

## THE SPANISH CIVIL CODE.

The far-reaching problems—political, commercial and legal—involved in the extension of United States authority over ten million former subjects of Spain, have invested with new and peculiar interest to American lawyers the ancient civil law so closely interwoven with all Latin institutions. On its practical side, this interest has been heightened by the fact that for the past two years the military and district courts of the United States have exercised correlative jurisdiction in Cuba, Porto Rico and the Philippine Islands with the municipal courts instituted under the Spanish regime.

One of the early administrative acts of the military governor of Havana, General William Ludlow, was to authorize a special translation of the Spanish Civil Code for the use of American officials, the work being entrusted to Dr. Clifford S. Walton, a learned practitioner of the civil law in Havana, as well as a member of the bar of the United States Supreme Court. This first task of editing and translating the code has been amplified by Dr. Walton in a second edition,<sup>1</sup> whose historical introduction and careful notes will prove of much service to the American practitioner in the study of Spanish laws and customs. The following review of the work must be confined to some of the more interesting and important features of the code itself.

In its present form, the Spanish Civil Code owes its origin to the Constitutional Cortes of Cadiz, which in 1811, through a special commission, undertook to codify the most important branches of the Spanish laws. The work of codification, continued at intervals through successive sovereignties, was finally completed in 1899, and the code went into effect upon the Spanish peninsula in May of that year. By a royal decree of July 31, 1889, its provisions were extended to Cuba, Porto Rico and the Philippine Islands.

In comprehensive brevity of statement and scientific classi-

<sup>1</sup> Civil Law in Spain and Spanish-America. By Clifford Stevens Walton. Washington, D. C.: W. H. Lowdermilk & Co. 1900.

fications, the Spanish code has been compared favorably with that other modern and celebrated rendition of the civil law, the Code Napoleon. The predominating element in both is the Roman system of jurisprudence, reduced to its most classic form in the institutes and digests of Justinian. Nearly two thousand years of barbaric conquest and innovation have not sufficed to shake the hold of this imperial legal system upon the Latin races of southwestern Europe. As curious evidence of legal evolution, there may also be traced in the code survivals of the Visigothic conquest, where the Teuton individualism has modified property rights, as in the "conjugal community" and the "advantages" allowed to intestate heirs. A canonical element has crept in and modified the law of marriage and divorce; and traces of the Arabic occupation can be seen in special customs and in excellent provisions relating to agrarian laws and irrigation privileges and rights.

A brief "Preliminary Title" of the code contains familiar civil law maxims, as "*ignorantia legis non excusat*"; also provisions that laws shall not have retroactive effect unless specifically provided in them and that any tribunal refusing to give judgment "on pretext of silence, obscurity or insufficiency of the laws" shall incur penalties therefor.

Book First is concerned with the "Law of Persons." The customary emphasis of the civil law is placed upon *status*, several chapters being required to define the legal qualities of a Spaniard, the creation of civil personality and of domicile. The most important chapters of the first book are those relating to marriage and its incidents.

Among those to whom marriage is forbidden by the code are "the widow during the three hundred and one days following the death of her husband," and also "a guardian with respect to the person whom such guardian has in charge," until the relation of guardianship has terminated. Minors must in all cases obtain the consent of the parent or guardian in order to marry, and "children of age," likewise, are required to "ask the advice of the father and, in his default, of the mother" before engaging in wedlock. Should consent be refused to said "children of age," they cannot legally marry until the expiration of three months after they

consulted their parents—an apparent precaution against hasty marriages.

The code clearly states (Article 57) that the “husband is obliged to protect the wife and the latter to obey her husband.” A later section (Article 105) sets forth a civil-law refinement among the causes of divorce, the first being: “Adultery on the part of the wife, in every case, and on the part of the husband when public scandal or disgrace of the wife results from it.”

An elaborate system of interacting guardianships is established by the code. Not only are the ward and his property protected by a common or first guardian, but in every case provision is made for a second, known as the protutor or “vigilant” guardian, whose duty it is to watch the first, to audit his accounts and to hale him into court on the first sign of dereliction. In addition there is a committee of relatives, called the “family council,” to supervise the two guardians. This council consists of five relatives of the minor, selected by the municipal judge, or, in the default of relatives, the court may appoint five disinterested persons to act in their place. The family council must meet at stated intervals, receive the reports and accounts of the two guardians, and are subject further to “personal liability for whatever damages the person under the guardianship may suffer owing to their malice or culpable neglect.” The minor does not attain his majority until twenty-three years of age, and in the case of “unmarried daughters,” they are forbidden to leave the home of their parents until twenty-five years of age, unless a surviving parent shall have contracted a second marriage.

