

11-1-1964

Criminal Procedure in the Federal District and Federal Territories of Mexico

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CRIMINAL PROCEDURE IN THE FEDERAL DISTRICT AND FEDERAL TERRITORIES OF MEXICO

DANIEL E. MURRAY*

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I. INTRODUCTION

Mexico has a federal system of government embracing twenty-nine states. In addition to the states there is the Federal District which embraces Mexico City and the Federal Territories of Sur Baja California and Quintana Roo. Under this federal system, there are two codes of criminal procedure in effect. The Federal Code of Penal Procedure¹ is a nationwide code which governs the procedures for federal crimes (e.g., robbing of the mails, crimes against the railroad, etc.) committed in any of the states or territories. The Code of Penal Procedure of the Federal

* Associate Professor of Law, University of Miami. This article was prepared by the author for the Comparative Study of the Administration of Justice, established under the terms of a grant from the Ford Foundation to Loyola University School of Law (Chicago) and is published here with the consent of the Study. All rights are reserved by the Study.

The author would like to express his appreciation to *Lic.* Miguel Campos Somellera, Guadalajara, Jalisco, Mexico, for placing his office at my disposal and for the courteous treatment accorded me by him and his staff of attorneys. Appreciation is also due to *Lic.* Carlos Cortes F., of Mexico City. Finally, the author is indebted to Dr. Eduardo Le Riverend, formerly of the University of Havana, now Adjunct Professor of Law, University of Miami, for his constructive criticisms and suggestions concerning the author's translation of the code of procedure. Any sins of omission or commission in this article are to be assessed against the author.

1. CODIGO FEDERAL DE PROCEDIMIENTOS PENALES (1934).

District and Federal Territories² establishes the procedure for crimes committed against persons and non-governmental entities in the Federal District and in the two territories. Finally, most of the states have codes of criminal procedure which resemble, in varying degrees, the two federal codes.³

It is the purpose of this article to discuss the Code of Penal Procedure of the Federal District and the Federal Territories as more or less representative of Mexican criminal procedure.

This Code, in accordance with almost all civilian penal procedure codes,⁴ is based upon an inquisitorial principle in which almost all of the important evidence is introduced during the stage of pre-trial investigation, while the trial is reserved primarily for arguments dealing with the facts and law. At the very outset it should be stressed that although the procedure is inquisitorial in nature, almost every possible safeguard for the rights of the individual is preserved both in the Constitution of Mexico and in the Code itself. Every accused, regardless of economic means, is guaranteed the right to have an attorney defend him from the moment he is arrested and to represent him at every step of the investigation (*instrucción*). The accused legally cannot be forced to testify against himself, and it would seem rather difficult to prove the value of extra-judicial confessions if they should be coerced by over-zealous police. In connection with the relative weight to be accorded to the testimony of witnesses, the burden of proof would seem almost insurmountable to a prosecutor in the United States. The inability of the prosecution to amend its original charges also tends to tip the scales in favor of the accused.

Although the Code is well written in its individual parts, an overall disorganization is manifested in its failure to unfold in a step-by-step progression from the beginning of a criminal prosecution to its conclusion. As a result, the author has rearranged the outline to fit the procedure as it develops in a criminal case. Further, many provisions have not been discussed because they would have little interest to the reader in the United States.

II. THE INVESTIGATION STAGE

A. *Constitutional Guarantees* (Garantias Constitucionales)

The provisions of the Constitution of Mexico have nationwide application in the same manner as the Constitution of the United States. However, the Mexican provisions appear to be better stated than their coun-

2. CODIGO DE PROCEDIMIENTOS PENALES PARA DEL DISTRITO Y TERRITORIOS FEDERALES (1931).

3. E.g., CODIGO DE PROCEDIMIENTOS PENALES PARA EL ESTADO DE JALISCO (1934).

4. E.g., Murray, *A Survey of Criminal Procedure in Spain and Some Comparisons With Criminal Procedure in the United States*, 40 N.D.L. REV. 7-56 (1964); Murray, *The Proposed Code of Criminal Procedure for Guatemala*, 24 LA. L. REV. 728 (1964).

terparts in the United States. Article 14 of the Mexican Constitution provides for the basic rights of substantive due process. No law may be given retroactive effect in prejudice of any person. No one may be deprived of life, liberty or of his property, possessions or rights, except by means of a trial conducted before previously established tribunals in which the essential formalities of procedure shall be observed and in conformity with the laws issued prior to the act. In criminal proceedings it shall be prohibited to impose, by simple analogy and even by superiority of reason, any penalty which is not decreed by any law precisely applicable to the crime.

Article 16 deals with the general area of searches and seizures. No one may be molested in his person, family, home, papers or possessions, except by virtue of a written order issued by the competent authority, and based upon and motivated by a legal cause of procedure. If one other than the judicial authority issues an order of apprehension or detention, it must be preceded by a denunciation, accusation or private complaint (*querrela*) of a specific act which the law punishes with a corporal penalty, and the foregoing means of denunciation must be supported by a declaration "under protest"⁵ made by a "meritorious person of faith" or by other data which makes it probable that the accused is responsible. An exception is made in those cases of *flagrante delicto*, in which any person may apprehend the delinquent and his accomplices by placing them without delay at the disposition of the immediate authority. Only in urgent cases, when there is no judicial authority dealing with crimes which are prosecuted *ex officio*, may be administrative authority under its most strict responsibility decree the detention of an accused by placing him immediately at the disposition of the judicial authority. All search warrants (*orden de cateo*) must be written and may be issued only by the judicial authority. The warrant must express the place which is to be inspected, the person or persons who are to be apprehended and the object of the search; to which the search must be limited. In order to conclude the search, the searchers are required to draft a detailed report of the search. This report must be made in the presence of two witnesses proposed by the occupant of the place searched, or in his absence or refusal, by the authority which performs the step (*diligencia*).

The administrative authority may conduct an examination of a home only in order to ascertain if the occupants have complied with police and sanitary regulations, and to demand the exhibition of indispensable books and papers in order to prove that the occupants have "respected" the fiscal (taxation) provisions in accordance with the respective laws and the formalities perscribed for these searches.

Preventive imprisonment (in the sense of being in jail while awaiting

5. The terms "under protest" or "to give or make protest" are used in the sense that a declarant solemnly promises to tell the truth.

trial) can be ordered only in the case of a crime which merits a corporal penalty. The site of this preventive imprisonment must be distinct from the one that is designated for the "extinction" (in the sense of serving time) of penalties.⁶

In all criminal cases the accused shall have the following guarantees:

1) Immediately upon his request he shall be placed at liberty under a bond in an amount which the judge shall fix, taking into account the personal circumstances of the accused and the gravity of the crime which has been imputed against him, provided that the crime is punishable with a penalty of not more than five years imprisonment and further provided that he places a sum of money at the disposition of the authority or executes a "mortgage" bond (*hipotecaria*) or a personal bond in an amount sufficient to assure his presence.

In no case shall the bond or security required be greater than 250,000 pesos (approximately \$31,350) unless it deals with a crime which represents an economic benefit for its author or causes the victim patrimonial damage; in these cases the guaranty is assessed at three times the benefit obtained or the damages caused.

2) No one shall be compelled to declare against himself, and the holding of the accused incommunicado or any other method of forcing the accused to incriminate himself is rigorously prohibited.

3) Within forty-eight hours of his consignment to the justice, the accused must be informed in a public hearing (*audiencia*) of the name of his accuser and the nature and cause of the accusation in order that he be aware of the punishable act which has been attributed against him and in order that he may contest the charge by giving his "preparatory declaration."

4) The accused must be confronted with the witnesses who have deposed against him and if they are in the place of the proceedings, they shall declare in his presence, to enable him to ask them all questions which are conducive to his defense.

5) The testimony of witnesses and other proof which the accused offers shall be received by providing him such time as the law deems necessary for this purpose and by aiding him in securing the appearance of those persons whose testimony he requests, provided that they may be found in the jurisdiction where the proceedings are being conducted.

