order that an indicted minor (*procesado*) shall be "equipped" with a *procurador* and an *abogado* if the minor's legal representative shall fail to appoint them.

ities in the two systems which will be discussed under the various subdivisions of this article.

Because we are dealing with an entirely strange system of legal procedure, the author has considered it advisable to use a chart comparing the steps in the United States (under very brief subject headings) with the Spanish steps next to them. It is hoped that this skeleton chart will aid the reader as the remainder of this article attempts to put flesh upon its bones.

COMPARATIVE PROCEDURE CHART

I. THE INVESTIGATION

America	Spain
<u>Prosecution File—Not Admissible</u>	<u>Sumario—Admissible Per Se</u>
The Complaint	
Private Denuciation.....	<i>Denuncia</i>
Private Complaint.....	<i>Querella</i>
Police Investigation.....	<i>Policia Judicial</i>
Search and Seizure.....	<i>Entrada y registro en lugar cerrado</i>
The Summons.....	<i>Citación</i>
The Arrest.....	<i>Detencion</i>
Temporary Imprisonment.....	<i>Prision Provisional</i>
Temporary Freedom.....	<i>Libertad Provisional</i>
Bail.....	<i>Fianza y Embargos</i>
(No comparable step).....	<i>Instrucion y Formacion del Sumario ("Instruction" and formation of the Sumario)</i>
Investigation: Confirmation of the Crime and Investigation of the Alleged Criminal.....	<i>Comprobacion y Averiguación</i>
Visual Inspection of the Scene.....	<i>Inspeccion Ocular</i>
The Corpus Delicti.....	<i>Cuerpo del Delito</i>

Identity of the Alleged Criminal and his Background.....	<i>De la Identidad del Delincuente y sus Cir- cunstancias personales</i>
Confessions and Statements of the Accused.....	<i>De las Declaraciones del Procesado</i>
Statements by Witnesses.....	<i>Declaraciones de los Téstigos</i>
Confrontation of Accusers and the Accused.....	<i>Del Careo de los Téstigos y el Procesado</i>
Reports of Experts.....	<i>Del Informe Pericial</i>
Recusation of Experts.....	<i>Recusacion de los Peritos</i>
Conclusion of the Investigation.....	<i>Conclusion del Sumario</i>
(No comparable step).....	<i>Recurso de Reforma, etc. (Motions and Appeals from Rulings of Investigating Judge)</i>
The Indictment.....	<i>Procesamiento</i>
(No comparable step).....	<i>Sobreseimiento (full or partial exoneration in advance of the trial itself)</i>

II. THE TRIAL

(No comparable step).....	<i>Calificacion del Delito (Contentions by all parties as to what facts and law are involved and what crime has or has not been committed and the civil respon- sibilities involved)</i>
Trial in the Courtroom.....	<i>Juicio Oral</i>
The Taking of Evidence During the Trial.....	<i>Del Modo de Practicar Las Pruebas Durante el Juicio Oral</i>

Confessions (Arraignment).....	<i>Confesión del Procesado</i>
Examination of Witnesses.....	<i>Examen de los Testigos</i>
Presentation of Expert Testimony.....	<i>Del Informe Pericial</i>
Documentary Evidence.....	<i>Prueba Documental</i>
Inspection of the Scene.....	<i>Inspeccion Ocular</i>
Prosecutor's Summation.....	<i>Acusacion</i>
Defense Argument.....	<i>Defensa</i>
Sentencing.....	<i>La Sentencia</i>

I. THE INVESTIGATION THE SUMARIO

INTRODUCTORY NOTE

In the United States all of the evidence of a crime which has been collected by the police will be held by them until it is presented to the proper prosecuting official for his examination. If the prosecutor believes that the police have accumulated enough evidence to convict someone of a crime, he will file an information or present the material to a grand jury for an indictment. In the majority of United States jurisdictions there is little, if any, judicial control of the police and the prosecuting attorney until after the information has been filed or the grand jury has returned an indictment. The only real record of the investigation is an office file in the hands of the prosecution. As a general rule, this file is secret, and there will be no way for the accused to know what the prosecutor has in his "bag of tricks" until it is suddenly opened in court. Of course, some states have statutes which grant an accused limited rights of discovery, but these rights are so hedged by restrictions that they seem more apparent than real.³ There seems to be little popular outcry about this system in the United States while at the same time many lawyers in the United States will decry the Spanish counterpart of this system as smacking of the Inquisition or say that it is a relic from the Middle Ages.

In truth, the Spanish system of pre-trial investigation

3. See generally, 6 WIGMORE, EVIDENCE §§ 1851-1855a (3rd ed. 1940, Supp. 1962) 2 UNDERHILL, CRIMINAL EVIDENCE § 501a (Supp. 1962), *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1051-1063 (1961).

has all of the advantages of the system of investigation in the United States without many of its disadvantages. The Spanish record of the pre-trial investigation is known as the *sumario*—the summary or résumé of the facts. It is a complete written record of everything that has transpired from the time that a criminal complaint has been made until the accused is remanded for trial. The *sumario*, like its counterpart in the United States, is secret and no part of it (except in three cases which will be mentioned later) can be disclosed to the accused prior to the time that he has been declared a *procesado*—an indicted person. But, this disclosure is made long in advance of the trial itself, enabling the *abogado* (trial attorney) of the *procesado* to prepare his case because he will know who will testify, what will be said in general and what law will be relied upon by the prosecution. In brief, most of the element of surprise is eliminated. In addition, the *abogado* for the *procesado* will be able to have further investigative steps taken which may result in evidence favorable to the *procesado*.

In addition to the foregoing advantages, the *sumario* is directly supervised by a judge of instruction and not the police. This judge is obliged to undertake *diligencias* (in the sense of actions or steps)⁴ of investigation in order to ascertain the truth, whether it is favorable to the prosecution or the defense; this judge is under the control of the trial court which may order him to undertake additional *diligencias*. In the United States the search for the whole truth depends upon the collective conscience of the police and the prosecutor, which creates a somewhat unhappy situation.

Of course, with Spain's advantages go disadvantages, and the main one is that the *sumario* itself is presented to the court which tries the accused. Since the *sumario* contains all of the statements (*declaraciones*) of those persons who will testify at the trial and since their statements usually were taken out of the presence of the *procesado*, he has been denied any right of cross-examination. How-

4. *Diligencia* is a word with many meanings, e.g., diligence, care, industry, speed, business, errand, etc. In law it includes steps and actions taken in litigation (both civil and criminal) as well as a written report of what happened during the steps or actions.

ever, a right of cross-examination is given to him at the trial (*juicio oral*) when the person who made a declaration at the *sumario* stage repeats his testimony in court. The author has observed some examples of cross-examination in Spanish trials that would do credit to courtrooms in the United States.

The following sections are designed to trace the step-by-step preparation of the *sumario* and then its final disposition when it reaches the full disclosure (*plenario*) or trial stage (*juicio oral*)

The author does not mean to imply that every step discussed hereafter will be taken in the preparation of the *sumario* of each case. Some of the steps will not be necessary because of the nature of a particular crime. For example, if the suspect is apprehended by the police in the act of stabbing a man to death, it will not require each step mentioned hereafter. On the other hand, if the crime involves a complicated series of embezzlements, it may require many investigative steps. In partial recognition of this fact, the Spanish Code of Criminal Procedure was amended in 1957 to provide for the "urgent" preparation of *sumarios* dealing with persons charged with improper driving or being to blame for motor vehicle accidents, those caught in the act of committing a crime or caught immediately after committing it, or caught immediately afterwards with the effects or instruments of a crime. In general, it may be said that these amendments merely shortened the usual time necessary in the preparation of the *sumario* by abbreviating some of the *diligencias*.⁵ These amendments were needed, in part, because of the volume of automobile accident cases flooding the courts; Spain has one of the highest automobile accident rates in the world. On the other hand, it is believed that Spain has a much lower crime rate than most western countries. The author postulates that Miami, Florida, has more crimes of violence (e.g., murder, rape, and robbery) each year than all of Spain. The majority of crimes prosecuted in Spanish criminal courts involve petty thefts

5. LEY DE ENJUICIAMIENTO CRIMINAL, arts. 779-803 (1960). All citations hereafter will refer to the particular articles of the LEY DE ENJUICIAMIENTO CRIMINAL unless otherwise noted. All of the articles cited have been taken from AGUILAR, LEY DE ENJUICIAMIENTO CRIMINAL (1960).

and automobile accidents; murder cases are relatively rare.⁶

In spite of the relative rarity of the more serious crimes in Spain, the author believes that the more complicated procedure required in these crimes must be discussed in order to make any meaningful comparisons with American criminal procedure.

DENUNCIATION, COMPLAINT AND THE POLICE (*denuncia*, *querrela* and the *policia*)

Criminal proceedings in most countries must begin in one of (or a combination of) three ways: (1) the denuncia by someone who has knowledge of the commission of a crime; or (2) a complaint brought by the victim or some member of his family; or (3) the activities of the police. These three methods are known in Spain as the *denuncia*, *querrela* and *la policia judicial*.

THE DENUNCIATION (*denuncia*) The law requires every person who was present during the perpetration of any crime immediately to inform a judge of instruction, justice of the peace, municipal or district judge, or prosecuting official, of the commission of the crime.⁷ Children who have not reached puberty and persons lacking the use of reason are exempted from this obligation.⁸ Also exempted are the wife or husband of the wrongdoer; the ascendants and descendants by consanguinity or affinity of the wrongdoer; his collateral relatives by consanguinity or uterine and affinity until the second degree; natural (illegitimate) children of the mother in all cases and with respect to the father when he has recognized them, as well as the mother and the father in both cases.⁹

Trial attorneys (*abogados*) and "solicitors" (*procuradores*) are not obligated to denounce when they have learned of a crime from their clients, a rule similar to the United States view. Also exempted are priests of the Catholic faith and ministers of other religions with respect

6. In 1961 there were 131,628 criminal cases in all Spain. Of this number, 28,859 were for traffic violations and 24,211 cases involved crimes against persons, which includes everything from the most simple assault to murder. Spain has a present population of approximately thirty-one million people and the 1961 coefficient of crime is 428.6 per 100,000 persons. 210 *Boletín de Estadística* 42 (June, 1962). At the present time there are only 14,700 prisoners in the Spanish prisons. *Diario de Barcelona*, August 18, 1962, p. 16.

