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A Survey of Criminal Procedure in Spain and Some Comparisons with Criminal Procedure in the United States (Part II)

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

(PART II)*

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II. THE TRIAL (*JUICIO ORAL*)

THE CLASSIFICATION OF THE CRIME (*la calificación del delito*)

It will be recalled that prior to the time that an accused is declared a *procesado*, with only a few exceptions, he is denied access to the records in the *sumario*.[230] It also will be recalled that as soon as he has been declared a *procesado*, the *sumario* is opened to him in order that he might press for the prompt termination of the *sumario*; request the judge of instruction to conduct additional investigative steps (*diligencias*),[231] formulate claims which affect him; and exercise the recourses of *reforma*, *apelación* and *queja* if the judge of instruction (and the *audiencia*) denies his requests.[232] In addition, the *sumario* must be made available to the *procesado* in order that he may be able to present his contentions as to the *calificación* or classification of the crime. Basically, the *calificación* consists of the written contentions of the prosecutor, any private accuser and the person indicted (*procesado*) as to what facts they contend have been proved (or disproved) in the investigation proceedings (*sumario*) and how these facts con-

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230. See *supra* notes 100, 101, 113, 143, 168, 185.
231. See *supra* notes 129, 197, 211.
232. See *supra* notes 203 *et seq.*

stitute (or fail to constitute) a crime. These written contentions could be analogized to a mixture of the pleadings (complaint and answer) in a common law action coupled with a brief of the law and facts aimed at narrowing the issues for presentation before the trial court. As soon as the court orders the opening of the trial, the cause shall be delivered to the prosecutor (*fiscal*) for a period of five days in order that he might prepare his *calificación* of the facts in writing.[233] When the *fiscal* has returned the cause, it shall be delivered for five days to the accuser, if there be one, in order that he might present his *calificación* of the facts in writing,[234] then for a like period to the *procesado* for his *calificación*,and then to third persons who may be civilly responsible for damages.[235]

The "writings" of the classification (*escrito de calificación*) are to be limited to determine in precise and numbered conclusions: (1) the punishable facts which have resulted from the *sumario*; (2) the legal classification or qualification (*calificación*) of these facts, determining the crime which they constitute; (3) the participation of the *procesado* or *procesados* in these facts; (4) those facts which constitute attenuating or aggravating circumstances of a crime or which result in exemption from criminal responsibility; (5) the penalties which the *procesado* has incurred by his participation in the crime. The private accuser and the *fiscal* (when sustaining a civil action) shall also express: (1) their views as to the amount of damages and harm caused by the crime, or the value of the thing which has to be restored, and (2) the names of the person or persons who appear responsible for the damage and harm or the restitution of the thing and the facts as to how they have contracted this responsibility [236]

All of the parties submitting the writings of *calificación* are bound by the same format, and they are obligated to admit or deny each separate point and to assign the points upon which they disagree.[237] However, the parties may pre-

233. Art. 649.
234. Art. 651.
235. Art. 652.
236. Art. 650.
237. Arts. 650-652

sent alternately two or more conclusions about each point in order that if the first alternative is not agreed to in the trial, the second alternative may be agreed to in the final sentence (*sentencia*) [238] In addition to the *sumario* (in the sense of a written record) itself, the parties will be able to examine any correspondence, books, papers and other "pieces of conviction."[239]

If the penalty requested by the accusing parties be of a correctional nature, the *procesado* may manifest his absolute conformity with the gravest crime charged in the *calificación* and with the penalty therein requested. If the tribunal does not think it necessary to continue the trial after the *procesado* has agreed to this, it shall dictate a sentence in accordance with the classification mutually accepted. The tribunal in this case is not able to impose a greater penalty than that agreed upon by the *fiscal* and the *procesado*.[240] It is at this point that the accused (*procesado*) and the prosecution (*fiscal*) formalize their prior agreement that the prosecution will reduce the severity of the charges in return for the accused's agreement to plead guilty—in the American vernacular to "cop a plea." It is to be noted that the court is bound to accept the "deal" worked out by the parties. An adoption of a similar rule by the courts in the United States would prevent the injustices which arise when an accused agrees with the prosecution to plead guilty in return for a lesser sentence and then is given a maximum sentence by a judge who is not bound to honor the agreement; many courts in the United States are as guilty as the accused in meting out shabby treatment. If this procedure is not accepted by the *procesado*, the trial will be continued.[241]

The *fiscal* and the parties in their respective "writing" of *calificación* are to manifest the proof which they intend to make use of in the trial (*juicio oral*) by presenting a list of experts and witnesses who will testify The list of experts and witnesses shall give their names and surnames, nicknames, and their domicile or residence; the list shall also

238. Art. 653.
239. Art. 654.
240. Art. 655.
241. Art. 655.

manifest if these experts and witnesses have to be cited by the court, or if they will be brought before the court by the proponent.[242] A similar rule would seem worthy of adoption in many jurisdictions in the United States.