6) For all crimes punishable by more than one year in prison, the accused shall be tried in a public trial by a judge or a jury of citizens⁷

6. CONSTITUCIONE DE MEXICO, art. 18.

7. Articles 332-88 and 645-59 provide the procedural rules for jury trials. Space limitations do not permit a discussion of these rules in this article, but the author is preparing an article which will discuss this unusual form of jury trial.

who are literate and who are residents of the place and district in which the crime was committed. In all cases he shall be tried by a jury for those crimes committed by means of the press against the public order or the foreign or internal security of the nation.

7) He shall be supplied with all data which he solicits for his defense, and it shall be made a part of the proceedings.

8) He shall be tried before the expiration of four months if the proceeding deals with a crime whose maximum penalty does not exceed two years imprisonment and before the expiration of one year if the maximum penalty exceeds two years.

9) He shall be heard personally in his defense or by a person of his confidence, or both, according to his choice. If the accused does not have a person to defend him, he shall be presented a list of those *ex-officio* public defenders⁸ to enable him to choose the defender or the defenders who are suitable to him. If the accused does not wish to name defenders after he is required to do so, the judge *ex officio*, shall name one in order for the accused to give his "preparatory declaration." The accused may appoint a defender from the moment of his apprehension and this defender has the right to be present at all acts of the trial, but he shall have the obligation of making as many appearances as shall be necessary.

10) In no case may the imprisonment or detention of the accused be prolonged for lack of defenders' fees, or for any other payments of money or for cases of civil responsibility or any other analogous reason. Neither may preventive imprisonment prior to conviction be prolonged for a greater time than that fixed by law for the crime which motivates the proceedings. The time spent in detention shall be computed (in the sense that the prior detention will be taken into account in fixing the term of imprisonment) in all penalties of imprisonment which are imposed in the final sentence.

The double jeopardy provisions of the Constitution are rather intricate. First, no criminal proceedings shall have more than "three instances."⁹ Neither may anyone be adjudged twice for the same crime, since in the trial he shall be absolved or condemned. "The practice of absolving of the instance" remains prohibited. Under this latter proviso it would be invalid for the court to decide that the accused has not been proved guilty: he must be acquitted or condemned for the crime itself, and not just of the particular prosecution which has failed to prove the guilt of the accused.

8. See: LEY DE LA DEFENSORIA DE OFICIO FEDERAL, 1922; REGLAMENTO DE LA DEFENSORIA DE OFICIO FEDERAL, 1922; REGLAMENTO DE LA DEFENSORIA DE OFICIO DEL FUERO COMUN EN EL DISTRITO FEDERAL (1940).

9. CONSTITUTION OF MEXICO art. 23.

B. *Commencement of the Proceedings* (Iniciación del procedimiento)

The judicial police are obliged to proceed *ex officio* to make an investigation of the crimes of which they have notice, except in the following cases:

- 1) When they deal with crimes which may be prosecuted only by a necessary private complaint (*querrela*), if it has not been presented, and
- 2) When the law demands some prior requisite, which has not been fulfilled.¹⁰

The following crimes may be prosecuted only upon petition of the offended party: abduction and rape (*raptó v estupro*); insults, defamation, slander and simple blows, and other crimes provided for in the Penal Code.¹¹ When the complaint of the offended party is necessary for the prosecution of the crime, a verbal complaint is sufficient even when it is made by a minor. If another person appears before the judge and files a complaint in the name of the offended person, the complaint shall be considered legally formulated if the offended person has not expressed his opposition to it.¹²

To initiate their proceedings, the Public Ministry¹³ or the judicial police shall go immediately to the place of the acts in order to attest (*dar fé*) as to the persons and things which have been affected by the criminal act. They are required to obtain data from those who were present by procuring their declarations at the place of the act, if it is possible, and if it is not possible, by citing them to appear within a period of twenty-four hours to render their declarations.¹⁴ The Public Ministry and the judicial police of the Federal District and Federal Territories are obliged, without waiting for a judicial order, to proceed to the detention of those responsible for a crime if it is a case of *flagrante delicto* and in cases of "notorious urgency" when the place is without judicial authority.¹⁵

The apprehension of a delinquent in *flagrante delicto* is understood to include not only his arrest at the moment of committing the crime, but also the physical pursuit after he has committed the criminal act.¹⁶ By

10. CODIGO DE PROCEDIMIENTOS PENALES PARA DEL DISTRITO Y TERRITORIOS FEDERALES art. 262 (1931). All references hereafter are to this code, unless otherwise noted.

11. Art. 263.

12. Art. 264.

13. The "Public Ministry" is somewhat equivalent to the Department of Justice in the American Federal System. The Public Ministry has prosecutors assigned to the Penal Courts. See LEY ORGANICA DEL MINISTERIO PUBLICO DEL DISTRITO Y TERRITORIOS FEDERALES (1954).

14. Art. 265.

15. Art. 266.

16. Art. 267.

way of definition, there is no judicial authority in the place and there exists "notorious urgency" for the apprehension of the delinquent when, because of the hour or by the distance of the place in which the detention was performed, there is no judicial authority who may issue the proper order and there exists serious fear that the one responsible will remove himself from the action of the authorities.¹⁷

When the person who is "presumed" responsible is apprehended, a record will be made of the hour when it was done and the arresting officers will receive the declaration of the accused. In addition, the persons making the arrest shall recover those objects which have a relationship with the crime, as well as those which should not be in the accused's possession for fear of losing them or because it is considered inconvenient for the accused to have them in his possession. In all cases, the arresters are required to deliver to the detained person a receipt specifying the objects gathered; the duplicate of this receipt must be signed and approved by the accused and included in the record (*acta*).¹⁸

Before transferring the presumed criminal (*presunto reo*) to the preventive jail, the arresters shall take his personal data (*generales*—name, age, address, occupation, etc.,) and shall identify him accurately. They then shall inform the accused of the right which he has to appoint a defender. The defender may enter into the discharge of his duty after giving a "protest," or a solemn promise to perform his duties, before the officials of the Public Ministry or of the police who intervene.¹⁹ If the accused or his defender requests liberty under bond (*libertad cautional*), the officials shall "limit themselves" to receive the petition and to add it to the record in order that the judge may decide the point.

In every case, the official who knows of a criminal act shall have the victim as well as the person presumed responsible examined immediately by the court physicians (*medicos legistas*) in order that they might draw up a provisional report about their psycho-physiological (*psico-fisiologico*) conditions.²⁰

When the accused is apprehended, the Public Ministry (the prosecuting authority) shall be obliged under its most strict responsibility to place the detained person immediately at the disposition of the judicial authority.²¹ The judicial police shall be under the authority and command of the Public Ministry; the same rule shall apply when the preventive police act in the investigation or prosecution of crimes.²²

17. Art. 268.

18. Art. 269.

19. Art. 270.

20. Art. 271. The *Medico-Legistas* are in the various branches of forensic medicine appointed by the Supreme Court. See LEY ORGANICA DE LOS TRIBUNALES COMUNES DEL DISTRITO Y TERRITORIOS arts. 224-36 (1932).