7. Art. 259.

8. Art. 260.

9. Art. 261.

to information which has been revealed to them in the exercise of the functions of their ministry¹⁰

The denouncer is not obligated to prove his accusation, but he may incur criminal responsibility for crimes committed in making an unfounded accusation.¹¹ For example, a false accusation of a crime would itself be the crime of *calumnia*.¹² The denunciation may be made orally or in writing, but it must eventually be reduced to writing and signed by the denouncer and the official who received it.¹³ As soon as this has been done, the official who received the denunciation is obligated to make a confirmation of the facts, unless they do not indicate that a crime has been committed, or the allegations are manifestly false.¹⁴

THE PRIVATE COMPLAINT (*querella*) The *querella* is actually a formal and solemn accusation of the commission of a crime, made usually by the victim or his lawful representative. It is designed primarily to introduce into a criminal case the rights of the victim for such remedies as damages for injuries, damage to property or restitution of movables.¹⁵ In brief, the Spanish are able to settle the criminal and civil responsibilities of the wrongdoer in one action, while it usually takes two actions to accomplish the same thing in the United States.

All Spaniards, whether they have been injured by a crime or not, may file a *querella*. Also, all foreigners may file a *querella* for wrongs committed against their persons or goods or the persons or goods of those they represent.¹⁶ However, foreign *querellantes* (complaining parties) must deposit a *fianza* (bond) of a class and in the quantity fixed by the judge or tribunal in order to be responsible for the final results of the trial, unless by virtue of international treaties or by the principle of reciprocity a Spaniard would not have to post a *fianza* in the country of the foreigner in question.¹⁷ In addition, officials of the

10. Art. 263.

11. Art. 264.

12. Código PENAL arts. 453-456.

13. Arts. 265-267.

14. Art. 269.

15. Arts. 100-117, 270-277. For the substantive law see the Código PENAL arts. 101-111.

16. Art. 270.

17. Arts. 280-281.

Fiscal Ministry (*Ministerio fiscal*) are also obligated to file a *querella* in certain cases.¹⁸

The *querella* shall be interposed before a competent judge of instruction.¹⁹ The *querella* shall always be presented by a *procurador* ("solicitor") with enough power to act for his client and endorsed by a *letrado* (*abogado*). It must be prepared on official paper, and it shall state: (1) the judge or tribunal before whom it is being presented; (2) the name, surnames and neighborhood (*vecindad*) of the *querellante*; (3) the name, surnames and neighborhood (*vecindad*) of the accused (*querellado*). If the complaining party is ignorant of the latter details, the accused ought to be identified as well as possible. In addition, the *querella* is to state the relevant facts, including the place, the date and hour when the facts occurred, if they are known. It ought also to express the *diligencias* (in the sense of investigative steps or actions) which ought to be practiced for the confirmation of the facts. Finally, the *querella* shall petition for the admission of the *querella*; the practice of the *diligencias* previously indicated; the detention (arrest) and imprisonment of the one presumed culpable, or his release (*libertad provisional*) upon the delivery of a *fianza* (bail bond), and the *embargo* (attachment) of his goods in the amount necessary.²⁰

If the *querella* is for a crime which may only be prosecuted at the instance of the party wronged,²¹ the *querella* must be accompanied by a certificate which shows that the complaining party (*querellante*) and the accused (*querellado*) have performed or intend to perform an act of conciliation. The crimes of forcible rape and abduction of a female (for sexual purposes) are excepted from this requirement.²² This latter provision is consistent with the Spanish Code of Civil Procedure,²³ which provides that most civil actions cannot

18. Arts. 271, 105.

19. Art. 272.

20. Art. 277.

21. These crimes are: sexual assault less than rape, *los abusos deshonestos*—Código PENAL art. 430 "statutory rape" *del estupro y de la corrupción de menores*—Código PENAL arts. 434-439 notorious adultery of the husband and simple adultery of the wife, *adulterio*—Código PENAL arts. 449-452 false accusation of a crime, *calumnia*—Código PENAL arts. 453-456 false accusation of a "misdemeanor" or lack of morality, *injurias*, etc.—Código PENAL arts. 457-461 abduction of a female for sexual purposes, *raptó*—Código PENAL arts. 440-442, forcible rape, *violación*—Código PENAL art. 429.

22. Art. 278.

23. LEY DE ENJUICIAMIENTO CIVIL arts. 460-480. See 2 Medina y Marañón, *Leyes Civiles de España*, pp. 156-160.

be instituted until the parties have appeared before a municipal or district judge along with two good men (*hombres buenos*) in an attempt to have the parties settle their differences. This requirement would appear to be a splendid concept theoretically, but in practice the parties treat it as an arid formality without any real effort to settle the case.

THE POLICE (*La policia judicial*) —As soon as the police have knowledge of a public crime or have been required to prepare investigative steps (*la instruccion de diligencias*) because of some private wrong, they shall notify the judicial authority or the representative of the office of prosecution (*munisterio fiscal*)²⁴ The police are then required to practice without delay the investigative actions (*diligencias*) which the prosecuting officials (*munisterio fiscal*) have commanded for the confirmation of the wrong, the discovery of the wrongdoer and other similar actions ordered by the judges of instruction (*jueces de instruccion*) or the judges of the municipality²⁵

The *fiscal* (prosecutor), the judges of instruction and judges of the municipalities may deal directly with the police.²⁶ The police are charged with the duty of recording an attestation of the *diligencias* which have been practiced, in which shall be specified with the greatest exactitude: the facts discovered by them, the declarations (statements) and information received and all of the circumstances which they have observed which may be proof or *indicia* of a crime.²⁷ This report shall be signed by those who have prepared it. Experts and witnesses who have intervened in the *diligencias* are "invited to sign" the statements they have given, and if they refuse to do so, the reasons shall be recorded.²⁸ The law provides that in no case, except for the most powerful reason (*fuera mayor*), shall the police allow more than twenty-four hours to elapse without giving knowledge to the judicial authority or to the *fiscal* (prosecutor) of the *diligencias* which have been practiced.²⁹

24. Art. 284.
25. Art. 287.
26. Art. 288.
27. Art. 292.
28. Art. 293.
29. Art. 295.

Unfortunately, the Spanish police (like their counterparts in the United States) often ignore the law, and they will conduct an investigation for more than twenty-four hours before informing the proper authorities. This investigation will include the securing of declarations (statements) from the accused, who has had no opportunity to retain an attorney to represent him.

The attestations which have been drawn up and the manifestations which have been made by the police, as a consequence of the investigations which they have made, are considered as *denuncias* in terms of legal effect.³⁰ The declarations of persons interrogated ought to be signed and they shall have the worth or value of declarations by witnesses. In all cases, the police are obligated to observe strictly the legal formalities in all *diligencias* practiced, and to abstain from using means of investigation which the law does not authorize.³¹

However, Spanish police, like police the world over, are often inclined to beat a prisoner with their fists or open hands in order to induce him to confess. Often an arrested suspect will confess all the thefts or other crimes committed in the vicinity during a period of months in order to avoid harsh treatment by the police. Fortunately, the Spanish judge of instruction is a realist and well aware of this police conduct. As a result, he will usually pay little, if any, serious attention to the alleged confessions; the crime must be proved by other means.

SEARCH AND SEIZURE (*Entrada y registro en lugar cerrado*) Basically, the Spanish provisions dealing with search and seizure in private dwellings are not too different from Anglo-American concepts. The phrasing and procedural steps may differ, but the results are startlingly similar. No one may enter the domicile of a Spaniard or a foreigner residing in Spain without his consent, except in the cases and in the form expressly provided in the laws.³²

The judge or the tribunal which has jurisdiction

30. Art. 297.

31. Art. 297.

32. Art. 545.

(*conocier*—literally, that knows of or takes care of the case) may order the entry and search, by day or night, of all public buildings and places when there have been indications that the *procesado*, or the effects or instruments of a crime, or books, papers and other objects which may serve for the discovery and proof of the crime may be found there.³³ Likewise, the judge may order, in the cases indicated in the preceding sentence, the entry and search of a private domicile if the interested party consents or by virtue of a *mandamiento* (the *mandamiento* is equivalent to a search warrant and it can be issued only by virtue of an order - *auto*) The order (*auto*) authorizing the search shall be communicated to him immediately or not later than twenty-four hours after it has been signed.³⁴ The court official making the search is required to avoid a useless inspection and to avoid "harming and pestering" the interested persons more than is necessary. Further, the searcher is enjoined from endangering the interested party's reputation respecting his secrets if they are not relevant to the instruction contained in the order (*auto*) authorizing the entry and search.³⁵

The Spanish law also recognizes a right to enter without a court order when the police are in "hot pursuit" of a wrongdoer. The police may proceed to search an inhabited place when there has been an imprisonment order entered against a person and they are trying to effect his capture, or when an individual has been surprised in *flagrante delicto*, or when a delinquent (not the American juvenile variety) hides himself or takes refuge in some house when he has been "immediately pursued" by the police.³⁶

Taverns, restaurants, boardinghouses and inns are not considered as the domicile of those who are encountered there accidentally or who reside there temporarily. Those portions of the above establishments which are occupied as the domicile of the owner and his family will be considered as their domicile for the purposes of entry and search.³⁷ The order (*auto*) authorizing the entry and search of a domicile

33. Art. 546.

34. Art. 550.

35. Art. 552.

36. Art. 553.

37. Art. 557.

must always be well founded, and the judge shall express "concretely" the building or closed place which is to be inspected, that the inspection is to take place only during the daytime, and the authority or officer who is to make the inspection.³⁸ When the entry and search are to be made in the domicile of a particular person, he is to be notified of the order (*auto*) which authorized the entry, and if he was not present at the first *diligencia* (in this case the act of attempting to serve notice upon the domiciliary), the notice is to be given to the person in charge of the domicile. If no one is in charge, the notice is to be given to any other adult person found in the domicile, preferably a member of the family of the interested party. In the absence of any of the foregoing, the *diligencia* (in the sense of service of notice) shall be performed in the presence of two neighbors, and a written record of the *diligencia* shall be prepared and signed by the neighbors.³⁹

From the moment that the judge has ordered the entry and search, he is to adopt vigilant means to prevent the flight of the *procesado*, or the removal of the instruments, effects of the crime, books, papers, or any other things which may be the object of the search.⁴⁰ This is usually done by posting a policeman at the door of the house.

