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INELIGIBLE WITNESSES ACCORDING TO CASTILIAN TERRITORIAL LEGISLATION

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I. THE STATE OF THE QUESTION

Since the 13th century, there has been a detailed regulation of witness evidence in the legal system. This most certainly arose because of the strong misgivings of the legislator of the time in the light of past experience, when prevailing circumstances forced council authorities to allow all subjective means of evidence to have a greater role. Among these forms of evidence are the testimonies of individuals unconnected to the procedural relationship. What this ultimately demonstrated on many occasions was that their falsehood, a product of a bribe, friendship, enmity, kinship or simple ineptitude, led judges to rule in favour of litigants when in fact they should not have done so.

According to legal sources, the aim was to dissolve this trend through the application of regulations that stood out for their excessive casuistry. From this moment, all subjects proposed for testifying at a trial had to meet an extensive list of requirements[1]. This made it practically impossible to find somebody with complete competence to provide a description of the facts under discussion in the trial and that they had witnessed at the time. It is in essence the start of a period during which the legislator is concerned, perhaps somewhat obsessively, about establishing a plethora of categories for witnesses, who were categorized according to factors such as social status, sex, age, fame, fortune, faith, etc.[2].

But this array of restrictions fell short of the force necessary to achieve their objective. We refer to the hope that the statements made by witnesses would be as accurate as possible. It is perhaps for this reason that still in the 19th century, one justifies the mistrust expressed by the jurist José de Vicente y Caravantes, when he commented on the risks that witness evidence involved. In this sense, he said "ya por haberse introducido la mala fe en el testimonio de los hombres, ya por la falta de inteligencia y de memoria de estos para recordar y exponer debidamente los hechos sobre que versa su declaración. Bien considerada la prueba de testigos es una de las mas peligrosas, porque en las demás puede el juez engañarse a si mismo, pero en esta son los testigos los que pueden engañar al juez"[3].

Six centuries prior to this criticism expressed by the above author against witness evidence, we should remember that the so-called system of legal and weighted evidence was established in Castile, where the requirements and evidential

[1] Jesús Vallejo, "La regulación del proceso en el Fuero Real: Desarrollo, precedentes y problemas", in *Anuario de Historia del Derecho Español*, nº 55, 1985, p. 529.

[2] Giuseppe Salvioli, *Storia della procedura civile e criminale*, Milán, 1927, p. 427. Perhaps it would be pertinent to consider, the article by Santos García Larragueta "Sobre la prueba documental en el Derecho aragonés", in *Anuario de Historia del Derecho Español*, nº 48, 1978, p. 464, "desde el siglo XIII la prueba documental tiene cierta preferencia sobre las demás". Y ello se debió a que desde hacía tiempo se había elaborado, agrega en p. 470 "un concepto de forma diplomática, que permitía distinguir los documentos auténticos de los falsos, atribuyendo a los primeros un conjunto de características externas e internas, para cuya precisión hay ya incipientes reglas, que constituyen un inicio de ciencia diplomática. La persecución de la falsedad de documentos es práctica habitual desde la segunda mitad del siglo XII...". This had to determine that individuals would again trust in a means of proof that had been largely forgotten in the previous centuries and, that consequently other means, like witness evidence, would be relegated to a secondary role. Beyond that, for a good understanding of this crime we should refer to Juan Antonio Alejandre García, "Estudio histórico del delito de falsedad documental", in *Anuario de Historia del Derecho Español*, nº 42, 1972.

[3] José de Vicente y Caravantes, *Tratado histórico, crítico-filosófico de los procedimientos judiciales en materia civil,* Madrid, 1856, libro II (De los trámites y disposiciones comunes a los juicios), capítulo VIII (De los testigos), nº 936 y 937, pp. 215 y 216.

weight were legally constituted for each of the means of evidence presented at trial[4].

Above all, the aim was to guarantee the strictest procedural security, since it was based on the premise that the magistrate, given his human condition, was not infallible and could be deceived by others with relative ease. Hence, all the necessary precautions had to be introduced to control their actions. The strong distrust towards any type of subjectivism recommended that each means of evidence and its degree of veracity should be regulated in detail. To do so, specific preestablished criteria were included in the regulations, which in their application would automatically lead to the sentencing of prisoners or, to the contrary, their absolution although the judge hearing the case might have believed otherwise.[5].

However, these undeniable drawbacks did not have enough force to eradicate witness evidence from our procedural system. On many occasions, it was presented as the only means of investigation the judges could accept to solve the litigations they heard. Thus, despite the intrinsic risk involved in witness evidence, medieval and modern legislators had to make do with indicating the most suitable conditions in which evidence should be presented so as to guarantee the maximum veracity of witnesses' statements.

In this context, the requirements became more demanding to the point that the general rule seemed to be based on the presumption that the vast majority of individuals were ineligible to testify and only in exceptional cases could some subjects count on the required legal authorization for such a duty, after passing the mandatory examination carried out by the judicial authority[6].

II. THE CAUSES THAT COULD LEAD TO INELIGIBILITY

The incompetence of witnesses was sometimes due to natural and therefore objective reasons, which meant subjects summoned to appear in court were unable to carry out their mission and through their testimony shed enough light on the matter for the judge to be able to clarify the facts under discussion in the trial. As well as these witnesses, there were those who, although their physical and psychological circumstances were more or less sufficient to give evidence, it was seen as legally expedient to distance them from the procedural environment and from either testifying in any type of proceedings or to only do so in certain proceedings.

On studying the extensive list of precepts that deal with this issue, we can ultimately differen-

[4] Carlos Lessona, *Teoría general de la prueba en Derecho civil*, Madrid, 1964, tomo IV (prueba testifical y pericial), p. 205.

[5] Paz Alonso Romero, *El proceso penal en Castilla (siglos XIII-XVIII)*, Salamanca, 1982, p. 223.

[6] Fuero Real II, 8, 9 "padres, fijos, nietos, visnietos, hermanos, primos, sobrinos, primos fijos de hermanos, sobrinos fijos de primos, segundos cohermanos, tios que son hermanos, o primos de padre, o de madre, no sean testimonias contra estraños fueras si fuere el Pleyto que sea entre parientes e parientes de egualeza". Asimismo, se negaba testificar a quien "no haya diez y seis años complidos", ni a un amplio elenco de delincuentes entre los que se encontraban "home que mató home a tuerto, ni traydor, ni alevoso, ni descomulgado, mientra lo fuere, ni herege, ni siervo, ni ladron, ni home que ande fuera de su orden sin licencia de su mayor, ni home que da yervas a otro por facerle mal, ni robador conocido, ni home que dixo falso testimonio, ni el que es dado por sentencia por falso de qualquier falsedad, ni perjurado, ni adevino, ni sortero, ni los que van a ellos, ni alcahuete conoscido, ni home que anda en semejanza de muger, ni aquel que haya natura de home" a quienes se agregaba los sujetos muy pobres, quizá para evitar que se dejasen sobornar por las promesas económicas del litigante que los propuso. Por lo demás, en el precepto que inmediatamente precede a éste, Fuero Real II, 8, 8 se reduce la capacidad testifical de las mujeres a declarar sobre lo que las fuentes locales llamaban "fechos mugeriles" que, recordamos, eran los que acontecían "en baño, o en forno, o en molino, o en rio, o en fuente, o sobre filamientos, o sobre teximientos, o sobre partos, o en acatamiento de mujer".

tiate between the naturally ineligible, those who lacked integrity and those who, for different reasons, would always testify in favour of the party who proposed them by distorting the truth.

1 General exclusion of the physically and mentally incompetent.

1.1 Incompetence due to age.

In recent studies about witness evidence, it has been asserted that when we talk about natural ability we are referring to the physical and intellectual state of the subjects at the time of being summoned. The clearness in the perception of the facts and their preservation in the memory and their later reproduction depend on a series of subjective qualities that should coexist in the person proposed to testify and prevent any risk of distortion when relating the events to be heard in the corresponding trial[7].

The sense of these words, which we consider timeless, was already appreciated in the late Middle Ages. At that time, the laws established that anyone under the stipulated age at the time of the events they had to testify to lacked adequate witness competence. The minimum age was defined by the glossators and appears in the *Partidas* and was fixed at fourteen for civil lawsuits and twenty for criminal lawsuits. In the latter case, it was understood that greater maturity of the witness would be required, since a sentence contrary to the accused's interest could entail greater losses.[8].

The testimony of anyone under these ages did not have probative value, although the law itself recognised that it could create a great presumption. Likewise, nothing could prevent a minor from testifying about what they knew prior to reaching the legally established age, if they remembered it well and could repeat it without any problem[9].

Compliance with this exception to the general rule was particularly interesting when an individual under twenty witnessed the commission of an offence of treason. As we know, the ordinary requirements of proof for this offence were substantially more flexible in order to be able to correctly identify the subjects under suspicion of committing such a serious offence. All this was under the understanding that the admission of the minor's words was subject to their having undergone torture beforehand, which was frequent

[7] Francisco Gorphe, *La crítica del testimonio* (Traducción española de la segunda edición francesa a cargo de Mariano Ruiz-Funes), Madrid, 1949, p. 89; Alfonso de Paula Pérez, La prueba de testigos en el Derecho civil español, Madrid, 1968, p. 52.

[8] Glosa a Digesto XXII,5,19: "Pupillus regulariter testis esse non potest. Impubes & in ciuili, & in criminali causa esse non potest. Pubes in ciuili potest esse testis, at non in criminali: nisi sit maior XX annis".

[9] Partidas III, 16, 9: "Veinte años cumplidos a los menos deue auer el testigo que aduzen en pleyto de acusacion, o de riepto, contra alguno en juyzio. E dessa mesma edad deuen ser los testigos que fueren recebidos en pesquisa que el Rey mande fazer contra alguno, para saber algund mal fecho del, de que fuesse enfamado, de que pudiesse nascer muerte, o perdimiento de miembro, o echamiento de tierra, si le fuesse prouado. Mas en todos los otros que non fuessen criminales, assi como por razon de debdo, o de rayz, o de herencia que demandassen en juyzio, bien podria ser recebido por testigo el que ouiesse catorze años cumplidos. E non tan solamente podrian testiguar estos de suso nombrados en esta ley, en las cosas que vieron, o que supieron, en la zazon que eran en esta edad; mas aun en todas las otras que ouiessen ante visto, e sabido, que bien se acordasen: mas si recibiessen su testimonio de menor de veynte años sobre pleyto criminal, o del que fuesse menor de catorce años, en otros pleytos, dezimos, que como quier su dicho non empeceria acabadamente a aquel contra quien testiguare, pero seyendo de buen entendimiento, atales menores farian grand presumpcion al fecho sobre que fuesse el testimonio"; This distinction in ages, according to the type of trial, led to the ratification of the wording of the provisions in the Espéculo, which dealt with the age of witnesses when attributing probative value to their words, or simply it was interpreted as a simple indication,

when those called to testify were people who had little credibility in the eyes of the law[10].

In line with the above, in the middle of the 16th century, Antonio Gómez also recognised that the words of prepubescents in trials could be valued as any prima facie evidence when they were summoned to appear in a criminal trial. In practice, this led to the possibility of the judge giving an arbitrary sentence that was lower than the ordinary one defined in the law in view of the circumstances surrounding the commission of the offence[11].

Other jurists of the Modern age were not so satisfied with the solution provided. To be exact, the Valencian Matheu i Sanz understood that only the words pronounced by a person over sixteen could be fully validated, which was two years more than what is specified in the *Partidas*. Besides an increase in the minimal age for testifying, this author also considered that the testimony of these subjects would only be accepted if it was essential to discovering the true guilt of the accused[12].

Although he adds nothing further regarding this, it is as if he considered that at this age a person could be mature and able enough to faithfully fulfil their responsibilities as somebody summoned to testify in a trial. This had to be the case, especially if their testimony was essential to the punishment of offences committed in places where were no older people, presumably with a fully consolidated maturity, were to be found.

The Italian jurist Ferraris also wrote some interesting points, but we should note from the outset that this author was to a great extent a mere compiler of ideas and arguments taken from third parties. Therefore, we should take a prudent stance regarding his comments that in the procedural system in his country, unlike the Castilian system, it was enough for a subject to be fourteen to appear in a trial regardless of whether it was a civil or criminal trial, and this age was reduced to twelve if the person who had to testify was female[13].

This difference in age between boys and girls was certainly based on the physiological changes

while putting an end to the single age which was established in the Royal Charter, where it was prohibited for any minor of sixteen years old to testify in a trial. In this sense, we can read in the Espéculo IV, 7, 4: "...Varon nin mugier no puede testiguar en ningun pleito, a menos de seer de edat de XV años...Pero decimos que en pleito de justicia de muerte, o de lision, o de desterramiento, o por que podiese alguno perder quanto que oviese, non deve ninguno seer testigo a menos de aver edat de veynte años. Mas si alguno siendo niño de siete años arriba, vio algunas cosas, o se acertó en algunos fechos, sobre quel aduxiesen para testiguar despues que oviese edat de quinze años o de veynte dezimos, que lo que testiguare en esta manera deve valer quanto por razon de su edat", y en Fuero Real II,8,9: "...Otrosi testimoniar contra otro el que no haya diez y seis años complidos..."; Ignacio Jordán de Asso y Miguel de Manuel Rodríguez, *Instituciones del Derecho civil de Castilla*, Madrid, 1792 (He manejado edición facsímil, Valladolid 1975) tit. VII (De las pruebas), cap. IV (De la prueba de testigos), p. 299.