21. Art. 272.

22. Art. 273.

C. *Special Rules for the Performance of Steps and the Drawing up of Records of the Judicial Police* (Reglas especiales para la práctica de diligencias y levantamiento de actas de policia judicial)

As soon as the members of the judicial police on duty have knowledge of the commission of a crime which is prosecutable *ex officio*, they shall draw up a record (*acta*) in which shall be stated:

- 1) The report of the police or, as the case may be, the denunciation which has been made before them or another;
- 2) The proofs which were submitted by the persons who made the denunciation, as well as those which the police recovered in the place of the acts, whether they refer to the existence of a crime or to the responsibility of its authors, accomplices or concealors; and,
- 3) The measures which the police dictate in order to complete the investigation.²³

When the crime is of the kind mentioned in article 263—those calling for private prosecution—the agent who receives the complaint must at once take the following measures before performing the first steps (*diligencias*) of the investigation:

- 1) Inform the complaining party (*querellante*) of the sanctions which he will incur if he “produces with falsity”;
- 2) Record the general data for the identification of the complaining party, among which shall be included in all cases his fingerprint impressions at the end of the document which he presents; and
- 3) Prove the legal capacity of the complaining party, in the terms established in article 264.²⁴

When the complaining party is illiterate, or for any reason does not formulate his complaint in writing, the official before whom it is made is obliged to draw up a record which will include the above data.²⁵ All of these records are to be written on “sealed” paper—official paper bearing the requisite tax stamps—and the acts will be recorded in the official books by keeping copies of all documents when it is necessary to remit the original copies to the court.²⁶ The official who receives weapons or other objects related to the crime is required to make a description of them in the records by expressing the marks, kinds, matter and other characteristic circumstances which facilitate their identification. The official who receives money or jewelry shall deliver a receipt which states

23. Art. 274.

24. Art. 275.

25. Art. 276.

26. Art. 277-78.

the kind and the amount of money, and which clearly specifies the jewelry.²⁷

Each person who must be examined as a witness or as an expert shall give a "protest" of "producing with truth" under the following formula: "Do you protest under your word of honor and in the name of the law, to declare the truth in the steps [*diligencias*] in which you are going to intervene?" After the person answers this question in the affirmative, he will be informed of the severe sanctions for false testimony.²⁸

The steps which are performed must be brief and concise, by avoiding fruitless and superfluous narrations which protract the proceedings.²⁹ When the "record" (in the sense of this step of the investigation) is closed, this fact shall be noted and the agent of the Public Ministry shall proceed in accordance with his powers.³⁰

In the record which they prepare, the officials of the Public Ministry and the Judicial Police shall take down in writing all the observations which they may gather about the methods employed in the commission of the crime.³¹ They shall also record all the observations about the character of the delinquent which they gathered, whether at the moment the crime was committed, during the detention of the accused, or during the performance of the "steps" in which they have intervened.³² The "steps" performed by the Public Ministry and the Judicial Police "shall have full probatory value" provided that they are in accordance with the rules of this Code.³³

D. *The Instruction Period* (La Instrucción)

1. PREPARATORY DECLARATION OF THE ACCUSED AND THE APPOINTMENT OF THE DEFENDER (*Declaracion preparatoria del inculpado y nombramiento del defensor*)

The Code requires that a preparatory declaration be taken from the detained person within a period of forty-eight hours from the time the detained person has been placed at the disposition of the judicial authority.³⁴ This step will be performed in a place to which the public may have free access, but excluded from it are those persons who must be examined as witnesses in the investigation.³⁵ In no case and for no reason may the judge employ "incummunication" or other coercive means

27. Art. 279.

28. Art. 280.

29. Art. 281.

30. Art. 282.

31. Art. 284.

32. Art. 285.

33. Art. 286.

34. Art. 287.

35. Art. 288.

in order to obtain the declaration of the detained person.³⁶ The judge has the obligation in this act to inform the detained person of the following:

- 1) The name of his accuser, if there is one, and of the witnesses who declare against him, the nature and cause of the accusation, so that he knows the punishable act which has been attributed against him, and that he may contest the charge;
- 2) The guaranty of "liberty under bond" (*la libertad cautional*), in those cases in which it may proceed, and the procedure in order to obtain it; and,
- 3) The right which he has to defend himself personally or by naming a "person of his confidence" to defend him, and that if he does not name a defender the judge shall appoint a public defender.³⁷

In the case the accused wishes to declare, the preparatory declaration shall commence with his personal data (*generales*—name, age, residence, occupation, etc.), including his nicknames. He shall be examined about the acts which are imputed against him, and the judge shall adopt the form, terms and other circumstances which he deems fitting and adequate in order to clarify the crime and the circumstances of time and place in which it was conceived and executed.³⁸ The agent of the Public Ministry and the defense have the right to interrogate the accused, but the judge has at all times the power to reject a question if he judges it to be deceptive.³⁹ The accused may write his answers; if he does not, the judge shall write the answers by endeavoring to interpret them with the greatest exactitude possible "without omitting any details which may serve to charge or discharge."⁴⁰

After terminating the declaration or after obtaining the manifestation of the detained person who does not wish to declare, the judge shall appoint an *ex officio* defender for the accused if he does not already have one.⁴¹ After receiving the preparatory declaration or the manifestation of the accused that he does not wish to declare, the judge shall confront the accused with all the witnesses who have deposed against him.⁴² Every accused has the right to be assisted in his defense by himself or by the person or persons "of his confidence." If there are several defenders, they are obliged to appoint a common representative or, if they fail to do so, the judge will.⁴³

36. Art. 289.

37. Art. 290.

38. Art. 291.

39. Art. 292.

40. Art. 293.

41. Art. 294.

42. Art. 295.

43. Art. 296.

2. STEPS TAKEN BY THE JUDICIAL POLICE AND THE INSTRUCTION
(*Diligencias de Policia Judicial e instruccion*)

When the crime has left vestiges or material evidence (*pruebas*) of its perpetration, the Public Ministry or the agent of the Judicial Police must make a record of this fact and collect the evidence if it is possible.⁴⁴ When persons or objects having a relationship to the crime are encountered, their condition and connected circumstances shall be described in detail.⁴⁵ The Public Ministry shall name experts when the circumstances surrounding the person or thing may not be evaluated precisely without their use.⁴⁶ If the examination of a particular place is important in the proof of the crime, a record of this examination shall be made without the omission of any detail which may have value.⁴⁷ In the first moments of their investigation, the Judicial Police shall proceed to gather the arms, instruments or objects of any kind, which have a relationship with the crime and which are found in the place where the crime was committed and in contiguous areas within the control of the accused or of another known party. They shall carefully express the place, time and occasion of their findings by making a minute description of the circumstances. The police are required to give a receipt for all objects received from any person, and to keep a duplicate receipt which will express the agreement or disagreement of such person.⁴⁸ The Public Ministry shall order an expert examination of the places, weapons, instruments or objects of the crime whenever it is dictated by the "best evaluation" of their relation to the crime.⁴⁹

The judicial police shall draw a plan of the place of the crime and take photographs of it and the victims of the crime, when it is fitting for greater clarity and proof of the facts. Copies or sketches of the effects or instruments of the crime shall be made by using all of the resources which are offered by the arts. The plan, picture, copy or design shall be made a part of the record.⁵⁰ When the crime has not left traces or vestiges, this fact shall be recorded, and the opinions of experts shall be received as to whether the disappearance of the evidence occurred naturally, casually or intentionally, the causes of the same and the means of the disappearance if they were employed. The police shall proceed to gather and to record the evidence of any other nature which they may have acquired about the perpetration of the crime.⁵¹ In a like manner, the declarations of witnesses may be received about the non-existence of the evidence.⁵²

44. Art. 94.

45. Art. 95.

46. Art. 96.

47. Art. 97.

48. Art. 98.

49. Art. 99.

50. Art. 101.

51. Art. 102.

52. Art. 103.

The code makes further detailed provisions for the police investigation of murder, wounds, abortion, robbery, forgery, etc., which are beyond the scope of this article.⁵³

3. DETENTION OF THE ACCUSED (*Detención del inculpado*)

In order that a judge may issue an order of detention against a person, it is required that: 1) the Public Ministry has requested the detention, and 2) the requisites fixed by article 16 of the Federal Constitution shall concur.⁵⁴ The order of detention which the judge dictates shall be delivered to the Public Ministry.⁵⁵ Whenever a detention has been carried out by virtue of a judicial order, the agent of the police that has accomplished it is obliged without delay to place the detained person at the disposition of the respective judge and to state the hour when the detention began.⁵⁶

4. THE EVIDENCE (*de las pruebas*)

The Code recognizes the following means of evidence: the judicial confession, public and private documents, the opinions of experts, judicial inspections, the declarations of witnesses and presumptions. "Also there shall be admitted as proof all that is presented as such, provided that it may constitute proof in the judgment of the official who performs the investigation." When the official deems it necessary, the authenticity of this proof may be established by any legal means.⁵⁷

5. THE JUDICIAL CONFESSION (*Confesión judicial*)

A judicial confession is one which has been made before the tribunal or judge hearing the case or before the official of the judicial police who has performed the first steps in the investigative process.⁵⁸ A judicial confession is admissible in any stage of the proceeding until just prior to the pronouncement of the final sentence.⁵⁹ The extra-judicial confession shall be valued in accordance with the rules established by the code.⁶⁰

