

**DOMINADOR B. BUSTOS, PETITIONER, VS. HON. ANTONIO G. LUCERO, JUDGE OF BRANCH II OF THE COURT OF FIRST INSTANCE OF PAMPANGA, RESPONDENT.**

*G.R. No. L-2068. March 08, 1949*

Ponente: TUASON, J.

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**TUASON, J.:**

This cause is now before us on a motion for reconsideration. In the decision sought to be reconsidered, we said, citing *Dequito, et al. vs. Arellano*, G. R. No. L-1336: "The constitutional right of an accused to be confronted by the witnesses against him does not apply to preliminary hearings; nor will the absence of a preliminary examination be an infringement of his right to confront witnesses. As a matter of fact, preliminary investigation may be done away with entirely without infringing the constitutional right of an accused under the due process clause to a fair trial." We took this ruling to be ample enough to dispose of the constitutional question pleaded in the application for certiorari. Heeding the wishes of the petitioner, we shall enlarge upon the subject.

It is contended that Section 11 of Rule 108 of the Rules of Court<sup>[1]</sup> infringes Section 13, Article VIII, of the Constitution.<sup>[2]</sup> It is said that the rule in question deals with substantive matters and impairs substantive rights.

We can not agree with this view. We are of the opinion that Section 11 of Rule 108, like its predecessors, is an adjective law and not a substantive law or substantive right. Substantive law creates substantive rights and the two terms in this respect may be said to be synonymous. Substantive rights is a term which includes those rights which one enjoys under the legal system prior to the disturbance of normal relations. (60 C. J. 980.) Substantive law is that part of the law which creates, defines and regulates rights, or which regulates the rights and duties which give rise to a cause of action; that part of the law which courts are established to administer; as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtains redress for their invasion. (36 C. J. 27; 52 C. J. S. 1026.)

As applied to criminal law, substantive law is that which declares what acts are crimes and prescribes the punishment for committing them, as distinguished from the procedural law which provides or regulates the steps by which one who commits a crime is to be punished. (22 C. J. S. 49.) Preliminary investigation is eminently and essentially remedial; it is the first step taken in a criminal prosecution.

As a rule of evidence, Section 11 of Rule 108 is also procedural. Evidence - which is "the mode and manner of proving the competent facts and circumstances on which a party relies to establish the fact in dispute in judicial proceedings" - is identified with and forms part of the method by which, in private law, rights are enforced and redress obtained, and, in criminal law, a law transgressor is punished. Criminal procedure refers to pleading, evidence and practice. (*State vs. Capaci*, 154 So. 419, 179 La. 462.) The entire rules of evidence have been incorporated into the Rules of Court. We can not tear down Section 11 of Rule 108 on constitutional grounds without throwing out the whole code of evidence embodied in these Rules.

In *Beazell vs. Ohio*, 269 U. S. 167, 70 L. ed. 216, the United States Supreme Court said:

"Expressions are to be found in earlier judicial opinions to the effect that the constitutional limitation may be transgressed by alterations in the rules of evidence or procedure. See *Calder v. Bull*, 3 Dall. 386, 390, 1 L. ed. 648, 650; *Cummings v. Missouri*, Wall. 277, 326, 18 L. ed. 356, 364; *Kring v. Missouri*, 107 U. S. 221, 228, 232, 27 L. ed. 507, 508, 510, 2 Sup. Ct. Rep. 443. And there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition. *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 507, 2 Sup. Ct. Rep. 443; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620. But it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited. A statute which, after indictment, enlarges the class of persons who may be witnesses at the trial, by removing the disqualification of persons convicted of felony, is not an ex post facto law. *Hopt v. Utah*, 110 U. S. 575, 28 L. ed. 263, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417. Nor is a statute which changes the rules of evidence after the indictment so as to render admissible against the accused evidence previously held inadmissible, *Thompson v. Missouri*, 171 U. S. 380, 43 L. ed. 204, 18 Sup. Ct. Rep. 922; or which changes the place of trial, *Gut v. Minnesota*, 9 Wall. 35, 19 L. ed. 573; or which abolishes a court for hearing criminal appeals, creating a new one in its stead. See *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570."