The search itself is to be made in the presence of the interested party, or his legal representative, or, in their absence, an adult member of his family, or in their absence, in the presence of two neighbors. In addition to the foregoing persons, the search is to be conducted in the presence of the Secretary of the Judge of Instruction and two additional witnesses who are to sign their names to a written record of what has occurred during the search.⁴¹

From the complexity of the foregoing process it can readily be observed that the Spanish do not treat the entry and search of a home as a trifling thing. Unless the original order authorizing the entry and search provided for it to continue during the night,⁴² the search must be suspended

38. Art. 558.

39. Art. 566.

40. Art. 567.

41. Art. 569.

42. Art. 550.

at the end of the day unless the interested person gives his consent for its continuation during the night. If consent is not given for the search to continue during the night, the Secretary is then charged with the responsibility of closing and sealing the place or the movables, and taking as many precautions as he considers necessary to prevent the flight of the person or the removal of the things which are being searched.⁴³ It is interesting to note that Spanish law does not permit the search of a private home to commence during the night.

In the *diligencia* of entry and search (in the sense of a written record of the entry and search) are to be expressed the name of the judge, or his delegate; what was done; the names of the persons who intervened; the incidents which occurred; the hour in which it was begun and concluded; the relationship of the search to the order by which it was made, as well as the results obtained.⁴⁴ The search of accounting records of the *procesado* or of other persons will not be ordered without grave indications resulting from the *diligencia* of the discovery or proof of some fact or circumstance important to the case.⁴⁵

The judge (*juez instructor*) is to collect the instruments and effects of the crime, and he may also collect any other things if they be necessary for the result of the *sumario*. All pages of all books and papers are to be numbered, sealed and signed by the judge, his secretary, by the interested person and by the other persons who have attended the search.⁴⁶ It will be observed that this process, although perhaps a bit cumbersome, is greatly conducive to the preservation of evidence collected as well as to the safe return of it to the accused if he is the lawful owner

The law authorizes the judge to conduct an examination by an expert to aid him in determining whether he should collect things which he has encountered as a result of his search.⁴⁷

43. Art. 570.

44. Art. 572.

45. Art. 573.

46. Art. 574.

47. Art. 577.

The judge of instruction is authorized to order the detention of private correspondence, both postal and telegraphic, which is in the process of being sent or received, and he has the right to open and examine it if he has indications of obtaining by this means the discovery or the proof of any important fact or circumstance in the case.⁴⁸ The interested party is to be cited before the correspondence is opened and read, and he is to be given an opportunity to be present at this examination;⁴⁹ however, if he does not wish to be present in person or through an authorized representative, the opening and reading may be performed.⁵⁰ The judge may then take necessary notes of the contents, and he is then obliged to have the correspondence signed by all those attending the examination and to seal it in an envelope. The judge is charged with the responsibility of preserving the contents, and he may open the sealed envelope as often as he considers it necessary; however, the interested person must be cited before each opening.⁵¹ Any correspondence which is not relevant to the crime is to be returned to the *procesado* or to a member of his family if he be in default.⁵² Finally, the act of opening of the correspondence will be recorded by a *diligencia* which shall record all that has occurred, and, again, this *diligencia* must be signed by the judge of instruction, his Secretary and the other persons attending.⁵³

It is believed that this résumé of the Spanish laws dealing with search and seizure well illustrates that the Spaniards, like the Anglo-Americans, believe that every man's house is his castle. In fact the Spaniard's castle seems better constructed than the castle of the Anglo-American. The author does not know of any law in the United States which places the examination of a man's home under the direct, personal supervision of a judicial officer and his secretary. Nor does Anglo-American law provide in such detail for a written record of everything that transpires during the search and seizure; any written memoranda are usually the result

48. Art. 579.
49. Art. 584.
50. Art. 585.
51. Art. 586.
52. Art. 587.
53. Art. 588.

of efficient detective forces rather than as a result of legal compulsion. Further, the necessity of two neighbors being present at the time of the search would seem to give additional safeguards not afforded by the American law. The author may add that the foregoing provisions are not just empty words, but are followed strictly by the judicial authorities.

THE SUMMONS: (*la citación*)

When a crime has been imputed against a person he ought to be summoned only to be heard by the judge of instruction "unless the law provides to the contrary or that immediately proceeds to his arrest."⁵⁴ For example, if the crime of theft has been imputed against a man the judge will then summon him to declare about his "side of the case." If there is serious doubt in the mind of the judge about the man's guilt, he will not confine the man to jail. Conversely, if after hearing from the man and the police the judge believes that a crime has been committed and that this man is probably guilty, he will issue an order (*auto de procesamiento*) declaring him a *procesado* and he will be remanded to jail or released on bond in an appropriate case. The main concept behind this provision is that a person ought to have a hearing *before* he is remanded to jail. If the person summoned fails to appear and does not justify his absence, the order to appear may be converted into an order of arrest.⁵⁵ During the instruction period of the case, the judge instructor may order as many persons to appear as he thinks it is proper to hear because "some established indications of culpability" have arisen against them, i.e., the judge may summon all persons who may appear to be involved in a crime to give their version of the facts.⁵⁶

THE ARREST (*la detención*)

Neither Spaniards nor foreigners may be arrested except in the cases and in the form which the law prescribes.⁵⁷ Any person may arrest another:

- (1) who attempts to commit a crime, if he is appre-

54. Art. 486.

55. Art. 487.

56. Art. 488.

57. Art. 489.

- hended "in the moment" of going to commit it; or
- (2) who is apprehended in the act of committing a crime (*in flagrante*), or
 - (3) who is fleeing from a prison to which he has been sentenced; or
 - (4) who is fleeing from a jail in which he was awaiting his transfer to a prison or place for the completion of his sentence; or
 - (5) who is fleeing while being conducted to the prison or place mentioned in number 4, or
 - (6) who flees while being arrested or imprisoned for a pending case; or
 - (7) who is a *procesado* or a condemned person who is in defiance or default.⁵⁸

A private person who has arrested another will be justified when he has done so "by virtue of sufficient rational reasons to believe" that the one arrested has done something comprised in one of the cases of the preceding paragraph.⁵⁹ The police are obliged to arrest:

- (1) any one included in the cases mentioned in the preceding paragraph; or
- (2) any one who has been declared a *procesado* for a crime which has been designated in the Code for a penalty greater than imprisonment in the correctional prison (i.e., a sentence for more than six months and a day), or
- (3) the *procesado* of a crime for which has been fixed a lesser penalty if his antecedents or the factual circumstances make it presumptive that he will not appear when he is summoned. (For instance, a person who has been declared a *procesado* and then given provisional liberty will usually be ordered to appear in court on the first and fifteenth day of each month until the time of his trial. If he fails to appear on the appointed dates, or changes his domicile or attempts to flee this will create a presumption that he will not appear when he is summoned

58. Art. 490.

for the trial which will justify his immediate arrest.) However, an exception will be made when the *procesado* deposits enough *fianza* (bail) in the judgment of the authority or agent who intends to detain him, to create a rational presumption that he will appear when he is summoned by the competent judge or court;

- (4) the provisions of the preceding sub-section 3 will apply, even when no one has been found a *procesado* when both of the following circumstances occur: (a) The arresting authority or agent has enough rational reasons to believe in the existence of a fact which presents the character of a crime and (b) when he also has enough reasons to believe that the person he intends to detain has participated in the crime.⁶⁰

Any person making an arrest is obliged to free the arrested person or present him before a judge within twenty-four hours following the act of arrest.⁶¹ As mentioned previously, in practice this rule is often violated by the police.⁶² Ordinarily, the judge shall remand the arrested person to prison or free him without effect within seventy-two hours from the time the prisoner was presented before him.⁶³ Of course, if the arrested person has already been condemned, he will be remanded to the prison or place from which he escaped in order to complete his sentence.⁶⁴ The *auto* (court order) remanding the prisoner to prison or releasing him without effect shall be communicated to the prosecutor (*fiscal*), to any *querellante* (a complaining party who is, ordinarily, asking for damages), and to the *procesado*.⁶⁵

TEMPORARY IMPRISONMENT (*prisión provisional*)

In order to decree that a person be committed to prison during the course of the investigation, the following circumstances will be necessary:⁶⁶

- (1) it is evident that a crime has been committed;

59. Art. 491.

60. Art. 492.

61. Art. 496.

62. See *supra* note 29.

63. Arts. 497-499.

64. Art. 500.

65. Art. 501.

66. Art. 503.

- (2) the penalty for this crime is deportation or imprisonment for more than six years. However, even when the crime has a lesser penalty the judge may consider provisional imprisonment necessary on account of the factual circumstances and the antecedents of the *procesado* until he deposits the *fianza* (bail) which has been fixed;
- (3) when it appears from the record that there are sufficient reasons to indicate that this person is criminally responsible;
- (4) when the cause is based upon a crime contrary to the internal security of the state regardless of the penalty designated for the crime and while a disturbed situation has not been completely normalized. However, in no case may this detention exceed the duration of the penalty provided for the crime itself. In all cases provisional imprisonment will be decreed when the crime is against the Chief of State, the Counsel of Ministers or its members and the form of the Government, or if it consists of non-peaceful meetings or manifestations or in the fulfillment of illegal propaganda.⁶⁷

Temporary imprisonment will be ordered when it is evident a crime has been committed by the *procesado*, and he has failed to appear without legitimate reason to the first summoning of the judge or court.⁶⁸ There is a qualification to the rules articulated in the preceding paragraph even though the crime may be punished by a penalty greater than imprisonment in the correctional prison. This is that the judge or court may accord liberty upon bial to a *procesado* who has good antecedents or when the judge or court believes that the *procesado* will not attempt to avoid or evade the action and when moreover the crime has not produced alarm nor is it of the kind which has been committed frequently in the territory of the province.⁶⁹ As a practical matter, the courts seldom grant provisional liberty to a *procesado* accused of a crime of violence regardless of the amount of bail

67. Art. 503. In practice many persons accused of political crimes will be exiled (*confinamiento*) to the Canary Islands without any trial. Section 4 of this article was added in 1957.

68. Art. 504.

(*fianza*) that he may be able to deposit, because he is considered a "dangerous person."

TEMPORARY LIBERTY (*libertad provisional*) AND BAIL (*fianza*)

The last paragraph in the preceding section indicates that the Spanish law is zealous in protecting the liberty of most alleged wrongdoers until there has been a final determination of guilt. This theme is continued by a rule that the provisional (temporary) imprisonment should last only as long as the reasons which have occasioned it, and that all the authorities who intervene in a case are obliged to limit to the least possible degree the detention and provisional imprisonment of *inculpados* (those who have been accused of a crime by the police or victim, etc.) or *procesados*.⁷⁰

When a person has been declared a *procesado* for a crime whose maximum punishment does not exceed six years in prison or the penalty of guarded exile (*confinamiento*)⁷¹ or unguarded exile (*destierro*),⁷² and it is believed that he will appear in court in response to a summons, the judge or court shall decree whether or not the *procesado* has to give a bail (*fianza*) bond in order to continue in provisional liberty. In the same order (*auto*) decreeing the *fianza*, the judge shall fix the quantity and quality of what has to be deposited as the *fianza*.⁷³ Conversely, if the maximum punishment for a crime exceeds six years, the *procesado* may not be given provisional liberty no matter how much *fianza* he may be able to deposit.