10 Glosa a Digesto XXII, 5, 19: "Minor sit XX annis in crimine laesae maiestatis testis esse, interrogari, & torqueri potest...".

11 Antonio GÓMEZ, *Variae resoluciones iuris civilis, communis & regii*, Lugduni, 1735, tomo III, caput XII (De probatione delictorum), nº 13, p. 387: "...Repellitur minor viginti annorum, bene tamen faceret indicium, tamen semiplenam probationem...".

12 Lorenzo Matheu i Sanz, *Tractatus de re criminali*, Madrid, 1776, controversia II (De criminibus exceptis), nº 31, p. 14: "Si crimina per majores sexdecim annis probentur, per idoneos testes probari est tenendum".

13 Lucio Ferraris, *Promta bibliotheca*, Madrid, 1786, voz *testis, articulus I*, nº 8, p. 54: "Et in primis generaliter & absolute inhabiles ad testificandum, tam in causis civilibus, quam criminalibus sunt infantes & impuberes, idest masculi minores 14 annis & foeminae minores annis 12".

that occurred at this age and which led to the start of the puberty phase[14]. It seems logical that if this age was considered ideal for a person to participate in an act as significant a marriage, it was an even more fitting age for someone to contribute to a trial by describing the events that they had witnessed; hence, they were esteemed as being sufficiently mature to appear as a witness at a trial.

His compatriot, Julio Claro, whose work has been profusely cited by his Castilian colleagues since the end of the 16th century[15], had a similar view to Matheu i Sanz. He advocated that the witness incompetence of prepubescents should not be taken into account when they were required to testify in trials against individuals accused of committing an offence of maximum seriousness like treason, and whenever the truth about the event could not be uncovered through other means[16].

Despite this greater doctrinal flexibility regarding the wording of the regulation, the truth is that the judges had to act with extreme prudence when weighing up the testimony of children. We have to consider the circumstance that the personality of these individuals is going through a process of change and they are open to many influences from third parties, which could lead to them to unwittingly alter the truth. The possibility that a person could be easily influenced by third parties decreases over the years until it reaches a limit where it is presumed that these influences disappear or seem to diminish considerably. From that moment, the credibility of the witnesses' words is assured[17].

The problem therefore focuses on knowing exactly when a person has reached a sufficient level of maturity that they cannot be easily convinced by the promises of third parties. Perhaps, this explains the discrepancies that exist not only between the regulatory stipulations and Modern Age doctrine, but even among the treatise writers themselves.

1.2 The mentally and physically disabled.

The mentally disabled were also included in the group of those who were incompetent for natural reasons. Because they lacked sufficient good sense, they were unable to be objectively aware of what was happening around them. This was the case with respect to the insane or demented.

In the Espéculo an important distinction was already noted, which judges had to observe when they decided on whether a person with unbalanced psychological faculties should or should not be allowed to appear in the proceedings as a witness. In this sense, the subject who suffered a temporary state of insanity was distinguished from the one who was permanently insane[18]. This

[14] Reyna Pastor: "Para una historia social de la mujer hispano-medieval. Problemática y puntos de vista", en *Coloquio hispano-francés*. La condición de la mujer en la Edad Media, Madrid, 1986, p. 191.

[15] Francisco Tomás y Valiente, *El Derecho penal de la Monarquía Absoluta (siglos XVI, XVII y XVIII)*, Madrid, 1969, p. 133.

[16] Julio Claro, *Opera omnia sive practica civilis atque criminales*, Lugduni, 1672, liber V, fin. pract. crimin., quaestio XXIV, nº 18, p. 460: "Vidi quandoque dubitar, nunquid pupillus in causis criminalibus possit testificari?. Et fuit conclusum, quod de iure minores 14 ann. non possunt testificari...tamen consuetudo admittit, quod possint ad veritatem indagandam & hoc praesertim in crimin attrocioribus".

[17] Gorphe, *La crítica del testimonio*, pp. 90 y 91; De Paula Pérez, La prueba de testigos, pp. 52 a 58.

is an extremely relevant distinction in the context of the issue we are discussing, since the subjects suffering temporary insanity could testify as long as they did so during an interlude of lucidity and, of course, if they perfectly recalled the events they had seen at the time. By contrast, the permanently insane could never testify in a trial, however important their statements could be for solving controversial cases.

The problem evidently lay in finding out when the mentally disabled suffered transitory disorders and when they were perpetual. For the judges at that time it must have seemed a particularly complex matter. In fact, as they did not have all the medical advances and knowledge of today, it was not possible for them to know that insanity and dementia are states characterized by the decadence of intellectual and affective functions or by the complete deprivation of reason and conscience.

Nevertheless, the differences between one situation and another are important in relation to the subject under analysis. As some authors pointed out some years ago, insanity is characterised by the perturbation of intellectual faculties and memory disorders and irregularities in the perception of events and thoughts, which leads to their volitional faculties being diminished; dementia, however, is due to an intellectual and moral decadence that generates a progressive loss of intellectual activity, incoherent language and lack of awareness about the true significance of their words or acts. In contrast to insanity, there are no interludes of lucidity in someone with dementia. All this implies that a mentally-ill person's ability to testify would vary greatly according to the level of mental perturbation, which recommends a thorough examination of the subject before they make their statement at the trial[19].

These important aspects were unknown centuries ago and lead us to suppose that in the interests of the demands for legal certainty, judges would be inclined to exclude any subject they observed at first sight to be suffering a personality disorder whether temporal or perpetual.

The rejection of another group of disabled people would entail fewer problems for the judges. We are referring to those who suffered a serious sensorial disability of hearing, sight or speech. It is surprising that there is not even the most perfunctory mention of possible witness incompetence of these types of people in any stipulation of Castilian law. Nevertheless, we should point out that if the first demandable requirement for granting someone eligibility as a witness was that they should be able to correctly appreciate external facts, we should suppose that these people must also be declared ineligible despite the legal mutism mentioned above.

In any case, it is necessary to clarify that, in our opinion, nothing should have stopped the deaf from testifying about what they saw or the blind about what they heard, if they were able to transmit to the judge through other senses accurate information about the matter under discussion in the trial. With respect to this issue, we must add that the circumstances determining this ineligibility had to exist when the events, which were to then be related at the trial, took place, since it was that exact moment that was taken

[18] Espéculo IV, 7, 6: "Testiguar non deve ome que aya perdido el seso, por qual manera quier que sea, en quanto durare la locura…"; Gutiérrez, *Práctica criminal*, tomo I, cap. VIII (De las pruebas), nº 16, p. 263.

[19] Lessona, *La prueba en derecho civil*, p. 220; Gorphe, *La crítica del testimonio*, p. 182; De Paula Pérez, *La prueba de testigos*, p. 48.

into account to evaluate whether the witness' disability influenced or not the effectiveness of their statement. By contrast, from a procedural perspective, the lack of visual or auditory faculties subsequent to the event, when testimony was given, was irrelevant, since what mattered was how the event affected the mind of the witness through the appropriate organ, regardless of the means which they would afterwards have to use to express themselves. If blindness or deafness occurred after knowing about the events nothing must prevent the subject's competence who had been deprived of those senses afterwards[20].

2 Ineligible by legal mandate.

These were individuals who, in spite of enjoying some adequate physical and psychological aptitudes for testifying, were denied the eligibility to testify because the laws forced judges to do so. Their criminal history, their dire economic situation or their very legal status generated well-founded suspicions that their testimony would not correspond to the truth of what they had witnessed.

However, as we described above, it is true that mistakes in the statement did not depend only on the witnesses' moral qualities, but on other numerous factors related to mental capacity, like the correct perception of the object of their statement as well as the type of circumstances it occurred in[21].

The declaration of ineligibility by law was absolute. This meant that if the motive that led to their incompetence had gone unnoticed by the parties, then during the act of the examination of the witnesses, the judge would order these witnesses to be excluded because the need to preserve public interest took precedence over the individual interests corresponding to the litigants, as noted first by Alberico de Rosate and later by Antonio Gómez[22].

Another surprising and important aspect arising from the analysis of this subject is that the treatment of these cases seems very disperse and significantly reiterative in the different Castilian regulatory laws for witness evidence. This is a clear example of the relevance given to this question throughout this prolonged period.

We also have to point out that there was a very extensive list of individuals legally unable to declare in a trial. Perhaps this was so, because the aim was to mitigate the dangerous consequences that could affect the regulatory provisions. According to these, the words of two legitimate and credible witnesses who were exempt from any irregularities was enough to be able to penalise the individuals accused of committing any offence with ordinary sentences as stipulated in the regulations. All this regardless of whether they had

[20] De Paula Pérez, *La prueba de testigos*, p. 51.

[21] Gorphe, *La crítica del testimonio*, cit., pp. 7 y 86 a 88..

[22] Alberico de Rosate, *Commentarii in secvundam Digesti*, (De testibus), lex XIII, nº 2, p. 198: "Quod iudex possit ex officio suo repellere testes, repellendos etiam, si pars nihil dicat"; Gómez, *Variae resolutiones*, tomo III, caput XII (De probatione delictorum), nº 22, p. 390: "Item quaero, si de facto testes inhabiles producantur, vel producti admissi fuerunt & testimonium tulerunt, an possint per judicem ex officio repelli, parte non opponente?. Et breviter, & resolutive dico, quod sic...Quod tamen sing. intellige, quando testes sunt inhabiles culpa, vel delicto ipsorum testium, vel incapacitate eorum, ut infamis, condemnatus, minor etate, foemina, vilis persona, vel similis, quia tunc consensu tacito, vel expresso ipsius partis, contra quam producitur, non potest habilitari, quia favore publico prohibetur". Farinaccio, en *Praxis et theoricae criminalis*, tomo II, quaestio LXII, limit. VIII, nº 190 y 191, p. 187.

witnessed the events they were testifying about visually or through another corporal sense, and as long as they were able to prove the authenticity of their statements[23]. As well as this, witnesses were required to coincide in their statements, confirming each other's testimonies in answer to the questions they were asked about converging aspects at the time the crime was committed[24].

What elements of the witnesses' testimony had to coincide? In Alberico de Rosate's opinion, their consistency was only necessary with respect to what he qualified as "sustancia o esencia del negocio", but not for other less relevant points like the exact time of the commission of the crime[25]. Moreover, in cases when statements were completely similar, the judge should not consider them if there was a suspicion that the witnesses had been previously bribed by the party that had asked for them to testify at the trial[26].

However, the prisoner could slightly improve his possibilities of defence, as he was allowed to rule out certain subjects who testified against him because of their serious irregularities of ineligibility as set out in the statutory regulations.

For a clearer presentation of this subject, this extensive number of subjects, ineligible for reasons of honour, can be divided into three large groups.

2.1 The Infamous

Infamy has been defined as an accessory penalty that accompanied others imposed on those who committed certain offences and it entailed the deprivation of the most relevant civil rights.

Its opposite, good reputation, was conceived as a necessary assumption for someone to be admitted as a witness and one which meant the veracity of their words could be assumed[27]. For this reason, the judges were expected to thoroughly examine the witnesses proposed before allowing them to declare in the proceedings they had been summoned for. All those who were suspected on reasonable grounds to almost certainly declare falsely, given their infamous reputation, should be rejected[28].

[23] Partidas III,16,32: "...dos testigos que sean de buena fama, e que sean atales que los non puedan desechar por aquellas cosas que mandan las leyes deste nuestro libro, abonda para prouar todo pleyto en juyzio"; Gómez, *Variae resolutiones*, tomo III, caput XII (De probatione delictorum), nº 9, p. 385: "...principaliter probatio delicti sit per testes legitimos fidedignos, et omni exceptione majores, et sufficiunt duo, sicut in civilibus...Sensus tamen visus super re, vel facto perceptibili alio sensu, valet...Item adde, quod ad hoc, ut testes probent & concludant, debent deponere de certa sciencia, non vero de credulitate, nisi adjiciant causam & rationem concludentem per sensum corporeumm quod veritas potest sciri & cognosci...". Vid. Tomás y Valiente, *El Derecho penal*, p. 176; Alonso Romero, *El proceso*, pp. 49 y 231; Fernández Espinar, *El principio "testis unus,"* p. 41.

[24] Gómez, *Variae resolutiones*, tomo III, caput XII (De probatione delictorum), nº 10, p. 386: "Item adde, quod etiam oportet, & requiritur, quod tales testes sint contestes in actu vel delicto, super quo deponunt, concordando in tempore, loco, & persona...".

[25] Alberico de Rosate, *Commentarii in secvndam Digesti veteris*, (De testibus), lex XXI, nº7, p. 199: "Quod dummodo testes concordent in substantia negotii, licet discordent in tempore, quod nihilominus probent".

[26] *Ibidem*, (De testibus), lex III, nº 10 y 11, p. 195: "...Sed quando omnino concordant in eisdem sermonibus, & modo loquemdi: tunc praesumptio est, quod simul locuti sint: & quod sint subornati & corrupti...Concordanti ergo debent testes in substantia negotii de quo agitur: alias non probant...sed si per omnia concordant in verbis & modo loquendi, talis concordia inducit subornationis praesumptionem...".