6. THE JUDICIAL INSPECTION AND RECONSTRUCTION OF THE FACTS (*Inspeccion judicial y reconstruccion de hechos*)

The judicial inspection may be performed *ex officio* or on petition of a party. The interested parties may attend and make any observations

53. Art. 104-24.

54. Art. 132.

55. Art. 133.

56. Art. 134.

57. Art. 135.

58. Art. 136.

59. Art. 137.

60. Art. 138.

they deem fitting.⁶¹ In order to perform the judicial inspection, the judge shall obtain the assistance of experts who subsequently must issue their report about the places or objects inspected.⁶² The judge *ex officio*, or upon petition of a party, shall draw up any plans or take any photographs which might be suitable. A record is made of this proceeding and signed by those who have intervened.⁶³ In cases involving wounds, upon the wounded person's recovery, the judges or tribunals shall certify the visible consequences of the wounds and perform an inspection. Again, it is necessary to draw up a report of this proceeding.⁶⁴ The judicial inspection may have the character of a reconstruction of the facts, and its purpose is to evaluate the declarations which have been rendered and the expert opinions which have been formulated. Judicial inspections shall be performed within the investigation stage only when the official who performs the steps (*diligencias*) of the judicial police or the judge or tribunal deems them necessary. In any case they must be performed when the instruction has been terminated, provided that in the judgment of the judge or tribunal the nature of the criminal (*delictuoso*) act committed and the evidence rendered require it. In addition, the judicial inspection may be performed during the hearing of the case or during the trial before the jury, when the judge or tribunal deems it necessary, even when it was not performed in the instruction.⁶⁵ When the site has influence in the development of the facts which are being reconstructed, this inspection "step" must be performed precisely at the place in which the crime was committed; in a contrary case, it may be performed in any other place.⁶⁶

A reconstruction of the facts may never be performed unless a simple visual inspection of the place where the crime was committed has been previously carried out and the accused, the victim, or witnesses (who must intervene in the case) have been examined.⁶⁷ The steps of reconstruction of the facts may be repeated as many times as it is deemed necessary by the official who performs the steps of the judicial police or of the instruction.⁶⁸ The following persons must attend the judicial inspection and the reconstruction of the facts: the judge with his secretary, or "witnesses of assistance" or the judicial police, as the case may be; the agent of the Public Ministry; the presential witnesses, if they reside in the place; the named experts, when the judge or the parties deem it necessary; those other persons whom the judge believes fitting and orders to do so.⁶⁹

61. Art. 139.

62. Art. 140.

63. Art. 141.

64. Art. 142.

65. Art. 144.

66. Art. 145.

67. Art. 146.

68. Art. 147.

69. Art. 148.

In order to perform this proceeding, the personnel of the court shall go to the *loci delictus* together with the persons who must attend. They shall "take the protest"—exact a promise to tell the truth—of the witnesses and experts and designate the person or persons who shall substitute for the absent "agents of the crime," and shall certify to the circumstances and details which have a relationship with the crime. Next, they shall read the declaration of the accused and shall ask him to explain the circumstances of place, time and form in which the facts developed. The same step will be taken with respect to each one of the witnesses present. Then the experts shall issue their opinions based on the declarations rendered and the traces or clues existent; in such cases the judge shall endeavor to insure that the opinions deal with precise points.⁷⁰ The parties who request the reconstruction of the facts must fix the facts or circumstances which they desire clarified and must express their petition in concrete propositions.⁷¹

7. SEARCHES AND EXAMINATIONS OF DWELLINGS (*Cateo y visitas domiciliarias*)

The search may be performed only by virtue of a written court order issued by the judicial authority. The order shall express the place of the inspection, the person or persons who are to be apprehended or the objects which are to be sought; the step must be limited to these. A record of the search must be made in the presence of two witnesses proposed by the occupant of the searched place or, in his absence or refusal, in the presence of two witnesses proposed by the authority who performs the step. When the Public Ministry acts as an investigator of crimes, he may ask the judicial authority to perform the search by furnishing the data which justifies the search. If the judicial authority agrees to perform the search, it shall send a report of the search to the Public Ministry.⁷²

The examination (*visitas*) of dwellings may only be performed during the day, from six in the morning until six at night, except when the examination has been declared in a prior order to be an urgent matter.⁷³

The official who has the power to order a search must observe the following rules:

- 1) If the search deals with a case of *flagrante delicto*, the judge or official may proceed to make a search or examination without delay in accordance with the terms of article 16 of the Federal Constitution.

70. Art. 150.

71. Art. 151.

72. Art. 152.

73. Art. 153.

- 2) He shall cite the accused to be present at the search if there is no danger that the presence of the accused will nullify or make the search difficult. If the accused is free and he is not found, or if, being detained, he is impeded from assisting in the search, he shall be represented by two witnesses who shall be summoned in order that they may be present at the search.
- 3) In every case, the head of the house or farm which must be visited, even though the act which motivates the search is not presumed to be his, also shall be summoned to be present at the search. If the head of the house is unknown, or if he cannot be found, or if the search deals with two or more apartments, two witnesses shall be summoned and the search shall be performed in the apartment or apartments which are necessary.⁷⁴

If the inspection has to be performed within any public building, at least one hour's notice shall be given to the person in charge, except in an urgent case.⁷⁵

If the inspection has to be made in the "official house" of a diplomatic agent, the judge shall request instructions from the Secretary of Foreign Relations and shall proceed in accordance with them. In the meantime, the judge shall take such measures relating to the exterior of the building as he deems fitting.⁷⁶ Every inspection of a domicile shall be limited to the proof of the fact which motivated the search, and it may not extend into a search of crimes and faults in general.⁷⁷ However, if an inspection of a domicile casually results in the discovery of a crime which was not the direct object of the search, an appropriate record of this fact shall be drawn up, provided that the crime is not one of those which must be instituted by a private complaint (*querrela*).⁷⁸

The inspection of inhabited homes must be conducted without causing the inhabitants more molestation than is necessary for the purpose of the search. All illegal molestation of the inhabitants shall be punished in conformity with the Penal Code.⁷⁹

8. EXPERTS (*Peritos*)

The examination of any person or of any object which requires special knowledge must be made by experts.⁸⁰ As a general rule, there must be at least two or more experts, but one will be sufficient when only

74. Art. 154.

75. Art. 155.

76. Art. 156.

77. Art. 157.

78. Art. 159.

79. Art. 158.

80. Art. 162.

one expert is available, or when there is danger of delay or when the case is of only small importance.⁸¹ Each party has the right to nominate as many as two experts who shall be informed by the judge of their appointment, and to whom shall be furnished all of the data which may be necessary for the rendition of their opinion. This opinion shall not be taken into consideration by the judge in regard to any step (*diligencia*) or order which shall be dictated during the period of instruction; the judge will guide (*normara*) his procedures by the opinion of other experts appointed by him.⁸²

The judge shall fix a time in which the experts must perform their commission. The experts who have not rendered their report before this period has elapsed will be compelled to do so in the same manner as witnesses and with similar sanctions. If any expert has not presented his report in spite of the first warning, he will be "indicted" (*procesado*) for the crimes provided for in the Penal Code.⁸³ Whenever the experts disagree among themselves, the judge shall summon them to a meeting in which the points of difference will be decided. The record of this meeting shall state the result of the discussion.⁸⁴

Experts must have an official diploma in the science or art dealing with the point upon which they are to express an opinion, if the profession or art is legally regulated; if it is not legally regulated, the judge shall name persons who are experienced in the field.⁸⁵ Experts who are able to speak Spanish shall be preferred.⁸⁶ The judge shall ask all the questions of the experts which he deems fitting, but without making any suggestions; in addition, he shall give them the data in his possession and shall make a record of this act.⁸⁷ The experts shall perform all the operations and experiments which their science or art suggests to them, and they shall express the facts and circumstances which serve as the basis for their report.⁸⁸ When the judge finds that it is fitting, he shall attend the examinations which the experts make of persons or things.⁸⁹ The experts shall issue their report in writing, and they shall ratify it in a special step in case there are objections to it on the grounds of falsity, or if the judge deems it necessary.⁹⁰ When the opinions of the experts are not in accord, the judge must name a third expert "in discord."⁹¹ When the expert opinion devolves about objects which are consumed by analysis, the