After the presentation of the above lists to all parties, any party may request the practice of *diligencias* which he fears may not have been practiced in the *sumario*.[243] The *audiencia* then orders that the *calificación* has been completed and that the record be given to the *ponente* (the judge of the court who is in charge of an individual case) for a period of three days in order that he might examine the proposed proofs.[244] As soon as the cause has been returned to the tribunal by the *ponente*, the court examines the proposed proofs, admits those which it considers pertinent and rejects the others. There is to be no recourse against an order admitting additional proof or ordering the practicing of additional *diligencias*, but the recourse of *casación* (annulment) may be interposed at a later stage of the proceedings if the court rejects additional proofs or denies the practicing of additional *diligencias*.[245] It is to be noted that the civil and criminal procedure is consistent in encouraging the introduction of all of the facts; appellate relief is afforded only when there is a denial of evidence.[246] In the same order (*auto*) in which the court has ruled upon the introduction of the proposed evidence, the court (*audiencia*) designates the day for the commencement of the trial itself.[247]

The parties may recuse (*recusar*) experts named on the lists for any of the causes mentioned in article 468 dealing with the *sumario*,[248] provided that the recusation is made within three days after the receipt of the list of experts. The allegations of recusation are to be given in writing to the party who intends to present the expert. After each party has given evidence in opposition to or in support of a challenged expert, the court shall resolve the question,

242. Art. 656.
243. Art. 657.
244. Art. 658.
245. Art. 659.
246. LEY DE *ENJUICIAMIENTO CIVIL*, arts. 155, 156.
247. Art. 659.
248. See *supra* note 180.

and there cannot be any recourse against this decision.[249] The expert who is not recused within the above time may not be recused later [250]

Assuming that additional *diligencias* have been taken, the report of these *diligencias* will be delivered to the trial court (*audiencia*) for its consideration at the trial.

Public Trials

Contrary to what many lawyers in the United States might think, criminal trials (*juicio oral*) in Spain are required to be open to the public under a penalty of nullity However, the president of the court (*audiencia*) may order that the sessions be conducted behind closed doors when the case deals with morality, public order, or because of respect owing to the person harmed by the crime or to his family In order to adopt a resolution of a closed hearing, the president shall consult with the other members of the tribunal and then deliver his reasoned order which cannot be appealed.[251] After this resolution ordering a closed hearing has been read in open court, everyone is to leave the court except the victims of the crime, the *procesados,* the private accuser, the plaintiff (*actor*) who is seeking damages and their respective attorneys.[252] Secrecy of the trial may be ordered before it is commenced or at any stage.[253]

In practice the author has observed a very slight variation in the above procedure in Barcelona. Each time that a trial is to begin, the *alguacil* (court bailiff) appears at the door of the court room and announces "*audiencia pública*" (public trial or audience) Whereupon all of the parties, witnesses and spectators file into the courtroom. As soon as the particular trial is concluded everyone leaves the courtroom and waits for the next announcement of *audiencia pública.* This causes quite a bit of stirring about by the spectators, and it would seem more practical for the courts

249. Art. 662.
250. Art. 663.
251. Art. 680.
252. Art. 681.
253. Art. 682.

to follow the literal wording of the code which would allow the spectators to remain until a closed trial was announced; however, the variation would seem to be without any significant importance.

The Powers of the President of the Court

Although jury trials were used in criminal cases in Spain during the Republican Government, they were abolished by the Franco regime. Today, if the crime being tried calls for the imposition of the death sentence,[254] a court or *sala* (a subsection of the *audiencia*) of five judges will decide the facts and the law In all other criminal cases only three judges will sit. The conduct of each trial is under the supervision or direction of the president of the particular tribunal (*sala*), the other judges usually remain silent. The president of the tribunal (*sala*) could be analogized to a chief justice of an intermediate or final appellate court in America, although American puisne judges will be much more vocal than their Spanish counterparts.