Tested by this standard, we do not believe that the curtailment of the right of an accused in a preliminary investigation to cross-examine the witnesses who had given evidence for his arrest is of such importance as to offend against the constitutional inhibition. As we have said in the beginning, preliminary investigation is not an essential part of due process of law. It may be suppressed entirely, and if this may be done, mere restriction of the privilege formerly enjoyed thereunder can not be held to fall within the constitutional prohibition.

While Section 11 of Rule 108 denies to the defendant the right to cross-examine witnesses in a preliminary investigation, his right to present his witnesses remains unaffected, and his constitutional right to be informed of the charges against him both at such investigation and at the trial is unchanged. In the latter stage of the proceedings, the only stage where the guaranty of due process comes into play, he still enjoys to the full extent the right to be confronted by and to cross-examine the witnesses against him. The degree of importance of a preliminary investigation to an accused may be gauged by the fact that this formality is frequently waived.

The distinction between "remedy" and "substantive right" is incapable of exact definition. The difference is somewhat a question of degree. (*Dexter vs. Edmands*, 89 F. 467; *Beazell vs. Ohio*, *supra*.) It is difficult to draw a line in any particular case beyond which legislative power over remedy and procedure can pass without touching upon the substantive rights of parties affected, as it is impossible to fix that boundary by general condition. (*State vs. Pavelick*, 279 P. 1102.) This being so, it is inevitable that the Supreme Court in making rules should step on substantive rights, and the Constitution must be presumed to tolerate if not to expect such incursion as does not affect the accused in a harsh and arbitrary manner or deprive him of a defense, but operates only in a limited and unsubstantial manner to his disadvantage. For the Court's power is not merely to compile, revise or codify the rules of procedure existing at the time of the Constitution's approval. This power is "to promulgate rules concerning pleading, practice, and procedure in all courts," which is a power to adopt a general, complete and comprehensive system of procedure, adding new and different rules without regard to their source and discarding old ones.

The motion is denied.

Moran, Paras, Labrador, Bengzon, Briones, and Montemayor, JJ., concur.

Perfecto, J., We dissent. Our opinion in the *Dequito* can still shows a motion for reconsideration should be frauded.

Reyes, J., took no part.

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[1] Rights of defendant after arrest. - After the arrest of the defendant and his delivery to the court, he shall be informed of the complaint or information filed against him. He shall also be informed of the substance of the testimony and evidence presented against him, and, if he desires to testify or to present witnesses or evidence in his favor, he may be allowed to do so. The testimony of the witnesses need not be reduced to writing but that of the defendant shall be taken in writing and subscribed by him.

[2] The Supreme Court shall have the power to promulgate rules concerning pleading, practice, and procedure in all courts, and the admission to the practice of law. Said rules shall be uniform for all courts of the same grade and shall not diminish, increase, or modify substantive rights. The existing laws on pleading, practice, and procedure are hereby repealed as statutes, and are declared Rules of Courts, subject to the power of the Supreme Court to alter and modify the same. The National Assembly shall have the power to repeal, alter, or supplement the rules concerning pleading, practice, and procedure, and the admission to the practice of law in the Philippines.

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## DISSENTING

**FERIA, J.:**

I dissent.

The motion for reconsideration must be granted.

According to the resolution, the right of a defendant to be confronted with and cross-examine the witnesses for the prosecution in a preliminary investigation granted by law or provided for in General Orders No. 58, as amended, in force prior to the promulgation of the Rules of Court, is not a substantive right but a mere matter of procedure, and therefore this Court can suppress it in Sec. 11, Rule 108, of the Rules of Court, for the following reasons:

First. Because "preliminary investigation is evidently and essentially remedial; it is the first step taken in a criminal prosecution." x x x "is a rule of evidence, section 11 of Rule 108 is also procedural." x x x "The entire rules of evidence have been incorporated into the Rules of Court." and therefore "we can not tear down section 11 of Rule 108 on constitutional grounds without throwing out the whole Code of evidence embodied in these Rules."

Secondly, Because, "preliminary investigation is not an essential part of the due process of law. It may be suppressed entirely, and if this may be done, mere restriction of the privilege formerly enjoyed thereunder can not be held to fall within the constitutional prohibition."