When a driver of a motor vehicle has been declared a

69. Art. 504.

70. Art. 528.

71. The penalty of *confinamiento* means that a person is exiled to a village or district in Spain, or the Balearic or Canary Islands "in complete liberty under the vigilance of the authorities." This means that the person will have to make periodic reports to the authorities in order to insure that he is still in the place of exile. This is the "common" punishment for political prisoners. The term of exile may extend from six years and a day to twelve years. Código PENAL arts. 30, 37.

72. The penalty of *destierro* means that the person is not allowed to enter within a certain radius of a certain village or city. The radius will have a minimum of twenty-five kilometers and a maximum of two hundred fifty kilometers with the exact radius being fixed in the sentence for each case. The term may extend from six months and a day to six years. For example, if a husband in Barcelona should kill his wife while she is committing adultery, the common punishment is exile of the husband from Barcelona for six months and a day. He will be allowed to live and travel anywhere in Spain, but he will not be permitted to come within a radius of (let us say) fifty kilometers of Barcelona during the period of the sentence. Código PENAL arts. 30, 38.

73. Art. 529.

procesado because of a traffic violation, and if he has been given his provisional freedom, the judge may in his discretion deprive the driver of his driving permit pending the conclusion of the case.⁷⁴

The *procesado* who has been granted provisional liberty, with or without *fianza*, is legally considered to have incurred the obligation under oath (*apud acta*) to appear on the days fixed in the court order (*auto*) and moreover as many times thereafter as he is summoned before the judge or court.⁷⁵ In order to determine the quantity and quality of the *fianza* the judge shall take into account the nature of the crime, the social status and antecedents of the *procesado* and other circumstances which may influence the *procesado* to "place himself out of the reach of the court."⁷⁶ The *fianza* shall be employed to respond for the appearance of the *procesado* when he is summoned by the judge or court. It will also serve to satisfy the court costs incurred in preparing a separate record for the execution of the *fianza* (*ramo separado formado para su constitución* - literally a "separate branch"), and the rest shall be adjudicated to the State.⁷⁷

If the accused does not appear when summoned the first time, and he does not justify the impossibility of his appearing, the personal bondsman (*fiador personal*) or the owner of the goods given as a *fianza* will be given a ten day period in which to present the defaulter.⁷⁸ If the personal bondsman (*fiador personal*) or owner of the goods given in *fianza* does not present the accused within this ten day period, the *fianza* will be declared forfeited to the State less the costs caused in the court's separate record as aforesaid.⁷⁹ In order to realize all the *fianza* the court shall proceed by way of urgency (*apremio*) or pressure. The court shall proceed against the goods of a bondsman (*fiador personal*) in order to obtain the amount fixed in the original order. The stocks, bonds, action and obligations of railroads and public works and similar

74. Art. 529 Bis.

75. Art. 530.

76. Art. 531.

77. Art. 532. The pages of the *sumario* are bound together with a knotted string while the "separate branch" of the records dealing with the payment of the *fianza* is separately bound with string and then loosely attached by a piece of string to the *sumario*.

78. Art. 534.

79. Art. 535.

stocks and bonds of industrial and mercantile companies, will be transferred by an agent of the stock exchange or a broker. Other movables, as well as hypothecated immovables, will be sold at public auction subject to a previous appraisal (*previa tasación*)⁸⁰

When the goods of the *fianza* are owned by the *procesado*, they shall be sold, and the proceeds adjudicated to the State as soon as the *procesado* has failed to appear to justify the impossibility of his appearance.⁸¹

The court orders (*autos*) dealing with provisional imprisonment, provisional liberty and the *fianza* may be amended or reformed by the judge *sua sponte* or at the instance of a party during any stage of the case. As a consequence, the *procesado* may be imprisoned and freed as many times as the judge orders, and the *fianza* may be increased or decreased as much as is necessary to assure the results of the trial.⁸² The *procesado* will be remanded to prison if he does not present or increase the *fianza* in the period which has been fixed in the order (*auto*)⁸³

The bail bond (*fianza*) will be cancelled: (1) When the bondsman (*fiador*) requests it provided that he presents the *procesado* at the same time; (2) or when the *procesado* has been remanded to prison; (3) or when there has been dictated an order of *sobreseimiento* (a total exoneration) or a final sentence absolving the *procesado* or, if he has been condemned, when he is presented to comply with the sentence; (4) or when the *procesado* dies during the pendency of the case.⁸⁴ Conversely, if there has been a condemning sentence entered, and the *procesado* has not appeared in response to the first summons or does not justify his absence because of impossibility, the *fianza* will be adjudicated to the state.⁸⁵

When the *fianza* has been adjudicated to the state, the bondsman (*fiador*) has no action to request its return; his only right is to claim an indemnification against the *procesado*

80. Art. 536.

81. Art. 537.

82. Art. 539.

83. Art. 540.

84. Art. 541.

85. Arts. 542, 545.

or those who succeed to or are subrogated to the rights of the *procesado* (*sus causahabientes*)⁸⁶

Miscellaneous provisions governing fianzas (bail bonds) embargos (attachment) of goods to satisfy the fianza and embargos of goods to satisfy the claims of third parties.

The same *auto* (court order) which fixes the amount of the *fianza* also will provide for the attachment (*embargo*) of enough goods of the *procesado* to cover his financial responsibilities (both criminal and civil) in the event that the *procesado* fails to deposit the *fianza*. The amount or value of the goods which are to be attached is to be at least one-third more than the amount of the financial responsibility which may be assessed against the accused.⁸⁷ The *fianza* may be in the form of cash, property of the *procesado*, property of other persons and stocks and bonds of public and private corporations. When movable goods (*bienes muebles*) other than cash are deposited, the judge or the tribunal has to determine the worth of these goods before admitting them as a *fianza*.⁸⁸

As an alternative to a tangible *fianza*, any Spaniard of good conduct who resides within the territory of the tribunal may be a personal bondsman or guarantor. He must be in full enjoyment of his civil and political rights, and he must have been paying during the three previous years a contribution (tax) which (in the judgment of the judge) corresponds to an amount of property or income which will be sufficient to pay the amount of the responsibility which eventually may be ordered.⁸⁹

If on the day following the notification of the *auto* (court order) ordering the *fianza*, no one has presented it, the *embargo* (attachment) of the goods of the *procesado* will proceed. The *procesado* will be summoned to pledge sufficient property (*bienes*) to cover the amount fixed in the

86. Art. 543.

87. Art. 589.

88. Art. 591.

89. Art. 592. In practice this means that the guarantor has to be a business or professional man who pays a contribution or tax to the government. The judge will use this tax as a criterion in order to determine if the man's income is sufficient to be a guarantor.

auto.⁹⁰ If notice of this *auto* cannot be delivered to the *procesado*, or to his attorney, or any member of his family found in his domicile, or if the *procesado* does not wish to pledge the goods, the *alguacil* (bailiff) shall proceed to attach all of the household goods of the *procesado* with the exception of the marital bed which is exempt.⁹¹ The *embargo* (attachment) may also proceed against immovables including the fruits and rents of the land.⁹² If land has been attached, the judge may continue the administration of it by the *procesado* or by another person known as the *interventor*; the *procesado* himself may be designated as an *interventor* by the judge.⁹³

Salaries and wages of the *procesado* may also be embargoed (attached), however, if the *procesado* earns less than twenty pesetas (approximately 33 cents) per day or 7,500 pesetas a year (approximately \$123.75) his wages are exempt. Earnings above this amount are subject to attachment at rates varying from twenty-five per cent for the first 5,000 pesetas over 7,500 to fifty per cent of the sixth 5,000 pesetas over 7,500.⁹⁴ If during the course of the proceedings (*juicio*) the judge believes that the final responsibility of the accused will exceed the amount originally fixed, he will order (*auto*) an increase of the *fianza* or of the *embargo*.⁹⁵ The judge is also authorized to decrease the original amount when he believes that it exceeds the amount that will be awarded.⁹⁶

Assuming that the *procesado* has been found guilty after the trial (*juicio oral*), any cash which has been deposited as a *fianza* will be used to pay for the court costs, fines and damages to the victim. In the event that there has been a personal guarantor or bondsman, then the court proceeds against his goods by way of urgency or pressure (*la vía de apremio*), and they will be sold at a public auction after being previously appraised (*publica subasta previa tasación*) Stocks and bonds of railroads, public corporations, and mercantile and industrial corporations will be sold and trans-

90. Art. 597.
91. Arts. 598, 599.
92. Art. 603.
93. Art. 605.
94. Art. 610.
95. Art. 611.
96. Art. 612.

ferred by a stock exchange agent or broker Goods which have been pledged and immovables which have been hypothecated will be sold at a public auction subject to a previous appraisal.⁹⁷

THE INSTRUCTION (*instruccion*) The instruction section of the Code deals with the *sumario* and those authorities who are competent to prepare it. The *sumario* is to be constituted of all the actions directed towards the preparation of the trial (*juicio*) and the actions practiced for the search and the preparation of a written record of crimes. It should include all circumstances which may influence its *calificación* (this word means the classification of the facts and the law in order to determine the specific guilt of a person), the culpability of the wrongdoer, his apprehension and his financial responsibility for the wrong which he has committed.⁹⁸ In brief, the *sumario* is a complete written record of everything that has transpired from the time that a criminal complaint is made until the accused is remanded for the trial (the *juicio oral*) Each wrong coming to the knowledge of the judicial authority is to be the object of a *sumario*; nevertheless, connected crimes are to be included in one single *sumario*.⁹⁹

With certain exceptions which will be discussed subsequently the *diligencias* (investigative actions and the written report of the actions) of the *sumario* are kept secret from the accused until he has been declared a *procesado*. Anyone, including the trial attorneys (*abogados*) and "solicitors" (*procuradores*) of the parties, who reveals the secret portions of the *sumario*, will be subject to a severe fine.¹⁰⁰ In spite of the foregoing admonition, the *juez instructor* (the judge preparing the *sumario*) may authorize the *procesado* to have knowledge of any actions and *diligencias* when they are related to any right he intends to exercise, provided that the authorization will not impair the purposes of the *sumario*. If the investigation (*diligencias*) be prolonged more than two months after the accused has been declared a *procesado*, the *procesado* may request the judge of instruction to give him