The law requires the president to direct the debates and to prevent impertinent discussions which are not conducive to clarification of the truth, but without restraining the necessary liberty of the defense attorneys.[255] In order to maintain order and the respect owing to the tribunal, the president may fine any person for disrespect unless they have committed a graver infraction punishable as a crime. The president may also eject disorderly persons from the courtroom in addition to imposing a fine against t h e m,[256] and may detain them by placing them at the disposition of the competent judge.[257]

Everyone who is interrogated during the trial or who addresses the court must stand while he is speaking; there are certain exceptions—including the prosecutor (*fiscal*), the attorneys for the parties and other persons if the president

254. The death sentence is rarely imposed today· a murderer will usually receive a thirty-year sentence, which is the maximum prison sentence permitted. CODIGO PENAL art. 30. The author has been informed that the average prisoner will only serve one-half of his sentence provided that he has behaved properly in prison.
255. Art. 683.
256. Art. 684.
257. Art. 684.

dispenses with this obligation for special reasons.[258] It should be noted also that all expert witnesses who are members of a learned profession (doctors, lawyers, engineers, etc.) also may testify while sitting as a mark of respect accorded their status. In fact, if the accused happens to be a lawyer this privilege will be extended to him.

All manifestations of approbation or of disapprobation are forbidden during the trial.[259] When the accused disturbs the order of the trial by his improper conduct and persists in doing so in spite of the warnings of the president, including warnings that he may be made to leave the courtroom, the court may decide that he be expelled for a certain time or for the entire duration of the sessions.[260] The author does not know of any comparable statutory provisions in the United States which permit the judge to expel an accused and to continue the trial during his absence. The American practice of imposing fines and sentences for contempt will probably be adequate in the ordinary case, but inadequate when the defendants and their lawyers have banded together to be obstreperous. The fairly recent trial of the communists before Judge Medina would seem illustrative.[261] The power to expel would soon curb this form of misbehavior

From the author's own observations this power to expel seems to be exercised rarely For example, the author witnessed the trial of a young artist who had decided to branch out by "drawing" the names of other people on checks. During the course of the trial this defendant began to interrupt the testimony of the handwriting expert. The president of the court would patiently tell him to be quiet, but the accused persisted in his noisy conduct. At the conclusion of the case the accused was invited to make a statement whereupon he began to shout that he had been incarcerated in a jail in Cádiz (approximately nine hundred

258. Art. 685.
259. Art. 686.
260. Art. 687.
261. See DANIEL, JUDGE MEDINA 235-283 (1952). In two cases, U.S. v. Davis, 6 Blatchf. 464, 25 Fed. Cas. 923 (No. 14) (C.C.S.D. N.Y. 1869) and People v. DeSimone, 9 Ill. 2d 522, 138 N.E.2d 556 (1956), the courts did expel (for short periods of time) defendants for improper conduct and continued the trials. The results of these cases may be questionable under the constitutional and statutory rights (both federal and state) of an accused to be present during the course of his trial. See generally Snyder v. Massachusetts, 291 U.S. 97 (1934) 14 AM. JUR. *Criminal Law* § 190 (1938) ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 414 (1947).

and sixty kilometers from Barcelona) and had not been given a just opportunity to discuss his case with his attorney, who had been appointed (by the *Colegio* of *Abogados*) to defend him. He became quite violent in his denunciations of the justice meted out by this particular court and the unfairness in general of Spanish justice. Finally, when he became obscene the president ordered him expelled. Whereupon, two guards began to remove him and the accused kept on mouthing his denunciations during a slow passage to the door The face of the president mirrored his anger, but he exercised admirable restraint and soon recovered his composure. The author doubts that many Anglo-American courts would have been as tolerant of similar misconduct.

THE TAKING OF EVIDENCE DURING THE TRIAL
(del modo de practicar las pruebas durante el juicio oral)

The Confession of the Accused and Persons Civilly Responsible (*confesión del procesado*)

Before beginning a discussion of the trial, it would seem appropriate to describe the typical courtroom in Barcelona, which is representative of those found throughout Spain. As one enters the door at the rear (or at the side towards the rear) of the courtroom one sees the bench at the front end of the room. Three judges will be sitting garbed in black robes (togas) and a black *birrete* or *bonete* (the *birretes* are dispensed with during the summers because of the heat) In the center of the wall behind the judges there will be a fairly large photograph of *Generalissimo* Francisco Franco. There will be a crucifix right below the photograph or on the bench. The front of the bench will be covered with a dark red or maroon velvet drape or cloth. To the right of the bench will be located the chair and desk of the *fiscal,* similarly draped in maroon. To the left of the *fiscal* will be a similar chair and desk for the *abogado* of the *querellante* (the attorney for the victim who is seeking a penal sanction or damages from the accused) or the private accuser (*acusador privado*) On the left side of the courtroom directly across from the *fiscal* there will be a similar chair and desk for the *abogado* of

the accused, along with an extra chair and desk to his right for associate counsel. The desk and chair of the secretary of the court will be in the center of the room twenty or thirty feet from the front of the bench. Directly behind the desk of the secretary there will be a small wooden bench or stool for the accused. Inasmuch as this stool is without a back and is unpadded, it must become acutely uncomfortable during the course of a protracted trial. It must be stressed that the accused has little opportunity to communicate with his *abogado* after the trial commences; from the author's experience in the United States this might be a blessing rather than a disadvantage.