81. Art. 163.

82. Art. 164.

83. Art. 169.

84. Art. 170.

85. Art. 171.

86. Art. 173.

87. Art. 174.

88. Art. 175.

89. Art. 176.

90. Art. 177.

91. Art. 178.

judges shall not permit the use of more than one-half of the substance in performing the first analysis, unless the quantity of the substance is so scarce that the experts may not issue their opinion without consuming all of it. This latter circumstance shall be made a matter of record.⁹²

The designation of experts made by the judge or by the Public Ministry must fall upon those persons who discharge this employment by official appointment and at a fixed salary. If there are no official experts, experts are to be appointed from among those persons who are professors of the corresponding branch of science in the national schools or among those officials or employees of a technical character in government establishments or agencies. If there are no experts of the foregoing kind available, the judge or the Public Ministry may name others. In these cases, the fees shall be settled according to what is paid customarily to permanent employees of those establishments, taking into account the time which the experts actually occupied in the discharge of their commission.⁹³ Experts who "enjoy a salary from the public treasury" may not charge fees when they issue their opinions about points decreed *ex officio* or at the request of the Public Ministry.⁹⁴

When he believes it fitting, the judge may order the assistance of the experts at any step and may order them to take notice of all or any part of the proceedings.⁹⁵

When the accused, the victim or the accuser, or the witnesses or experts do not speak Spanish, the judge shall name one or two adult interpreters who shall give a solemn declaration that they will faithfully translate the questions and answers which they are required to transmit. The judge may name as translator a minor over the age of fifteen only when an adult translator may not be found.⁹⁶ When it is requested by any of the parties, the statement of the declarant may be written in his own language without this hindering the making of the translation.⁹⁷ However, no witness may serve as an interpreter.⁹⁸ If the accused or any of the witnesses is a deaf-mute the judge shall appoint as an interpreter a person able to understand him; however, if the deaf-mute is able to read and write, the questions and answers will be in writing.⁹⁹

9. WITNESSES (*Testigos*)

The judge shall examine any person if the factual revelations disclosed in the first steps, in the private complaint (*querrela*), or by any

92. Art. 179.

93. Art. 180.

94. Art. 181.

95. Art. 182.

96. Art. 183.

97. Art. 184.

98. Art. 186.

99. Arts. 187-88.

other means, make it appear necessary to examine him about the delinquent, or about the clarification of a criminal act or its circumstances.¹⁰⁰ During the instruction the judge may not fail to examine witnesses whose declarations are requested by the parties. He must also examine the absent witnesses (in the manner provided by the code) without this delaying the progress of the instruction or impeding the judge from terminating it when the necessary elements have been collected.¹⁰¹

Any person of any age, sex, social condition or antecedents may be examined as a witness, provided that he may shed any light on the investigation of the crime and that the judge deems his examination to be necessary. The probative value of his testimony shall be examined closely in arriving at the decision.¹⁰² The following persons, however, shall not be obliged to declare as witnesses: the guardian, curator, ward or spouse of the accused; his relatives by consanguinity or affinity in a straight line ascending or descending without limitation of degree, and his collateral relatives until the third degree inclusive; nor those who are bound to the accused by love, respect or gratitude. If the foregoing persons wish to declare voluntarily, their declarations shall be received and a record will be made of this circumstance.¹⁰³ In penal matters the "faults" (*tachas*) of the witnesses may not be asserted, but the judge *ex officio* or upon petition of a party shall make a record of all of the circumstances which are of influence in the probative value of the testimony.¹⁰⁴ Witnesses must always give the reasons for their statements and they shall be recorded in the *diligencia*.¹⁰⁵

The Code provisions regarding the procedure to be used in securing the statements of absent witnesses are rather advanced. Absent witnesses who must be examined will be cited by means of a telephone message (*telefonema*) or by a warrant (*cedula*)¹⁰⁶ which has the following requisites: the legal designation of the tribunal or court before which the witness must present himself; the name, surname, abode of the witness (if this be known) and, if these be unknown, the data necessary in order to identify him; the day, hour and place in which he must appear; the sanction which will be imposed if he does not appear and the signatures of the judge and his secretary.¹⁰⁷

The citation may be made personally upon the witness wherever he may be encountered, or in his home even when he is not there, but in the latter case a record shall be made of the name of the person who

100. Art. 189.

101. Art. 190.

102. Art. 191.

103. Art. 192.

104. Art. 193.

105. Art. 194.

106. Art. 195.

107. Art. 196.

received the summons. If the recipient of the summons manifests that the person to be cited is absent, he shall state where and when he may be found and the approximate time he is expected to return. A record shall be made of these facts. The summons may also be delivered by mail.¹⁰⁸ If the witness is out of the judicial district, his testimony may be taken by means of an *exhorto* (an official communication between courts of the same authority or hierarchy) directed to the judge where the person is residing.¹⁰⁹ Every person is obligated to present himself to the court when he is cited unless he is infirm or it is physically impossible for him to do so. Nevertheless, when high officials of the federal government are to be examined the judge shall go to the home or the office of these officials in order to receive their declarations,¹¹⁰ or he shall do it by means of an "urgent communication" (*oficio urgente*).

Witnesses must be examined separately by the judge in the presence of the secretary. Only the parties may assist in the examination, except in the following cases: when the witness is blind, when he is deaf or dumb or when he does not know the Spanish language.¹¹¹ If the witness is blind, the judge shall appoint a person to accompany him and to sign the declaration for him; if he is deaf or dumb or does not know the Spanish language his declaration will be made as previously stated.¹¹² Before the witnesses commence to declare, the judge shall instruct them about the sanctions which the Penal Code imposes for false testimony, or for a refusal to declare, or to refuse "to grant the protest of the law." (*a otorgar la protesta de ley*—in the sense of a refusal to give a solemn promise to tell the truth).¹¹³ After "taking the protest" each witness shall be asked his name, surname, age, nationality, vicinity, abode, profession or employment, whether he is bound to the accused or with the complaining party (*querellante*) by bonds of relationship, friendship or of any other kind and if he has any hate or rancor against any of them.¹¹⁴

The witnesses shall declare orally without their being permitted to read the written answers, which they are permitted to carry. Nevertheless, they may see any notes or documents which they have, according to the nature of the case and within the judgment of the judge. The Public Minister may examine the witnesses by asking them questions which he deems fitting.¹¹⁵

The declarations shall be reduced to writing with clarity and should

108. Art. 197.

109. Art. 200.

110. Art. 202.

111. Art. 203.

112. Art. 204. See also arts. 183, 187-88.

113. Art. 205.

114. Art. 206.

115. Art. 207.

utilize, where it is possible, the same words used by the witness. A witness who wishes to dictate or write his declaration will be permitted to do so.¹¹⁶

Any witness whose declaration refers to an object placed in deposit shall be questioned about the marks which characterize that object and, if possible, he shall demonstrate that he recognizes it.¹¹⁷ If the declaration refers to a fact which has left permanent traces in any place, the witness may be conducted there in order to make appropriate explanations.¹¹⁸

After the examination is concluded, the declaration shall be read to the witness (or he shall read it if he wishes to do so) in order that he may ratify or amend it. The witness shall then immediately sign the declaration or it will be signed by the person who legally accompanies him. If he does not know how to sign or does not wish to sign, the record will reflect this circumstance.¹¹⁹

A note shall be made in the record whenever the declaration of a minor is taken, or of a relative of the accused, or of any other person who by special circumstances is suspected of lacking veracity or exactitude in his declaration.¹²⁰ Minors who are fourteen years old or younger will be exhorted to tell the truth instead of being required to give a protest to tell the truth.¹²¹ During the instruction, if sufficient indications appear that a witness has given false testimony, or that he has manifestly contradicted himself in his declarations, he shall be consigned immediately to the Public Ministry. The judge shall order an authentic transcript of the records appropriate to the investigation of the crime and separately shall form the proper proceedings without suspending the original case.¹²²

