Justice Manuel V. Moran Answers Some Questions on

The New Rules of Court*

QUESTION No. 1. What is the meaning of the words "and other cases not herein provided for" appearing in the third line of Rule 132? May we know specifically what cases are they?

ANSWER. The words "and other cases not herein provided for" in Rule 132 are used out of precaution to cover other possible cases which might have been omitted in the enumeration.

QUESTION No. 2. Are the following sections of Act 190 still in force:

(a) Sec. 513 on relief available in Supreme Court against a judgment by default.

ANSWER. Section 513 of the Code of Civil Procedure on relief available in the Supreme Court against a judgment in default, is no longer in force. The reason for its elimination is that such relief may now be granted by the Court of First Instance under section 2 of Rule 38, subject to appeal either to the Court of Appeals or to the Supreme Court, according as whether there is or there is no question of fact involved. (See Comments on Rules of Court, Vol. I, p. 349, by Moran.)

(b) Secs. 57-62; 153-161 on the matter of assessors.

ANSWER. Sections 57-62 and 153-161, on the matter of assessors, are no longer in force. The failure of the new rules to make provisions therefor operates as an implied repeal.

(c) Secs. 635 and 636 on whether wills made by aliens in their country or in the Philippines may under certain conditions be probated in the Philippines.

ANSWER. Sections 635 and 636 relative to probate of wills made by aliens, being of substantive character, are still in force. (See Comments on Rules of Court, Vol. II, by Moran.)

(d) Secs. 412-423 (a) on arrest of defendant in civil cases.

ANSWER. Sections 412-423 (a), on arrest of defendant in civil cases, are no longer in force, because of the failure of the new rules to reincorporate them therein.

(e) Secs. 348-352 on affidavits.

ANSWER. Sections 348-352, on affidavits, are no longer in force, because their provisions may be found scattered in different portions of the new rules.

(f) Sec. 409 on liability of witness disobeying a subpoena without just cause.

ANSWER. Section 409 on liability of a witness disobeying a subpoena without just cause is still in force. The provision is not incorporated in the new rules because it is of substantive character. (See Comment on Rules of Court, Vol. I, p. 280, by Moran.)

QUESTION No. 3. Must the right to declaratory relief (Rule 66) be understood subject to the exception established in Commonwealth Act No. 55?

ANSWER. The proviso contained in Commonwealth Act No. 55 was not incorporated in section 1 of Rule 66 in order to leave its application to the

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discretion of the Court. The United States Supreme Court has approved the practice long prevailing in other jurisdictions (McKinney vs. Holt, Commissioner, 211 Ky. 512, 277 S. W. 851; City of Jackson vs. Rifle, 219, Ky. 689, 294 S. W. 142; Price vs. Fox, Judge, 220 Ky. 373, 295, S. W. 433; Reed vs. Bjornson, 253 N. W. 102 (Minn.); Keator vs. Lackawanna Country, 292 Pa. 269, 141 Atl. 37; Moore vs. Lewis, 10 D. & C. 466 (Pa.); Frazier vs. City of Chattanooga, 156 Tenn. 346, 1 S. W. (2d) 789) of testing the legality of the tax by a declaratory action (Nashville, Chattanooga & St. Louis Ry. vs. Wallace, 288 U. S. 249, 53 Sup. Ct. 345). This, of course, must be deemed to be limited only to cases where the tax is not yet due and collectible, for in such cases, a declaratory action cannot possibly hamper the Government. Where the tax is already collectible, an action for declaratory relief cannot be maintained and the remedy provided for in section 1579 of the Administrative Code is exclusive. (See Vol. II, Comments on Rules of Court by Moran.)

QUESTION No. 4. As a rule, a person found guilty of constructive contempt by a Court of First Instance cannot, under sec. 240 of Act 190, appeal against the order of conviction separately, but must wait until final judgment is rendered in the case. May he now appeal, under section 10 of Rule 64, before rendition of judgment on the merits?