The courtrooms are hot, ill-lighted, acoustically poor and quite grimy Why are so many courtrooms in all countries dirty? It would appear that the accumulated wisdom of the ages can only be applied in the accumulated filth of the ages. Despite these detracting features the courtroom in Spain is very obviously a courtroom in the full meaning of the term. One will not find the judicial banter, the judge telling jokes to the attorneys, the circus atmosphere too often found in criminal courts in the United States, or at least in some of those which have been encountered by the author The trial of a reckless driving charge in Spain is given the same dignity, the same care, the same attention as would be devoted by the United States Supreme Court to the review of a case involving the most fundamental of American freedoms. Justice is a dreadfully serious business in Spain, and it is treated accordingly

All of the *abogados*, the *fiscal* and the secretary of the court will be wearing black *togas* and *bonetes* (*bonetes* being dispensed with during the summers because of the heat) All of the *abogados*, the *fiscal* and the secretary will be seated before the trial actually commences.

Before the trial commences the "pieces of conviction" (objects used in committing the crime) will be collected before the court, and the president then declares the opening of the session.[262] At this moment the *alguacil* will come to the door and announce a public trial (*audiencia pública*),

262. Art. 688.

whereupon all parties, their attorneys and interested spectators will crowd into the courtroom. If the accused is free on bond (*fianza*), he will be directed to his stool by the *alguacil* who will direct the accused to remain standing until directed otherwise by the president. Everyone else will take his seat. If the accused has been in jail pending trial, he will be escorted into the courtroom by two guards carrying rifles. These guards will stand next to the accused until the trial has ended.

If the crime imputed in the writing of *calificación* of the *fiscal* calls for the imposition of a correctional penalty, the president asks the accused if he confesses his guilt and if he is civilly responsible for the restitution of the thing or for the payment of damages in the amount fixed in the writing of *calificacion*.[263] If there be a *querellante*, the accused will likewise be asked if he confesses his guilt to the gravest crime charged in the *calificación* of the *querellante*, and if he confesses his civil responsibility for the greatest amount fixed in this *calificacion*.[264] If more than one crime has been imputed against the accused in the writings of *calificación*, he will be asked the same questions about each charge.[265] The president is obliged to ask these questions with all clarity and precision and to demand categorical answers.[266] If the accused answers the questions affirmatively, the president then asks the attorney for the accused whether he considers the continuation of the trial necessary If the *abogado* answers negatively, the court then proceeds to enter a final sentence.[267]

The accused may confess his criminal responsibility, but deny his civil responsibility or deny that he is civilly responsible for the amount fixed in the writing of *calificación*, in this case the court will order the continuation of the trial. However, the discussion and the introduction of evidence will be limited to the charges which the accused has not admitted.[268] The above procedure could be compared to the American system of arraignment.

263. Art. 688.
264. Art. 689.
265. Art. 690.
266. Art. 693.
267. Art. 694.
268. Art. 695.

The trial will be continued if the *procesado* denies that he is guilty or if his attorney considers it necessary to continue the trial[269] after he has admitted his guilt.

In the average case the *procesado* will not wait to decide until the time of the trial to confess his guilt, but he will (as indicated previously)[270] make an agreement (if this be possible in his case) with the *fiscal* that he will "conform" with a certain charge calling for a set penalty which the court is bound to follow It would seem a bit dangerous to wait until the last moment to enter a plea of guilty when the law provides a safer alternative.

The trial will also be continued when a third party who is allegedly civilly responsible for the damages does not appear in court, or, if after appearing, he does not wish to answer the questions which are asked him by the president.[271] The third party will be warned that a failure to answer will be considered a confession. If he persists after the warning in not answering, he will be declared confessed, and the trial may be terminated unless his *abogado* considers it necessary to continue.[272]

Assuming that the *procesado* has denied his guilt, he is ordered to sit down and the trial is ready for the next stage, the examination of witnesses.