Upon the request of any party, any person who shall have to absent himself and who may declare about the crime, its circumstances or about the accused person, may be restrained (*arraigo*—in the sense of stopped from leaving) by the judge for the period of time strictly necessary for him to render his declaration. If it should result that the restraint was made illegally (in the sense that it was made without cause), the restrained person has the right to demand that he be indemnified by the judge for the damages and harm caused by the restraint.¹²³

The judge may dictate the necessary orders to prevent witnesses from communicating directly among themselves or by means of other persons before they have given their declarations.¹²⁴

116. Art. 208.

117. Art. 209.

118. Art. 210.

119. Art. 211.

120. Art. 212.

121. Art. 213.

122. Art. 214.

123. Art. 215.

124. Art. 216.

10. "THE LINEUP" (*confrontación*)

Any person who has to refer to another in his declaration or in any other judicial act shall do so in a manner that is clear and distinct and that leaves no room for doubt as to the identity of the person that is designated, by mentioning his name, surname, abode and other circumstances which may assist in the identification.¹²⁵ The confrontation step shall proceed when the declarant is ignorant of the foregoing data, but manifests the conviction that he may recognize the person if he is presented. This step is also appropriate when the declarant assures that he knows a person and there are reasons to suspect that he does not.¹²⁶ The performance of the confrontation shall be made carefully as follows:

- 1) The person who is to be identified must not be disguised nor disfigured nor have removed the traces or marks which may serve the witness;
- 2) The person being identified must be accompanied by other individuals dressed with similar clothing and even with the same marks as the one being confronted, if it is possible; and
- 3) The individuals who accompany the person being identified must be of a similar class, taking into account his education, breeding and special circumstances.¹²⁷

Any of the parties may request that greater precautions be taken than those provided above, and the judge may acquiesce as long as they will not prejudice the truth or appear non-useful or malicious.¹²⁸ The person being confronted may elect the place in which he wishes to be arranged among his "companions." He may also request the exclusion from the group of those persons who seem to be suspect, and it remains within the discretion of the judge to accede to or refuse this request.¹²⁹ The step of confrontation shall be prepared by arranging the person to be confronted in a single file with his companions. The "protest" of the declarant that he will speak truthfully shall be taken and he shall be asked: if he persists in his prior declaration; if previously he knew the person to whom he attributes the fact, if he knew him in the moment of the execution of the act which is being investigated, and if he saw him after the execution of the act and in what place, for what cause and with what reason.¹³⁰ The declarant then will be conducted in front of the persons who form the file. If he has affirmed knowing the person being confronted he shall be permitted to scrutinize him "attentively," and he

125. Art. 217.

126. Art. 218.

127. Art. 219.

128. Art. 220.

129. Art. 221.

130. Art. 222.

shall be advised (*se le prevendra*) that he should touch the designated person with his hand, to manifest the differences or similarities between the present state of the person and the characteristics observed during the period referred to in his declaration.¹³¹ When there are several declarants or persons being confronted, each confrontation will be verified as a separate act.¹³²

11. CONFRONTATION OF WITNESSES AND PARTIES WITH EACH OTHER (*Careos*)

The confrontation of the witnesses among themselves and with the accused or of all of them with the victim must be performed during the instruction period and as soon as possible, without prejudice to repeating the confrontations when the judge deems it fitting, or when new points of contradiction arise.¹³³ In all cases the confrontation shall be made between one witness and another, or between one witness and the accused, or with the victim, if it is performed during the instruction period.¹³⁴ There shall never be more than one confrontation performed in each step, and the authority who contravenes this prohibition will incur penal responsibility.¹³⁵ The confrontation shall be performed by reading the alleged contradictory declarations and by calling the attention of the persons being confronted to the points of contradiction so that they can "recriminate" among themselves, and so that by such recriminations the truth may be obtained.¹³⁶

When one of those persons who must be confronted cannot be located or resides in another jurisdiction, a supplementary confrontation will be performed by reading the declarations of those who are absent to those who are present and making these persons take note of the contradictions between them. The tribunal shall issue the proper *exhorto* for those persons who must perform the confrontation and who are out of the jurisdiction of the tribunal.¹³⁷

12. DOCUMENTARY PROOF (*Prueba Documental*)

Public and private documents are those which are designated as such by the Code of Civil Procedure.¹³⁸ Whenever any of the interested par-

131. Art. 223.

132. Art. 224.

133. Art. 225.

134. Art. 226.

135. Art. 227. The judicial authorities, including judges and lawyers, are subject to penal sanctions for "misdemeanors" (*faltas*) and crimes committed in the course of their official duties. Most failures in following the procedural rules are classified as *faltas*. See LEY ORGANICA DE LOS TRIBUNALES COMUNES DEL DISTRITO Y TERRITORIOS arts. 326-55 (1932).

136. Art. 228.

137. Art. 229.

138. Art. 230.

ties requests a copy or "testimony" (in the sense of a copy issued by a notary or other public officer) of parts of documents which are in the public archives, the other parties have the right to make any additions to these partial documents which they believe fitting. The judge shall clearly resolve whether or not the additions are according to the law.¹³⁹ The documents which the parties shall present during the instruction or those which must produce effect in the proceedings shall be added to the file and a note of the additions shall be set down in the file.¹⁴⁰ Attested copies (*compulsas*) of documents which are located out of the jurisdiction of the tribunal are to be made by virtue of an *exhorto* which shall be directed to the judge of the place in which the documents are to be found.¹⁴¹

Private documents and correspondence originating from one of the parties, which is presented by another party, shall be acknowledged by the issuer or sender. For this purpose, the proposing party must exhibit the entire document, and not just the signature, to the other party.¹⁴² When the Public Ministry believes that evidence of the crime may be found in correspondence addressed to the accused, he may petition the judge and the judge shall order that this correspondence be received.¹⁴³ The correspondence received by the judge shall be opened by him in the presence of the secretary, the agent of the Public Ministry and the accused, if he is present.¹⁴⁴

The judge shall read the correspondence privately and if it has no relationship with the act under investigation, it shall be returned to the accused or to any member of his family if he is absent. If the correspondence has any relationship to the subject of the proceedings, the judge shall communicate the contents of the correspondence to the accused and shall order the document to be added to the records. In every case, he shall draw up a record of this step.¹⁴⁵ A document whose certification was issued by a person who was not discharging a public duty on the date in which the certificates were issued will not be taken as authentic, even though the certification refers to acts which occurred when the person was exercising his public duty.¹⁴⁶ Upon petition of a party, the judge shall order any telegraphic office to deliver a true copy of a telegram which it has transmitted, provided that this telegram may contribute to the clarification of the crime.¹⁴⁷ The order which is dictated in the fore-

139. Art. 231.

140. Art. 232.

141. Art. 233.

142. Art. 234.

143. Art. 235.

144. Art. 236.

145. Art. 237.

146. Art. 238.

147. Art. 239

going cases must specify exactly the letters or telegrams which are to be examined.¹⁴⁸

When the judge, at the request of an interested party, orders that a legal copy be made of private documents which are in the possession of a person, the possessor shall exhibit the documents designated by the parties. If the holder of the document refuses to exhibit it, the judge in a verbal hearing, and in view of what is alleged by the holder and the parties, shall resolve whether the exhibition must be made.¹⁴⁹ The person who requests the production of a document or record which is in the books, copybooks (*cuadernos*) or archives of a commercial house or of an industrial establishment must fix precisely the record requested; the copy thereof shall be made in the office of the establishment and the owner or manager of this establishment is obligated only to present the designated part or parts.¹⁵⁰

Although public and private documents may be presented in any stage of the proceedings up to the end of trial, they may not be admitted afterwards unless accompanied by a formal protest made by the presenter that he did not have prior notice of them.¹⁵¹

When the authenticity of a document is denied or placed in doubt, it may be requested and decreed that a comparison of the writing or signatures be performed in accordance with the following rules:

- 1) The comparison shall be made by experts, who may be assisted by the official who is performing the investigation, and, in that case, he shall draw up a report of this act;
- 2) The comparison shall be made with unquestioned documents or those which the parties, by common accord, have recognized as such, or with those whose handwritings or signatures have been recognized judicially and with the impugned writing by the party who acknowledges the handwriting to his prejudice; and
- 3) The judge may order that the comparison be repeated by other experts.¹⁵²

13. PRESUMPTIONS (*De las presunciones*)

"The presumptions or indications are the circumstances and antecedents having relationships with the crime upon which one reasonably may base an opinion about the existence of the considered facts."¹⁵³

148. Art. 240.

149. Art. 241.

150. Art. 242.

151. Art. 243.

152. Art. 244.

153. Art. 245.

For example, if an accused were being tried for murder, the statement of witnesses that they had heard the accused threaten to kill the victim would be included within the above concept.