[27] *Ibidem*, cit., (De testibus), lex III, nº19, p. 196: "Sic etiam dignitas testium corroborat & confirmat dictum eorum: & si ex utraque parte essent partes probationes, sed ex una esset fama, ex altera non fama, fama confirmaret testes, cum quibus concurreret & praeferentur alii".

Despite the undeniable certainty regarding this last assertion, we have to stress that since the late Middle Ages the legal doctrine formulated in common Law had been concerned with drawing an important distinction between subjects who were merely infamous de facto and those who had been classified as such after being convicted by a mandatory sentence. The former could testify in civil as well as criminal cases that were not particularly relevant, in accordance with the nature of the case in hand. By contrast, the latter's eligibility to testify was restricted to trials against those accused of perpetrating any of the so-called heinous crimes[29], and in Azo's opinion, provided they had been previously subjected to torture[30].

Because of the extreme seriousness of the events being judged in the latter cases, there was still a possibility of allowing even legally ineligible subjects to testify if it would help to sustain the accusation against the suspects of having participated in the crime[31].

A more flexible criteria was considered by Julio Claro, for whom the Italian procedural systems seemed more satisfactory. There, the statement of an infamous witness was permitted when his words served not only to clarify the circumstances in which a heinous crime had been committed, but also any illegal conduct. However, this occurred only when there was no other feasible means to resort to as a more reliable form of evidence and, as Azo had defended centuries before, after the torture of the declarants, a mechanism through which any trace of suspicion of false statements could be eliminated[32].

Another doubt that arises in the analysis of this question concerns from what moment the declaration of infamy prevented someone from testifying at a trial. According to Antonio Gómez, individuals were not censurable if, at the time of the occurrence of the event they had to testify about, they still enjoyed a good reputation in the eyes of others or had not been declared infamous by a judicial sentence. If either of these two circumstances corresponded to them, they were permitted to intervene in a trial like any other individual above suspicion, in spite of being infamous when they testified during the evidence phase[33].

Even Gregorio López, in his annotations on the regulatory law regarding this issue in the *Partidas*, further reduced the possibility of dismissing infamous witnesses from appearing at a trial, considering that they should not be rejected. He understood this not only in the context, as expressed by Antonio Gómez, of a witness' good reputation when the events occurred, or if

[28] Partidas III, 16, 8, "...Ome que es conocidamente de mala fama: ca este atal non puede ser testigo en ningun pleyto"; Gutiérrez, *Práctica criminal*, tomo I, cap. VIII (De las pruebas), nº 16, p. 262. *Vid*. Migliorino, *Fama e infamia*, pp. 139 a 177.

[29] Glosa a Digesto XXII,5,3, en *Corpus Iuris*, tomo I, p. 2076: "Et sic nota iure nostro repelli infames...Fallit in crimine laesae maiestatis. Item fallit in haereticis, qui tamen admittuntur...".

[30] Azo, *Summa, Codicis IV, lex IX, nº4*, p. 322: "...Cum tormentis tamen admittuntur infames...".

[31] Gómez, *Variae resolutiones*, tomo III, caput XII (De probatione delictorum), nº 9, p. 386: "...Confirmatur etiam, quia in actibus gravissimi sufficiant duo testes...".

[32] Claro, *Opera omnia*, liber V, fin. pract. crimin., quaestio XXIV, nº 13: "Hoc tamen intellige, vt procedat regulariter, sed in subsidium, scilicet vbi aliter veritas haberi non potest tunc vtique admittitur testis infamis cum tortura". También en Quaestio XXV, nº 2, p. 461.

[33] Gómez, *Variae resolutiones*, cit., tomo III, caput XII (De probatione delictorum), nº 22: "Item valet testimonium infamis, quando tempore dati dicti testimonii communi opinione reputabatur bonae famae".

there was no longer any reason for a witness to be seen as infamous in the eyes of others once the trial had started and the party had made their proposal. In his opinion, these were not strong enough reasons for the infamous person to be declared ineligible. In addition, it was necessary for infamy to be of a notorious nature[34].

Alfonso Azevedo was even more acquiescent, understanding that the testimony of someone convicted of committing a crime that entailed the judge imposing a penalty of infamy was perfectly admissible, provided that the sentence had been appealed and the delinquent had been summoned to declare before the appeal was resolved; since it was not known whether the high court would ratify the sentence or to the contrary would revoke the first sentence that had condemned the witness to suffer the legal consequences that infamy involved[35].

However, not all the authors developed their theories in the same line. In contrast to the doctrinal position described, which showed a certain condecension regarding the witness competence of the infamous, there were those who took the stance of defending a greater rigour than indicated in the regulations. This was the case of the jurist Tomás Carlevalio, who invoked the transcendent effect of infamy to deny the procedural competence of individuals who professed the Muslim religion or Jewish religion. He also considered that from the moment of their birth their descendants were "infectados" by the infamy their parents transmitted[36].

It is also necessary to point out that at this time Pradilla Barnuevo drew up a list of the cases that, in his opinion, should be included within the concepts of infamy de facto and de jure. Given the importance they had in the proceedings regarding the judges' decision to allow or not allow the testimonies of subjects involved in any of these situations, we outline them below. It was thought that the first group should include children defamed by their own parents through testament, the descendants of clergy or those born from extramarital relations and anyone punished for having caused harm to another. The second group included adulterous women, women who married before a year had passed since the death of their previous husband, procurers who had women in their houses who worked as prostitutes, soldiers punished with losing their ensigns and arms, or usurers[37].

[34] López, en glosa 2 a Partidas III,16,8: "...si tamen pars, quae eum produxit probaret, quod tempore, quo fuit assumptus testis, communi opinione reputabatur bonae famae, tunc non repelleretur...repulsionem infamis exigat notorietatem infamiae".

[35] Azevedo, *Commentarium Iuris Civilis*, (comentario a Nueva Recopilación IV,8,2), nº 60, p. 188: "Est tamen verum, quod si quis sit condemnatus, ex delicto quod irrogat infamia, durante tempore appellationis potest in testem produci".

[36] Tomás Carlevalio Hispano, *Disputationum iuris variarum*, Venecia, 1660, lib. I, tit. II, nº 14, p. 20: "...deponentibus contrarium de mala fama, videlicet illum descendere a Iudaeis, vel Mauris, reputarique communiter pro habente infectam originem...". This idea of the "infection" that affected the children of heretics became wholly apparent when the matter of the destination of their assets had to be clarified. In this sense, José María García Marín "Magia e Inquisición: Derecho penal y proceso inquisitorial en el siglo XVII", en *Revista de Derecho público*, año XIV, vols. III-IV, nº 112-113, julio-diciembre, 1988, p. 239, after obtaining the opinions of the most renowned jurists who dealt with this issue in the Modern Age, distinguishes between the situation of the descendants of heretics born before the crime had presumably been committed and those born afterwards. While for the former assets followed the normal course of any inheritance process, for the latter it was not the case, since it was premised that "the child was found in some way already within the parent, as a part of their bodily substance and according to their consubstantial generative capacity. Although heresy is a spiritual vice, this does not mean it is transmitted with less intensity than any other vice or deformation of the flesh...".

[37] Pradilla Barnuevo, *Summa de las leyes penales*, Madrid, 1639 (Lex Nova, Valladolid, 1996), second part (De los casos en que

2.2 Delinquents.

The second group of ineligible witnesses by legal mandate comprised a large number of individuals who had committed crimes of particular seriousness to the extent that through their behaviours legal assets as relevant as life, physical integrity, sexual morality or catholic orthodoxy had been affected.

Castilian legislation does not provide any innovation worthy of any special mention in the treatment of this particular point, since basically it continues to repeat the extensive list of delinquents that were included in the legal acts that were in force during other earlier periods. These included forgers, those who cause abortions, murderers, those cohabitating, rapists, those who commit incest, traitors, and thieves among others, who, given their absolutely reproachable criminal behaviour, constituted a group of subjects that aroused the strongest hostility among the rest.

This led the legislator to consider that the most recommendable solution would be to continue to keep them away from the procedural sphere[38]. However, we have to clarify that for this to be viable, it was not enough for them to have been accused of having committed any of the cited criminal acts, but it was necessary, in Alfonso de Azevedo's opinion, that the sentence that convicted them to the punishment stipulated in the corresponding law had already been handed down. According to this author, this was the usual rule observed in both civil and ecclesiastic common Law, therefore he advocated the solution that was also encompassed in Castilian law[39].

The Italian jurist Julio Claro, who was more rigorous in his approach towards this question,

por derecho particularmente del Reyno, ay puesta determinada y cierta pena a los que delinquieren en ellos), caso XLIII (Porque causas es alguno infame), nº1 y ss, fol. 62 y ss. On another level, some years ago Migliorino intended to make a clear distinction between infamy de facto and infamy de jure, when he asserted in *Fama e infamia*, p. 117 que: "la pluratità dei significati di fama e infamia e la comune condizione di svantaggio degli infami e dei turpi sono alla base della formazione e dello sviluppo dell´istituto dell´infamia facti...L´infamia facti resta sempre una specificazione dell´infamia legale ma mantiene una significativa affinitá con l´infamia sociale. Occorre, però, distinguere: quest´ultima rimane confinata nella sua sfera extragiuridica, mentre l´infamia di fatto riceve una sistematizzazione dogmatica ed attrae al suo interno ipotesi che altrimentri resterebbero soggete alla mutevole ed incerta valutazione della pubblica opinione..."

[38] Partidas III,16,8: "...Otrosi non puede ser testigo ome contra quien fuesse prouado, que dixera falso testimonio, o que falsara carta, o sello, o moneda del Rey; nin otrosi aquel que dexasse de dezir la verdad en su testimonio, por precio que ouiesse recebido. Nin aquel a quien fuesse prouado, que diera yeruas, o ponçoña para matar alguno, o para fazerle otro mal en el cuerpo, o para fazer perder los fijos a las mugeres preñadas. Nin otrossi aquellos que matassen los omes. Nin aquellos que son casados, e tienen barraganas conocidamente. Nin aquellos que fuerçan las mugeres...Otrosi dezimos que non puede testiguar ome que fuere de mala vida, assi como ladron o robador..." Amplia relación de individuos que en esencia reproduce la recogida en el Fuero Real II,8,9, y Espéculo IV,7 leyes 6 y 7. A ellos aludieron Antonio Gómez,: *Variae resolutiones*, tomo III, caput XII (De probatione delictorum), nº 22, p. 390: "Quando testes sunt inhabiles culpa, vel delicto ipsorum testium, vel incapacitate eorum, ut infamis, condemnatus, vel similis, non potest habilitari, quia favore publico prohibetur"; Villadiego, *Instrucción política*, cap. I (De la instrucción), nº 31, fol. 11; Joseph Berní, *Práctica criminal con nota de los delitos, sus penas, presunciones, y circunstancias que los agravan y disminuyen*, Valencia 1749, (Civitas. Madrid, 1995), libro II (Del modo de seguirse causas criminales en Tribunales Reales), cap. VIII (Sumaria de testigos), nº 1, p. 106. Con posterioridad Jordán de Asso y de Manuel Rodríguez, *Instituciones del Derecho civil*, título VII (De las pruebas), cap. IV (De la prueba de testigos), p. 298; Gutiérrez, *Práctica criminal*, tomo I, cap. VIII (De las pruebas), nº 16, pp. 262 y 263; Juan Sala, *Ilustración del Derecho real de España*, Madrid, 1820, tomo II, libro III, tit. VI (De las pruebas), nº 6, pp. 199 y 200.

[39] Azevedo, *Commentarium Iuris Civilis*, (comentario a Nueva Recopilación IV,8,2), nº 57, p. 188: "Vnum pro complemento

believed it was enough to have proved a delinquent's participation in the events they were accused of to be able to deny them witness eligibility without having to wait for the subsequent court ruling that convicted them[40].

This controversial matter of whether the testimony of delinquents should be facilitated still had repercussions some centuries after the previous jurists had given their opinion about it. Therefore, we understand the relevance of the comment by José Marcos Gutiérrez regarding the law of *Partidas* that stated that delinquents were ineligible to testify. He considered that in mid-19th century, it was illogical to continue with such an extensive list of subjects prohibited from testifying in a trial just because there were certain suspicions surrounding them that their testimony would be false, all because of a crime they had committed years before. In order to explain his critique, he uses three examples, and given their clarity we will outline them in order to better understand his words.

On the one hand, he refers to the prohibition on a Moor, Jew or heretic of testifying against a Christian. This prohibition seemed coherent to him at a time when those who professed different religions "se odiaban como enemigos capitales". However, in his time, he adds, "estaba felizmente superado", hence he did not understand why such an anachronic regulatory provision was maintained, since he failed to determine what interest a subject who professed a certain religion would have in falsely declaring against a follower of another religion.

On the other hand, he refers to excluding someone as a witness if they had been convicted of facilitating a substance to a woman in order to provoke an abortion. In spite of the undeniable seriousness of this criminal act, this author does not appreciate the smallest link between the motive that could lead someone to provoke an abortion and a hypothetical fear that they should decide to give a false testimony in a trial against a person charged with committing a crime different to abortion and someone who they are not related to or friends with.