97. Arts. 613, 536.

98. Art. 299.

99. Art. 300.

100. Art. 310.

a "view" of the judicial steps taken (*actuado*) so that he can ask for the quickest termination of the investigation. The judge of instruction is obliged to accede to this request immediately, unless he considers that it would be dangerous for the success of the investigation. If the judge of instruction denies this request or denies the *procesado* the opportunity to have knowledge of the actions and *diligencias* when they have a relationship to any right which he intends to exercise, the *procesado* may use only the recourse of complaint (*queja*) before the *audiencia*.¹⁰¹

THE FORMATION OF THE SUMARIO (*formacion del sumario*) The judges of instruction are to form the *sumarios* of wrongs, under the direct inspection of the prosecuting official of the competent tribunal (*fiscal del tribunal competente*)¹⁰² As soon as the judges of instruction have notice of the perpetration of a crime, they shall notify the *fiscal* (*prosecutor*) of the trial court (*audiencia*) and the President of the *audiencia*. This notification must be made within three days from the commencement of the *sumario*, and it must succinctly and sufficiently relate the facts and circumstances and the name of the alleged wrongdoer¹⁰³ In the event that a *querella* has been presented and admitted, the judge of instruction shall order the practice of the *diligencias* which are proposed in it, unless he considers them contrary to the law, unnecessary or damaging to the object of the *querella*.¹⁰⁴ Likewise, the judge of instruction may refuse *diligencias* requested in the *querella* when the facts alleged do not constitute a wrong or when the judge does not consider himself jurisdictionally competent.¹⁰⁵ The *diligencias* which were proposed and denied in the course of the preparation of the *sumario* may be proposed again at the trial itself.¹⁰⁶

The *querellante* (complaining party) may intervene in all of the *diligencias* (in the sense of investigative steps) of the *sumario*; nevertheless, if the crime is a public wrong, the judge of instruction may order that the *sumario* be kept

101. Arts. 302, 384.

102. Art. 306.

103. Art. 308.

104. Art. 312.

105. Art. 313.

106. Art. 314.

secret from the *querellante*.¹⁰⁷ Conversely, if the crime is private, (e. g. *calumnia, injurias, adulterio*)¹⁰⁸ the complaining party (*querellante*) will have knowledge of the *sumario* because he instituted the criminal proceedings.

THE CONFIRMATION OF THE WRONG AND INVESTIGATION OF THE WRONGDOER (*comprobacion y averiguacion*)

The visual inspection (*de la inspección ocular*) When the crime has left vestiges or material proofs (*pruebas*) of its perpetration, the judge instructor shall if possible collect and conserve them for the trial (*juicio oral*) He shall proceed to make a visual inspection and to make a description of all of these objects. He shall report in the *autos* a description of the place of the wrong, the site and condition of the objects which were found, and all other details which may be utilized for the accusation "as well as for the defense."¹⁰⁹ (emphasis added) The italicized words indicate that this *sumario*, although inquisitorial in nature, is not designed to convict—it is truly a fact finding process designed to ascertain the truth.

When it may be convenient for greater clarity or confirmation of the facts, a sufficiently detailed drawing of the place may be prepared, or photographs may be made of the victims, or copies or design drawings may be made of the effects or instruments of the crime which have been found.¹¹⁰ If the crime is robbery or any other crime committed with a breaking, climbing or violence, the judge is obliged to describe the vestiges which have been left, and he may consult with experts about the manner, instruments, means or time of the execution of the crime.¹¹¹

The judge has the authority to forbid any persons found at the site of the crime to absent themselves during the visual inspection, and he can order any persons found nearby to appear at the site and to make proper declarations about the facts.¹¹² If there be an accused, and he has:

107. Art. 316.

108. See *supra* note 21.

109. Art. 326. (Emphasis added).

110. Art. 327.

111. Art. 328.

112. Art. 329.

been declared *procesado* (indicted), he is allowed to appear in person or by his attorney if he desires, and he or his attorney may make observations which they deem pertinent.¹¹³ Under this latter provision the accused is given full opportunity to aid in the fact finding process for his own protection. Of course, if he has not been indicted (*procesado*), he does not have this opportunity

Finally, a record of the *diligencias* practiced will be prepared and signed by the judge, the *fiscal* (if he has attended), the Secretary of the judge and the persons who were found present.¹¹⁴

THE CORPUS DELICTI (*cuero del delito*) The judge of instruction is charged with the responsibility of collecting all the arms, instruments, or effects of any kind which relate to the crime, and of minutely recording the circumstances in which he found them.¹¹⁵ If the crime deals with forgery,¹¹⁶ a killing,¹¹⁷ chemicals,¹¹⁸ or virtually any specialized knowledge, he is empowered to call experts in medicine, pharmacy, chemistry, engineers, and other fields to make an examination and report. The court doctor will ordinarily conduct the examination and autopsy of corpses;¹¹⁹ however, "professors" of medicine may also make expert examinations and reports if ordered by the judge or requested by the interested parties.¹²⁰ Again, all the *diligencias* (reports) of the findings by the experts will be made a part of the *sumario*. If the victim of a crime has suffered personal injuries, he will be examined every fifteen days by the court doctor who will file a written report of the diagnosis and prognosis.¹²¹

THE IDENTITY OF THE WRONGDOER AND OF HIS PERSONAL CIRCUMSTANCES (*de la identidad del delincuente y de sus circunstancias personales*)

113. Art. 333.

114. Art. 332.

115. Art. 334.

116. Art. 335.

117. Art. 340.

118. Art. 356.

119. Art. 353.

120. Arts. 355 *et seq.* The title "professor" refers to a doctor who has a degree in medicine. It does not mean that the doctor is a professor at a university.

121. Art. 355. This article does not specify how often the examination must be made. In Barcelona it is customary to order the examination to be made every fifteen days.

After the preceding steps (or at least some of them) have been taken, the fact of a wrong or crime has been established. It now becomes necessary to connect the crime with the alleged wrongdoer; this is accomplished by the "recognition step" (*diligencia de reconocimiento*). The person who is to identify the wrongdoer may confront him to identify him, or the judge may order that the witness observe the accused unseen. As a protection to the accused, he is placed with a group of persons and the witness is asked to pick out the accused from the group in a determined, affirmative and clear manner. The manner of identification as well as the names of all the people in the group must then be recorded in the *diligencia*.¹²² When a number of people are to identify one person, they are to each make the identification separately, and they are not to communicate among themselves until after the termination of the proceedings.¹²³ The code provides, in some detail, about the means of determining the name of an accused by means of church and civil records, etc.¹²⁴ These provisions would seem somewhat passé today when every Spaniard is required to carry an identification card.

If the judge deems it proper, he may request information about the morality of a *procesado* by making inquiries of the *Alcaldes de barrio* (mayor of the section) or to the police of the villages in which the *procesado* has resided.¹²⁵ Under this provision it would appear that a person's general reputation for immorality could be introduced against him.

If the *procesado* is older than nine but less than fifteen years of age, the judge is to receive information about his judgment, especially about his ability to appreciate the criminality of the fact which has given rise to the case. The judge may hear persons possessing good judgment about the child's personal circumstances regarding the relations which they have had with the child before and after the crime. In the absence of these witnesses the judge may name two medical "professors" to examine the *procesado* and give their

122. Art. 369.

123. Art. 370.

124. Art. 375.

125. Art. 377.

opinion about his mental condition.¹²⁶ Like procedures will be followed if the *procesado* gives indications of having a mental disorder.¹²⁷ If the *procesado* becomes insane after the commission of the crime, the *sumario* will be concluded and it will be deposited in the archives of the court until the *procesado* recovers his sanity. If the *procesado* committed the act while he was insane, the provisions of the Penal Code will be followed.¹²⁸

If the *sumario* results in some rational indication of criminality against a person, the judge shall dictate an *auto* (*de procesamiento*) declaring him a *procesado*. The *procesado* may from that moment be advised by counsel (if he is not being held incommunicado) and may press for the prompt termination of the *sumario*. He also has the right to request the practice of *diligencias* (additional investigative steps) and to formulate claims which effect his situation. If the judge of instruction does not promptly terminate the *sumario* (at the request of the *procesado*), the *procesado* may file a complaint (*queja*) before the *audiencia*. If the judge of instruction fails to order the practice of additional investigative steps (*diligencias*) at the request of the *procesado* or fails to allow the *procesado* to formulate claims, he may appeal (*apelar*) to the *audiencia*.¹²⁹

When the *auto* has been signed declaring a person as a *procesado*, he may file the recourse of reform (*recurso de reforma*) before the judge of instruction within three days after he is notified of the order (*auto*). If the recourse of reform be denied, he may file the recourse of appeal (*recurso de apelación*) before the judge of instruction within five days after being notified of the court order (*auto*).¹³¹ The provisions dealing with the *recurso de reforma* are extremely important, and they will be discussed in detail in a subsequent section of this article.¹³²

126. Art. 380.

127. Arts. 381, 382.

128. Art. 383.

129. Art. 384. See also *supra* note 101 and accompanying text.

130. The recourse of reform is a request addressed to a judge or court which has entered an order (*auto*) to reform or amend the order in certain particular respects.

131. Arts. 384, 219, 220.

132. See *infra* notes 203 *et seq.*

THE DECLARATION OF PROCESADOS (*las declaraciones de los procesados*)

The judge upon his own motion or at the request of the *fiscal* or of any *querellante*, may have the *procesado* present as may declarations or statements as are considered convenient for the investigation of the facts. However, neither a private accuser nor a civil plaintiff (*actor civil*) may be present when the declarations are made.¹³³ If the *procesado* is detained, the first declaration shall be made within twenty-four hours. This time may be extended for another forty-eight hours if a grave cause intervenes which is to be stated in the *providencia* (court order) which authorizes the extension.¹³⁴ The *procesado* is not required to declare under oath, but he is to be exhorted to tell only the truth and warned by the judge that he ought to answer questions in a precise, clear and truthful manner.¹³⁵ In the first declaration he is to be asked his name, surnames (paternal and maternal), nicknames (if he has any), age, nationality, neighborhood, status, profession, art or mode of earning a living, if he has children, if he has been a *procesado* before, and, if so, for what crime, before what judge, and what penalty was imposed, if he knows how to read and write and if he knows why he has been declared a *procesado*.¹³⁶ The questions are to be direct and they may not be made in a deceitful or suggestive manner. Neither shall there be employed any kind of compulsion or threat.¹³⁷ When the examination of a *procesado* is prolonged, or the *procesado* has lost the serenity of judgment necessary to answer, because of heavy questioning, the examination shall be suspended to give him time to rest and to recuperate. The declaration shall always record the time spent in the interrogation.¹³⁸ The judge shall permit the *procesado* to state what he has available for his exculpation or for the explanation of the facts. In no case shall the judge make charges against nor argue with the *procesado*, nor shall he allow the *procesado* to read any part of the *sumario*, except

133. Art. 385.
134. Art. 386.
135. Art. 387.
136. Art. 388.
137. Art. 389.
138. Art. 393.

his own prior declarations.¹³⁹ The *procesado* may dictate his declarations, and if this is not done, the judge shall endeavor as much as possible to record the exact words of the *procesado*.¹⁴⁰ It may be interjected at this point that the use of short-hand or stenotype reporters during the *sumario* or during the trial itself seems unheard of in Spain.