THE EXAMINATION OF WITNESSES (*del examende los testigos*)

This stage is the beginning of the trial proper The secretary then is supposed to read an account of the facts which have motivated the formation of the *sumario* and the day when the instruction was commenced. He is supposed to state also if the *procesado* is in prison or in provisional liberty with or without bail (*fianza*) He then is supposed to read the writings of *calificación*, the lists of experts and witnesses which have been presented at the opportune time and give an account of the other proofs which have been offered and admitted.[273] It may be mentioned that although

269. Art. 696.
270. See *supra* note 240.
271. Art. 698.
272. Arts. 700, 694.
273. Art. 701.

the law requires the above readings by the secretary, in practice this rule is not observed in the Barcelona criminal courts except when an *abogado* arrives late for a trial and is being castigated by the court for arriving late. The *abogado* will then ask the court if it has complied with the above reading; since the court has not it must then order the secretary to do so. This gives the *abogado* time to compose himself and alleviates the sting of the court's criticism, a good offense always being the best defense.

The trial then proceeds to the practice of *diligencias* of proof and the examination of the witnesses, beginning with those offered by the *fiscal,* continuing with those offered by the other *actors* (private accusers and *querellantes*) and ending with those offered by the *procesado.*[274]

The evidence of each party is introduced in the order in which it has been proposed in the written lists submitted by the parties, and the witnesses are examined also in the order in which their names appear on these lists. Nevertheless, the president may alter this order of proceeding, at his own instance or at the instance of one of the parties, when he considers it proper for clarification of the facts or for the discovery of the truth.[275]

If certain governmental officials have knowledge of the facts in the case, they need not testify in person before the court, but they may send a written report to the court which is to be read immediately before the examination of the other witnesses.[276] In this case (a relatively rare one) there is, of course, no right of cross-examination. The witnesses who are to testify at the trial are obliged to remain outside of the courtroom until they are called, without communicating with those who have testified or with any other persons;[277] when they are called, they are to enter one by one in the order of testifying.[278]

All witnesses older than fourteen years of age are to be sworn in the name of God and in accordance with their

274. Art. 701.
275. Art. 701.
276. Arts. 702, 703, 410-412.
277. Art. 704.
278. Art. 705.

own religion.[279] In accordance with the rules governing the witnesses in the *sumario*, all persons are obliged to testify when called except certain relatives of the accused, ministers of the gospel, and *abogados* and *procuradores*.[280]

The president asks each witness his name, surnames (paternal and maternal), age, marital status and profession, whether he knows the *procesado* and the other parties and if he is related to any of them, whether he is a friend of theirs or has had relationships of any other kind with them, if the witness has been a *procesado* and, if so, the penalty that was imposed.[281] The president then turns the witness over to the party who presented him, and the party then asks questions of the witness. However, in practice almost all testimony is presented in narrative fashion on the direct examination, and the presenting lawyer will confine his questions to the elucidation of the narration. When the direct examination has been concluded, the other parties may also ask the witness questions if they are pertinent to the contentions presented. The president, at his own instance or at the request of any judge, may ask the witness questions which he deems conducive to "purify" (*depurar*) the testimony [282]

The president is obliged to forbid the witness from answering deceitful (misleading), suggestive or impertinent questions or "re-questions." The secretary is then required to record *verbatim* the question or re-question which the president has forbidden the witness to answer The *recurso de casación* may be interposed against the president's act if there was proper protest made at the time of the ruling.[283] If American trial lawyers were forbidden to use misleading or suggestive questions (particularly upon cross-examination), it is feared that many of them would have to seek gainful employment in other pursuits.

All witnesses are bound to express the reasons for what they have said. If their testimony is a narration of what

279. Arts. 706, 434.
280. Arts. 707, 416-418. Ministers of the gospel, *abogados* and *procuradores* are exempted as to communications received in the practice of their respective ministry or professions. See *supra* note 10.
281. Arts. 708, 436.
282. Art. 708.
283. Art. 709.

someone has told them, they are to give the source of the information precisely by designating the name and surname of the person who communicated the information to them.[284] In brief, this is a code recognition of the admissibility of hearsay testimony For example, if the witness should testify that Juan Diaz told him that he (Diaz) had seen the *procesado* commit a crime, it would be admissible. Its main probative value would be in proving that Juan Diaz made the statement; it would have little, if any, probative value that the *procesado* did in fact commit the crime.

The parties may request that a witness recognize the instruments or effects of a crime or any other "piece of conviction."[285] In the confrontation of the witness with the *procesado,* or between the witnesses themselves, the president is not to permit insults or threats. He is to limit the confrontation by directing the confronters in their duty to make the observations which they believe proper in order to come to an agreement and to arrive at the discovery of the truth.[286]

When the testimony of the witness does not conform substantially with his testimony presented in the *sumario,* any of the parties may request that his prior testimony be read to him. After this testimony has been read, the president then "will invite" the witness to explain the difference or contradiction between the two statements.[287] It appears that the crime of perjury can only be committed if the false testimony is given during the trial (rather than during the *sumario*), if the testimony was falsely given during the *sumario* it is to be punished as a different crime.[288]

The declarations of the authorities and officers of the police are to have the value of "declarations of normal witnesses appreciable as such if they are according to the rules of rational judgment."[289] The import of this article is that the testimony of a policeman is not to be given any more weight than that of any other witness simply because he is a policeman.