The same conclusion is reached when he looks at the example of individuals who are cohabiting, in whose case he does not observe any relation between lasciviousness and lies in the trial.

For all these reasons, it seems that the social interest in discovering the truth about controversial facts always had to have precedence at the time of punishing the authors of these offences, although it was at the expense of relying on the words of subjects previously charged for the perpetration of other illicit acts[41].

This thorny issue we are dealing with also deserved the attention of the most important jurists beyond our borders. The opinion of Jeremy Benthan deserves a particular mention, cited so often by Spanish contemporary colleagues in the treatment of numerous issues, especially those of a procedural and constitutional nature. For this English author, those convicted of false testimony should not always remain excluded from the pos-

huius glossae quaerendum est, num scilicet, vt testis tanquam falsarius, vel periurus vel ex alio crimine repellatur a testimonio, requiritur quod sit de illo condemnatus. Iure tamen ciuili condemnatio requirebatur vt repelli posset, & ideo ius canonicum in foro ecclesiastico, & ciuili in seculare veniebat obseruandum...".

[40] Claro, *Opera omnia*, cit., liber V. fin. pract. crimin., quaestio XXIV, nº 17, p. 460: "Scias tamen quod semel conuictus de crimine praecedente accusatione, repellitur a testificando in causis criminalibus".

[41] Gutiérrez, *Práctica criminal*, tomo I, cap. VIII (De las pruebas), nº 20, pp. 265 y 266.

sibility of testifying in trials that started after their being sentenced. In his opinion, it was first necessary to look into whether or not in the previous trial they were coerced into testifying against the truth so as to defend the interests of a person who they had close ties with or who were friends or relations. In the event that in the new litigation there were no apparent objective indications that they still had a need to make a false statement, there should be no problem for their testimony to be admitted.

Before deciding whether or not to admit the proposed witness, the judge was also recommended to assess how much time had passed since the sentence for false testimony had been issued. If it was a long time of twenty or thirty years, and the subject's behaviour had been unreproachable, "debe el testigo ser admitido como otro cualquiera, pues, en definitiva, es él quien más tiene que temer, ya que es objeto de desconfianza y la reincidencia aumentaría la gravedad de su delito"[42].

2.3 The poor.

Indigents formed another group that was considered legally ineligible to testify[43]. We should highlight, however, that there was no consensus between the different regulations when defining what should be understood as legally poor[44]. However, in relation to the issue of the witness eligibility of an individual, the Espéculo tells us that anyone whose personal wealth was no more than twenty maravedíes was poor[45].

Unfortunately, this regulation does not clarify the reason that led the legislator to reject the eligibility of poor witnesses. In any case, perhaps it was a consequence of the well-founded fear that these individuals could be easily bribed by the litigants who presented them at the trial, so they would make a false statement in their favour. Hence, it was recommended that their words should be ignored, especially when dealing with criminal cases or complex civil cases which required full evidence and not simple indicators, as a means of sustaining the court ruling as reflected

[42] Bentham, *Tratado de las pruebas judiciales*, tomo II, lib. VII (De la exclusión de las pruebas), cap. XIII (Exclusión en razón de la falta de probidad), p. 134.

[43] Partidas III,16,22: "...Otrosi pedimos, que non deue ser recebido por testigo aquel fuere ome vil e muy pobre..."; Gutiérrez, *Práctica criminal*, tomo I, cap. VIII (De las pruebas), nº 16, p. 263.

[44] Partidas VII,1,2, "acusar puede todo ome que non es defendido por las leyes deste nuestro libro", to then list those subject who are denied this right. Among those excluded are "ome que es muy pobre que non ha la valia de cincuenta marauedis non puede fazer acusacion", salvo en pleito de traición o cuando la víctima del delito hubiese sido el propio pobre o algún familiar allegado que en la norma se indica. En otra disposición, Partidas III,23,20, se recoge el deber del monarca de "guardar todos los de su tierra", con especial atención de "los que son tan pobres, que non ha valia de veynte marauedis". As well as fixing a specific amount of personal wealth which defined the legally poor from those who were not, there were precepts in which the condition of poverty was found because of other circumstances. In this sense, it was understood that a poor person was, Partidas IV,17,8, aquel padre de familia que se veía abocado a "vender o empeñar sus fijos, porque aya de que comprar que coma", o el que no tuviese para pagar al abogado que le defendiese en juicio, Partidas III,6,6. En última instancia, también nos encontramos con una norma Partidas VII,28,5, más tajante que las citadas al reservar la condición de pobre tan sólo al sujeto que "non aya nada", cuando alude a las diferentes penas que debían imponerse a los castigados por blasfemia. Sobre todo ello Miguel Pino Abad, "La aplicación singular de las normas penales a los pobres en Castilla (siglos XIII-XVIII)", en *Rudimentos legales*, nº 2, 2000, pp. 259 a 276.

[45] Espéculo IV,7,8: "...E dezimos que los pobres que non podrien testiguar que por estos se deve a entender e non por otros, asi como aquellos que non an en su valia en mueble e en rayz de veynte mrs. arriba..."

in the sentence[46].

We find the words by Castillo de Bobadilla of interest in his treatment of this issue. He graphically advocated prohibiting witness eligibility of the poor, as they were dangerously inclined to covet the goods of strangers, when he asserted "la pobreza haze que se trasformen los homes en la brutalidad de los animales: como los papagayos necessitados de la hambre hablan y pronuncian la voz humana"[47].

Asides from greed, the poor were generally linked to infamy which was connected with shame and dishonour. In this sense, throughout the centuries, poverty has been conceived as something harmful, associated with God's punishment for original sin. A consequence of this was the attitude that society adopted with respect to the poor, who were marginalised, and discriminated in all facets of life and of course judicially[48].

Nevertheless, the jurist Alberico de Rosate took steps to introduce an important exception to this rule of refusing the penniless witness eligibility. An exception which appeared when the person proposed as a witness was a person of a sound reputation despite his depleted financial situation[49]. This exception was adopted by the Castilian Antonio Gómez, who added that if the poor person was a priest and had obtained the mandatory authorisation of his corresponding abbot or superior then they also had to be accepted as a witness[50].

However, in this second case, Julio Claro was reluctant to admit the testimony of a priest, whenever he was summoned to a trial against a subject accused of committing any offence punished by law with sentences that entailed bloodshed, like death or the mutilation of a limb[51]. Apart from this exception, there should be no problem for a friar to testify as any other private individual.

In contrast to these authors, who accepted the participation of the poor as witnesses although, as we have emphasised, subject to the fulfilment of certain requirements, was Gregorio López's opinion. In his annotations to the law of *Partidas* where the ineligibility of this type of witness was stipulated, he even compared them to being ignorant. This lack of correct knowledge of reality, according to his particular vision, recommended

[46] Gómez, *Variae resolutiones*, tomo III, caput XII (De probatione delictorum), nº 19, p. 389: "...Repellitur pauper, et vilis persona, quia faciliter posset corrumpi pretio..."; Ferraris, *Promta Bibliotheca*, voz *Testis*, nº 36 y 37: "Pauperes & viles personae, nequeunt esse testes in causis criminalibus. Et ratio est, quia in criminalibus causis requiruntur probationes indubitae...Item pauperes, & viles personae non admittuntur tamquam testes idonei in causis civilibus arduis. Et ratio est, quia causae civiles arduae aequiparantur causis criminalibus".

[47] Castillo de Bobadilla, *Política para corregidores*, tomo I, lib. I, cap. XI, nº 21, p. 127. Vid. José María García Marín, *El oficio público en Castilla durante la baja Edad Media*, Madrid, 1987, p. 196.

[48] Carmen López Alonso, *La pobreza en la España medieval*, Madrid, 1986, p. 319 y ss.

[49] Alberico de Rosate, *Secundam veter*, (De testibus), lex III, nº 4, p. 195: "Item quaero, an pauper, si est alias fidelis, & bone vitae: admittatur in testem? & si consideremus fidem, ut principale, ad fidem praesumendam, quod videtur debebit admitti..."

[50] Gómez, *Variae resolutiones*, tomo III, caput XII (De probatione delictorum), nº 19, p. 389: "Quando est pauper, honesta persona, et digna, quia tunc bene potest esse testis...Clerigus religiosus bene potest esse testis cum licentia sui abbatis vel superioris..."

[51] Claro, *Opera omnia*, liber V, fin. pract. crimin., quaestio XXIV, nº 8, p. 459: "nunquid clericus possit testificari in causa criminali?. Resp. quod sic, debent tamen clerici abstinere a testificando in causis criminalibus in quibus ingeratur poena sanguinis. Nam ex tali testificatione, vbi contingat sequi mortem, aut membri mutilationem..."

that they should be kept away from the forensic world, given the well-founded risk that it was assumed they would be easily misled by lawyers or by parties who intended they should falsify the reality of the facts[52].

2.4 Servants

As occurred in other historical periods, men subjected to slavery were denied eligibility to appear at a trial as witnesses.

Despite this being the general rule that governed in relation to the procedural situation of slaves, we have to point out that in specific circumstances exceptions were argued when the statements of these men were seen as necessary for the resolution of a case. In this sense, it can be read in the *Partidas* that their statements would be admitted at trial as long as they were essential to the prosecution of suspects for having perpetrated a crime of treason against the sovereign or the security of the kingdom.

In addition, a servant was allowed to testify in another five cases, specified in the same law of *Partidas*. These are indicated as follows: servants could testify against their master, as in the previous case, if they had proof that he had planned some type of attack against the king; their testimony was also acceptable at trial if they had witnessed the death of their master at the hands of his wife or vice versa; when their owner's wife had been accused of committing adultery and their testimony would serve to prove the veracity or not of this circumstance; it remained equally an exception to the general rule, if the slave was present when their master was assassinated by another because of a previous discussion they had had about who the ownership of a third slave corresponded to; finally, if servants suspected that the heirs of their master were the authors of his death, by which means they would obtain the assets that made up his fortune before the usual time.

Not only was it necessary for any of these stipulated conditions to exist for a slave's testimony to be accepted in a trial, but they must also be previously subjected to torture, which had been customary since Roman Law was established[53]. Although the regulation of this particular point does not clarify anything, we believe that perhaps it was sustained on the presumption that coercion would ensure that the slave would testify with greater certainty during the evidence phase of the trial which he had been summoned for[54].

[52] López, *glosa* 1 a Partidas III,16,22: "Item testis ignotus non recipitur".

[53] Partidas III, 16, 13: "Sieruo ninguno non puede ser testigo en juyzio contra otro; fueras ende en pleyto de trayzion que alguno quisiesse fazer, o que ouiesse fecho contra el Rey, o contra el Reyno. Otrosi dezimos, que el sieruo non puede dar testimonio contra su señor en ninguna cosa, fueras ende en cosas señaladas. La primera es, quando el señor es acusado de traycion que ouiesse fecho, o que quisiesse fazer contra el Rey, o contra el Reyno; o sobre pleyto de furto, o de engaño de auer del Rey, de que fuesse acusado su señor. La segunda es, quando sospechassen que la muger ouiesse muerto, o quisiesse matar al señor del sieruo, o el marido a la muger. La tercera es quando el pleyto es de adulterio de que fuesse acusada su señora. La quarta es quando fuessen dos omes señores de vn sieruo, el vno dellos fuese acusado de la muerte de otro. La quinta es, quando matasen al señor del sieruo e fuesse sospecha que los herederos del muerto lo fiziessen matar: ca en qualquier destas cosas puede ser cabido el testimonio del sieruo, e deue ser creydo, maguer diga contra su señor. Pero deuenlo tormentar quando dixere el testimonio, preguntandole, e amonestandole que diga la verdad del fecho, non nombrando ninguna persona. E el tormento le deuen dar por esta razon: porque los sieruos son como omes desesperados por la seruidumbre en que estan. E deue todo ome sospechar que diran de ligero mentira, e que encubriran la verdad quando alguna premia non les fuere fecha"; Gutiérrez, *Práctica criminal*, tomo I, cap. VIII (De las pruebas), nº 17, p. 264; Más recientemente Martínez Díez, "La tortura judicial", p. 261; Alonso Romero, *El proceso*, p. 50.

However, according to the opinion of some authors, the requirement of the prior application of torture was insufficient for a slave to be allowed to appear at a trial. We believe Gregorio López's opinion is significant since he considered that a slave's testimony had to be used as an alternative whenever it was impossible to discover the facts under discussion in the trial proceedings through other more suitable witnesses or by means other than that of witness evidence[55].

III. THE TREATMENT OF CASES OF WITNESS INELIGIBIL ITY IN LEGAL LITERATURE.

In conclusion to the above, we can affirm that any infamous person, delinquent, indigent or slave had to be denied witness eligibility, regardless of the specific provisos included in the law itself and that we have highlighted.

Nevertheless, legal Doctrine in the Modern Age undertook to refine the excessive rigour of many aspects included in the laws regulating the requirements that had to be met for proposed subjects to testify at a trial. In practice, this meant that the number of individuals that could testify would increase considerably, more than what can be inferred after a first reading of the abovementioned regulations[56].

From a legal point of view, Castillo de Bobadilla was clearly in favour of understanding that the testimony of an ineligible subject could not be excluded if their lack of competence could be compensated thanks to other completely trustworthy people attending the same trial. If this were the case, the testimony of ineligible subjects could be valued opportunely by the judge, as long as there was consistency in the statements by all the proposed witnesses in answer to questions asked during the evidence phase. Failing that, the words of ineligible subjects could also be accepted if it was possible for documents to be presented that corroborated the veracity of their words[57].