The Second Book considers the topics—“Property, Ownership and Its Modifications.” Under the title of “Real Property” are included:

Land, buildings, roads and constructions of every kind adherent to the soil; trees, plants and ungathered fruits while not separated from the land; statues, reliefs, paintings or other objects of use or ornament so placed upon a building as to show intention of permanently attaching them thereto; machinery, vessels or implements whenever a necessary part of industrial works; manures intended for the cultivation of land when, upon the place where they are to be employed;

docks and constructions afloat when intended to remain in a fixed place upon a river, lake or coast; administrative concessions for public works and easements or other rights attached to real property.

Personal property includes broadly all not mentioned in above classification and is also described as "anything which can be carried from place to place without impairing the real property to which it may be attached." This form of property is further divided into consumables (fungibles) and non-consumables (no-fungibles), to the first class belonging those things which cannot be used, in a manner appropriate to their nature, without consuming them, and to the second class all others.

The following discrimination against the "stranger" is a barbaric survival:

"Hidden treasures belong to the owner of the land upon which they are found. However, when the discovery is made upon property belonging to a stranger, or to the state and by chance, one-half of it shall be adjudged to the finder."

A refined civil law distinction is contained in Article 465:

"Wild animals are only possessed while they are under one's control; those domesticated or tamed are considered as tame or domestic so long as they retain the habit of returning to the home of their possessor."

The doctrine of "usufruct" is developed through a series of ten chapters with the completeness of a mathematical theorem. The Latin maxims are occasionally varied with a touch of Teuton common sense, as in the following: "The usufructuary is bound to take care of the property given in usufruct as any good father of a family would do."

The obligation to repair property held in usufruct is thus clearly defined:

"The usufructuary is bound to make the ordinary repairs required by the things given in usufruct. Ordinary repairs shall be considered those produced by wear and tear in the natural use of things and such as are necessary to their preservation. Extraordinary repairs shall be made on the account of the owner. The usufructuary is bound to notify him when the necessity of making them is urgent."

The doctrine of easements is also treated with the clear

and logical method of the Roman Code. Especially interesting are the distinctions between positive and negative, continuous and discontinuous, apparent and non-apparent, voluntary and involuntary easements; the creation and extinction of the easements of ways, of party-walls and fences, of lights and views, and of the drainage of buildings are outlined with the precision of algebraic formulæ, as compared with the arithmetical detail and frequent confusion of the English common law in this important department of collateral ownerships.

Book Third considers the "Different Ways of Acquiring Ownerships," among the chief methods described being "Occupancy" and "Succession." The last includes all forms of inheritance either by testament or intestacy. Under the code the common forms of testaments are either holographic, open or secret. The term "holographic" is applied to a testament written entirely by the hand of the testator. An "open" testament is one executed and published in the presence of witnesses who are informed of its contents. A "secret" testament is executed under seal and delivered without revealing its contents to the persons authorized to act under it after the testator's death. A "military" testament is a special form which may be made by word of mouth before two witnesses when a soldier is engaged in or about to enter a battle. A similar form of nuncupative will, called a "maritime" testament, may be made before the commander of a vessel when the testator is in peril of death at sea.

The following persons are excluded from all inheritances, either under or without a will, by reason of their unworthiness:

1. Parents who have abandoned their children, or prostituted their daughters, or made attempts against their virtue.

1. Persons condemned in a trial for having made attempts against the life of the testator, his consort, and his descendants or ascendants.

3. He who has accused the testator of a crime, when the accusation has been proven to have been calumnious.

4. The heir of full age, who knowing of the violent death of the testator has not denounced it to the courts within a month, unless judicial proceedings have already been taken.

5. A person condemned at a trial for adultery with the wife of the testator.

6. He, who by menaces, fraud or violence forces the testator to make a testament or to alter it.

7. He, who by the same means prevents another from making a testament, or from revoking one already made, or who forges, conceals or alters a later one.

The extent of the principle of inheritance under the civil law is indicated by the doctrine of legitimes. "Legitime" is that part of his property of which the testator cannot dispose because the law has reserved it for certain heirs, called, on that account, forced heirs. These include (1) the legitimate children and their descendants; (2) the legitimate parents and their ascendants; (3) the widower or widow, the natural children legally recognized, and in some cases the father and mother of natural children. The "legitime" of legitimate children, which cannot be devised away from them, consists of two-thirds of the hereditary estate of the parents; the legitime of parents or ascendants consists of one-half of the hereditary estate of the children; the widower or widow, not divorced, is entitled to the usufruct of a portion of the estate equal to the legitime of each of the legitimate children; where there are no legitimate children the surviving consort is entitled to one-third of the estate in usufruct; when the testator leaves legitimate children, the natural children legally recognized as such by their parents, are entitled to one-half of the portion which may belong to the legitimate children; and when there are no legitimate descendants, a one-third part of the estate shall be divided among the recognized natural children; the rights of succession which the law grants to natural children extend by reciprocity, in similar cases, to the natural father and mother.