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284. Art. 710.
285. Art. 712.
286. Art. 713.
287. Art. 714.
288. Art. 715.
289. Art. 717.

When it is impossible for a witness to testify and the court considers his testimony important to the outcome of the trial, the president may designate one of the members of the court to go to the residence of the witness if it is located within the area of the court. The court (consisting of one judge appointed for this task and the secretary of the court) shall be formed in his home, and the parties may ask questions which they consider proper The secretary then makes a record of the proceedings by recording the questions and "re-questions" which were asked of the witness, the answers that he gave and the incidents which occurred in the proceeding.[290] If the witness does not reside in the area where the trial is being conducted, and it is impossible for him to attend, the president may issue an *exhorto* (a written request addressed to a judge of equal rank) or a *mandamiento* (an order by a superior judge addressed to an inferior judge) for the witness to be examined before a judge of his district. The examination may be conducted in accordance with the preceding paragraph or, if the parties prefer, the questions and "re-questions" may be delivered in writing in the *exhorto* or *mandamiento* and the president shall consent if they are not deceitful (misleading), suggestive or impertinent.[291] These last two articles would seem to give the courts a great amount of flexibility in dealing with this difficult situation. The author does not know of any comparable rules in criminal procedure in the United States.

Finally, witnesses may claim compensation for their trip to court. The court shall take into account only the expenses of the trip and the amount of the wages lost by the witness by reason of his appearing to testify [292] The American practice of giving a bootblack the same *per diem* as the highest paid wage earner has always seemed a little too democratic to the author; a witness who is going to lose a large daily wage is going to be hostile to the person calling him. The Spanish practice would seem more conducive to the obtaining of impartial witnesses.

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290. Art. 718.
291. Art. 719.
292. Art. 722.

THE TESTIMONY OF EXPERTS (*del informe pericial*)

Experts may be recused for the reasons and in the manner mentioned previously in the discussion of the *sumario*.[293] The substantiation of the incidents of *recusación* must take place previously in the time intervening between the proposing of proof by the parties and the opening of the trial.[294] The experts are examined together when they are to testify about the same facts, and they are supposed to answer the parties' questions and "re-questions."[295] If the experts consider it necessary to practice any examination in order to answer a question put to them, the examination will be made in court if possible. If it is not possible to conduct the examination in the courtroom, the trial will be suspended for the necessary time, unless meanwhile these experts may continue practicing other *diligencias* of proof.[296] It may be interjected that the brief attention given by the Code to the testimony of experts in the trial has no relationship to the importance of this testimony From what the author has seen and been told, it appears that the Spanish courts give great weight to the testimony of experts—much more weight than an American court might give. For example, mention has been made previously of a forgery case that the author saw tried. The only witness for the prosecution was a handwriting expert who testified that he had asked the accused to sign his name for comparison purposes, and that the accused had obviously attempted to disguise or alter his handwriting style during this examination. The prosecution seemed content with this testimony alone, and judging from the faces of the judges, the prosecution's contentment was well grounded. It must be stressed, however, that the Spanish courts are not bound by the experts' opinions, but they are entitled to make a free appraisal of the value of the experts' opinions.

DOCUMENTARY PROOF AND VISUAL INSPECTION (*de la prueba documental y de la inspección ocular*)

In accordance with the common practice in Anglo-

293. See *supra* notes 179, 180.
294. Art. 723.
295. Art. 724.
296. Art. 725.

American courts, the Spanish courts are to examine the books, documents, papers and other similar "pieces of conviction" which may contribute to the clarification of the facts or the more certain investigation of the truth.[297] Again, somewhat in accordance with Anglo-American practice, the court may order a visual inspection of the scene of the crime. If the visual inspection was not practiced before the opening of the trial (*i.e.*, in the *sumario*) and if the place to be inspected is located in the city in which the court is sitting, the court and the parties will go to the scene. The secretary is obligated to prepare a *diligencia* (record) expressive of the place or thing inspected, the observation of the parties and other similar incidents which may occur If the scene of inspection is out of the city, the president may designate a member of the court to go to the scene with the parties and a similar *diligencia* will be prepared by the secretary [298]

The author has been informed that this visual inspection is rarely made because the judges are not usually inclined to leave their courtrooms, and there will seldom be a real need for the inspection.