For his part, Antonio Gómez considered that an important exception to the general rule had to come into play; this was the witness ineligibility of those convicted of having participated in the commission of a certain crime. To be exact, he defended that there should be no impediment for the statement by these subjects to be accepted, when their words could be particularly valuable to discovering the guilt of those who had acted in perpetrating another crime in hidden, secret places or at times when it was materially impossible to rely on the statement by witnesses who were suitable from a legal point of view. According to

[54] Castillo de Bobadilla, *Política para corregidores*, tomo II, libro V, cap. I, nº 113, p. 444: "...es conclusion firme en derecho que en los casos donde se admiten testigos infames de hecho o de derecho o que padecen algunas tachas criminosas por las quales regularmente devian ser repelidos de testificar se requiere que depongan con tormento porque de otra suerte no harian fee. La razon es porque de la fidelidad sola del testigo no se fia la verdad, sino se junta este adminiculo del miedo del tormento...".

[55] López, *glosa 5 a* Partidas III,16,5: "Servi responso credendum, quando aliae probationes deficiunt sumitur, in quacumque causa civili, vel criminali, deficientibus aliis probationibus, servi recipientur"

[56] It is quite true that this tendency to admit the testimony of ineligible witnesses in a trial was not an option shared unanimously by the modern doctrine. The words by the renowned Italian jurist Julio Claro are of great interest in *Opera omnia*, liber V, fin. pract. crimin, quaestio XXIV, nº 1, p. 458 donde afirma con indiscutible contundencia que "scire tamen debes quod qui repellitur a testificando in causa ciuili, multo magis repellitur in criminali, in qua debent esse probationes luce meridiana clariores... Quinimo multi admittuntur in causis ciuilibus, qui non admittuntur in criminalibus".

[57] Castillo de Bobadilla, *Política para corregidores*, tomo II, libro V, cap. I, nº 67, p. 427.

the opinion of this author, considered the best Castilian criminal lawyer for several centuries[58], the existence of these unusual conditions recommended that the words of incompetent subjects should be admitted as long as they served to sustain that the suspects had participated in the commission of these criminal acts[59]. Of course, the apprehensions that surrounded them meant their testimonials had to be minimally consistent after being asked about aspects such as the place the crime was committed, the time, the identity of the people who participated in it etc.[60].

Alfonso de Azevedo was more restrictive than the two previous authors in his approach to this issue. Although he admitted that the words of ineligible witnesses could have certain value for clarifying whether the defendants had participated or not in the crime they were accused of, when there were no other more reliable witnesses, he argued that judges should act with particular caution. This recommendation had to be especially taken into account, when trying to find out whether the accused were guilty of committing a crime during the night. In such circumstances, the witness had to testify under oath that that night the moonlight was bright enough for them to be able to correctly perceive everything that happened and consequently identify the delinquents without hesitation. If this were not the case, it would be assumed that their testimony was false and that they only aimed to slander innocent subjects[61].

The echo of these doctrinal voices arguing for the introduction of greater flexibility in the procedural system regarding matters of witness evidence resounded until much later dates. In this sense, still in the 19th century, José Marcos Gutiérrez insisted on the same idea as his predecessors. He criticised the parameters on the bases of which the procedural order in force had been developing for such a long time and qualified it as too scrupulous regarding the suitability of witnesses. As he stated, there were certain crimes that could only be committed in the presence of subjects who had been previously convicted by a mandatory judicial sentence. In this respect, he gave the example of homicides committed in a prison or on a galley. The strict application of the legal provision, in his opinion, would lead to the paradoxical situation of crimes carried out in these places going unpunished because of a lack of suitable witnesses. For this reason, he defended the necessary malleability of the regulation, so that it would always be feasible to gather suffi-

[58] Tomás y Valiente, *El Derecho penal*, p. 124.

[59] Gómez, *Variae resolutiones*, tomo III, cap. XII (De probatione delictorum), nº 21, p. 390: "Et magistraliter et resolutive dico quod si factum vel delictum est commissum tali loco vel tempore, quo verisimiliter non potest haberi copia testium: ut quia commissum est in eremo, monte, de nocte vel loco secreto, bene admittuntur testes minus idonei vel inhabiles". Con similares términos se expresó también Alfonso de Azevedo, *Commentarium Iuris Civilis*, (comentario a Nueva Recopilación IV,8,1), nº 38, p. 178: "Est itidem notandum, quod in omnibus casibus, vbi diximus testes inhabiles non esse admittendos, admittendi erunt ob defectum alterius probationis".

[60] Gómez, *Variae resolutiones*, tomo III, caput XII (De probatione delictorum), nº 10, p. 386: "Item adde, quod etiam oportet, & requiritur, quod tales testes sint contestes in actu, vel delicto, super quo deponunt, concordando in tempore, loco, & persona, alias vero...". In Italy, this type of testimony was also admitted according to Mario Giurba en *Consilia sev decisiones criminales*, Venecia, 1626, Consilium XCI, nº 55, p. 470: "Licet inhabilis testis admitteretur, vbi veritas aliter haberi non potest".

[61] Azevedo, *Commentarium Iuris Civilis*, (comentario a Nueva Recopilación IV, 8, 2), nº 52, p. 188: "Quod si testis deponat de maleficio commisso de nocte debet deponere, quod illa nocte lumen vel luna aderat mediante qua potuit videre & cognoscere delinquentem, alias nihil dictum suumvalebit, imo potius falsum praesumetur...".

cient testimonies that would sustain the accusation against the suspects, despite their coming from individuals with very little credibility[62].

IV. THE ADMISSION OF INELIGIBLE WITNESSES AT A TRIAL TO REPRESS CRIMES OF TREASON.

The previous opinions given are simply examples of the opinions presented by the copious Castilian doctrine of the Modern Age, which argued for a relaxation in the requirements that were demanded for an individual to be accepted as a witness at a trial.

Despite its undeniable importance, we cannot forget that Castilian territorial legislation already allowed the testimony of ineligible subjects that had witnessed a crime of treason against the king or the kingdom. The particular seriousness that was involved in these types of crimes recommended that any testimony, regardless of who made it, that could serve to sustain the charges against the prisoner should be admitted. Consequently, this also meant that the accused's defence was greatly diminished when they were refused the option of rejecting the referred to witnesses by means of formulating a procedural motion to exclude them[63].

This limitation would later be increased, as we know, thanks to the enriching contribution of common Law doctrine, which had gradually created loopholes within the long-term system of weighted evidence which had been in force for centuries in Castile, and which closely linked the judge with the wording of the regulation. The strict use of this evidence system would lead to the risk of unfair situations arising, as the suspect on many occasions would remain exempt from sentencing if he had committed the crime in the presence of only legally incompetent people. All this unless they were crimes of treason for which no exception of witness incompetence could be alleged.

The jurists of that time considered that they must adopt urgent solutions to stem this troubling situation. For this reason, they expressed what attitude judges had to endorse when the crime had been committed before ineligible subjects alone: did their ineligibility prevent them from testifying and therefore there would be no witnesses for the prosecution to declare against the suspects? Or, on the other hand, should such testimonies be accepted to prevent the guilty parties from remaining exempt from receiving the sanction specified in the laws according to the criminal conduct they had committed?[64].

Before undertaking a closer look into the responses to these questions in the doctrine, we can point out that the *Leyes del Estilo* already admitted testimonies from subjects whose behaviour had contributed to a greater or lesser extent to guaranteeing the consummation of a crime and its subsequent concealment. Although these statements were not legally full proof, they did at least establish an important presumption which served to justify the punishment applied to the accused. A punishment that the judge imposed

[62] Gutiérrez, *Práctica criminal*, tomo I, cap. VIII (De las pruebas), nº 21, p. 267.

[63] Partidas VII,1,2; Azevedo, *Commentarium Iuris Civilis*, (comentario a Nueva Recopilación IV,8,1), nº 33, p. 178: "VIterius notandum est, quod in crimine laesae maiestatis non admittitur testium repulsa".

[64] Bernard Schnapper, "Testes inhabiles. Les temoins reprochables dans l´ancien droit penal", en *Revue d´histoire du droit*. Tome XXXIII, IV fascicule, 1965, p. 576; Tomás y Valiente, *El Derecho penal*, p. 176 y ss; Alonso Romero, *El proceso penal*, p. 231.

according to his discretion depending on the concurrent circumstances of the commission of the crime[65].

Years ago Tomás y Valiente wrote that all this, "se creaban, por absurdo que parezca, situaciones intermedias entre la inocencia y la culpabilidad, ya que en estos casos la pena era atenuada en la sentencia condenatoria no porque se reconociese que la responsabilidad del delincuente era menor, sino porque la prueba de su culpabilidad era incierta"[66]. In essence, at the end of the trial, the judge had been convinced that the accused was really guilty but the characteristics of the witnesses who declared against him recommended that a lower sentence should be given than would have been the case if he could have counted on the testimony of people free from any suspicion.

Thus, the testimony of accomplices, who had incriminated the other participants in the commission of serious crimes, was accepted[67]. These included crimes such as heresy, lèse majesté, counterfeiting, heinous crime, grand theft or any others which, according to Antonio Gómez, necessarily required the assistance of various collaborators for their commission[68].

However, once more we should insist on the idea that the admission of these testimonies was dependent on the absence of other suitable subjects who would serve to attest to the guilt of the suspects, and on the *a priori* ineligible witnesses being previously subjected to torture in order to guarantee a greater veracity of their declaration[69].

Matheu i Sanz was even more demanding; not only did he believe that it was necessary to apply torture to the participants in the crime, so that their declaration could be valued by the judge, but he further recommended that the words spoken after the torture should be considered as long as they coincided with those spoken during

[65] Ley del Estilo LIV: "...E maguer sea aparcero en el yerro este que pregunta el Alcalde, no lo dexará de preguntar por eso, ca los que son aparceros en los yerros, maguer no deban ser creidos: pero si dixere el aparcero del yerro contra alguno, que es culpado en este fecho, sospechan contra aquel contra quien dixo, con otras sospechas, e ayudas que falló el Alcalde del fecho en verdad, pasará el Alcalde contra él segun viene, no moviéndose el Alcalde con malquerencia, ni por don, ni por otra malicia". Vid. Pedro Ortego Gil, "El fiscal de su Majestad pide se supla a mayores penas. Defensa de la justicia y arbitrio judicial", in *Initium. Revista catalana d´Historia del Dret*, nº 5, 2000.

[66] Tomás y Valiente, *El Derecho penal*, p. 178.

[67] López, *glosa* 2 a Partidas III,16,21: "...In casibus tamen exceptis, bene admittitur testimonium participis criminis...".

[68] Gómez, *Variae resolutiones*, lib. III, Cap. XII (De probatione delictorum), nº 388: "Adde tamen, quod in aliquibus casibus socius criminis potest esse testis in crimine haeresis, item in crimine laesae majestatis, item in crimine falsae monetae, item eadem ratione idem dicerem in crimine nefando contra naturam, ubi habetur et dispontur, quod istud crimen probatur eodem modo, quo crimen haeresis, vel laesae majestatis, item in furto famoso...et regulariter dico, et teneo, quod in delictis, quod non possunt verisimiliter committi sine sociis, socius et particeps criminis potest esse testis..."; , p. 529; Hevia Bolaños, *Curia Philipica*, parte III, ep. 15, nº 17, p. 227.

[69] López, *glosa* 2 a Partidas III,16,21: "...Sed an tunc dictum unius participis criminis faciat indicium ad torturam"; Gómez, *Variae resolutiones*, tomo III, caput XII (De probatione delictorum), nº 18, p. 389: "Quod talis socius criminis in casibus in quibus potest deponere de sociis, sufficienter probet, tanquam legitimus testis, et per consequens solus faciat indicium ad torturam..."; Castillo de Bobadilla, *Política para corregidores*, tomo II, lib. V, cap. I, nº 113, p. 444: "Y tambien porque es conclusion firme en derecho, que en los casos donde se admiten testigos infames, de hecho o de derecho o que padecen algunas tachas criminosas, por las quales, regularmente devian ser repelidos de testificar, se requiere que depongan con tormento, porque de otra suerte no harian fee". This opinion was shared by the Italian doctrine of the time. As an example, we can provide the words written by

the torture[70]. In reference to this idea, Julio Claro highlighted the beneficial effects that torture could generate, when he indicated that applying it to ineligible witnesses would be useful to purge them of the defect that they suffered and therefore dissipate any risk that they should make a false statement[71].

Despite the requirements of suitability that the authors gradually established, it is true that the number of delinquents allowed to appear as witnesses at trial had to increase considerably, which in turn meant an undeniable decrease in the expectations of the accused being absolved at the end of the corresponding trial they were involved in.