The judge has authority to interrogate the *procesado* in the place where the facts took place or before the persons involved in the case if he considers this convenient.¹⁴¹ The *procesado* is given the right to make as many statements as he wishes, and the judge is obligated to receive them if they are relevant.¹⁴²

The *procesado* may read his own statement, and the judge is to advise him that he has this right; if the *procesado* does not use this right, the Secretary shall read the statement to him.¹⁴³ If the *procesado* has made later statements which contradict his earlier statements or has retracted prior confessions, he is to be interrogated about the motive for any contradictions, statements or the reasons for the retractions of his confessions.¹⁴⁴

A confession by the *procesado* will not dispense with the necessity for the judge to practice the *diligencias* necessary to convince him of the truth of the confession and the fact of the crime. To this end, the judge shall interrogate the *procesado* about his confession in order to ascertain all of the circumstances of the crime and what he (the *procesado*) may contribute to the confirmation of his confession, seeking to determine if he was the author of the crime or an accomplice, and if he knows of any persons who were witnesses or who have knowledge of the facts.¹⁴⁵

It is not necessary to appoint a curator for a minor *procesado* before receiving his statements.¹⁴⁶

139. Art. 396.

140. Art. 397.

141. Art. 399.

142. Art. 400.

143. Art. 402.

144. Art. 405.

145. Art. 406.

146. Art. 409.

DECLARATIONS OF WITNESSES (*declaraciones de los testigos*)

All Spaniards and all foreign residents of Spain (with certain limited exceptions),¹⁴⁷ who are not impeded from doing so, are obligated to attend a judicial hearing in order to answer questions about a crime, if they have been properly cited to appear¹⁴⁸ However, a large number of persons are exempted from the foregoing rule. The relatives of the *procesado* in a direct ascending or descending line, his wife (or husband as the case may be), his brothers and sisters by consanguinity or uterine and his laterals by consanguinity until the second civil degree as well as his natural relatives (which are referred to in Article 261)¹⁴⁹ are not obligated to testify against the *procesado*.¹⁵⁰ Nevertheless, they may make declarations if they so desire.¹⁵¹ The *abogado* of the *procesado* is also exempted from testifying as to facts confided to him in his professional capacity¹⁵² Catholic priests and ministers of other faiths are not obliged to declare as to facts revealed to them in the exercise of their ministry Witnesses who are physically or morally incapacitated are also exempted.¹⁵³

In addition, no one is obligated to declare as to any question whose answer may materially or morally damage the person or the fortune of any of the relatives enumerated in the preceding paragraph, except in the case of a wrong of the highest gravity endangering the security of the State, the public tranquility or the King or his successor¹⁵⁴ It will be observed that the Spaniards have greatly extended the number of persons who are exempted from testifying against an accused because of their relationship to the accused or because they have been the recipients of privileged communications. Both Spanish and American laws¹⁵⁵ deem privileged,

147. Art. 412.

148. Art. 410.

149. See *supra* note 9.

150. Art. 416.

151. Art. 416.

152. Art. 416.

153. Art. 417. Public officials, civil as well as military, who are under a duty of guarding secrets or who are not authorized by their superiors to declare. *Id.* (2).

154. Art. 418.

155. 8 WIGMORE, EVIDENCE §§ 540-641 (McNaughton Rev. 1961) 3 WHARTON, CRIMINAL EVIDENCE §§ 143-164 (1955).

communications received by a priest or minister and the accused's lawyer. Some American jurisdictions have extended the privilege to medical doctors,¹⁵⁶ but this privilege is not found in the Spanish law. The most remarkable difference is the number of relatives who are not obligated to testify at all against an accused simply because they are related and without any reference to privileged communications. In this particular area it would seem obvious that the accused in Spain is accorded much more protection than an accused in the United States.

If a witness is physically impeded from coming to the judicial examination, the judge may receive his statement in the domicile of the witness provided that the examination will not put the witness' life in danger.¹⁵⁷ Any witness who is not exempted from testifying and who fails to attend the hearing or who refuses to answer questions is to be fined. If he persists in his conduct, he will be declared a *procesado* for the crime of refusing to be of assistance, and if he still persists he will also be declared a *procesado* for grave disobedience.¹⁵⁸

The statements of all witnesses over the age of puberty are to be made under oath. These witnesses and those under the age of puberty are to be told by the judge of their obligation to be truthful and of the penalties provided for perjury.¹⁵⁹ The oath itself shall be given in the name of God in accordance with the religion of the witness.¹⁶⁰ The witnesses are to be interrogated separately and secretly in the presence of the judge and the Secretary.¹⁶¹

Each witness is to state: his name, surnames (paternal and maternal), age, marital status, profession, whether he knows the *procesado* and the other parties, if he is related to them, or is a friend of theirs or has had any other kind of relationship with them and if he has been a *procesado* and the penalty which was imposed. The judge then is to let the witness narrate, without interruption, and he is to require

156. 8 WIGMORE, EVIDENCE §§ 818-878 (McNaughton Rev. 1961) 3 WHARTON, CRIMINAL EVIDENCE §§ 166-177 (1955).

157. Art. 419.

158. Art. 420.

159. Art. 433.

160. Art. 434.

161. Art. 435.

only the explanations which are conducive to dissolve obscurities or contradictions. After the witness has finished his narration, the judge is to direct questions which he deems proper to clarify the facts.¹⁶² The author would like to interject at this point that the Spaniards in both the *sumario* and in the trial make much use of the narrative form of testimony by letting each witness tell the facts in his own way; any questions are reserved until the witness has finished testifying. From the author's observations at a number of trials this results in a much more coherent presentation of the facts than one finds in the average United States courtroom.

The witnesses are to declare orally, and they are not permitted to refer to a prepared statement, but they may consult notes (*apuntes*) and memoranda which contain data difficult to remember¹⁶³ The judge may order that the witness be conducted to the place where the facts occurred and be examined about the objects put before him.¹⁶⁴ The questions shall not be asked of the witness in a deceitful or suggestive manner, nor shall there be used any compulsion, trick, promise or artifice in order to oblige or to induce the witness to declare in a certain way¹⁶⁵

The witness may read the record (*diligencia*) of his statement; if he cannot read, it will be read to him by the Secretary¹⁶⁶ The judge is not to record in the *autos* (the records) the declarations of the witnesses, which, according to the judge, are manifestly inconducive for the confirmation of the facts of the *sumario*. He is charged also with recording in each declaration the manifestations of the witness which may be of use to the accusation as well as to the defense.¹⁶⁷

If a witness manifests that he will be prevented from attending the trial of the *procesado* because he will be absent from Spain, or there are sufficient indications to fear rationally that the witness may die or become physically or mental-

162. Art. 436.

163. Art. 437.

164. Art. 438.

165. Art. 439.

166. Art. 443. If the witness is unable to read and speak the Spanish language, a translator will be named and the questions and answers will be in the foreign language. The declaration will be written in the foreign language and then translated into Spanish. *Id.* and art. 440.

ly incapacitated before the opening of the trial (*juicio oral*), the judge shall make the fact known to the accused (*reo*) in order that he might appoint an *abogado* (if he does not have one) within twenty-four hours to help him receive the statement of the witness. After this period has elapsed, the judge shall receive the oath of the witness and examine him in the presence of the *procesado* and his attorney, and the *fiscal* and the *querellante* if they wish to attend. These persons will be allowed to ask as many "re-questions" (*repreguntas*) as they deem proper, unless the judge deems them to be manifestly impertinent.¹⁶⁸ In case of the imminent danger of death of a witness the judge will proceed urgently to receive the statement in the manner previously expressed even though the *procesado* may not be able to be assisted by an attorney.¹⁶⁹ It is to be noted that although the *diligencias* of the *sumario* are usually kept secret from the *procesado* until after he has been declared a *procesado*, the above provisions make an exception when the witness will not be present at the trial itself—in this latter case the *procesado* is to be given every opportunity to question the witness. This would appear to be an attempt to preserve the *procesado's* rights of cross-examination as much as possible.

THE CONFRONTATION OF THE WITNESSES AND THE ACCUSED (*del careo de los testigos y procesado*)

When the witnesses disagree among themselves or with the *procesado* (or the *procesados* disagree among themselves) about some fact or circumstance, the judge may order the confrontation of those persons disagreeing. As a general rule, this confrontation should not take place between more than two persons at a time.¹⁷⁰ The confrontation is to be conducted before the judge, and the Secretary is to read to the *procesado* and to the witnesses the statements which they have presented. They are to be reminded of their oaths and the penalties for perjury and then asked if they ratify what they have said or if they have any variations to make. The judge shall immediately show them the contradictions

167. Art. 445.

168. Art. 448.

169. Art. 449.

170. Art. 451.

which have resulted in their statements and shall invite them to come to an agreement among themselves.¹⁷¹

The judge is not to permit the confronters to insult or menace each other, nor is the act of confrontation to be practiced unless there is no other known way of proving the existence of a crime or the culpability of any of the *procesados*.¹⁷² In the normal case it would appear that the accused in Spain has no more opportunity of being confronted by his accusers before the trial than does his counterpart in the United States.

The Secretary is to record faithfully (*dara fe* - literally shall give faith to) all that has occurred in the confrontation, including the questions, answers, and "reconciliations or agreement of declarations" (*reconvenciones*) which mutually have been made by the confronters, as well as what he has observed in their attitudes. The record (*diligencia*) is then to be signed by all those who took part in the act of confrontation, and if all do not do so, the reason which they have given for not signing is to be recorded.¹⁷³ It is interesting to observe that the judge is permitted to make his own observations and qualitative analysis of the testimony of the witnesses at the end of the *diligencia*. For example, the judge may state "In my opinion *Señor Gomez* seems more sure of his statement than does *Señor Alvarez*, etc."