Miscellaneous Rules of Evidence

In general, no party may practice *diligencias* of proof which were not proposed in writing before the beginning of the trial, nor examine witnesses whose names were not similarly presented in writing.[299] However, the court itself may order *diligencias* of proof which it considers necessary for the confirmation of any facts presented in the writings of *calificación* (*escritos de calificación*) [300] Also, the court may admit *diligencias* of proof offered by the parties in order to accredit or support some circumstances which may influence the probative value of the testimony of a witness.[301] At the request of any of the parties, the secretary will read those *diligencias* (in the sense of the records of an investigative step) practiced in the *sumario* "which may not

297. Art. 726.
298. Art. 727.
299. Art. 728.
300. Art. 729(2).
301. Art. 729(3).

be reproduced at the trial because of causes independent of their will."[302] For example, if the judge of instruction made a visual examination of the site of the crime, the record (*diligencia*) of his examination and findings will be read rather than the trial court repeating the same visual examination.

THE ACCUSATION, THE DEFENSE AND THE SENTENCE (*las acusación, defensa y sentencia*)

After all the testimony has been taken, the parties may modify their conclusions (in the sense of contentions) contained in the writings of *calificación*; the new conclusions are to be written and delivered to the president of the court. Again, the conclusions may be in alternative form.[303]

If the court adjudges that the justiciable facts have been classified in manifest error, the president may use the following form:

> Without this seeming to prejudge the definitive judgment about the conclusions of the accusation and the defense, the tribunal desires that the *fiscal* and the attorneys of the *procesado* (or the attorneys of the parties when they are numerous) illustrate if the justiciable fact constitutes the crime of or if there exist exempting circumstances from responsibility which are referred to in number ——— of article ——— of the Penal Code.

This is an exceptional power which the tribunal is to use with moderation. This power may not be extended to crimes which may only be prosecuted at the instance of a party, nor is it applicable to errors which may have been committed in the writings of *calificación* with regard to attenuating or aggravating circumstances as well as the degree of participation of each of the *procesados* in the execution of the crime. If the *fiscal* or the attorneys for the parties indicate that they are not sufficiently prepared to discuss

302. Art. 730.

303. Art. 732, 653. These "new" conclusions are known as "definitive" conclusions even though they might be merely a reiteration of the "provisional" conclusions contained in the writings of *calificación*.

the question proposed by the president, the session will be suspended until the following day [304]

Assuming that the above procedure is not utilized (and it will not be in most cases), the case is now ready for the *informe* stage which is somewhat similar to the closing arguments in American courts. The prosecutor speaks first,[305] followed by the attorney for the *accuser*,[306] the attorney for the civil plaintiff,[307] the attorney or attorneys for the *procesado* or *procesados* and lastly the attorney of a third person who may be civilly responsible for damages (unless some of them have a common attorney)[308] The prosecutor and the private accusers are to expound about the facts which they consider to have been proved at the trial, their legal classification, the participation of the procesado in these facts and the civil responsibility incurred by him or other persons. They expound also about the chattels which are to be restored or of the amount of damages which ought to be awarded when the informants exercise the civil action for these things.[309]

The arguments of the attorneys for all of the parties are to be arranged in accordance with the conclusions which have been formulated definitively by each of them.[310] After the conclusions of the arguments by the attorneys for all the parties, the president then asks the *procesado* if he has anything to say to the court, and if he answers affirmatively, he is to be given the right to speak. The president is to take care that the *procesado* does not offend morals or fail to give the respect owing to the court and to all of the persons in the court. The statement of the *procesado* is to be limited to what is pertinent, and if he violates the warning of the court, his right to speak will be withdrawn.[311] It is considered very bad form for a *procesado* to address the court in response to its invitation because it causes grave embarrassment to his attorney The *abogados* always tell their clients to decline the op-

304. Art. 733.
305. Art. 734.
306. Art. 734.
307. Art. 735.
308. Art. 736.
309. Art. 734.
310. Art. 737.
311. Art. 739.

portunity to speak; unfortunately, clients (of whatever nationality) do not always follow the advice of their counsel. The author witnessed one case where the client began to remonstrate with the court about the conduct of his own *abogado,* who had been appointed to serve without fee. As the *procesado* was being forcibly removed, the overwrought *abogado* rushed to the bench protesting the truth of his client's statements. The court then hastened to assure the *abogado* that they did not believe the client's statements; there was much embarrassment on both sides of the bench. Inasmuch as the *abogado* had conducted a masterful defense of a very sorry case, the complaints of an indigent client seemed very poor compensation indeed.