ANSWER. Yes. An appeal from a judgment for contempt may be prosecuted without waiting for the termination of the principal case, just as contempts committed in special proceedings. (Calderon vs. McMicking, 10 Phil. 261.) The former rulings (Gutierrez Repide vs. Sweeney, 3 Phil. 738; Mantile vs. Cojucom, 15 Phil. 118; Slade Perkins vs. Director of Prisons, 58 Phil. 271) therefore, to the contrary, are abrogated. (See Comments on Rules of Court, Vol. I, p. 607, by Moran.)

QUESTION No. 5. If a defendant files his answer with specific denials and affirmative defenses, may he still object to the venue after filing his said pleading but before trial?

ANSWER. Yes. Objections to venue under section 4 of Rule 5 are available to a party at any time prior to the trial, that is, even after the defendant has already pleaded to the complaint. (See Comments on Rules of Court, Vol. I, p. 58, by Moran.)

QUESTION No. 6. Reasons for eliminating the conclusive presumption identified as letter (e) in section 68 of Rule 123 before its amendment.

ANSWER. The conclusive presumption identified as letter (e) in section 68 of Rule 123 before its amendment was eliminated because it refers to land registration cases which are excluded from the operation of the rules, except in the manner provided in Rule 132. Besides, it is already provided for in Commonwealth Act No. 141, Chapter VIII, section 48(b).

QUESTION No. 7. May a fatally defective affidavit for attachment, on the strength of which properties of defendant have been levied on, be subsequently amended under section 13 of Rule 59?

ANSWER. Yes. The provision repeals the ruling laid down in Cu Unjieng vs. Goddard, 58 Phil. 482, to the effect that when plaintiff's affidavit is fatally defective, it can not be cured by amendment. (See Comments on Rules of Court, Vol. 1, p. 540, by Moran.)

QUESTION No. 8. Do the words "after" and "from" found in Rules 40 and 41, sections 2 and 3 respectively, change in any way the counting of the period for the appeal?

ANSWER. No. These words do not in any way affect the manner of computing time as provided in Rule 28.

QUESTION NO. 9. May an accused, after he has been arrested, be released by a justice of the peace conducting the preliminary investigation if the evidence by him presented warrant his release?

ANSWER. Yes. The purpose of the preliminary investigation is (1) to determine "whether there is reasonable ground to believe that an offense has been committed and the defendant is probably guilty thereof, so as to issue a warrant of arrest" and (2) "to hold him for trial". To accomplish the first purpose, a justice of the peace conducting the preliminary investigation examines the complainant and his witnesses either in the presence or absence of the defendant (Rule 108, sec. 6). If by such examination, he believes that the defendant is probably guilty of the offense, he issues a warrant for his arrest. This constitutes the first stage in the preliminary investigation. Thereafter, and to give effect to the second purpose, the defendant is informed of the complaint and of the substance of the evidence presented against him so that he may produce evidence in his behalf, if he so desires (Rule 108, sec. 11). This proceeding constitutes the second stage in the preliminary investigation. The authority of the justice of the peace to receive the evidence for the accused must necessarily be deemed to include a like authority to judge upon such evidence in order to determine whether to remand the case to the Court of First Instance and hold the defendant for trial therein, or to release him if the evidence so warrants. Any other interpretation will render the second purpose of the preliminary investigation completely nugatory.

GUILTY AND NOT GUILTY

"MAY it please your honor," said the counsel, " the indictment isn't sustained, and I shall demand an acquittal on direction of the court. The prisoner is on trial for entering a dwelling in the night-time with intent to steal. The testimony is clear that he made an opening, through which he protruded himself about halfway and, stretching out his arms, committed the theft. But the indictment charges that he actually entered the tent or dwelling. Now, your honor, can a man enter a house, when only one half of his body is in, and the other half out?" "I shall leave the whole matter to the jury. They must judge of the law and the fact as proved," replied his honor. The jury brought out a verdict of "guilty", as to one half of his body from the waist up, and "not guilty" as to the other half. The judge sentenced the guilty part to two years' imprisonment, leaving it to the prisoner's option to have the not guilty half cut off or take it along with him. (*From Bench and Bar, Modern Eloquence*)