THE REPORT OF EXPERTS (*del informe pericial*) AND THE RECUSATION OF EXPERTS (*recusación de peritos*)

The judge of instruction shall order reports from experts when, in order to know or appreciate some important fact or circumstance in the *sumario*, it becomes necessary or convenient to have scientific or artistic knowledge.¹⁷⁴ The experts may be with or without titles. Experts with titles are those who have an official title of a science or art which is regulated by the administration. Experts without titles are those who in spite of being without an official title nevertheless have knowledge or special practice in some science

171. Art. 452.

172. Arts. 454, 455.

173. Art. 453.

174. Art. 456.

175. Art. 457.

or art.¹⁷⁵ The judge shall make use of the experts who have titles in preference to those who do not.¹⁷⁶

All expert examinations are to be made by two experts except when there is only one at the place of examination, and it will not be possible to await the arrival of another expert without grave inconvenience for the course of the *sumario*.¹⁷⁷

The names of the experts appointed by the judge will be communicated immediately to the *actor* (in the sense of a civil plaintiff), if there be one, as well as to the *procesado* or his legal representative.¹⁷⁸ If the experts' examinations and reports are to be introduced in the trial, the experts named by the judge may not be recused by the parties, but if the examinations and reports will not be reproduced at the trial the parties have the right to recuse the experts.¹⁷⁹ The causes for recusation (*de recusación*) of the experts are: (1) If the expert is related by consanguinity or affinity within the fourth degree with the *querellante* or with the accused; (2) or the expert has a direct or indirect interest in the case or in a similar one; or (3) the expert has manifested intimate friendship or enmity towards one of the parties.¹⁸⁰ The cause for recusation must be stated in writing before the beginning of the *diligencia* by the experts, and it must express the basis of the recusation and be accompanied by proof offered in support of the cause as well as any documents or a designation of the place where the documents are to be found if the moving party does not have them.¹⁸¹

The judge, without further order, shall examine the documents which are produced and hear the witnesses presented by the objecting party. If the judge sustains the recusation, he is to suspend the expert examination for the time strictly necessary to name a substitute expert; if he does not sustain the recusation, the expert examination shall proceed as if "the power of recusation" had not been used.¹⁸²

176. Art. 458.
 177. Art. 459.
 178. Art. 466.
 179. Art. 467.
 180. Art. 468.
 181. Art. 469.
 182. Art. 470.

If the experts' examinations and reports are not going to be reproduced at the trial, the *querellante* and the *procesado* each have the right to nominate, at their own expense, an expert to intervene in the expert examination. Normally, these additional experts should have titles, but if experts with titles are not available, those without titles will be accepted by the judge.¹⁸³ The experts appointed by the judge and those who have intervened are to be sworn to tell the truth¹⁸⁴ and to proceed well and faithfully in their operations. If the experts' reports are not to be reproduced at the trial, both the *querellante* and the *procesado* (even when he has been placed in provisional imprisonment) and their attorneys may attend the acts of the experts.¹⁸⁵ The acts of the experts will be presided over by the judge instructor, or, by virtue of his delegation, by the municipal judge. The supervision of autopsies may be delegated to a police officer¹⁸⁶ All of the preceding acts are to be made with the assistance of the Secretary of the Judge Instructor¹⁸⁷

The experts' report shall be comprised of the following items, if possible: (1) A description of the person or thing which was the object of the examination in the state or manner in which it was found; (2) a detailed recount of all of the operations practiced by the experts and of the results; and (3) their conclusions which, in view of all the data formulated by the experts, conform to the principles and rules of their science or art. This report shall be drafted (by the secretary of the judge) as dictated by the experts and signed by all of them.¹⁸⁸

The judge may allow the experts to retire (at their request) for a precise period of time to a place designated by the judge in order to deliberate and reduce their conclusions to writing.¹⁸⁹ The judge may, at his own instance, or at the instance of the parties or their attorneys, ask pertinent questions of the experts when they have produced their conclusions and ask them to make necessary clarifications.

183. Arts. 471-473.
184. Art. 474.
185. Art. 476.
186. Arts. 477, 353.
187. Art. 477.
188. Art. 478.
189. Art. 481.

These answers of the experts are to be considered as part of their report.¹⁹⁰

Spanish experts are no different from experts in the United States in arriving at different conclusions, and the law provides a very rational way of dealing with this problem. If the experts evenly disagree, another will be appointed by the judge. Upon the intervention of the new expert the operations which have been practiced shall be repeated (if possible) If it is not possible to repeat the operations nor practice new ones, the intervention of the new expert will be limited to deliberations with the original experts in view of the examination (*diligencias*) which have already taken place. He is then to formulate his reasoned conclusions in conformity with one of the experts, or separately if he does not agree with any of them.¹⁹¹ The code seemingly fails to provide how the judge is to resolve three different conclusions of the experts—a problem which is faced constantly by courts in the United States and which is still to be resolved.

THE CONCLUSION OF THE SUMARIO AND THE *Sobreseimiento*.

The Conclusion of the Sumario. If all the *diligencias* have been practiced in accordance with the decrees of the judge instructor, and he considers that the *sumario* has been completed, he shall declare it terminated and order the remission of the *autos* and the "pieces of conviction" (physical objects of the crime—e.g., guns and knives) to the competent tribunal.¹⁹²

The order of the judge instructor terminating the *sumario* may declare that the accused is a *procesado* (presumably guilty of a crime) or that he is to be partially or completely exonerated from the accusations made against him (*sobreseimiento*) This order (whether favorable or unfavorable to the accused) is not conclusive for it is subject to "attack" by the prosecutor, the accused and private complaining parties (*querellantes*) These "attacks" are eventually resolved by the trial court — the court of second instance (*audiencia*) The procedure for making these "attacks" is

190. Art. 483.

191. Art. 484.

192. Art. 622.

quite technical, and it does not make for light reading. When there has not been a private accuser, and the prosecutor considers that the *sumario* has assembled sufficient elements in order to make the *calificación de los hechos* (the written contentions of the parties as to the facts and law of the case) and to permit the proceedings to go to trial, he shall return the *sumario* to the judge in order that it may be remitted without delay to the trial court (*audiencia*)¹⁹³

The judge shall give notice of his *auto* (order), in which he concludes the *sumario*, to the *querellante* (even when he only has the status of a civil plaintiff), the *procesado* and other like persons against whom have resulted possible civil responsibilities for damages. The parties are to appear before the trial court (*audiencia*) in a period of ten days or in a period of fifteen days if the appearance is before the Supreme Court.¹⁹⁴

The court (*audiencia*) which receives the *autos* and "pieces of conviction" shall order that they be delivered to the *ponente* (a member of the court who is assigned to be in charge of a particular case) The sealed envelopes and other closed and sealed objects in the "pieces of conviction" will be opened for examination, and the opening of these objects must be recorded by the secretary of the *audiencia*, who is to record the condition in which they were found.¹⁹⁵ After a period of ten days has expired, the *sumario* will be delivered to the prosecutor (*fiscal*) for a period of not less than three days and not more than ten, and then it will be delivered to the *procurador* ("solicitor") of the *querellante* for examination by his *abogado*. Each person upon returning the *autos* (the record of investigation) will accompany it with a writing which agrees with the *auto* terminating the *sumario* or which requests the practice of new *diligencias* (investigative steps) If the prosecutor (*fiscal*) and the "solicitor" (*procurador*) of the *querellante* agree with the *auto* closing the *sumario*, they are to present their views as to the commencement of the trial or the *sobreseimiento*.¹⁹⁷

193. Art. 622.

194. Art. 623.

195. Art. 626.

196. Art. 627.

197. Art. 627.

Upon the return of the *autos* they pass immediately to the *Ponente* for his consideration for a period of three days.¹⁹⁸ After the expiration of this period the court (*audiencia*) shall dictate an *auto* (order) confirming or revoking the *auto* closing the *sumario*.¹⁹⁹ If the trial court (*audiencia*) revokes the order closing the *sumario*, it shall order the return of the *sumario* to the judge of instruction, and it shall designate the *diligencias* (investigative actions) which have to be practiced.²⁰⁰ In effect, this kind of ruling by the *audiencia* means that the judge of instruction has not done enough investigation of the facts to disclose all the details of the crime, or that the facts have not been developed sufficiently showing that the accused committed a crime or crimes.

If the trial court (*audiencia*) confirms the *auto* terminating the *sumario*, the *audiencia* shall resolve within the third day with respect to the trial or the *sobreseimiento*.²⁰¹ In the *auto* in which the trial court orders the opening of the trial, it shall order the delivery of the investigative records (*autos*) in order that the *calificación* of the crime can be made without harm (*perjuicio*) to the *sobreseimiento* proceedings.²⁰²

RECOURSES AGAINST THE RESOLUTIONS OF THE COURT AND THE JUDGE OF INSTRUCTION (*recursos contra las resoluciones de los tribunales y jueces de instrucción*)

This section, translated literally, means the recourses that the *procesado* has against the rulings and findings of fact of the judge of instruction in the *sumario* and against the rulings of the *audiencia*, which is the intermediate appellate court as well as the trial court in criminal cases. In American terminology it includes motions to the judge of instruction to reform or change the findings which he made in the *sumario* or "indicting *résumé*," as well as interlocutory appeals to the intermediate appellate court attempting to have a ruling of the judge of instruction in the *sumario* overruled. It must be understood that this section deals only with "motions" and appeals made from the rulings in

198. Art. 628.
199. Art. 630.
200. Art. 631.
201. Art. 632.
202. Art. 633.

the *sumario*, and not with motions and appeals from the final sentence entered after the actual trial (*juicio oral*). As mentioned in the introduction to this article, this procedure gives the *procesado* the opportunity to ask the judge of instruction to admit further evidence which may convince him that the *procesado* is innocent, and, as a result, the judge may "reform" or change his findings from "apparently guilty" to innocent. In a very rough analogy it is somewhat similar to an American judge quashing an information or indictment because there was not sufficient proof introduced to show that the accused was the apparent perpetrator of the act. This procedure is rarely, if ever, used in the United States, but its counterpart is extremely important in Spain. For example, if the crime deals with the collision of motor vehicles, the fact that the accused has settled with the victim of the accident may be introduced during the course of the *reforma*, and this often induces the judge of instruction to find the accused "innocent."