14. JURIDICAL VALUE OF THE EVIDENCE (*Valor juridico de la prueba*)

The judges and tribunals shall evaluate the evidence "with obedience" to the rules of the Code.¹⁵⁴ In case of doubt they must absolve the accused. They may not condemn an accused except when it has been proved to the judge's satisfaction that the accused committed the crime imputed against him.¹⁵⁵

The person who affirms a fact has the burden of proving it. Also, one who denies a fact is obliged to disprove it when his denial is contrary to a legal presumption or when the denial involves the express affirmation of a fact.¹⁵⁶

A judicial confession is entitled to full weight ("shall produce full proof") when the following circumstances are met:

- 1) That the existence of the crime has been proved completely, save for what is provided in articles 115 and 116 of this Code,¹⁵⁷
- 2) That the confession has been made by a person older than fourteen, that it is against him, that it was done with full understanding and without compulsion or violence;
- 3) That it refers to an act of the accused;
- 4) That the confession has been made before the judge or tribunal of the case, or before the official of the judicial police who has performed the first steps (*diligencias*) of the instruction, and,

154. Art. 246.

155. Art. 247.

156. Art. 248.

157. Art. 115: In all cases of robbery (*robo*) the *corpus delicti* shall be proved by any of the following means:

- 1) By the proof of the material elements of the crime;
- 2) By the confession of the accused, even when it is not known who is the owner of the material thing of the crime;
- 3) By proof that the accused has had in his possession anything which, by his personal circumstances, he may not have acquired legitimately, if he does not justify its derivation;
- 4) By the proof of the pre-existence, dominion (ownership) and the subsequent absence of the material thing of the crime [from the possession of the owner]; and
- 5) By the proof that the offended person was in the situation of possessing the material thing of the crime, that he enjoys a good opinion and he made some judicial or extra-judicial efforts in order to recover the stolen thing. These proofs shall be preferred in the numerical order in which they are arranged, the later ones being accepted only because of a lack of the prior ones.

Article 116 provides that the *corpus delicti* of fraud, abuse of confidence and embezzlement shall be proved by any of the means expressed in fractions 1 and 2 of Article 115 and that which is provided in the final clause (*inciso*) will also be observed.

- 5) That the confession has not been accompanied by other proof or presumptions which make it improbable in the judgment of the judge.¹⁵⁸

Public instruments (documents) shall produce "full proof," except that the parties have the right to impugn them on the grounds of falsity and to request the comparison of these instruments with the protocols or with the originals in the archives.¹⁵⁹ Private documents shall produce full proof against their authors only if they are acknowledged judicially or if the authors have not objected to them after knowing that they were introduced into the proceedings. Those documents issuing from third persons shall be deemed as presumptions.¹⁶⁰ Private documents proved by the testimony of witnesses shall be considered as testimonial proof.¹⁶¹ The judicial inspection as well as the results of the searches of domiciles shall be entitled to full weight, provided that they were performed in accordance with the requisites of this law.¹⁶² The probative force of all expert opinions, including the comparison of handwriting and the opinions of scientific experts, shall be "qualified" (*calificada*—in the sense of evaluated) by the judge or tribunal according to the circumstances.¹⁶³

In order to evaluate the declaration of a witness, the tribunal or judge shall take into consideration that:

- 1) the witness is not disqualified for any of the causes designated in this Code;
- 2) by his age, capacity and knowledge, he possesses the criteria necessary to make a judgment of the act;
- 3) by his probity, independence of his position and personal antecedents, he has complete impartiality;
- 4) the fact considered [in the cause] is susceptible of recognition by the means of the senses and that the witness knows of them by the same means and not by the inducements or references of others;
- 5) the declaration be clear and precise, without doubts or reticences about the substance of the fact or its essential circumstances; and
- 6) the witness has not been obligated by force or fear, nor impelled by deceit, error or subornation. The judicial compulsion shall not be reputed as force.¹⁶⁴

158. Art. 249.

159. Art. 250.

160. Art. 251.

161. Art. 252.

162. Art. 253.

163. Art. 254.

164. Art. 255.

The declarations of two qualified witnesses shall produce full proof, if the following requisites are met:

- 1) That they coincide not only in substance, but also in the "accidents of fact" (*accidentes del hecho*—in the sense of the incidental details) to which they have referred; and
- 2) That the witnesses have heard the words pronounced or seen the fact about which they have deposed.¹⁶⁵

The declarations of two witnesses also shall produce full proof if, although coinciding in substance but not in the incidental details, these details (in the judgment of the tribunal) do not modify the essence of the fact.¹⁶⁶ When both parties have an equal number of contradictory witnesses, the tribunal shall decide on the basis of the word of those who merit the greatest confidence. If all of the witnesses merit equal confidence and there is no other proof, the tribunal shall absolve the accused.¹⁶⁷ Where one of the parties has a greater number of witnesses than the other, the tribunal shall decide in favor of the former, provided "that equal reasons of confidence concur in all of them." In a contrary case, the tribunal shall decide as its conscience dictates.¹⁶⁸

The testimony of the following witnesses shall produce only presumptions rather than "full proof":

- 1) Witnesses who do not coincide in substance, witnesses who only heard (rather than saw), and the declaration of only one witness;
- 2) The declarations of individual (*singulares*) witnesses who discussed successive acts referring to one single fact;
- 3) The "public fame"; and
- 4) The non-specified proofs which are referred to in the last part of Article 135, provided that they have not lost their strength (*desvirtuadas*) by any other means of proof as specified in the first five parts of article 135.¹⁶⁹

"The judges and tribunals, according to the nature of the facts, the proof of these facts and the more or less necessary natural link which exists between the known truth and that which is being searched for, shall evaluate in conscience the value of the presumptions until they are able to consider their total [the total of the presumptions] as full proof."¹⁷⁰

165. Art. 256.

166. Art. 257.

167. Art. 258.

168. Art. 259.

169. Art. 260. For the substance of article 135, see text accompanying note 57 *supra*.

170. Art. 261.

E. Order of "Formal Imprisonment" and Liberty for Lack of Merit
(Auto de formal prision y libertad por falta de meritos)

Every order of "preventive imprisonment" (imprisonment prior to the trial) must express the following requisites:

- 1) The exact hour and day in which it was dictated;
- 2) The crime imputed to the accused by the Public Ministry;
- 3) The crime or crimes which must be prosecuted and the proof of their elements;
- 4) The place, time and circumstances of execution (of the act) and other data resulting from the previous investigation which shall be sufficient to prove the *corpus delicti*;
- 5) All the data which results from the investigation and which makes the responsibility of the accused probable; and
- 6) The name of the judge who dictated the determination and of the secretary of the court which authorized it.¹⁷¹

Upon dictating the order of formal imprisonment, the judge shall order that the prisoner be identified by the system administratively adopted for this case, except when the law disposes to the contrary.¹⁷² If the accused is being detained, he shall be notified immediately of the order of formal imprisonment; in addition, notice must be given to the warden of the detention establishment.¹⁷³ The order of formal imprisonment is appealable in *efecto devolutivo* [*i.e.*, without preventing the execution of the order].¹⁷⁴