Lastly. Because "the distinction between remedy and substantive law is incapable of exact definition. The difference is somewhat a question of degree." x x x It is difficult to draw a line in any particular case beyond which legislative power over remedy and procedure can pass without touching upon the substantive right of parties affected, as it is impossible to fix the boundary by any general condition, x x x "This being so it is inevitable that the Supreme Court in making rules should step on substantive rights, and the Constitution must be presumed to tolerate if not to expect such incursion as does not affect the accused in a harsh and arbitrary manner or deprive him of a defense, but operates only in a limited and insubstantial manner to his disadvantage."

Before proceeding it is necessary to distinguish substantive laws from procedure, for the distinction is not always well understood. Substantive law is that part of the law which creates, defines, and regulates rights as opposed to

adjective or procedural law which prescribes the method of enforcing rights. What constitutes practise and procedure in the law is the mode or proceeding by which a legal right is enforced, "that which regulates the formal steps in an action or judicial proceedings; the course of procedure in courts; the form, manner and order in which proceeding have been, and are accustomed to be had; the form, manner and order of carrying on and conducting suits or prosecutions in the courts through their various stages according to the principles of law and the rules laid down by the respective courts." 31 Cyc. Law and Procedure, p. 1153; id. 32 Sec. 405; Rapalje & Lawrence's Law Dictionary; Anderson Law Dictionary; Bouvier's Law Dictionary.

Substantive rights may be created or granted either in the Constitution or in any branch of the law, civil, criminal, administrative or procedural law. In our old Code of Civil Procedure, Act No. 190, as amended, they are provisions which create, define and regulate substantive rights, and many of those provisions such as those relating to guardianship, adoption, evidence and many others are incorporated in the Rules of Court for the sake of convenience and not because this Court is empowered to promulgate them as rules of court, and our old law of Criminal Procedure General Orders No. 58 grants, the offended party the right to commence a criminal action or file a complaint against the offender and to intervene in the criminal prosecution against him, and grants the defendant in the Court of First Instance (except in the City of Manila) the right to bail, and to a preliminary investigation including his rights during said investigation, and the rights at the trial "which are now reproduced or incorporated in Rules 106, 108, 110, and 111 of the Rules of Court, except the rights now in question. And all these, and others not necessary for us to mention, are obviously substantive rights.

(1) As to the first argument, the premise "that preliminary investigation is evidently and essentially remedial is not correct. Undoubtedly the majority means to say procedural, in line with the conclusion in the resolution, because remedial law is one thing, and procedural law is another. Obviously they are different branches of the law, "Remedial Statute" is "a statute providing a remedy for an injury as distinguished from a penal statute. A statute giving a party a mode of remedy for a wrong where he had none or a different one before, x x x Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfections of all human law, from change of time and the mistakes and unadvised determination of unlearned (or even learned) judges, or from any other cause whatsoever. (Black's Dictionary, third edition, pp. 1525, 1526)

It is also not correct to affirm that Sec. 11 of Rule 108 relating to right of defendant after arrest "is a rule of evidence and therefore is also procedural." In the first place, the provisions of said section to the effect that "the defendant, after the arrest and his delivery to the court has the right to be informed of the complaint or information filed against him, and also to be informed of the testimony and evidence presented against him, and may be allowed to testify and present witnesses or evidence for him if he so desires," are not rules of evidence; and in the second place, it is evident that most of the rules of evidence, if not all, are substantive laws that defines, creates or regulate rights, and not procedural. "Rules of evidence are substantive right found in common law chiefly and growing out of reasoning, experience and common sense of lawyers and courts" (State v. Pavelich, et al., 279 P. 1102). "It is true that weighing of evidence and the rules of practice with respect thereto from part of the law of procedure, but the classification of proofs is sometime determined by the substantive law." (U. S. v. Genato, 15 Phil. 170, 176). How can the law on judicial notice, conclusive as well as juris tantum presumption, hearsay and best evidence rule, parol evidence rule, interpretation of documents, competency of a person to testify as a witness be considered procedural?