After the conclusion of the arguments for all the parties, the president declares the conclusion of the trial for sentencing.[312] The court, appreciating according to its conscience the proofs practiced in the trial, the reasons expressed by the prosecution and the defense and the manifestations of the *procesado,* shall dictate the sentence within a period of eight days.[313] In reaching its decision the court is to make use of its free judgment for the classification of the crime or for the imposition of the penalty provided in the Penal Code. The sentence ought to state if the court has considered the elements of judgment required by the applicable precepts of the Penal Code.[314]

The sentence shall resolve all of the questions involved in the trial, condemning or absolving the *procesado* not only for the principal crime and its connected crimes, but also for the incidental offenses which have been connected with the case. If the tribunal believes that the *procesado* ought not to be condemned because of insufficient evidence, it must absolve him; the tribunal may not employ the formula of the *sobreseimiento* in order to suspend or discontinue the proceedings until sufficient evidence is obtained. Finally, the sentence shall also resolve all the questions dealing with the civil responsibility of the *procesado.*[315]

312. Art. 740.
313. Art. 741.
314. Art. 741.
315. Art. 742.

CONCLUSION

In this article the author has neither intended to imply that the criminal procedure in Spain is perfect nor that it should be adopted *in toto* in the United States. On the other hand, the author does submit that certain Spanish concepts deserve serious consideration by lawmakers in the United States:

1. The *querella* system whereby the rights of the state and the victim are vindicated in one single action would reduce court costs and delay If a man steals or damages my property or injures me, why should I be forced to institute a civil suit for damages when my claim could be handled as a part of the criminal action? It seems to the author that much of our present system of splitting one act into two cases is based upon a blending of Parkinson's and Gresham's laws.

2. The utilization of a judge of instruction to process the investigation of a case would aid in the search for truth. If Anglo-American criminal justice is based upon the concept that all the facts (whether incriminating or exculpating) are to be introduced in a case, why entrust this delicate task to the police and prosecution without any real control by the judiciary? It is asking too much of human nature to expect the police and the prosecution to reveal facts which might damage the prosecution's case. It is a tragic farce to expect all the truth to be revealed when the mammoth investigative power of the state is marshalled against an indigent defendant. The appointment of counsel to represent indigent defendants has little purpose when the counsel cannot afford to conduct an investigation of the facts by expert investigators. The intervention of a judge during the investigative process might tend to balance the scales by making certain that all the facts were revealed.

3. The utilization of the judge and his secretary in making a report of the investigation might tend to insure that important evidence did not vanish because the police were bribed, or because the police succumbed to temptation and took it for their own use.

4. The utilization of the judge and his secretary in making a report of the entry and search under a search warrant (or without a search warrant) might reduce the the number of cases wherein an obviously "guilty" defendant has escaped conviction because of the blundering steps taken by the police and by their equally blundering testimony of what they did.

5. The revealing of the prosecution's case to the accused would tend to balance the scales of justice. In the United States we have adopted discovery rules in civil cases in order that each side might learn of the other's case. When it comes to a man's life or liberty we still cling to the medieval notion that each side should carefully hide the evidence so that it may be used as a bombshell at the trial; it is a very tragic game that we play

6. Agreements between the prosecution and an accused as to the ultimate charge and sentence would tend for more respect of our criminal system. Why should not the prosecutor in the United States have the authority to enter into a binding agreement with the accused as to the severity of the charge and the sentence to be imposed?

7 A judicial review of the facts and law before the trial might tend to reduce the number of baseless criminal suits. What valid objection would there be to the establishment of a system whereby a judge would review the prosecution's file in order to make a judicial assessment of the facts and law involved before the accused was put on trial? When an information is used, it is a tragic thing for a man to be tried upon the sole judgment of the prosecutor; an acquittal is small consolation to an innocent man whose reputation has been ruined as the result of a well-publicized trial.

8. Judicial scepticism of confessions might tend to avoid miscarriages of justice. Why should so much care and attention be devoted in American courts to determining the "voluntary" nature of confessions? It seems to the author that when the police have testified that the confession was obtained from the accused without any threats, force or

promises this should be a "red flag" to the judiciary Leaving to one side the neurotics and psychotics, how many persons will voluntarily confess a crime knowing that it will result in the loss of their liberty or life? Would there be any valid objection to the law providing that an accused cannot be convicted upon his confession unless the crime is fully corroborated by other evidence or unless his confession is repeated in open court after he has been given a psychiatric examination?[316]

Of course, the real objection to all of the above suggestions is that it was not done this way in England in the Middle Ages. As one English law teacher expressed it to the author, "You Americans have religiously copied the ancient English law — the defects as well as the virtues." Perhaps it is time to look to other legal systems.

316. The suggested psychiatric examination process is not in use in Spain.