When only a non-corporal sanction or an alternative penalty including non-corporal punishment is designated for the crime, the liberty of the accused may not be restrained and the judge shall dictate an order of formal imprisonment for the sole purpose of designating the crime or crimes referred to in the proceedings.¹⁷⁵

The order of liberty of a detained person shall be founded on the lack of evidence relative to the existence of the *corpus delicti* or to the "presumed responsibility" of the accused. This order of liberty does not prevent a new action if new data is introduced against the accused.¹⁷⁶ When the judge must dictate an order of liberty because the absence of the proof of the *corpus delicti* or of criminal responsibility of the accused rest upon omissions of the Public Ministry or the Judicial Police, the judge shall expressly mention such omissions in order that the per-

171. Art. 297.

172. Art. 298.

173. Art. 299.

174. Art. 300.

175. Art. 301.

176. Art. 302.

minent responsibility may be fixed.¹⁷⁷ The order of liberty is also appealable in *efecto devolutivo*. [*i.e.*, without preventing the execution of the order].¹⁷⁸

III. THE TRIAL STAGE

A. *The Procedure Before the Penal Courts and Judges of First Instance* (Procedimiento antes las cortes penales y jueces de primera instancia)

In order to clarify the obscurity of the evidence which has been rendered or in order to prove any point which he deems important, the judge of instruction who believes that it is indispensable to receive evidence different from that proposed by the parties shall order the performance of the steps which he considers necessary.¹⁷⁹

When, in the judgment of the judge of instruction, the investigation has been exhausted by the performance of the steps requested by the parties or ordered by the judge, he shall order that the case (in the sense of the record of the investigation) be placed "within the view" of the parties—*i.e.*, the parties may examine the court file—in order that within eight days, they may promote the evidence which they deem pertinent and which may be performed in a period of fifteen days.¹⁸⁰ After this fifteen day period has elapsed or after it has been renounced by the parties, or if they have not promoted the evidence within this period, the judge shall declare the "instruction" closed and shall order that the case be placed "within the view" of the Public Ministry and of the defense, in succession, in order that they may formulate their conclusions of law and fact within a term of three days which, as a rule, may not be extended.¹⁸¹

The Public Ministry is obliged to formulate its conclusions by making a succinct and methodical exposition of the conducive facts and by proposing the questions of law which arose out of those facts. It must also cite the laws, decisions and doctrines which are applicable, and it shall end its petition with concrete propositions.¹⁸² The defense must present its conclusions in writing, but they are not subject to any special rule.¹⁸³

The definitive conclusions of the Public Ministry may not be modified in any sense, except for supervening causes and then only for the benefit of the accused. On the other hand, the defense may withdraw

177. Art. 303. See also note 135 *supra*.

178. Art. 304.

179. Art. 314.

180. Art. 315.

181. Art. 316.

182. Art. 317.

183. Art. 318.

freely and modify its conclusions at any time until just before the end of the trial has been declared.¹⁸⁴

If the conclusions of the Public Ministry are non-accusatory or if they are inconsistent with the procedure, the judge, by designating the contradictions when this is the reason, shall order the remission of the conclusions and the proceedings to the Solicitor of Justice in order that he may modify or confirm the original conclusions.¹⁸⁵ The Solicitor of Justice will decide as to the modification or confirmation of the conclusions after hearing from the agents of the Public Ministry.¹⁸⁶ If the Solicitor confirms that the conclusions are not accusatory in nature, the resolution will be communicated immediately to the judge of the case who will discontinue the prosecution on this matter and order the immediate liberty of the accused.¹⁸⁷ This "order of discontinuance" (*auto de sobreseimiento*) shall produce the same effects as an absolatory sentence—*i.e.*, a complete exoneration.¹⁸⁸

Assuming that the foregoing procedure has not occurred, after receiving the definitive conclusions and accusations from the Public Ministry and from the defense, the judge of instruction shall pass the case to the president of his respective court in order that he might fix the hour and day for the performance of the trial within a period of fifteen days.¹⁸⁹ The trial (*audiencia*) will be conducted whether or not the parties appear, but the Public Ministry may not fail to attend the court. If the defender does not attend at the trial, he will be subject to disciplinary correction and a new defender *ex officio* will be appointed, unless the absence of the original defender was with the express authorization of the accused. Likewise, if the court-appointed defender fails to assist the court he shall be subject to a similar penalty and another defender will be substituted. This process of substitution of defenders is to be without prejudice to the right of the accused to name any persons found in the audience as his defenders, unless they are legally impeded to act as defenders.¹⁹⁰

All trials are required to be open to the public, and all may attend who appear to be more than fourteen years old. However, in cases involving crimes against morals, or when morals are attacked in the proceedings, the trial shall take place behind closed doors in the presence of only those persons who have officially intervened in it.¹⁹¹

All those persons who attend at the trial are to do so with bared

184. Art. 319.

185. Art. 320.

186. Art. 321.

187. Art. 323.

188. Art. 324.

189. Art. 326.

190. Art. 327. See note 135 *supra*, for the disciplinary correction aspect.

191. Art. 59.

heads, with due respect and in silence. It is forbidden to give indications of approbation or disapprobation and to reveal (*externar*) or to manifest opinions about the culpability or innocence of the accused, about the evidence which has been rendered or about the conduct of any of those who intervene in the trial. Anyone who transgresses these rules shall be admonished, and if he repeats the offense he shall be expelled from the courtroom. If he resists leaving or returns to the trial in spite of being ejected, he shall be fined (*corrección disciplinaria multa*) up to an amount of two hundred pesos (approximately \$16.00).¹⁹²

When there has been tumult in the hearing, the presiding official may punish the wrongdoers by imposing a fine of up to two hundred pesos or imprisonment of up to fifteen days.¹⁹³ When order cannot be re-established by the foregoing means, the presiding official shall have the judicial police (*fuera pública*) clear the courtroom and then continue the trial behind closed doors.¹⁹⁴ If the accused insults (*faltare*) or injures any of those who intervene in the trial, or any other person, he shall be ordered removed from the trial and it will continue during his absence. Again a penalty of up to fifteen days imprisonment or up to two hundred pesos may be imposed.¹⁹⁵

Any defender who disturbs the order of the trial or injures or offends any person shall be warned, and he shall be expelled if he repeats the offense. The accused will then be presented with a list of defenders *ex officio* (official public defenders) from which, if he desires, he may name another defender. Again, the expelled defender will be fined up to two hundred pesos or imprisoned for up to fifteen days.¹⁹⁶ Likewise, if the prosecutor commits the same offenses, an account shall be given to the Solicitor of Justice (*Procurador de Justicia*).¹⁹⁷

During the trial the accused shall communicate only with his defenders, and he will not be permitted to address the public. If he infringes this rule, he and the person who communicates with him will be punished by imprisonment of up to fifteen days or a fine of up to two hundred pesos.¹⁹⁸

In all trials the accused may defend himself personally or by the persons appointed by him or for him as his defenders. The naming of a defender does not exclude the right of the accused to defend himself personally. The judge or president of the court shall always ask the accused, before the closing of the "debate," if he wishes to make a statement and this right shall be granted to the accused if he desires to do so.

192. Art. 60.

193. Art. 61.

194. Art. 62.

195. Art. 63.

196. Art. 64.

197. Art. 65.

198. Art. 66.

If any accused has several defenders, not more than one shall be heard in the defense and the same defender (or another) shall be heard in the reply, which is a response to the prosecution's answer to the initial defense asserted by the accused.¹⁹⁹ The victim of a crime or his representative may appear at the trial and allege his rights under the same conditions as the defenders allege the rights of the accused.²⁰⁰

After receiving the proofs which may be legally presented, the reading of such parts of the records (*constancias*) which the parties point out, and after hearing the allegations of the same, the President of the court shall declare the trial approved and then terminate this step.²⁰¹ Within fifteen days following the trial, the sentence shall be reduced to writing by the judge of instruction and be pronounced by a majority of the judges (a majority of two of the three judges) who have voted.²⁰² The condemning sentence is appealable in "both effects."²⁰³

199. Art. 69.

200. Art. 70.

201. Art. 328.

202. Art. 329.

203. Art. 330.