Therefore, the argumentative conclusion that "we can not tear down section 11, of Rule 108, on constitutional grounds without throwing out the whole code of evidence embodied in these rules," is evidently wrong, not only for the reason just stated, but because our contention that the defendant can not be deprived of his right to be

confronted with and cross-examine the witness of the prosecution in a preliminary investigation under consideration would not, if upheld, necessarily tear down said section. Our theory, is that said section 11 should be so construed as to be valid and effective, that is, that if the defendant asks the court to recall the witness or witnesses for the prosecution to testify again in the presence, and to allow the former to cross-examine the latter, the court or officer making the preliminary investigation is under obligation, to grant the request. But if the defendant does not so ask the court, he should be considered as waiving his right to be confronted with and cross-examine too witness against him.

(2) With respect to the second argument or reason, it is true that the preliminary investigation as provided for in the General Orders No. 58, as amended, is not an essential part of due process of law, because "due process of law" is not iron clad in its meaning; it does not necessarily mean a particular procedure. Due process of law simply requires a procedure that fully protects the life, liberty and property. For that reason the investigation to be made by the City Fiscal of the City of Manila under Act No. 612, now Sec. 2465 of the administrative Code, before filing an information, was considered by this Court as sufficient to satisfy the due process of law constitutional requirement (*U. S. v. Ocampo*, 18 Phil. 1; *U. S. v. Grant and Kennedy*, 18 Phil. 122). But it is also true that we have already and correctly held that: "The law having explicitly recognized and established that no person charged with the commission of a crime shall be deprived of his liberty or subjected to trial without prior preliminary investigation provided for in General Orders No. 58, as amended that shall show that there are reasonable grounds to believe him guilty, there can be no doubt that the accused who is deprived of his liberty, tried and sentenced without the proper preliminary investigation having been made in his regard, is convicted without due process of law." (*United States vs. Banzuela*, 31 Phil. 564).

The ruling in *Beazel v. Ohio*, 269 U. S. 167, 70 L. ed. 216, quoted in the resolution has no application to the present case, for the question involved therein was the power of Congress to alter the rules of evidence and procedure without violating the constitutional precept that prohibits the passing of ex post facto law, while the question herein involved is the power of the Supreme Court to promulgate rules of pleading, practice and procedure, which diminish the substantive right of a defendant, expressly prohibited by the same provision of the Constitution that confers upon this Court the power to promulgate said rules.

(3) The last reason or argument premised on the conclusion that "the distinction between remedy and substantive right incapable of exact definition; indeed the differences is somewhat a question of degree," (*Dexter v. Edmonds*, 89 F. 487), is immaterial, because, as we have already said in refuting the majority's first reason, remedy and procedure are two completely different things.

As above defined, substantive law is clearly differentiated from procedural law and practice. But even assuming arguendo that it is difficult to draw the line in any particular case beyond which the power of the court over procedure can not pass without touching upon the substantial right of the parties, what this Court should do in that case would be to abstain from promulgating such rule of procedure which may increase, diminish or it modify substantive right in order to avoid violating the constitutional prohibition above referred to. Because as this Supreme Court is not empowered by the Constitution to legislate on or abrogate substantive rights, but only to promulgate rules of pleading, practice and procedure which "shall not diminish, increase or modify substantive rights," this Court can not step on them in making the rules, and the Constitution must be presumed not to tolerate nor expect such incursion as would affect the substantive rights of the accused in any manner.

Besides, depriving an accused of his right to be confronted and cross-examine the witness against him in a preliminary investigation would affect the accused not in a limited and unsubstantial but in a harsh and arbitrary manner. The testimony of a witness given in the absence of the defendant and without an opportunity on the part of the latter to cross-examine him is a hearsay evidence, and it should not be admitted against the defendant in a

preliminary investigation that is granted to the latter as a protection against hasty, malicious and oppressive prosecutions (U. S. v. Grant and Kennedy, *supra*). Otherwise, an accused who is innocent and should not be arrested, or if arrested should be released immediately a short time after his arrest after the preliminary investigation, would have to be held for trial and wait for a considerable period of time until the case is tried and acquitted after trial by the Courts of First Instance in provinces on account of the admission of such evidence in the preliminary investigation, evidence not admissible at the trial.

Therefore, the motion for reconsideration is granted, and after the necessary proceedings the decision of the majority reversed or modified in accordance with my dissenting opinion.

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