Among collateral heirs, who may inherit in default of heirs in the direct line, brothers of the whole blood take a portion of the estate double that granted to brothers of the half blood. The right to inherit does not extend beyond the sixth degree of relationship in the collateral line, after which property escheats to the state for charitable uses. The doctrine of advantage corresponds in a measure with the "advances" of the common law. This specific form of disposing

of property is limited to the father or mother, who may dispose of one of the two-third parts of the estate, intended as legitime, in favor of one or more of their children or descendants. This portion of the estate is called "advantage" (*mejora*). The heir can only accept the "advantage" by the renouncement of his legal inheritance.

In no part of the code is the influence of the Roman law more pronounced than in Book IV, which is devoted to "Obligations and Contracts." These terms are treated inclusively, there being obligations created by law and also those arising from contract, which have the force of law between the contracting parties.

The spirit of equity governs the statement of many of the general rules or principles of obligations, the following being typical in character:

"A person obliged to give something is also bound to preserve it with the proper diligence of a good father of a family.

"When a person obliged to do a certain thing should not do it, it shall be ordered to be done at his expense.

"The same shall be ordered, when he does it contrariwise to the tenor of the obligation.

"Whatever has been badly done may be ordered to be undone.

"He who pays the account of another may recover from the debtor what he has paid, unless he has done it against the latter's express will. In this last case, he can only recover from the debtor in so far as the payment has been useful to him."

In the proof of obligations by the testimony of witnesses, minors under fourteen years of age are invariably barred as incompetent to testify, and the specific exclusion is also made of "the blind and deaf in those things, knowledge of which depends upon sight and hearing"—the necessity for this last provision being somewhat obscure. Another ground of incompetency which would suggest that the lawmakers were not devoid of a sense of humor is the following: "The father-in-law or mother-in-law cannot testify in the suits of the son-in-law or daughter-in-law, and *vice versa*."

The interpretation of contracts is guided by expressed

rules similar in their general intent to those of the English common law, though the following rules, among others, would appear to leave the door open to broad constructions in doubtful cases:

"To form a judgment about the intention of the contracting parties, attention must be paid principally to their acts, contemporaneous and subsequent to the contract.

"The interpretation of the obscure clauses of a contract shall not favor the party who caused such obscurity."

A direct survival of Latin custom is seen in the *emphyteusis*. A ground rent is called "emphyteusis," when a person transfers to another the useful ownership of a tenement, reserving to himself the direct ownership, and the right to receive from the "emphyteuta" an annual pension in recognition of such ownership. Emphyteusis can only be constituted on real property and by a public deed. At the time of the constitution of the emphyteusis, the value of the tenement and the annual pension to be paid must be fixed in the contract in order to give it validity. Subject to the payment of the ground rent, the emphyteuta is entitled to all the products of the tenement, and can dispose of his tenancy not only by acts *inter vivos*, but also by last will, leaving intact the rights of the direct owner.

The laws of agency and of partnership are developed with great particularity in the code, and a chapter of much interest is devoted to the obligations and rights growing out of the *commodatum*, or gratuitous loan. It is provided that

"When the borrower puts the thing to a different use than that for which it was loaned, or keeps the same in his possession for a longer time than that agreed upon, he shall be liable for its loss, even when said loss occurs by an unforeseen event (*vis major*).

"A lender cannot claim the thing loaned, except after the termination of the use for which it was loaned. Nevertheless, when, previous to such term, the lender has an urgent necessity for the same, he may claim its restitution.

"A lender, who, knowing the vices of the thing loaned, has not given notice thereof to the borrower, shall be liable to the same for the damages which he may have suffered on that account."

Among the forms of aleatory or hazardous contracts to which attention is given are those dependent on gaming and betting. The law does not give any action to claim what is won in a game of chance, luck or hazard, but the person who loses cannot recover what he has voluntarily paid, unless fraud has intervened, or he is a minor or incapacitated to administer his property. Games which contribute to the exercise of the body, as those whose object is to acquire skill in the management of arms, and races on foot or horseback, by vehicles, ball games, and others of an analogous nature are not considered prohibited, and the special exception is made, that a person who loses in a game or bet which is not prohibited shall be civilly liable therefor.

The concluding chapter of the fourth and last book of the code treats of "prescriptions," with more liberal regard for the rights of the possessor than under the English common law. Ownership of personal property is "prescribed" by an uninterrupted possession in good faith for a period of three years. Ownership of personal property is also prescribed by an uninterrupted possession of six years, without the necessity of any other condition. Ownership and other real rights in respect to real property shall be prescribed by possession for ten years as to persons present and by twenty years in respect to those absent, when held in good faith and under a just title, and uninterrupted possession for thirty years gives prescriptive rights in real property, without the necessity of title or good faith, and without distinction of persons, present or absent. With a few exceptions, as in the collection of rents and pensions, civil actions to enforce the fulfillment of obligations are prescribed after the lapse of three years, and actions to exact civil responsibility for contumely or calumny and for obligations derived from blame and negligence are prescribed after the lapse of one year.

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