As a way of achieving a certain compensation for this decrease in the accused's aspirations of being declared innocent of the charges against them, Antonio Gómez considered that this type of witness should not just be proposed by the prosecution, but also by prisoners so they could demonstrate that they were not responsible for the events that they were on trial for. However, in this case the words of the delinquent proposed by the prisoner were not valued as full-proof evidence, since it was conceived only as a mere indicator that had to be correctly weighed up by the judge, who, if he considered it admissible would impose an arbitrary sanction according to the nature of the crime committed and the concurrent circumstances of its commission[72]. This meant that the testimony of an incompetent witness presented by a prisoner would never be effective enough, on the basis of their words alone, for a judge to announce the accused's absolution, but that he should always punish him with a sentence although in fact it was lesser than the ordinary sentence.

Despite these precautions, the truth is that the rigid requirements of eligibility of potential witnesses were gradually reduced. This led to it becoming increasingly viable to resort to testimonies given by legally ineligible subjects to achieve the desired goal of a speedy conviction of individuals suspected of having committed particularly serious crimes, since they clearly influenced

Farinacius about this matter in *Praxis et theoricae criminalis*, Amberes, 1618, tomo I, quaestio XLIII, nº 2, p. 586: "In omnibus casibus, in quibus quis de sociis interrogari potest, in illismet interrogatus semper facit indicium ad torturam contra nominatos". Para conocer con mayor profundidad la regulación de la tortura en el seno de las Partidas, debe verse Martínez Díez, "La tortura judicial en la legislación histórica", p. 253 y ss.

[70] Matheu i Sanz, *Tractatus de re criminali*, controversia II (De criminibus exceptis), nº 33 y 34, p. 14: "Tamen in criminibus atrocioribus, quae sunt difficilis probationis, quando veritas aliter adipisci nequit, difficultate ipsius probationis testes alias inhabiles ex juris dispositione idonei redduntur…maxime si in tortura dictum confirmetur, & aequaliter de se ac de socio dicat". Apart from the interesting concerns that arise regarding torturing the accused in order to extract a guilty confession from them, we should remember Tomás y Valiente, who in "Teoría y práctica de la tortura judicial en las obras de Lorenzo Matheu i Sanz (1618-1680)", en *La tortura en España. Estudios históricos*, Barcelona, 1973, p. 56 two cases are pointed out for which it was viable to torture witnesses according to this 17th century Valencian jurist. To be exact, he says that it should be applied in such practices "a) a los testigos verosímilmente informados de la verdad relativa al delito perseguido, con el fin de poner en claro ésta; b) a los testigos viles o que se cotradigan en sus declaraciones, con el objeto de hacer más creíbles sus testimonios, al quedar purgada en el tormento su condición vil, o superadas sus contradicciones".It seems evident that the accomplices fitted into both categories, since they clearly knew everything that happened regarding the commission of the crime, and besides, their vileness as delinquents also permitted their being tortured.

[71] Claro, *Opera omnia*, liber V, fin. pract. crimin. quaestio XXV, nº 1, p. 461: "Sunt etiam aliqui casus, in quibus testes inhabiles admittuntur cum tortura, talis enim tortura purgat defectum testis, adeo vt fidem faciat contra reum, licet alias a sine tortura non probaret".

[72] Gómez, *Variae resolutiones*, lib. III, cap. XII (De probatione delictorum), nº 23, p. 390: "Item quaero, an testes inhabiles, & minus idonei possint admitti ad probandam innocentiam delinquentis? Et videtur, quod sic…Sed advertendum, quod ista sentencia, & conclusio, licet communis, videtur valde dubia, quia omnes rationes, per quas testes inhabiles repelluntur, militant etiam in isto casu, unde cogitavi, quod posset dici & teneri, quod isti testes inhabiles plene non probent, etiam pro defensione rei, sed faciant indicium secundum qualitatem inhabilitatis, & negotii…ex hoc invalidetur & diminuatur fides probationes contrariae, ut non imponatur poena

the political, economic and religious order and that they were encompassed within the genre of so-called heinous crimes[73].

Matheu i Sanz was particularly favourable to this idea. He sustained that with respect to these heinous crimes, it was perfectly legal to infringe the laws on how to proceed in order to discover the guilt of the accused. In his opinion, for reasons of public interest, it was necessary that these serious acts did not go unpunished, and for this reason he advocated that the requirements of proof should be made flexible, although it would mean an undeniable reduction in the prisoners' possibilities of defence, and if necessary, admitting the testimony of ineligible subjects[74], in the absence of people free from any irregularities. The latter were for him the ones who in contrast to the rest enjoyed a reputable honesty, laudable life or impeccable customs[75].

José Marcos Gutiérres also paid special attention to this issue regarding witness evidence for heinous crimes. In words similar to those used by the above-mentioned Valencian jurist, he recorded centuries later that for this type of crime such strong evidence as demanded in other cases was not required, as it was enough to gather simple conjectures to condemn the accused. However, following this, he denounced that this generalised practice led to the massive conviction of many innocent subjects. With respect to this point, he very expressively asserted that "los testigos tachados por las leyes, y que éstas han mirado como sospechosos e indignos de fe, merecen crédito, no en las causas en que puede demostrarse por muchos medios la inocencia del acusado, sino en aquellas precisamente en que de ninguna manera puede acreditarse, y en que se halla como la acusación sumergida en las tinieblas. Aquella confianza que la justicia niega a los testigos sospechosos en las acusaciones leves, se la da en las acusaciones capitales. Cuando la justicia debería privar de su confianza aún a los testigos más irreprehensibles, hace este don a los testigos más vituperables. En fin, la justicia rechaza los testigos sospechosos en las acusaciones en que sus dichos sólo pueden costar a la inocencia algún dinero, y les admite en causas en que sus declaraciones pueden costar a la inocencia el honor y la vida"[76].

V. THE GRADUAL ACCEPTANCE OF THE TESTIMONY OF LEGALLY INELIGIBLE WITNESSES IN THE PUNISHMENT OF OTHER PARTICULARLY SERIOUS CRIMES.

After being recognised in the *Partidas*, according to which anyone could testify against a person suspected of committing a crime of treason, except for their sworn enemy, the words by in-

ordinaria, sed lavior judicis arbitrio..."; Su opinión fue secundada por Julio Claro, quien afirmaba con similares términos en *Opera omnia*, liber V, fin. pract. crimin., quaestio XXIV, nº 19 y 20, p. 460: "Solet fidem adhibere testibus inhabilibus si non ad condemnatum poena ordinaria, faltem ad infligendam poenam extraordinariam...Item scias, quod isti omnes, quos supra diximus repelli a testificando in causis criminalibus, possunt nihilominus & debent admitti, si producantur ad defensam & sic ad probandam innocentiam ipsius rei"; Con posterioridad, Hevia Bolaños, *Curia Philipica*, parte III, ep. 15, nº 17, p. 227..

[73] Schnapper, "Testes inhabiles", p. 591 y ss; Alonso Romero, *El proceso penal*, p. 303.

[74] Matheu i Sanz, *Tractatus*, controversia II, p. 9 y controversia XXV, pp. 81 a 83.

[75] *Ibidem*, controversia II, nº 26, p. 13: "Testis idoneus resultatem ex probatione honestae opinionis, laudabilis vitae, vel morum inculpabilium. In iure enim nostro posita reperiuntur verba illa por buenos testigos: & sic quoties testes juxta ejusdem juris regulas idonei reperiantur, vel ad fidem faciendam admissi sint"; Tomás y Valiente, "Teoría y práctica de la tortura", especialmente en pp. 88, 89 y 92.

[76] Gutiérrez, *Práctica criminal*, tomo I, cap. VIII (De las pruebas), nº 39, p. 275.

famous subjects, delinquents, indigents and servants were admitted so as to sustain the accusation against those who had participated in the perpetration of other heinous offences.

In this sense, Felipe II, through a pragmatic law enacted in Madrid in 1598, equated the evidence requirements of the cases against the accused for committing a heinous crime with those of heresy and lèse-majesté. In this respect, it was indicated that such a crime could be demonstrated indistinctly through three perfectly ideal witnesses or through four who had participated in its commission. It would even be enough to have the testimony of another four subjects even though they had been charged with an offence that would allow the accused to formulate their exclusion if, without having intervened, they had witnessed the commission of the crime, and that certain indicators or presumptions were consistent, which would verify their testimonies.

But perhaps what was most striking about this issue was not that it would be enough to count on the consistency in the testimony of various subjects, regardless of their suitability, but that the law itself was explicit that the sentences that were imposed on those convicted should be the ordinary sanctions stipulated in the legislation and not reduced sentences as was the usual custom when the conviction was based on the declaration of ineligible subjects or suspects[77].

This law therefore represented an important turning point in the regulation of the issue we are discussing. Until then the ordinary sanction was only imposed when the accused had been found guilty through the words spoken by perfectly competent witnesses. From this date, it was understood to be enough that the statements coincided, and the demand for complete suitability of witnesses was relegated to secondary importance.

Perhaps this change was caused by a substantial increase in the crimes of sodomy and bestiality in the years prior to its enactment. This could have been the reason why a softening of the requirements in force was recommended regarding the valuation of the adequate competence of witnesses brought in to prove these crimes.

In any case, we should remember that the "rey prudente" was not a pioneer in establishing especially repressive regulations against the authors of these sexual behaviours qualified as sins against nature. According to Tomás y Valiente, "sólo dentro del contexto de enorme carga de moralidad legislativa que los teólogos introdujeron en el campo del Derecho penal es comprensible lo relativo a la represión durísima que se dirigió contra este pecado-delito"[78]. What is more, this same author indicated in another place that "aunque en sentido amplio todo pecado es un pecado contra natura, así y de un modo peculiar se dice de la sodomía pecado contra natura: la

[77] Nueva Recopilación VIII, 21, 2, "...por la qual ordenamos y mandamos que probándose el dicho pecado nefando por tres testigos singulares mayores de toda excepcion, aunque cada uno dellos deponga de acto particular y diferente, o por quatro, aunque sean partícipes del delito, o padezcan otras qualesquier tachas que no sean de enemistad capital...concurriendo indicios o presunciones que hagan verosimiles sus deposiciones, se tenga por bastante probanza; y por ella se juzguen y determinen las causas tocantes al dicho pecado nefando, que al tiempo de la publicacion de esta nuestra carta estuvieren pendientes y se ofrecieren de aqui adelante; imponiendo y executando la pena ordinaria de él, en los que lo hobieren cometido, de la misma manera que si fuera probado con testigos contestes, que depongan de un mismo hecho"; Novísima Recopilación XII, 30, 2; It should not come as a surprise that Felipe II should adopt a measure such as the one indicated, since according to Kagan in *Pleitos y pleiteantes en Castilla (1500-1700)*, Salamanca, 1991, p. 155, "él adoptó el papel de rey justiciero. Educado en la corriente humanística, el joven príncipe se empapó en la riquísima literatura de los espejos de príncipes, que exhortaban a los gobernantes a tomar la administración de justicia como una tarea sagrada". This circumstance strongly justifies the enactment of a regulation as the one transcribed which, by reducing probative requirements, facilitated the punishment of socially reprehensible behaviours.

sodomía es el pecado contra natura propiamente dicho..."[79].

As we have argued all along, this reproach, which the authors of such offences against sexual morality deserved, led to a special reduction in the evidence requirements and to an undeniable increase in the severity of the punishments. Therefore, the first regulatory reference that we find in Castilian territorial Law about this matter was set out in the *Partidas*. The punishment that was imposed on the authors of these behaviours appeared in the text by Alfonso and it established death for both the person who committed sodomy and the person who consented to it[80], except when one of the them had been forced to participate or was under fourteen. In such cases, if either of these two exceptional circumstances could be applied to a subject, they would be considered victim rather than author, so they would remain exempt from punishment[81].

The explanation facilitated in the legal text seems sufficiently reasonable. The person who was forced could not be blamed for what they did because it did not meet the requirement of the free execution of this act. For their part, minors of fourteen did not have the necessary reasoning powers to discern morally what should be esteemed as good or bad[82].

It is necessary to point out that according to Gregorio López, common law established a regulation that was different to what was outlined in the penalty for "delitos de lujuria". In this sense, the minimal age which permitted punishment was lower than in Castilian law, and besides, it also depended on the sex of the delinquent. While males had to be at least ten and half years old, in the case of females it was nine and a half years old. For the glossator of the *Partidas*, this was a matter in which the laws established these limits because it was considered that below these ages the prepubescent did not have the ability to deceive; while leaving open the possibility of their punishment if in any specific case the judge appreciated that the minor of ten and half years old had acted deceitfully and was consequently sentenced according to what was correct judicial discretion[83].

[78] Tomás y Valiente, *El Derecho penal*, pp. 227 a 231.

[79] Tomás y Valiente, "El crimen y pecado contra natura", en *Sexo barroco y otras transgresiones premodernas*, Madrid, 1990, p. 38.

[80] It is of interest to highlight that Antonio GÓMEZ was of the opinion that a broad conception should be adopted as to what could be considered as a crime of sodomy. In this sense, he not only understands sodomy as "si quis habet accessum ad alium hominem", sino también "vir habet accessum ad uxorem propiam vel ad aliam quamlibet mulierem ad vas exterius contra naturam". Por último alude que "et idem est si aliqua foemina agit tanquam masculus cum alia foemina". Vid *Ad leges Tauri*, "commentarii in legem LXXX", nº 32, 33, 34; pp. 481, 482, 483.