The recourses of reform, appeal and complaint (*reforma, apelación y queja*) may be utilized against the decisions of the judge of instruction in the *sumario*.²⁰³ The recourse of reform (*reforma*) may be interposed against all of the orders (*autos*) of the judge of instruction while the appeal (*apelación*) may be interposed only in the cases provided by the law. The appeal shall operate both for the purposes of transmittal of the record of the *sumario* to the *audiencia* as well as suspending the progress of the *sumario*, only when the law expressly orders it.²⁰⁴

The recourse of complaint (*queja*) is rarely used, but it may be interposed against all of the orders of the judge of instruction which are not appealable and against his resolutions denying the admission of the recourse of appeal.²⁰⁵ The recourse of reform and appeal are interposed before the judge of instruction while the recourse of complaint will be produced before the superior competent tribunal (*audiencia*).

203. Art. 216.

204. Art. 217.

205. Art. 218. As indicated by the text, the recourse of appeal must go through two stages, its admission by the judge of instruction and then its decision by the trial court (*audiencia*). If the judge of instruction refuses to admit the appeal, then the complaining party must utilize the recourse of complaint (*queja*) before the trial court (*audiencia*) in order to attack the decision of the judge instructor in denying its admission.

The recourse of reform is decided by the judge of instruction while the recourse of appeal is decided by the *audiencia* (the trial court) even though it is originally interposed before the judge of instruction. The recourse of complaint will be decided by the *audiencia* before whom it was interposed.²⁰⁶ Somewhat contrary to the American practice, which usually provides for written petitions and oral argument (if requested), the Spanish recourse of reform is argued only in writing²⁰⁷ while the recourses of appeal and complaint are urged both in writing and orally

Ordinarily, the recourse of appeal may not be utilized unless the recourse of reform is utilized first. However, they both may be interposed in the same writing, and then the recourse of reform will be decided first. Every party to the cause is entitled to receive a copy of the recourses and the judge shall make his ruling on the second day after the delivery of the writings, whether or not the other parties to the cause have presented writings in opposition to the recourses of the *procesado*.²⁰⁸ If the judge of instruction admits the appeal for "both effects" (*ambos efectos*) (i.e., to suspend the proceedings before him as well as ordering the delivery of the *autos* to the appellate court), the parties will be summoned to appear before the *audiencia* within ten days.²⁰⁹

If the judge of instruction admits the recourse of appeal *en un solo efecto*,²¹⁰ he is to order the taking of testimony and to fix the time within which he wishes to expedite the

206. Art. 219.

207. Art. 220.

208. Arts. 222, 384. It is interesting to note that if the judge of instruction denies the indictment (*procesamiento*), the prosecutor (*fiscal*) and any person who has instituted the prosecution (*querellante*) may utilize the recourse of reform within three days after being notified of the order of the judge instructor. If the judge instructor denies this recourse of reform, the complaining party may not use the recourse of appeal or any other recourse. However, his petition for indictment may be reproduced before the trial court (*audiencia*). The trial court, if it agrees with this petition, will give the reasons for its decision and will order the judge instructor to enter an order in accordance with its decision. The accused who has now been indicted as a result of this decision, may utilize directly the recourse of appeal "in one effect" without the necessity of having previously utilized the recourse of reform. On the other hand, if the recourse of reform of the prosecutor (*fiscal*) or any person who has instituted the prosecution (*querellante*) is successful in that the judge of instruction declares the accused *procesado*, the *procesado* may utilize the recourses of reform and appeal. Art. 384.

209. Art. 224.

210. *Un solo efecto* or "A single effect" means that the record (*autos*) is brought up to the higher court, but the proceedings in the lower court are not suspended.

taking of testimony Within two days after the *procesado* and the *fiscal* have received notice of this decision (*providencia*), they may petition the judge to admit additional testimony which they believe ought to be introduced. The judge shall then decide upon their petitions on the following day. Ordinarily, the time for taking this new testimony will not exceed fifteen days; however, if the *actuário* (secretary) shows the judge more than 100 written pages (*folios*) of testimony and states that the testimony has not been completed, the judge may order a maximum further extension of ten days.²¹¹

When those portions of the record (*auto*) which are to be transcribed are prepared, the appellant (the *procesado*) is not permitted to examine those portions of the record (*auto*) which must be kept secret from him.²¹² In the event of an appeal to the *audiencia*, the *procesado* and the *fiscal* will each be allowed to read the *autos* (the record in this sense) for a period of three days.²¹³ Upon the return of the record (*autos*) to the *audiencia* by the last party that has had them, the President of the *audiencia* shall fix the date for the hearing (*vista*) when the prosecuting attorney and the attorney for the *procesado* and other parties may present their cases. The hearing date may not be more than ten days after the order allowing the hearing. The *audiencia* is forbidden to allow more than two months to intervene between the time the *sumario* was given to the *audiencia* and the day of the hearing.²¹⁴ A similar rule would be useful in America.

Before the day of the hearing, the parties are authorized to present documentary proof in support of their contentions; no other means of proof are admissible.²¹⁵

When the *audiencia* has dictated the order, and it has become final, it is then transmitted to the judge of instruction (along with the records if they were before the *audiencia*) in order for the judge of instruction to execute it. These acts must be performed within three days after the *audiencia*

211. Art. 225.
212. Art. 226.
213. Art. 229.
214. Art. 230.
215. Art. 231.

has rendered its decision, and the investigating judge must acknowledge receipt of the *autos* (the records) ²¹⁶

Assuming that in any particular case the *auto* of the investigating judge (in a recourse of reform) or the *auto* of the *audiencia* (in a recourse of appeal) has been unfavorable to the *procesado*, an *auto* will be signed by the investigating judge terminating the *sumario*. The *autos* (record) are then transmitted to the *audiencia*, which may affirm the *auto* of the investigating judge that there has been a sufficient investigation.²¹⁷ At this point the *audiencia* must order a trial (*juicio oral*) or a *sobreseimiento* within the third day ²¹⁸

THE SOBRESEIMIENTO

The word *sobreseimiento* literally means a suspension, discontinuance or stay of proceedings; however, in practice, it may mean an absolute termination of criminal proceedings rather than a mere suspension or stay. For example, if the facts developed during the investigation disclose that no crime has been committed, the order of *sobreseimiento* will terminate the investigation by exonerating the accused. On the other hand, if the evidence shows that a crime has been committed, but it is not sufficient to indicate that the accused is probably guilty of committing it, the order of *sobreseimiento* will be provisional in the sense that the proceedings will be suspended until additional evidence is obtained. As a result, the accused may have the threat of prosecution hanging over him for a number of years.

If the *audiencia* (trial court) orders a partial *sobreseimiento*, it will order the opening of the trial for those *procesados* who were not exonerated. If there be a total *sobreseimiento*, the cause is ordered placed in the archives along with the "pieces of conviction" (objects involved in the alleged crime) which have no known owners.²¹⁹ If the objects have known owners, then they will be retained, if requested by a third party, until the final decision of the action he intends to file in the term allowed him by the court for this purpose.²²⁰

216. Art. 232.

217. Art. 622.

218. Art. 632.

219. Art. 634.

220. Art. 635.

A complete exoneration (*sobreseimiento libre*) will result: (1) when there are no existing rational indications that the facts referred to by the case were perpetrated; or (2) when the facts do not constitute a crime, or (3) when there appears to be unquestionable exemptions²²¹ from criminal responsibility of any or all of the *procesados* as authors, accomplices or concealers.²²² In the case of the first two examples, the court may declare that the institution of the case be without damage to the reputation of the *procesado*, and also, at the instance of a *procesado*, reserve his right to prosecute the *querellante* as a slanderer. In addition, the court may order that criminal proceedings be instituted against the *querellante*.²²³ In the case of the last example above, if the facts constitute a "misdemeanor," the case shall be remitted to the competent municipal judge for trial.²²⁴

The *sobreseimiento provisional* shall result: (1) when the perpetration of the crime which has given a reason for the formation of the cause, has not been duly justified, or (2) when the *sumario* shows that a crime has been committed, but there are not sufficient reasons to accuse a certain person or persons as authors, accomplices or concealers.²²⁵

When the prosecutor (*fiscal*) has petitioned for an order of *sobreseimiento* (either total or provisional) in conformity with the provisions of articles 637 and 641, and there is no *querellante* ready to sustain the accusation, the tribunal will inform those persons interested in the penal action of the petition of the prosecutor. The tribunal will then summon them to appear within a period fixed by the court to sustain their action. If they do not appear within the time fixed, the tribunal shall order the *sobreseimiento* solicited by the prosecutor.²²⁶ On the other hand, when the tribunal considers that the petition of the prosecutor is not according to the law and there is no *querellante* to sustain the action, the tribunal before ordering the *sobreseimiento* may determine that the case be remitted to the *fiscal* of the territorial *audiencia* (or to the *fiscal* of the Supreme Court if the case was before the

221. Art. 640.
222. Art. 637.
223. Art. 638.
224. Art. 639.
225. Art. 641.
226. Art. 642.

territorial *audiencia*)²²⁷ to resolve whether or not to proceed with the accusation.²²⁸ The tribunal is obliged to order the opening of the trial (*juicio oral*) if there be a *querellante* to sustain the action or when the prosecutor expresses the opinion that it should be opened; nevertheless, the tribunal may order a *sobreseimiento* when the facts do not constitute a crime in the judgment of the court. In no other case may the tribunal omit the opening of the trial.²²⁹ This latter provision illustrates that a trial will be mandatory for an accused when either the prosecutor or a private complaining party insists upon it, unless the court considers that the facts do not constitute a crime. Conversely, if the facts do constitute a crime a trial will be ordered at the instance of the prosecutor or *querellante* even though the court may be in doubt about the guilt or innocence of the accused because this can be proved at the trial stage. Assuming that the *sobreseimiento* proceedings have not resulted in the exoneration of the *procesado*, the case is now ready for the trial (*juicio oral*) stage, which extends from the order opening the trial until the final sentencing of the *procesado*.

Part two of this article (The Trial) will appear in issue number two of this volume.

227. For example, if the case was instituted in the City of Gerona (located within the province of Barcelona), the *Fiscal* of the *Audiencia* in the City of Barcelona (the capital of the province) would be requested to give his view as to whether the case should be prosecuted. If the case was instituted in the territorial *Audiencia* in the City of Barcelona, the *Fiscal* of the Supreme Court in Madrid would be requested to give his view as to the continuation of the prosecution. This graduated supervisory system might be worthy of adoption in America.

228. Art. 644.

229. Arts. 645, 637.