[81] Febrero Novísimo, Tomo VII, p. 15: "...Esta mitigación de penas que otorga el juez al menor de edad delincuente, no es en efecto de piedad, sino de justicia, de suerte que desde la edad próxima a la infancia hasta los catorce años, no está en arbitrio del mismo dejar de mitigarle la pena..."; Lalinde Abadía, *Iniciación histórica*, p. 627.

[82] Partidas VII,21,2: "Cada uno del pueblo puede acusar a los omes que fiziessen pecado contra natura...e si le fuere prouado, deue morir porende también el que lo faze, como el que lo consiente. Fueras ende, si alguno de ellos lo ouiere fazer por fuerça, o fuere menor de catorce años. Ca estonce non deue recebir pena, porque los que son forçados non son en culpa, otrosi, los menores non entienden que es tan gran yerro como es, aquel que fazen"; José Martínez Gijón, "La menor edad en el Derecho penal castellano-leonés anterior a la codificación", en Anuario de *Historia del Derecho Español*, nº 44, 1974, p. 476.

The increase in the admission of testimonies by incompetent subjects was to continue, when Felipe IV enacted a pragmatic law in Madrid on 20th March 1637 directed against counterfeiters. It encouraged testimonies from any subject who could throw some light on the clarification of the events that had taken place and the responsibility of the authors. To do so, a general pardon was offered to those who, despite being actual accomplices, accused and testified against the material executors of the crime, with the guarantee that their identity would remain hidden so as to avoid their suffering future hypothetical reprisals from those convicted because of their testimonies[84].

In spite of the attractive procedural advantages encompassed in the royal offer to all those whose testimony would facilitate the detention and later prosecution of the counterfeiters, the truth is that it was not enough to remove such a pernicious offence from the already ailing Hispanic economy of that time. We must not forget that along with manufacturing money by means that were not legally established, we can also include smuggling[85], which was specifically carried out by the Dutch[86].

This panorama raised concerns that reached a scale of such magnitude that the King was forced to enact three pragmatic laws in the short space of two years all with the same goal of putting an end to this troubling situation. For the King, the entrance of counterfeit money represented an even more serious crime than its manufacture by individuals within the Monarchy, since "los enemigos de esta Corona y de la Religión Católica", would be behind the perpetration of such misdeeds.

Therefore, in these royal provisions, it is declared for the first time that this is a crime of *laesae maiestatis*, which, as it is easy to understand, led to a notable relaxation in evidence requirements and substantially more severe sentences. Along with this, it was decided to establish equality in the sanctions, not only for those who materially introduced counterfeit money but also for their accomplices and receivers[87]. Sentences that could result in death by burning and confiscation of all

[83] Gregorio LÓPEZ: *Glosa 5 a* Partidas VII,1,9, en Códigos españoles, tomo IV, p. 264.

[84] Nueva Recopilación V,21,21: "Y atendiendo a que estos contratos se hacen secreta y paliadamente, procurando los transgresores imposibilitar la averiguación, ordenamos, y mandamos, que para probança deste delito, y para imponer la pena declarada basten tres testigos singulares, aunque sean las mismas partes, o complices, a quienes desde luego damos impunidad, si voluntariamente vinieren a acusarlo; y que se pueda proceder y proceda con proceso cerrado, sin dar nombres de testigos, en publicación, ni el del acusador, o denunciador, para efecto de imponer pena extraordinaria, según la calidad, y gravedad de la causa, con lo qual con más libertad podrán los testigos deponer, y el acusador acusar".

[85] I deal with the serious problems that this matter of smuggling led to, in general, in "La saca de cosas vedadas en el derecho territorial castellano", en *Anuario de Historia del Derecho Español*, nº 70, 2000, pp. 195 a 241. Likewise, "La extracción de cosas vedadas en el reinado de Carlos V", en *Actas de las IX jornadas nacionales de Historia Militar. El Emperador Carlos y su tiempo,* Madrid, 2000, pp. 545 a 556.

[86] John Elliott en *El Conde-Duque de Olivares*, Barcelona, 1990, p. 98: "Madrid era consciente de cuáles eran las fuentes de prosperidad holandesa y de cómo ésta se basaba en el empobrecimiento de España. Mientras los holandeses dominaran el transporte comercial entre el norte y el sur, del que dependían tanto las exportaciones como las importaciones españolas, la balanza comercial con la Europa septentrional tenía que resultar totalmente adversa. Significaba una sangría para la plata española, que luego empleaban los holandeses en consolidar su propia fuerza militar y comercial, y subvencionar a los enemigos de España".

the assets of any of the previously mentioned individuals, without them being able to obtain any attenuating or extenuating circumstances in their favour such as a being a minor when they participated in the commission of the counterfeiting or the fact of being foreigners, and therefore theoretically ignorant of Spanish legislation[88].

VI. THE SPECIAL POSITION OF JUDGES WITH RESPECT TO THE ADMISSION OF INELIGIBLE WITNESSES.

It can be understood from the above that on the whole the more serious the crime was considered, then the fewer guarantees of defence were granted to the accused. Such a principle became an essential substratum for the Castilian criminal procedural system in these centuries, leading to a substantial increase in the number of convictions. According to a publication of some years ago "la práctica observada en los Tribunales superiores, que los inferiores tendían a imitar, propició determinadas alteraciones al orden del derecho encaminadas en la misma línea: la obtención de condenas. Todo en contra del reo"[89].

As we can see, the growing acceptance of allowing ineligible witnesses to declare at a trial against those who had participated in a wide variety of crimes did not just count on the indicated legal and especially doctrinal support. The judges themselves were also openly in favour of achieving a greater possible relaxation of the evidence requirements, which would serve to sustain the guilty verdicts that they handed down. The judges did not appear as mere executors of the law, but rather as delegated collaborators in the legislative

[87] Partidas VII,33,19, "a los malfechores e a los consejadores, e a los encubridores debe ser dada igual pena". This was a legal concept accepted by the doctrine although with certain nuances, In this sense, en *Febrero Novísimo*, tomo VII, cap. 1, nº 35, p. 22, it is written that "los receptadores son en cierto modo cómplices, y según la mayor o menor parte de influjo que tuvieron, se les disminuye o agrava la pena hasta imponérseles en algunos casos las mismas que a los perpetradores...Es indudable que cuando el receptador tiene compañia con el delincuente, o percibe utilidad del delito, es más culpable que aquella persona que por una compasión mal entendida, por parentesco, amistad u otro vínculo semejante, oculta y recepta sin percibir lucro ni tener parte en el delito. Así pues, deben examinarse bien las circunstancias y motivos que mediaron en la ocultación o receptación, para poder graduar bien la culpa que tuvieron los ocultadores o receptadores, pues a veces podrá ser muy grave y ser castigado de igual forma que el perpetrador..."

[88] Novísima Recopilación XII,8,4: "Contra los que metieran en estos reinos, por ser delito de lesa Magestad moneda falsa, y mas pernicioso al Estado universal de estos reynos que si se labrara por los particulares dentro de ellos, por no tener en esta los enemigos de esta Corona y de la Religión católica el interes que consiguen en la que meten, mandamos, que todos los que metieren la dicha moneda, o la recibieran, o ayudaren a su entrada, o la receptaren, sean condenados en pena de muerte de fuego, y perdimiento de todos los bienes desde el día del delito...sin que se puedan excusar por menores de edad, ni por ser extrangeros y toda la dicha condenación pecuniaria se aplique la mitad al denunciador, y la otra mitad a nuestra camara y al juez que la sentenciare, por iguales partes...y los que tuvieren noticia de la dicha entrada de moneda y no la manifestaren, mandamos, sean condenados en pena de galeras, y perdimiento de todos sus bienes con la aplicación referida". These persecutions against counterfeiters and smugglers must have caused serious problems in the Spanish prisons, Jerónimo de Barrionuevo, *Avisos*, tomo II, p. 22 (Edición y estudio preliminar de A. Paz y Melia, Madrid, 1969), "las cárceles están llenas de monederos falsos como sardinas en canasta, y les queman, porque sus delitos no son para menos..." This is evident proof of the rigour of the legislation in force in those years for pursuing these types of delinquents. However, the prisoners would make out they were mad to avoid their fatal destination. In this sense, Pedro Herrera Puga, in *Sociedad y delincuencia en el Siglo de Oro*, Madrid, 1974, p. 127, talks about the famous counterfeiter, a Juan Otero, who pretended to be mad in order to get out of prison and be transferred to the mad house, where he managed to escape from in order to hide in France "bueno y sano y con mucho juicio". Vid. Álvarez, *Instituciones de Derecho real*, p. 235; Sainz Guerra, "Moneda y delincuencia", p. 1625; Pino Abad, *La pena de confiscación de bienes*, pp. 271 y 272.

[89] Alonso Romero, *El proceso penal*, p. 309.

function of the law "completando la ley penal al señalar la pena del delito en cada caso concreto"[90]. In other word, the judges enjoyed a wide margin of discretion when passing sentence, increasing or decreasing the punishment specified in the law, according to what they believed convenient, "si bien guardaron una gran correspondencia con las recogidas en la literatura jurídica"[91].

This was a judicial discretion which had been recognised legally since the 13th century in the *Partidas* and came into play whenever there was no regulation that established a penalty that could be applied for a determined crime, or, despite there being one, when the judges understood it suitable to use this authority to adjust the law to the concurrent circumstances in the case they had to pass judgement on[92].

The truth is that as the judges were protected in their discretion, they imposed guilty verdicts in many more cases than could be expected from the strict application of the law. A clear example of what we are saying can be found in the continual complaints made by the lawyers of the time, who had been proposing repeatedly the necessary conciseness and clearness of the laws in order to put an end to this abusive practice carried out by the judges.

As an example, we can point out that in the 16th century, Alfonso de Castro adhered to the opinion which Aristotle presented in his day, according to which "se debe dejar al arbitrio judicial el *minimum* posible y que todo lo demás debe determinarse concretamente en la ley"[93]. In similar terms, Castillo de Bobadilla, also in the same

[90] Tomás y Valiente, *El Derecho penal*, p. 375.

[91] Pedro ORTEGO GIL, "La literatura jurídica como fundamento en la aplicación práctica de la ley penal en la Edad Moderna", en *F. Puy Muñoz y Rus Rufino (Eds): La Historia de la Filosofía Jurídica Española*, Santiago, FAB, 1998, p. 77 In addition, this same author indicates in another place "Irregularidades judiciales en el proceso penal durante el siglo XVIII: problemas, controles y sanciones", en *Revista de la Facultad de Derecho de la Universidad Complutense de Madrid*, nº 91, p. 211, the different forms that existed for controlling and, if necessary, punishing the judges that committed abuses against individuals in carrying out their work. "These procedures were particularly relevant in a criminal trial, where the procedural development could result in serious harm for the accused, whether guilty or not". In the specific aspect of the abuses that the judges committed in the taking of evidence, the author we refer to notes on pp. 226 and 227 that in the 18th century and within the jurisdictional area of the Royal Audience of Galicia "los alcaldes del reino velaron sobre todo para que las deposiciones de los testigos se efectuaran con rigor y nunca contra lo establecido por derecho y buena práctica, que fueran tomadas las declaraciones por quienes debían efectuarlas, con pureza y prontitud a la hora de recibirlas, y evitando que cualquier comisionado permitiera la mudanza en las declaraciones testificales". We believe that this situation could be perfectly extended to other peninsular territories and to earlier periods of the Ancien Regime.

[92] Partidas VII,10,15: "..E aum demas desto, deue rescebir alguna pena en el cuerpo, segun aluedrio del Judgador, por la deshonrra que fizo al otro". We find the words expressed by Benjamín González Alonso regarding this matter very interesting, they can be further examined in "La justicia", cit., vol. II, p. 398. *Vid.* Enrique Gacto in "La Administración de justicia en la obra satírica de Quevedo", en *II Homenaje a Quevedo. Acta de la II Academia Literaria Renacentista*. Salamanca, 1982, p. 138; Casabó Ruiz, "Los orígenes de la Codificación penal en España: el plan de Código criminal de 1787", in *Anuario de Derecho Penal y Ciencias Penales*, nº 22, 1969, p. 330; Juan Antonio Alejandre García, "La crítica de los ilustrados a la Administración de justicia del Antiguo Régimen", in *Anuario jurídico y económico escurialense. XXVI (Homenaje a Fr. José López Ortiz), vol. II*, 1993, pp. 432 y 433. Furthermore, it is necessary to add that according to García Marín, in "Judaísmo entre el poder y la envidia. El caso Ávila ante la Inquisición", in *Revista de la Inquisición*, nº 4, 1995, p. 68, judicial discretion was not linked to the royal right represented in the Partidas, "but through its application and interpretation by the jurists of the time, whose *communis opinio*, much less restrictive than the law, prevailed, the implementation of a judicial discretion was thereby protected, which was clearly detrimental to legal security of the accused ".

century, dedicated a chapter of his *Política para corregidores* to a series of arguments in which he manifests several drawbacks arising from the judicial discretion applied when judges gathered evidence and passed sentence[94].

But what could this extra-limitation of the judges be attributed to? Why were they obsessed about gathering as much incriminating evidence as possible against the accused? What pushed then to use testimonies from incompetent witnesses? The answers to these questions are facilitated by Tomás y Valiente, who in a single phrase knew how to express where the real origin of this serious procedural problem lay: "al juez no le era indiferente condenar o absolver"[95].

They were not indifferent because they participated in the distribution of the assets confiscated and the fines imposed on the prisoners as a result of the guilty verdicts they ruled. Since the time of the Catholic Kings, the principle of the three-way division of the asset-based sanctions had already been enshrined in the law, whereby assets were shared between the judge, the Royal Chamber and the accuser or the informant to repress any challenges[96].

However, the judges were not content with participating in the division of the confiscated assets only when they were legally recognised, but their greed incited them to invoke the abovementioned discretion to seize assets in cases about which the laws kept silent. In any event, the judges in fact knew how to amply compensate their small salaries that the royal treasury, on many occasions depleted, paid them. All of this with the consequent detriment to the procedural guarantees of the accused and of the very expectations of the victims of the crime or their relations who waited impatiently to be paid the compensation that corresponded to them[97].

Undoubtedly, this unlimited greed shown by the judges when convicting prisoners as rapidly as possible and of making themselves wealthy at

[93] Alfonso de Castro, *De potestate legis poenalis libri duo*. Edición de Laureano Sánchez Gallego, Murcia, 1931, tomo I, p. 206: "Actenus Aristoteles qui subtilissimis, atque evidentissimis rationibus motus, docet minimum esse judicis arbitrio relinquendum, sed quod fieri potuerit, omnia esse legibus determinanda".

[94] Castillo de Bobadilla, *Política para corregidores*, tomo I, lib. II, cap. X, nº 10, pp. 312 y ss. We can say very succinctly that among the reasons for criticising judicial discretion outlined by this author are: 1 "que hay juezes que juzgan lo poco por mucho, y lo pequeño por grande", 2 "porque las leyes se hizieron con mucho acuerdo y examen de las cosas...pero los juezes por la instancia y apresuramiento de los litigantes, luego dan las sentencias y no las deven dilatar", 3 "porque las leyes no se mueven por afectos, no se ayran, no aborrecen, ni por ambicion se inclinan...pero los juezes siempre juzgan de las cosas particulares, o presentes, o de personas ciertas, de las quales pueden aver provecho", 4 "porque el que tiene libre autoridad de juzgar, no usa de la conveniente diligencia en el conocimiento de la causa e inteligencia de las leyes, sino que guia por donde le parece, sin ponderar las circunstancias de los negocios...", 5 "porque menor enemistad se sigue quando se dan las sentencias por leyes, que quando se dan por alvedrio, porque alli el juez no juzga nada de lo suyo, sino muestra lo que juzgan las leyes...".

[95] Tomás y Valiente, *El Derecho penal*, p. 163.

[96] Novísima Recopilación XII,20,1: "...Y porque en tales delitos tienen gran culpa y cargo los tratantes, que llevan y traen los mensages y carteles destos, y los padrinos que usan con ellos, mandamos, que ninguno sea osado de ser en esto tratante, ni llevar ni traer los carteles y mensages, ni sean padrinos de tal trance o pelea; so pena de que por el mismo fecho caya e incurra cada uno dellos en pena de aleve, y pierda todos sus bienes, y sean las dos tercias partes para la nuestra Cámara, y el otro tercio para la persona que lo acusare, y para el juez que lo sentenciare...".

[97] Pino Abad, *La pena de confiscación*, p. 205.

the cost of their personal assets had to generate significant problems. For this reason, some lawyers of the time are said to have decided to point out what could be the most opportune measures to curtail as far as possible this troubling situation.

Therefore, for someone who was most knowledgeable of the intricacies of the Administration of Castilian Justice, and so many times cited, Castillo de Bobadilla, the judges could only receive what corresponded to them from the confiscations after the treasury "porque el mayor en orden y dignidad, ha de ser primero en cobrar su porción", to then add some lines further on that "hazer el juez concierto, o avenencia antes de la sentencia, de lo que toca a su parte de la pena que la ley le aplica, es muy torpe y perjudicial al fisco"[98].

On the one hand, the doctrine was distrustful of the judges' attitude in this area, which was one of being obsessed in achieving a prompt conviction of the accused, although this was supported by the testimonies of subjects who were not in the slightest suitable. On the other hand, the legislation of *Partidas* was totally diaphanous when it indicated the steps that had to be followed by the judges in the implementation of their duties. As García Marín has sustained, "en esta magna obra se recogen disposiciones enormemente aleccionadoras y estimo que intemporales en su valor intrínseco, en cuanto que aparecen transidas de humanidad, un sentido de la proporcionalidad entre lo que es justo y lo que es menos justo en la decisión judicial según el caso que, aún hoy día, no tiene por menos que sorprender"[99].

The humanity that the latter author alludes to is included in two provisions where it is indicated with great expressiveness that: "A los fazedores delos yerros, de que son acusados ante los Judgadores, deuen dar pena despues que les fuere prouado, o despues que fuere conoscido dellos en juyzio: e non deuen los Judgadores rebatar, a dar pena a ninguno por sospechas nin por señales, nin por presunciones... porque la pena, despues que es dada en el cuerpo del ome, non se puede tirar, nin enmendar, mager que entienda el Juez que erro en ello"[100], to then add two stipulations that: "E aun dezimos, que los Judgadores todavía deuen estar mas inclinados, e aparejados, para quitar los omes de pena, que para condenarlos, en los pleytos que claramente non puedan ser prouados, o que fueran dudosos; ca mas santa cosa es, e mas derecha, de quitar al ome de la pena que meresciesse, por yerro que ouiesse fecho, que darla al que la non meresciesse, nin ouiesse fecho alguna cosa por que"[101].

As can be seen, the precautions that the very law required of the judges in carrying out their work meant they had to gather all the necessary evidence that would serve them to convince as fully as possible that the subjects on trial were really guilty of the charges they were accused of. To sum up, the judges were required not to get

[98] Castillo de Bobadilla, *Política para corregidores*, tomo II, lib. V, cap. VI, nº 7 y 9, p. 612.

[99] José María GARCÍA MARÍN, "Jueces culpables y defensa del indio. Notas sobre procesos criminales novohispanos del siglo XVIII", en *Initium. Revista catalana d´historia del dret. Homenatge al prof. J.M. Gay i Escoda*, nº 1, 1996, p. 363.

[100] Partidas VII, 31, 7.

[101] Partidas VII, 31, 9. Vid. Hevia Bolaños, *Curia Philipica*, libro III (Juicio criminal), cap. XVII (Sentencia) nº 1, p. 232: "Y assi los jueces en los delitos que no son claramente probados, o que fueren dudosos, mas inclinados han de ser a absolver al reo, que a condenarle...De todo lo qual se sigue, que por presumpciones, que no son suficientes a tormento, no se puede seguir condenacion de pena alguna" and García Marín en "Jueces culpables", pp. 363 y 364.

carried away by mere conjectures or indicators at the time of sentencing, since the imposition of certain types of penalties were not susceptible to reinstating the unjustly convicted person to their initial state, once the serious mistake made by the judge had been proven but with too much delay. This legal order is completed with what we have also transcribed and where it is recommended that when in doubt it is better to absolve the guilty than condemn the innocent.

This hypothesis ties in closely with the issue we are dealing with regarding the abuse committed by judges against the accused, on trying at all costs to achieve pecuniary convictions against them, manipulating if necessary testimonies by individuals who were legally ineligible in order to achieve the detrimental aim of satisfying their own greed regardless of the harm that this attitude would cause the different parties involved[102].

Therefore, the conclusion that we can draw from this whole problem is the idea that, as in many other situations, legal theory and legal practice followed opposing courses. The law demanded that judges should be prudent and understanding towards the accused. However, to the contrary, they preferred to turn a deaf ear to the provisions in the regulations and take the risk of being sanctioned if this meant they could satisfy the salary exiguity which they suffered in many cases, and despite it being at the cost of harming the interests of third persons who were innocent of the slightest criminal responsibility.

However, perhaps what was most serious of all was the bad example that the "encargados de impartir justicia" were setting for their subordinates through these behaviours. Unfortunately, their avarice for achieving the conviction of the accused at any price, fundamentally of those who enjoyed a certain financial status, was not a vice exclusive to the judges. Other officials linked to the judicial machinery also waited impatiently for their opportunity to receive their part of the bounty[103].

Castillo de Bobadilla himself recognised that there was a lot of fraud committed by the scribes, so they could appropriate the penalties belonging to the Chamber. Among the numerous manoeuvres, we can highlight some that they put into to practice, such as those consisting of not noting in the Chamber's book of penalties what had been paid for a conviction, or indicating that the case was pending appeal or falsely stating that the prisoner had not paid because he was poor, or the inscription of an amount that was lower than what had really been collected, or, what most interests us about this office, the alteration of the content of the witnesses' statement so as to make the prisoner's prompt conviction viable[104].

VII. CESSATION OF INELIGIBILITY. SPECIAL MENTION OF THE EXCOMMUNICATED.

However, our study of this thorny issue cannot be concluded without pointing out that the ineligibility for testifying at a trial that corresponded to delinquents, the infamous, the poor and slaves was not perpetual, but susceptible to disappearing once the case that had generated such a state

[102] Alejandre García, "La crítica de los ilustrados", pp. 435 y 436; Manuel Torres Aguilar, *Teatro de iniquidad: un escenario de abusos en la justicia de Nueva España*, Rubbettino, 2001, p. 19-ss.

[103] Pino Abad, *La pena de confiscación de bienes*, p. 206.

[104] Castillo de Bobadilla, *Política para corregidores*, tomo II, lib. V, cap. VI, nº 13 y 14, p. 613.

of incapacity disappeared. We are referring to serving out the sentence that was imposed on some of the previously mentioned delinquents, as well as slaves being granted freedom, or the increase in the personal assets of some who were once legally qualified as poor.

Once these impediments were overcome, the subject was perfectly competent to testify in any case, unless there were reasons of partiality or that the proposed witness had been punished for committing a crime of treason, malice, perjury or false testimony, in which case ineligibility extended beyond the fulfilment of the respective conviction and would be applied to the individual for life.[105].

For such a reason, Azevedo advised that the ineligibility of witnesses should be confirmed not only at the time they were proposed, but also when they had to declare during the evidence period, since it was possible that in this short time the reason that caused their ineligibility had been fully dissipated, and there was no longer any obstacle to their words being admitted at a trial[106].

On the other hand, we have to point out a very different and peculiar panorama for the excommunicated who, in certain circumstances, were allowed to testify even before they completed the time fixed for their excommunication. In principle, the rule that governed was the same as that for any convict, so they were forbidden to testify while their excommunication lasted, and even more importantly, if the party that had proposed these witnesses was aware of their situation. But if they were not aware of their excommunication, and in the next moment, their testimony was received and subsequently published, this statement was completely valid. All this despite the fact that the opposing party rejected it and managed to show that in fact at the time of testifying the subject was still serving their sentence. Only if such a circumstance was noticed before they testified at the trial, would it serve to exclude the proposed witness from the trial and his testimony would not considered by the judge at the time of passing the corresponding sentence[107].

A more reasonable circumstance was that the excommunicated were allowed to testify if their sentence had been annulled[108], or rather, if it had been authorised by the ordinary judge, after a guarantee had been provided that would serve to se-

[105] Espéculo IV,7,7: "...Todos estos sobredichos en estas leyes que dixiemos, que non deven testiguar, dezimos que desta manera se deven a entender estando en alguno de aquellos yerros, o de aquellos pecados que avemos dichos, e non se queriendo partir dellos. Mas desque fueren enmendados e quitos de lo non fazer, bien pueden ser testigos, sacados ende los traydores e los alevosos, e los perjuros e los que dixieron falso testimonio...".

[106] Azevedo, *Commentarium Iuris Civilis*, (comentario a Nueva Recopilación IV,8,1), nº 42, p. 179: "...testium inhabilitas non solum consideratur tempore productionis ipsorum testium, verum etiam tempore depositionis".

[107] Ley del Estilo CLXXVII: "...el descomulgado, mientras lo fuere, no puede testimoniar. E sobre esto es a saber, que si la parte sabía que eran descomulgadas las pruebas quando las trujo, que entonce su testimonio no es valedero, pues testimoniaron seyendo descomulgados, e sabiendo la Parte, o debiendolo saber, como eran denunciados publicamente por descomulgados. Mas si quando los trujo por testigos no lo sabia que eran descomulgados, ni eran denunciados por descomulgados, e los presentó ante el Alcalde, e recibieron sus dichos dellos, y los publicaron los dichos dellos, e despues aquel contra quien fueron aduxos dijo contra ellos que eran descomulgados, maguer lo pruebe que eran descomulgados, vale lo que dixeron en su testimonio. Mas si ante que dixesen su testimonio los testigos dixo la parte contra quien fueron traidos, que eran descomulgados, e que no recibiesen su testimonio, si probase despues que son descomulgados, no vale lo que dixeron...".

ttle the consequences that could arise from their possible false testimony[109].

[108] Azevedo, *Commentarium Iuris Civilis*, (comentario a Nueva Recopilación IV,8,1), nº 42, p. 179: "...testium inhabilitas non solum consideratur tempore productionis ipsorum testium, verum etiam tempore depositionis".

[109] *Ibidem*, cit., (comentario a Nueva Recopilación IV,8,2), nº 11, p. 183: "Notandum etiam est, quod iudex delegatus non potest testem excommunicatum absoluere ad cautelam, vt ferat testimonium".